

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 21 June 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Leave having been granted by the Legal Member of the Tribunal, I deal with the substantive appeal, which I allow. I set aside the decision of the Tribunal sitting at Belfast on 21 June 2023 as being in error of law. I remit the matter back to a freshly constituted Tribunal with the following directions.

Directions

1. The Department for Communities (the Department) shall, within 21 days of this decision being issued to them, make a submission to the tribunal clarifying the following issues in respect of this Personal Independence Payment (PIP) claim:
 - (i) the status of the claimant's father in respect of this PIP claim, which is currently thought to be that of Appointee in respect of this claim, and as to the receipt of Universal Credit;
 - (ii) the date of any appointment, and the reason for it, that is, whether it was due to physical or mental disability, and if so;
 - (iii) the view of the Department as to whether this engages any of the PIP activities, and at what level; and
 - (iv) the change or changes that were made to the report of the Disability Assessor following the Quality Audit.
2. The written reclaim and any associated evidence regarding the most recent Disability Living Allowance (DLA) award to the claimant shall be

filed with this. If the evidence no longer exists an explanation shall be provided.

3. The documents shall be filed with the Appeals Service (TAS). If further time is required, an application must be made to a legal Chair of TAS. If there is found to be no Appointee, the matter must be referred to a Chair by TAS administration.
4. The hearing shall be before a fresh tribunal. The appointee is to notify TAS within 21 days of issue of this decision of his choice of telephone, online (video platform) or face to face hearing format.

REASONS

Preliminary Matters

1. The case before me concerns a young man currently aged 20, but who was 17 at the date of the PIP decision which is the subject of the appeal.
2. I am told that the claimant's father is the appointee for benefit purposes, so the appointee is the appellant. I use the term claimant to distinguish the young man for whose benefit the claim was made.
3. An application for leave to appeal was granted by the Chair (Legal Member) of the tribunal on 25 October 2023, and the appeal itself is supported by the Department.

Background

The relevant legislation

4. The appeal below concerned entitlement to a PIP. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component, either or both of which may be payable to claimants whose ability to carry out various activities is limited, or severely limited, by their physical or mental condition.
5. Under the Personal Independence Payment Regulations (Northern Ireland) 2016 (the PIP Regulations), entitlement is demonstrated by scoring points under a series of activities set out in Parts 2 and 3 of the schedule to those regulations. I will refer to them and, if relevant, explain aspects of the scoring system as they arise in my discussion below.
6. Under the Social Security (Northern Ireland) Order 1998 13(8)(b), the tribunal hearing an appeal "shall not take into account any circumstances not obtaining at the time when the decision appealed against was made".

Benefit History

7. The claimant had been in receipt of DLA from 12 January 2016. Between 9 January 2019, when he was 14, and the date of his 17th birthday, he was entitled to the lower rate of the mobility component and the highest rate of the care component.
8. His father was his appointee. At that stage the appointment would have been made under regulation 42(1) of the Claims and Payments Regulations which provides for that outcome where an award of DLA is made on behalf of a child.
9. During the year that an existing DLA recipient is 16, the Department will invite them to claim PIP. That trigger affects the DLA award if PIP is not claimed. Here, a letter was sent on 15 September 2020, and a claim was made by telephone on 5 October 2020, and subsequently medical evidence was provided. The decision under that claim was made on 15 February 2021. It is the decision under appeal.

The appointment

10. There are transitional provisions which continue an appointment made in respect of DLA for the purposes of a subsequent PIP claim: see regulation 28 of the Transitional Provisions Regulations (Northern Ireland) 2016 and *UB -v- Department for Communities* [2020] NI Com 55 at paragraphs 26-28, a decision of Commissioner Stockman which has informed my thinking about this issue.
11. In this case the transitional provisions might have been engaged, but there is the distinct possibility here that the appointment was made on another, and potentially relevant basis, that the claimant was “personally unable to act” under regulation 33 of the Social Security (Claims and Payments) Regulations (NI) 1987.
12. This is because the papers before the tribunal appear to indicate that an appointment in respect of a potential PIP application was made on 30 January 2020, and that it may also have been made, then or subsequently, in relation to Universal Credit.
13. The copying of these pages, the final ones in the tribunal bundle, is in parts so faint as to be indistinct. That is why I ask for clarification of the appointment itself, and the basis of it.
14. The reason for the appointment might be relevant: mental capacity or mental health limitations in a person’s ability to administrate may raise a specific question within the PIP descriptors about managing budgeting or finance, as the appointment might be seen to carry with it the implication that this is problematic. That is why I have directed the Department to make a submission as to the reasons for the appointment, and for their observations on daily living activity 10 which relates to budgeting.

Substance of the PIP Claim

15. The appointee made a claim for PIP on the claimant's behalf on 5 October 2020. It was based essentially upon the claimant having type 1 diabetes, and related complications in managing that in respect of the potential for hypo/hyperglycaemic attacks, coupled with the claimant's apparent difficulty in acting in his own self-interests by doing, or not doing, things that would assist in stabilising the condition.
16. The claimant was assessed by a healthcare professional on 10 February 2021, and on 15 February 2021 the Department's decision was made refusing PIP. The Department followed the advice of the Disability Assessor and awarded just one point under the daily living activity 3(b) (managing a medical condition) and no mobility points.
17. There was no change to that decision on a Mandatory Reconsideration. Accordingly, an appeal was lodged with the Appeals Tribunal.
18. The tribunal heard an appeal against that decision on 23 June 2023, almost two and a half years after the decision under appeal, 15 February 2021.

The Tribunal hearing

19. The tribunal considered both the oral and the paper evidence which included the claim form, the Department's Submission and the appellant's General Practitioner notes. It heard evidence from the claimant. It refused the appeal, upholding the one point under daily living activity 3(b), monitoring a health condition. This was insufficient for an award.
20. The main issue before it was the extent to which the claimant's diabetes, with its "frequent highs and lows" (as set out in the report of the Disability Assessor), affected his abilities in relation to the performance of the activities in the schedule to the standard set out in regulation 4(2A):
 - (a) safely;
 - (b) to an acceptable standard;
 - (c) repeatedly, and
 - (d) within a reasonable time period
21. The issues were as to difficulties with the practical descriptors, cooking and preparing food, dressing, bathing, and budgeting and the effect on the claimant of needing insulin injections multiple times each day. His father's concerns relate in large part to the risk of harm from a diabetic incident, given the history, which included hospitalisation for ketoacidosis and his son's limited attention to those aspects of his personal care, such as nutrition, that affected its likelihood. There was also the issue of pain at the points where he had to make pinpricks for the regular blood monitoring that was required, and the extent to which that may have affected his

performance of the activities where manual dexterity was involved. The claimant's disinclination to leave the house was also mentioned.

22. The Disability Assessor's report had been subject to a Quality Control Audit. That is set out in the tribunal papers. The form is not easy to read or understand: I write this as one not experienced in its nuances, but it appears to me that the Assessor had to be reminded of some of the criteria such as the need to accomplish activities safely, and was asked to amend the report in certain respects. I cannot see exactly what was changed, or if all the amendments suggested were made, but it appears that the original (as examined by the assessing body's quality control) was less favourable to the claimant than it was thought appropriate. It may only relate to the one point that appears as merited in the report, and which was adopted by the tribunal which was under discussion, but the statement of reasons makes no reference to it.

Proceedings before me

23. The appeal was lodged late, but was admitted by the Chief Commissioner.
24. The claimant's father acts for him here, as he did below. I am also assisted by the written submissions from Ms Patterson who acts for the Department.
25. Neither party has requested an oral hearing and I am able to decide the matter fairly on the papers before me.

The arguments of the parties

The appellant

26. The appeal form relies on the issue of the tribunal appearing to take matters into account that post-dated the decision under appeal, and questioning about how the claimant managed a course in joinery that occurred well after the decision under consideration. The appointee was concerned as he was expecting a concentration on issues at the time of the PIP decision.
27. It concludes by saying that the tribunal didn't have the evidence to support the decision it made.

The respondent

28. The Department agrees with the appellant that the tribunal took an impermissible approach to the evidence. It supports the appeal on this ground alone, submitting that the case should be remitted to a fresh Tribunal.

29. Ms Patterson helpfully develops the issue and identifies a material error of law which potentially had effect on the tribunal's approach to a number of the activities it was considering.
30. She also raises the appointment question, and cites the case law developed by Commissioner Stockman which has helped me.

The errors of law

31. The tribunal placed significant reliance on medical reports dated 25 February 2021 and January 2022, the latter being almost a year after the decision under appeal.
32. The law prohibits the tribunal taking into account circumstances "not obtaining at the date of the decision".
33. Evidence that has come into existence after the decision date can legitimately be considered, but it is important for the tribunal to explain the way in which it is using the evidence, and show a recognition of any limitations in its use. It must explain how it aids the process without infringing the rule. The question is whether the evidence that comes from a later time sheds light on what the position was at the relevant time, that is for the qualifying period, up to the date of the decision.
34. The tribunal mentions that the letter of 4 January 2022 was some time after the decision, but quotes from, and places reliance upon, parts of the letter which span the year following the decision, and no adequate explanation is given as to why the tribunal is able to draw from that letter that the levels of control that enabled it to minimise the problems and in particular the risk attached, pertained at the time properly under consideration.
35. The reliance on this letter spanned a number of the activities under consideration, thus the decision as a whole was tainted by the error.
36. It is of note that the legal member gave leave on this issue, recognising that the tribunal's approach might be vulnerable in that regard; I respectfully agree with that, and with Ms Patterson's conclusion.

The appointee issue

37. I note at this point the helpful remarks of Ms Patterson as to this, and I have made directions that the Department clarify aspects of the appointment, as it raises another issue.
38. The appointment made for the purposes of the administration of benefits is a matter for the Department and not a decision for the tribunal. Where the appointment is made when a claimant is unable of managing their own affairs it may be of relevance depending upon the benefit under consideration. I agree with Ms Patterson that this seems to be the position here from the papers. I have been assisted in relation to this issue by the

decision of Commissioner Stockman's decision *JR v Department for Communities* [2023] NI Com 1. In noting that the tribunal made no reference to there being an appointee, he said (at [31])

"In *DO'S v Department for Communities* [2021] NI Com 23, I had said

'20. Further, as addressed in *UB v Department for Communities* while I consider that the fact of appointment is not binding on a tribunal as evidence of incapacity, it seems to require some further explanation by the Department as to why-if it accepts that an adult claimant is incapable of acting on his own behalf- it has not awarded any points under the potentially related activity 10 ("Making budgeting decisions") in PIP cases.

...A finding that someone lacks capacity raises issues that need to be addressed when considering the applicability of activity 10'."

39. So, the tribunal had knowledge of the appointment, in that it was set out in the papers, but it did not mention it, or, it seems, bring the father's concerns about the claimant's tendencies to forget things, his apparent difficulties in relation to a number of activities and his stated inability to journey out of the house, into its considerations, stating only that no mental health or mental limitations were diagnosed. That might be the end point for the fresh tribunal, but it should consider the nature of the appointment, and whether that affects its view as to the capability of the claimant.
40. Further, but linked, is what comes across in the Statement of Reasons as the need for a diagnosis before reliance is placed on evidence of an approach to an activity in the schedule that might suggest difficulties. A specific disease or condition for which there is a medical diagnosis is not required. Where there is no diagnosis, it may be necessary to examine stated functional difficulties to see if there is some physical or mental cause for them. There must be some cause for the limited ability that is either physical or mental; it cannot be merely a lack of skill or knowledge, unless that has its origin in a physical or mental deficiency. "Physical" relates to bodily functions including sensations such as pain and breathlessness; "mental" includes mental health conditions, as well as intellectual or cognitive impairment, *per my remarks in MR v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 86 (AAC).

For the fresh Tribunal

The circumstances in this case

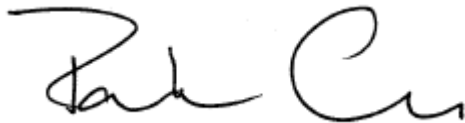
41. The Department will clarify the position about the appointee available in a submission as I have directed. It may contain information or its observations as to the PIP descriptors, but, subject to the need to explain its approach, the relevance of that will be for the tribunal to determine.
42. The appellant was, and, subject to the Department identifying an error in the appointment remains, the claimant's father, his appointee. The tribunal might feel that his oral evidence would be of value in this case.
43. The appellant should understand that the tribunal will be looking at the claimant's abilities as of the date of the decision under appeal, 15 February 2020, despite the fact that matters may have changed over the intervening time.
44. He should understand that this tribunal is not bound by the points previously awarded, as the tribunal decision is set aside by this decision, and the appeal is against the Department's decision awarding just the single point under the daily living activity 3(b).
45. As the decision under consideration followed from a significant DLA award, if no PIP award is made, I do recommend that the tribunal explains why there is such a difference from the substantial prior award of DLA. PIP is a different benefit with its own rules of entitlement is being considered, but the DLA award was of the highest rate of care, and the lower rate of mobility. In the spirit of decisions relating to a prior award of the same benefit, an explanation seems to me to be called for, although the obligation is not an onerous one: see *TH v Department for Communities (PIP)* [2022] NICom 13 in which Chief Commissioner Mullan makes it clear that a tribunal must explain a divergence in consecutive but different determinations, citing his own words to that effect in *LO'H v Department for Communities (PIP)*, as well as *SF v Secretary of State for Work and Pensions* [2016] UKUT 0481 (AAC).

General Points for the assistance of the tribunal

46. The tribunal may derive assistance in approaches to the PIP activities, of persuasive authority, from these UK Upper Tribunal decisions: Judge Hemingway in *TR-v-Secretary of State for Work and Pensions (PIP)* [2015] UKUT 0626 (AAC) establishes that if a claimant is unable to perform an activity for part of a day, that day counts towards that period provided that the inability to perform it affects them on that day to more than a trivial extent: in particular see [32-34]; as to the effect of pain on the activities in the schedules, see Judge Markus in *PS- Secretary of State for Work and Pensions* [2016] UKUT 326 (AAC). I further mention the terms of regulation 4 in relation to the quality (my emphasis) of performance of the activities.

In conclusion

47. The fresh Tribunal will consider the evidence available to it, bearing in mind the points that I make above, and make findings on the disputed issues. The appellant or a representative may make any points that I have not needed to consider here, at the rehearing.
48. Both he, and the claimant, must understand that the fact that the appeal has succeeded at this stage on an issue of law is not to be taken as any indication as to what the tribunal might decide as to the facts in due course.

A handwritten signature in black ink, appearing to read 'P Gray', written in a cursive style.

(signed): P Gray

Deputy Commissioner (NI)

25 September 2024