

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**PERSONAL INDEPENDENCE PAYMENT**

Application by the claimant for leave to appeal  
and appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 4 December 2023

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference BE/13561/22/02/D.
2. For the reasons I give below, I grant leave to appeal. I set aside the decision of the appeal tribunal under Article 15(7) of the Social Security (NI) Order 1998 without a formal finding that the tribunal has erred in law. I refer the appeal to a newly constituted tribunal for determination.

**REASONS**

**Background**

3. The applicant had previously been awarded personal independence payment (PIP) by the Department for Communities (the Department) from 21 March 2018 at the enhanced rate of the daily living and mobility components. On 20 November 2021 she was asked to complete an AR1 review form. She returned the AR1 questionnaire on 13 January 2022, describing the effects of disability arising from panic disorder, anxiety, depression, social phobia, asthma, restless legs, fibromyalgia, PCOS, back problems, hand problems, IBS and an underactive thyroid, along with further evidence. The Department obtained a report from her general practitioner (GP) on 19 August 2022. The applicant was asked to attend a telephone consultation with a healthcare professional (HCP) and the Department received an audited report of the consultation on 14 September 2022. On 14 October 2022 the Department superseded the existing award of PIP and instead awarded daily living component and

mobility component at the standard rate from 14 October 2022 to 29 August 2028. The applicant requested a reconsideration of the decision, submitting further evidence. She was notified that the decision had been reconsidered by the Department but not revised. She appealed.

4. The appeal was considered at a hearing on 4 December 2023 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal, removing all entitlement to PIP. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 19 February 2024. The applicant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 12 April 2024. On 10 May 2024 the applicant applied to a Social Security Commissioner for leave to appeal.

### **Grounds**

5. The applicant, represented by Ms Corr of Law Centre NI, submits that the tribunal has erred in law by failing to take into account and/or resolve conflicts of fact or opinion on material matters in respect of daily living activities 1, 6, 9 and mobility activity 1.
6. The Department was invited to make observations on the applicant's grounds. Mr Clements of Decision Making Services (DMS) responded on behalf of the Department. Mr Clements accepted that the tribunal had materially erred in law. He indicated that the Department supported the application on the basis of the ground identified in respect of activity 9.
7. The applicant's representative duly responded to the Department's observations and, when it was subsequently invited to respond, the Department in turn was content to rely upon its initial observations.

### **The tribunal's decision**

8. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, containing the PIP2 questionnaire completed by the applicant and a consultation report from the HCP. It also had access to the applicant's GP records and a written submission from her representative. A hearing was held by way of a video link. The applicant attended and gave oral evidence, represented by Ms Neill. The Department was not represented. The disputed activities were daily living activities 3 and 9, and mobility activity 1. The applicant did not dispute the Department's assessment in relation to daily living activities 1, 4, 5, and 6 or mobility activity 2. The tribunal ensured that the applicant knew that it had power to make a lesser award than was currently in place.
9. The tribunal found that the complaint of fibromyalgia encompassed all of the various complaints of the applicant and treated them as one. It found no evidence to support the applicant's claimed restrictions in mobilising,

noting her ability to go shopping in a supermarket, the lack of evidence supporting her use of crutches and lack of specialist input. While noting that she was on a significant medication regime for mental restrictions, it did not consider these to be sufficiently profound as to warrant an award based on inability to plan and follow a journey due to psychological distress. In this regard it found her to be an unreliable witness. It then addressed daily living activities, noting the lack of occupational therapy review in the previous 6 years. It accepted that points should be awarded for daily living activities 1.d, 3.b.ii, 4.c and 9.b, but this was insufficient to lead to an award. It disallowed the appeal.

### **Relevant legislation**

10. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component. These components may be payable to claimants whose ability to carry out daily activities or mobility activities is limited, or severely limited, by their physical or mental condition. The Personal Independence Payment Regulations (NI) 2016 (the 2016 Regulations) set out the detailed requirements for satisfying the above conditions.
11. The 2016 Regulations provide for points to be awarded when a descriptor set out in Schedule 1, Part 2 (daily living activities table) or Schedule 1, Part 3 (mobility activities table) is satisfied. Subject to other conditions of entitlement, in each of the components a claimant who obtains a score of 8 points will be awarded the standard rate of that component, while a claimant who obtains a score of 12 points will be awarded the enhanced rate of that component.
12. Additionally, by regulation 4, certain other parameters for the assessment of daily living and mobility activities, as follows:
  - 4.—(1) For the purposes of Article 82(2) and Article 83 or, as the case may be, 84 whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C’s physical or mental condition, is to be determined on the basis of an assessment taking account of relevant medical evidence.
  - (2) C’s ability to carry out an activity is to be assessed—
    - (a) on the basis of C’s ability whilst wearing or using any aid or appliance which C normally wears or uses; or
    - (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.
  - (3) Where C’s ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—
    - (a) safely;

- (b) to an acceptable standard;
- (c) repeatedly; and
- (d) within a reasonable time period.

(4) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(5) In this regulation—

“reasonable time period” means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person’s ability to carry out the activity in question would normally take to complete that activity;

“repeatedly” means as often as the activity being assessed is reasonably required to be completed; and

“safely” means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity.

### **Assessment**

13. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
14. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
15. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
16. Mr Clements for the Department has expressed support for the application. On the basis that such support indicates that at least one ground identified by the applicant, or advanced by the Department in the claimant’s interests, is arguable I grant leave to appeal.
17. The applicant had submitted that the tribunal – while advising about the general power to make an less favourable award than the award currently in place – did not alert the applicant to specific evidence that it felt to be inconsistent or put this to the applicant or her representative to afford an

opportunity to respond. Mr Clements for the Department supported this ground, noting the approach that I had adopted in *DM v Department for Social Development* [2010] NI Com 335, as approved by Chief Commissioner Mullan in *DP v Department for Communities* [2020] NI Com 1 in the context of PIP. Mr Clements observed that the record of proceedings did not indicate that the specific evidence on which the tribunal based its decision to remove the applicant's existing entitlement had been put to her at hearing. He accepted that the hearing was unfair in consequence.

18. Among the grounds raised by the applicant's representative was the tribunal's approach to activity 9. It was observed that the tribunal had found that the applicant could go to the shops and to appointments. However, the tribunal had ignored her evidence that she was always accompanied by her sister. It was submitted that the tribunal had erred in law by failing to address whether the assistance received from the applicant's sister amounted to social support. While Mr Clements noted that the issue in law was not whether someone received the support but rather whether they needed it, he agreed that the tribunal had erred in relation to this activity. He accepted that it had not given adequate reasons in relation to its findings under activity 9 and that this would amount to a material error of law.
19. I consider that the submissions of the parties demonstrate that the tribunal has not conducted a fair hearing and that it has not approached activity 9 in accordance with relevant legal principle.
20. On the basis that each of the parties submits that the tribunal has erred in law I consider that this is an appropriate case in which to exercise my discretion to set aside the decision under Article 15(7) of the Social Security (NI) Order 1998 and to remit the appeal to a newly constituted tribunal.

(Signed): O STOCKMAN

COMMISSIONER

15 October 2024