KT-v-Department for Communities (PIP) [2025] NICom 8

Decision No: C29/24-25(PIP)

**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 18 April 2024

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 BB/13165/22/02/D.

2. An oral hearing of the application has been requested. However, I consider that the proceedings can properly be determined without an oral hearing.

3. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

**REASONS**

 **Background**

4. The applicant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 21 June 2022 on the basis of needs arising from hypothyroidism, pernicious anaemia, and long Covid. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 22 June 2022. The applicant was asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation after 30 August 2022. On 15 September 2022 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 21 June 2022. The applicant requested a reconsideration of the decision, submitting further evidence in the form of a personal letter. He was notified that the decision had been reconsidered by the Department but not revised. He appealed.

5. The appeal was considered at a hearing on 18 April 2024 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal’s decision and this was issued on 3 July 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 2 September 2024. On 11 September 2024 the applicant applied to the Social Security Commissioner for leave to appeal.

 **Grounds**

6. The applicant submits that the tribunal has erred in law by:

 (i) Failing to make sufficient findings of fact;

 (ii) making perverse findings of fact; and

 (iii) “lying” about what he was capable of.

7. The Department was invited to make observations on the applicant’s grounds. Ms Patterson of Decision Making Services (DMS) responded on behalf of the Department. Ms Patterson submitted that the tribunal had not materially erred in law. She indicated that the Department did not support the application.

8. The applicant responded by written submissions, referring to case law, and Ms Patterson made further submissions in response. Additional submissions were made by each of the parties in turn.

 **The tribunal’s decision**

9. 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 report of a telephone consultation with a HCP on behalf of the Department. The applicant had also submitted his medical records to the tribunal, along with correspondence. The tribunal had further supplementary advice notes prepared by the Department’s medical services in response. The applicant attended the tribunal by way of a video link and gave oral evidence. The Department was not represented.

10. The tribunal noted that the applicant claimed PIP on the basis of hypothyroidism, pernicious anaemia and long Covid. The applicant described his symptoms as brief but frequent muscle cramps and spasms, fatigue, muscle pains, aches and weakness, numbness, shaking in hands and fingers, and low mood, loss of motivation and memory and inability to concentrate. He described symptoms of the pernicious anaemia as fatigue, memory loss, tinnitus and headaches. He described shortness of breath and insomnia as symptoms of long Covid. On consideration of the medical evidence, the tribunal further found that the applicant had been experiencing depressive episodes and that he neglected his prescribed medication regime for prolonged periods. However, the tribunal observed that the applicant was working full time at the date of decision, driving a lengthy distance between his home and workplace each day, and was looking after his three year old son on two or three days each week.

11. The tribunal addressed the various scheduled activities but declined to accept the evidence of the applicant, finding it unreliable and inconsistent with aspects of his lifestyle and medical treatment. It awarded no points for daily living or mobility activities and disallowed the appeal.

 **Relevant legislation**

12. 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.

13. 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.

14. 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.

 **Submissions**

15. The applicant essentially disputed the tribunal’s findings of fact, including its conclusion that he did not suffer from long Covid. He primarily challenges its findings on the level of activity he was capable of, submitting that it made insufficient findings and reached perverse and untrue findings. He relied on the subsequent deterioration of his health.

16. Ms Patterson for the Department responded with observations. She submitted that the tribunal’s findings of fact were sufficient and that it had given a decision that was based on the evidence and therefore not perverse. She observed that new medical evidence had been submitted to the LQM which post-dated the tribunal hearing and submitted that a post-decision deterioration in the applicant’s health could only be addressed by way of a fresh claim. She submitted that the tribunal was a neutral decision maker that had disagreed with the applicant about the extent of his capabilities and rejected the submission that it “lied” about these.

17. Ms Patterson did, however, raise a further matter in the applicant’s interests. She addressed the tribunal’s findings in relation to activity 9 (Engaging with other people). Whereas the tribunal had heard evidence of limitations in the applicant’s ability to engage with other people, it found that this was inconsistent with the evidence of taking his son to the park or to gymnastics. Ms Patterson pointed out that the scope of activity 9 (as per *AH v Department for Communities* [2019] NICom 20) includes the ability to establish relationships. She submitted that the tribunal’s reasons were inadequate in relation to this activity. She submitted that the tribunal may have erred in law on this ground. However, she noted that the resulting number of points awarded was unlikely to materially alter the outcome of an appeal, as no tribunal would be likely to award 8 points for descriptor 9.d.

18. The applicant duly responded. He submitted that the tribunal had erred in its findings and submitted that a recent diagnosis of chronic fatigue syndrome, albeit that it that post-dated the hearing, gave confirmation of his symptoms at the date of decision. He submitted that the tribunal had erred in its assessment of his credibility, relying on *ID v Secretary of State for Work and Pensions*. He further relied on *AH v DfC*, which was first raised by Ms Patterson.

19. Ms Patterson responded in turn. She submitted that *ID v SSWP* [2015] UKUT 692 addressed the issue of ocular observations by a tribunal in the course of a hearing. She submitted that no relevant observations were made that would fall into that category. She submitted that the tribunal could only consider the evidence that was in front of it and was entitled to place weight on that evidence.

20. The applicant replied, submitting that the symptoms he had described to the tribunal could now be attributed to chronic fatigue syndrome, as per his recent diagnosis, rather than due to hypothyroidism as was the explanation offered in the past. He queried how the panel could assess if he looked fatigued, as he understood that there was a problem with the video connection of the disability qualified member. He submitted that issues considered around his compliance, or otherwise, with his levothyroxine medication regime could now be understood better in the context of his present diagnosis. He submitted that the tribunal had failed to discharge its inquisitorial role.

21. In further submissions the applicant addressed the scheduled activities individually on the basis of his present state of health by noting the questions asked and some of the statements attributed to him in the record of proceedings and offering further evidence in relation to them.

22. In reply, Ms Patterson submitted that the evidence as to whether the applicant showed signs of fatigue came from the HCP report, not the tribunal’s ocular observations. She continued to rely on her previous submissions.

23. The applicant responded by submitting that he had been slandered. He expressed frustration with the adjudication process since he first claimed PIP in June 2022. He made what I judge to be emotionally manipulative and abusive statements directed at Ms Patterson.

24. Before proceeding further with my determination, I wish to observe that Ms Patterson, and all other Departmental representatives, tribunal members and staff of the Office of the Social Security Commissioner are simply carrying out their statutory responsibilities in good faith. They have no personal animosity towards any applicant but are simply doing their own jobs to the best of their ability. I consider that it is unfair of the applicant to project improper motives on to them. I have no doubt that he is personally experiencing emotional difficulties in his life. However, that does not give justification for seeking to transfer his emotional disturbance onto other people.

 **Assessment**

25. 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.

26. 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.

27. 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.

28. The applicant submits that the tribunal failed to make sufficient findings of fact. The tribunal has of course made very full findings of fact in its statement of reasons. However, whereas the applicant challenges much of the tribunal’s assessment of the facts, I understand that he is making a different argument by this submission. Rather than a reference to the evidence before the tribunal and its findings based on that evidence, this is a reference to a new diagnosis that has been received in the period after the tribunal hearing.

29. In the course of post-hearing submissions, the applicant has provided evidence from his GP dated 13 August 2024. Whereas the tribunal considered that his symptoms were attributable pernicious anaemia and hypothyroidism when considering how he was at the date of the decision in June 2022, his GP now diagnoses likely chronic fatigue syndrome. The applicant submits that this diagnosis was equally applicable at the date of the decision under appeal and in turn that the tribunal’s assessment of the credibility of his symptoms at that time was tainted by the incomplete earlier diagnosis.

30. The applicant is not a lawyer and these proceedings are inquisitorial rather than adversarial. In such cases, the Commissioner has an obligation to address obvious points that have not been raised by applicants in order to protect their interests and to ensure that the law is applied correctly. I would characterise the applicant’s submission not as one challenging the sufficiency of the tribunal’s finding of facts, but rather a submission that the tribunal has made a mistake of fact amounting to an error of law.

31. I addressed the relevant criteria for this in *DC v Department for Social Development* [2014] NICom 49. At paragraph 19, I said that the role of the Social Security Commissioner is to determine whether or not a tribunal has made errors in law and not simply to rehear appeals on the basis of new evidence. However, I observed that it is well established that mistakes of fact by tribunals can amount to errors of law. The circumstances where mistakes of fact can amount to errors of law were set out in the judgement of Brooke LJ in *R(Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at paragraphs 28-33:

“28. The next matter we must address relates to the circumstances in which an appellate body like the IAT, whose primary role during the relevant period was restricted to identifying and correcting errors of law, could entertain an argument to the effect that the outcome in the lower court was unfair as a result of a mistake of fact, and that this constituted an error of law which entitled it to interfere.

29.  In *E and R v Home Secretary* [[2004] EWCA Civ 49](http://www.bailii.org/ew/cases/EWCA/Civ/2004/49.html%22%20%5Co%20%22Link%20to%20BAILII%20version); [[2004] QB 1044](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/2004/49.html) this court was concerned to provide a principled explanation of the reasons why a court whose jurisdiction is limited to the correction of errors of law is occasionally able to intervene, when fairness demands it, when a minister or an inferior body or tribunal has taken a decision on the basis of a foundation of fact which was demonstrably wrong. Carnwath LJ gave at least eight examples in his review of the case law …

30. At para 64 Carnwath LJ said that there was a common feature of all these cases, even where the procedure was adversarial, in that the Secretary of State or the particular statutory authority had a shared interest with both the particular appellant and with any tribunal or other decision-maker that might be involved in the case in ensuring that decisions were taken on the best information and on the correct factual basis. At para 66 he identified asylum law as representing a statutory context in which the parties shared an interest in co-operating to achieve a correct result. He went on to suggest that the ordinary requirements for a finding of unfairness which amounted to an error of law were that:

(i) there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;

(ii) it must be possible to categorise the relevant fact or evidence as "established" in the sense that it was uncontentious and objectively verifiable;

(iii) the appellant (or his advisers) must not have been responsible for the mistake;

(iv) the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.

He made it clear that he was not seeking to lay down a precise code.

31. Needless to say, such a mistake could not be identified by the supervising or appellate court unless it was willing to admit new evidence in order to identify it. Paragraphs 68 to 89 of the judgment in *E and R* contain an analysis of relevant case law on the power to admit new evidence. It concluded with the observation that the case of *Khan v SSHD* [[2003] EWCA Civ 530](http://www.bailii.org/ew/cases/EWCA/Civ/2003/530.html%22%20%5Co%20%22Link%20to%20BAILII%20version) that gave rise to the problem summarised in (viii) above was a good example of the need for a residual ground of review for unfairness arising from a simple mistake of fact and that it illustrated the intrinsic difficulty in many asylum cases of obtaining reliable evidence of the facts that gave rise to the fear of persecution and the need for some flexibility in the application of *Ladd v Marshall* principles.

32. The reference to the *Ladd v Marshall* principles is a reference to that part of the judgment of Denning LJ in *Ladd v Marshall* [[1954] 1 WLR 1489](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/1954/1.html" \o "Link to BAILII version) when he said at p 1491 that where there had been a trial or hearing on the merits, the decision of the judge could only be overturned by the use of further evidence if it could be shown that:

(1) the new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing);

(2) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive);

(3) the new evidence was apparently credible although it need not be incontrovertible.

33. By way of a final summary of the position, Carnwath LJ said in *E and R* at para 91 that an appeal on a question of law might now be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" and that the admission of new evidence on such an appeal was subject to *Ladd v Marshall* principles, which might be departed from in exceptional circumstances where the interests of justice required.”

32. A mistake of fact on the part of a tribunal may well be demonstrated by referring to a misreading or misunderstanding of the evidence which was before it. It is more likely that mistake of fact will instead be demonstrated by evidence which was not before the tribunal. A party seeking to establish mistake of fact will therefore have to request the Commissioner to accede to an application to adduce new evidence under regulation 24(7)(b) of the Procedure Regulations. Where it is submitted that the tribunal has made a mistake of fact amounting to an error of law, the *Ladd v Marshall* principles will apply unless the case is exceptional in some way.

33. In this case the applicant essentially argues that his current diagnosis was not before the earlier tribunal and, whereas it post-dated the decision under appeal, which would normally render it inadmissible under Article 13(8)(b) of the Social Security (NI) Order 1998, it was admissible as it related to the circumstances obtaining at the date of decision. He submits that it explains his symptoms and supports his credibility.

34. I will admit the evidence under regulation 24(7)(b). The first *Ladd v Marshall* question is whether the evidence could not have been obtained prior to the tribunal hearing with reasonable diligence. The evidence post-dated the hearing and therefore could not have been obtained the documents prior to the tribunal hearing with reasonable diligence.

35. The second question is whether it would probably have had an important influence on the result of the case. It seems to me that the issue of diagnosis was a matter of some significance. The applicant had ascribed his symptoms to long Covid, which the tribunal did not accept. The tribunal gave consideration to the applicant’s management of his medication for treatment of hypothyroidism and whether that aligned with his reported symptoms. It seems to me that these matters were relevant to the tribunal’s finding that he was an unreliable and inconsistent witness. The new material may well have had an important influence on the outcome of the case.

36. Finally, the credibility of the new evidence must be addressed. I observe that it appears to be an uncertain diagnosis of chronic fatigue syndrome, albeit that his GP describes it as “likely”. This is enough to support the diagnosis on the balance of probabilities. I accept that it is credible and observe that it does not need to be established incontrovertibly.

37. I regard the tribunal’s decision on the basis of the evidence before it and its related statement of reasons as exemplary. However, the applicant produces evidence that was not before the tribunal and which might have produced a different assessment and outcome. I consider that, for reasons of procedural fairness, I should grant leave to appeal on the basis that I have referred to above.

38. Whereas the tribunal has carefully addressed the applicant’s evidence and the medical evidence before it, it has rejected that he is suffering from long Covid. It has placed weight on the inconsistency of his symptoms with the established diagnosed conditions of hypothyroidism and pernicious anaemia. At the same time, I recognise that it has given consideration to his employment and his travel to work routines as part of assessing his daily living and mobility activities when assessing the likely level of his needs. Despite this, I consider that fairness requires me to allow the appeal, to set aside the decision and to refer the appeal to a newly constituted tribunal for determination.

(Signed): O STOCKMAN

COMMISSIONER

5 March 2025