CF -v- Department for Communities (PIP) [2025] NICom 11

Decision No: C30/24-25(PIP)

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

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

**PERSONAL INDEPENDENCE PAYMENT**

Application by the above-named claimant for

leave to appeal to a Social Security Commissioner

on a question of law from a tribunal's decision

dated 28 March 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/2935/23/02/D.

2. For the reasons I give below, I grant leave to appeal. I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(a) of the Social Security Order (NI) 1998 and give the decision that the tribunal should have given.

3. I decide that the appellant is entitled to the enhanced rate of the daily living component of personal independence payment (PIP) from 8 June 2023 to 8 June 2027.

**REASONS**

 **Background**

4. The appellant had previously been awarded the standard rate of the daily living component of PIP by the Department for Communities (the Department) from 19 September 2018 to 2 December 2022. Due to administrative limitations resulting from the Covid-19 pandemic, on 10 January 2021 the award was extended at the same rate to 9 September 2023. On 2 October 2022 the appellant was asked to complete an AR1 review questionnaire to describe the effects of her disability. She returned this to the Department on 16 November 2022, stating that she had anxiety, depression, post-traumatic stress disorder (PTSD) and was underweight. The appellant was asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation, dated 25 August 2022, on 8 June 2023. On the same day the Department made a decision superseding the existing award and decided that the appellant continued to satisfy the conditions of entitlement to the daily living component of PIP at the standard rate from 8 June 2023 to 8 June 2027. The appellant 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, but waived the right to attend an oral hearing of the appeal.

5. The appeal was considered at a hearing on the papers by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal allowed the appeal at the same rate and for the same period as had been awarded by the Department. The appellant then requested a statement of reasons for the tribunal’s decision and this was issued on 11 June 2024. The appellant 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 13 August 2024. On 19 September 2024 the appellant applied to a Social Security Commissioner for leave to appeal.

6. The application was received after the expiry of the relevant statutory time limit. However, on 21 January 2025 the Chief Social Security Commissioner admitted the late application for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

 **Grounds**

7. The appellant had indicated an intention to apply for leave to appeal to the Commissioner, but did not state the grounds on which she submits that the tribunal has erred in law. She was sent a copy of an OSSC1 form and was asked to complete and return this, but did not do so. Nevertheless, the Department was invited to make observations on the tribunal proceedings.

8. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted that the tribunal had erred in law. He indicated that the Department supported the application on grounds that he had identified in the appellant’s interests.

 **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 AR1 questionnaire completed by the appellant and an ESA85 medical report from the HCP. It had further medical evidence from the appellant and a copy of the advice received by the Department in response. The appellant provided a copy of her medical records but had waived the right to an oral hearing and there was no oral evidence as a result.

10. The tribunal considered that the appellant had no physical limitations in performing daily living activities, but accepted that she had a need for prompting in relation to preparing food (1.b), supervision in taking medication (3.b.i), prompting in washing and bathing (4.c) and dressing and undressing (6.c.ii). It accepted that there were issues with engaging with other people (9.b) and making budgeting decisions (10.b). It awarded 11 points for daily living and none for mobility, awarding standard rate daily living component.

 **Relevant legislation**

11. 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.

12. 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.

13. 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.

14. A particular activity that arises in the present case is activity 2, as set out in Schedule 1, Part 2 (Taking nutrition). This provides:

 Activity Descriptors Points

 2. Taking nutrition.

 a. Can take nutrition unaided. 0

 b. Needs –

 (i) to use an aid or appliance to 2

 be able to take nutrition; or

 (ii) supervision to be able to

 take nutrition; or

 (iii) assistance to be able to
 cut up food.

 c. Needs a therapeutic source to

 be able to take nutrition. 2

 d. Needs prompting to be able to

 take nutrition. 4

 e. Needs assistance to be able

 to manage a therapeutic source to

 take nutrition. 6

 f. Cannot convey food and drink

 to their mouth and needs another

 person to do so. 10

 **Submissions**

15. The appellant did not submits any grounds of application. However, the Legal Officer directed that observations should be sought from the Department. Mr Killeen referred to grounds submitted by the appellant to the LQM in earlier proceedings. The grounds advanced to the LQM were essentially submissions of fact. Whereas Mr Killeen did not accept that any error of law was apparent from these grounds, he made further submissions in the appellant’s interests and offered support to her application.

16. The basis of the support advanced by Mr Killeen lies in the decision of Great Britain Upper Tribunal Judge Markus in *TK v Secretary of State for Work and Pensions* [2020] UKUT 22. Mr Killeen observed that the evidence showed that the appellant had a BMI (body mass index) figure below 18.4 and that this meant that she was medically categorised as underweight. He observed entries in the medical records that showed that, despite being prescribed nutritional supplements, she failed to consume them.

17. In *TK v SSWP*, Judge Markus said:

“21. The meaning of “take nutrition” in activity 2 was considered by Upper Tribunal Judge Wright in MM and BJ v Secretary of State for Work and Pensions (PIP) [2016] UKUT 490 (AAC), [2017] AACR 17. He decided that, in the light of the statutory definition, the words were focussed on the act of eating and drinking and not on the nutritious qualify of what was being eaten or drunk. It followed that the requirement in regulation 4(2A) to be able to perform the activity to an “acceptable standard” did not call for assessment of the nutritious quality of the food. It was the act of eating and drinking which the claimant had to be capable of doing to an acceptable standard. Judge Wright found that a need for prompting to eat sensibly and nutritiously did not satisfy descriptor 2d.

22. The present case is factually different from those considered by Judge Wright. The difficulties raised by TK were not about the nutritious quality of the food that he ate. He claimed that, as a result of his medical condition, he required prompting to eat a sufficient quantity of food to satisfy his calorific requirements. Without the prompting he would stop the activity of eating before he had consumed enough. In addition, or alternatively, he would not eat sufficiently frequently to satisfy his needs. Taking nutrition comprises cutting food, conveying it to the mouth, chewing and swallowing it. Those actions are of necessity performed repeatedly. At each meal they are repeated until the meal is complete. A person will eat a number of meals and/or snacks during the day in order to eat sufficient. This is not a matter of judging the nutritional quality of what is consumed; it is a description of the essence of taking nutrition. To take an extreme example, a person who is able to complete the task only once cannot be said to be capable of taking nutrition.

23. Regulation 4(2A) requires a person to be able to perform an activity “repeatedly”, which means “as often as the activity being assessed is reasonably required to be completed”. That definition does not import an objective test of how often an activity needs to be performed: PM v Secretary of State for Work and Pensions (PIP) [2017] UKUT 0154 (AAC) at paragraph 20. Different people need to eat different amounts, but as a minimum a person must be able to take sufficient food to meet their needs. It is a reasonable requirement that they are able to repeat the action of taking nutrition often enough to do so.

24. The DWP’s PIP Assessment Guide states as follows in relation to descriptor 2d:

“Prompting’ means reminding, encouraging or explaining by another person. Applies to claimants who need to be reminded to eat (for example, due to a cognitive impairment or severe depression), or who need prompting about portion size. Prompting regarding portion size should be directly linked to a diagnosed condition such as Prader Willi syndrome or anorexia.”

25. Of course the Guide is not a statement of the law and in any event it does not provide any legal analysis underlying this rather bald proposition. However, I note that it is consistent with my analysis above”.

18. Mr Killeen submitted that the evidence indicated that the appellant was eating insufficient quantities of food. He submitted that it was arguable that the tribunal should have awarded 4 points for activity 2.d, which would bring her over the threshold for an award of the enhanced rate of the daily living component.

19. Mr Killeen made further observations relating to the adjudication of the case. He submitted that the tribunal had not identified the ground of supersession relevant to the case and the date on which it should take effect. He submitted that this should properly have been identified as made under regulation 23 of the Universal Credits, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (NI) 2016 (the Decisions and Appeals Regulations), rather than under regulation 26 as stated in the Department’s appeal submission.

 **Assessment**

20. 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.

21. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

22. 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.

23. In the light of the support offered by the Department, it is evident that an arguable case arises. Therefore, I grant leave to appeal.

24. The appellant did not attend the tribunal hearing to give oral evidence. Nevertheless, it was clear that she had a BMI that fell into the underweight category. Medical evidence indicated that she had been prescribed dietary supplements shortly after the date of decision, which indicated that they were required prior to that date also. References in the medical records further confirmed that the appellant had a distaste for particular supplements and was not taking them. In that context, she had been advised to try to “eat small amounts with high calories as no supplements of any use if not taken…”.

25. I observe that “take nutrition” means—

“(a) cut food into pieces, convey food and drink to one’s mouth and chew and swallow food and drink; or

(b) take nutrition by using a therapeutic source;”

26. In turn, “therapeutic source” means parenteral or enteral tube feeding, using a rate-limiting device such as a delivery system or feed pump.

27. Judge Wright explained in *MM & RJ v SSWP* that the nutritious quality of what was being eaten was not a relevant factor for daily living activity 2. The legislative meaning take nutrition to an acceptable standard referred to the physical act of eating and drinking only. It did not require consideration of whether the contents of what was being eaten or drunk was to an acceptable standard. Thus, a need for help to avoid someone eating a junk food diet would not qualify under this activity. However, as Judge Markus made clear in *TK v SSWP*, where a person does not eat nutritious food sufficiently frequently to satisfy her needs, that is not a matter of judging the nutritional quality of what is consumed, but is a description of the essence of taking nutrition.

28. In this case, there was evidence that the appellant was not eating nutritious food with sufficient regularity to maintain her body weight. There was evidence that, having been prescribed nutritional supplements such as Fortijuice, she “hated” them. Nutritional supplements are relevant to the application of activity 2, to the extent that they can reasonably be described as food or drink. Therefore, the evidence established that the appellant did not take nutrition to a reasonable standard. In the light of submissions that the appellant relies on friends and family to encourage her to eat, Mr Killeen accepted that it was arguable that 4 points could be awarded for activity 2.d.

29. I accept the submission of Mr Killeen that the tribunal had not addressed the issue in the light of the evidence in the GP records. It appears to me that the tribunal has erred in law for this reason.

30. Mr Killeen further raised a technical matter relating to the adjudication process in the case. He observed that the Departmental decision of 8 June 2023, which was the subject matter of the appeal, was formally a supersession decision. The tribunal had not made any reference to supersession or whether grounds for supersession were established and, if so, from what date the superseding decision should take effect under the Decisions and Appeals Regulations.

31. I do not need to decide this point, as I have allowed the appeal on other grounds. It should be plain to tribunals that, where the subject matter of an appeal before them is a supersession decision, the tribunal itself has to be alert to that fact and to the need to identify the grounds of supersession and effective date of the supersession decision. However, as there is some complexity here, due to the nature of the extension decision, I will not address this issue further in the particular proceedings.

32. I allow the appeal on the grounds relating to daily living activity 2. In these circumstances, Mr Killeen invites me to refer the appeal to a newly constituted tribunal for determination, rather than decide the appeal myself. His rationale for this is that the appellant had raised the issue of the mobility component in her submissions to the tribunal and that this is a disputed matter that she may wish to raise before another tribunal.

33. However, no submission has been made by the appellant that would establish an arguable error of law in relation to mobility. She has not participated at all in the present proceedings. I further observe that she did not attend the previous tribunal hearing. In all the circumstances of this case, and having regard to the medical evidence before me, it appears more appropriate for me to give the decision that I consider the tribunal should have given.

34. I accept the findings of the tribunal in relation preparing food (1.b), supervision in taking medication (3.b.i), prompting in washing and bathing (4.c) and dressing and undressing (6.c.ii). I further accept the findings it made in relation to engaging with other people (9.b) and making budgeting decisions (10.b). I award 11 points for daily living on this basis. Having considered the evidence regarding the appellant being underweight and prescribed nutritional supplements and her stated need for support to take nutrition, I further award 4 points for nutrition (2.d). This brings the total of points for daily living to 15, which is above the threshold of 12.

35. I accept that there are grounds to supersede the decision of 10 January 2021. I decide that the appellant is entitled to the enhanced rate of the daily living component from 8 June 2023 to 8 June 2027. I have time limited the award due to the possibility of changes in the appellant’s health.

36. I accept the findings of the tribunal in relation to the mobility component and find that the appellant is not entitled to the mobility component from and including 8 June 2023.

 

(Signed): O STOCKMAN

COMMISSIONER

11 March 2025