LMcC-v-Department for Communities (PIP) [2020] NICom 19

Decision No: C40/19-20(PIP)

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 7 February 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from the decision of an appeal tribunal sitting at Craigavon.

2. For the reasons I give below, I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I direct that the appeal shall be determined by a newly constituted tribunal.

REASONS

Background

3. The appellant had previously been awarded disability living allowance (DLA) from 1 May 2009, most recently at the high rate of the mobility component and low rate of the care component. As her DLA award was due to terminate, following the Welfare Reform Order (NI) 2015, she was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). She duly made a telephone claim from 11 June 2018 on the basis of needs arising from asthma, fibromyalgia, diabetes, Sjorens Syndrome, and arthritis in her neck, shoulder, back, arms, legs and feet. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 9 July 2018. She was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 7 August 2018. On 3 September 2018 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 11 June 2018. The appellant

requested a reconsideration of the decision, and she was notified that the decision had been reconsidered by the Department but not revised. She appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 7 February 2019 the tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 9 April 2019. 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 5 June 2019. On 14 June 2019 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The appellant, represented by Mr Black of Law Centre NI, submits that the tribunal has erred in law on the basis that:

   (i) it failed to give adequate reasons as to why the appellant was not awarded the mobility component of PIP, having previous held an award of high rate mobility component of DLA;

   (ii) it materially misdirected itself in law by having regard to the appellant's ability to drive when assessing entitlement to PIP.

6. The Department was invited to make observations on the appellant's grounds. Ms Patterson of Decision Making Services (DMS) responded on behalf of the Department. Ms Patterson submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.

The tribunal's decision

7. 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 questionnaire completed by the appellant and a consultation report from the HCP, along with evidence relating to the previous DLA award. The appellant attended the hearing, accompanied by her husband, and gave oral evidence. She was represented by Ms Quinn, who had prepared a written submission indicating that three of the daily living activities 1 (Preparing food), 3 (Managing therapy) and 6 (Dressing and undressing) were in dispute, along with mobility activity 2 (Moving around). The award of 2 points by the Department for activity 4 (Washing and bathing) in the appealed decision was not disputed.

8. In relation to daily living, the tribunal accepted that the appellant had functional limitations arising from arthritis and fibromyalgia. It heard that the appellant had problems with grip, lifting and peeling when preparing

food. It heard that she used a dosette box to manage medication. It heard that her husband helped her to dress her upper body due to arm pain. It heard that she had no domestic aids and drove a manual car "quite a bit". The tribunal accepted that there was a degree of restriction in the appellant's upper and low limbs. It accepted that she needed to use an aid or appliance to wash and bathe, to prepare food, to manage medication and to dress or undress. It awarded 2 points each for activities 1(b), 4(b) and 6(b). It awarded 1 point for activity 3(b)(i). In making its assessment, the tribunal placed weight on the appellant's evidence that she drove a manual car regularly. As the total of 7 points was below the relevant threshold for an award of daily living component, the tribunal did not allow the appeal in respect of daily living.

9. In relation to mobility, the tribunal accepted that the appellant was likely to be restricted in the distance she could walk. It had regard to the previous DLA award and the related medical evidence of 2009. It found on the basis of more recent evidence, particularly that of the HCP, that she did not have very significant mobility restrictions. It noted that, while she possessed one, she did not use a walking stick regularly. She did not apply for a blue badge and used ordinary shopping centre and hospital car parking spaces. It found that activity 2(b) was appropriate. As the score of 4 points was below the relevant threshold for an award of mobility component, the tribunal did not allow the appeal in respect of mobility.

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 clamant who obtains a score of 12 points will be awarded the enhanced rate of that component.

12. A relevant activity in the present appeal is the activity of "Moving around". This appears at Schedule 3 of the 2016 Regulations and reads:

2. Moving around.	a. Can stand and then move more than 200 metres, either aided or unaided.	0

b. Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided.	4
c. Can stand and then move unaided more than 20 metres but no more than 50 metres.	8
d. Can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres.	10
e. Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided.	12
f. Cannot, either aided or unaided, –	12
(i) stand, or	
(ii) move more than 1 metre.	

13. An earlier provision relating to entitlement to the high rate component of DLA is also relevant to this appeal. This was regulation 12 of the Social Security (Disability Living Allowance) Regulations 1992, which read:

12.—(1) A person is to be taken to satisfy the conditions mentioned in section 73(1)(a) (unable or virtually unable to walk) only in the following circumstances—

(a) his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to place of residence or as to place of, or nature of, employment—

(i) he is unable to walk,

(ii) his ability to walk out of doors is so limited, as regards the distance over which or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk, or

(iii) the exertion required to walk would constitute a danger to his life or would be likely to lead to a serious deterioration in his health; or

(b) he has had both legs amputated at levels which are either through or above the ankle, or he has one leg so amputated and is without the other leg, or is without both legs, to the same extent as if it, or they, had been so amputated.

Hearing

14. I held an oral hearing of the application. Mr Black of Law Centre NI appeared for the appellant. Ms Patterson of Decision Making Services appeared for the Department. I am grateful to the representatives for their careful arguments and their assistance at hearing.

15. The first ground advanced by Mr Black was based on the proposition that a tribunal, refusing PIP mobility component in an appeal by a claimant who had previously been in receipt of an award of the high rate mobility component of DLA, must explain that disallowance with adequate reference to the evidence in the previous DLA award. At hearing Mr Black referred me to paragraphs 14 and 16 of *DC v Department for Communities [2019] NICom 24*, submitting that the Deputy Commissioner in that case held that it was necessary for a tribunal to explain why it was making a less favourable PIP mobility decision when a claimant had previously held a DLA high rate mobility component award. In paragraph 34 of *JF v Department for Communities [2019] NICom 72*, he submitted that I had indicated a different view. He suggested that a Tribunal of Commissioners or an appeal to the Court of Appeal may be required to resolve the conflict.

16. Mr Black also referred me to a summary on NIDOC of *JF v DfC*. It read: "Where previous award of DLA and PIP is less favourable tribunal must explain why unless obvious from findings". He submitted that this was not an obvious case and that the tribunal had not met this standard.

17. Ms Patterson submitted that there was no general rule of law requiring reasons for not awarding PIP where there had been a previous award of DLA. She submitted that *DC v DfC* was decided on its facts, as the tribunal had misunderstood the basis of the previous DLA award. She submitted that the present tribunal considered and addressed the previous DLA evidence in this case, but relied on the report of the HCP and the oral evidence of the appellant.

18. On his second ground, regarding driving, Mr Black relied upon paragraph 20 of the decision in *JMcD v Department for Communities [2019] NICom 4*. He submitted that the present tribunal had failed to explain how driving could be read across into the PIP activities and whether it was performed at the same level of regularity as the daily living activities. He relied on CDLA/4174/2006 at paragraph 8.

19. As the tribunal had accepted aspects of the appellant's evidence I asked what aspect of the daily living activities had been ruled out by the tribunal

over the fact of the appellant driving. Mr Black pointed in particular to activity 6, and the issue of dressing the upper body.

20. Ms Patterson submitted that the tribunal did not rely solely on the appellant's ability to drive, noting the medical evidence as well as her ability to drive. She submitted that the tribunal's decision met the standard required by *JMcD v DfC*. As the appellant drove the car every other day regulation 7, which required ability to perform activities for the majority of the time, was satisfied. She observed that at hearing the appellant did not dispute the activity of Washing and bathing – having been awarded 2 points. She observed that the condition of arthritis, which led to poor grip and made the appellant prone to dropping things was not inconsistent with driving. The tribunal accepted that she had some restrictions but also reasonable muscle power and control. Ms Patterson accepted that in order to drive one does not have to raise the arms above the head.

Assessment

21. The appellant has established an arguable case of error of law and I grant leave to appeal. At the stage of the leave application hearing the parties consented to me treating that hearing as a hearing of the appeal.

22. Two distinct grounds were relied upon by Mr Black for the appellant. The first ground concerned the extent of the requirement on a tribunal to give reasons when making a decision in a PIP appeal in the case of someone who has previously enjoyed an award of DLA high rate mobility component. The second related to the reliance by the tribunal on the appellant's stated ability to drive a manual car when making its findings and whether it had reached irrational or unfair conclusions as a result.

Reasons and previous DLA award

23. I have previously addressed this point in the case of *JF v DfC*, in which Mr Black also appeared. In the present case, Mr Black questioned the correctness of my approach in *JF v DfC* and its consistency with the decision of Deputy Commissioner Wikeley in *DC v DfC*. He submitted that a Tribunal of Commissioners or a decision by the Court of Appeal would be necessary to resolve the conflict in these decisions. I will therefore firstly reiterate my reasoning in *JF v DfC* and then address whether it is consistent with *DC v DfC*.

24. The decisions in *JF v DfC* and *DC v DfC* are directed to the standard of reasons required from a tribunal when, in a case such as the present one, a claimant who had previously enjoyed an award of DLA high rate mobility component has been refused an award of PIP mobility component. They address the extent to which the principles set out by Great Britain Commissioner Howell in *R(M)1/96* - a case where a DLA fixed term award was not renewed at the same rate as before, with connotations of inconsistency - extend to cases where PIP was not

awarded to a claimant who previously enjoyed a DLA award. Each of the cases also referred to the decisions of Great Britain Upper Tribunal judges in *YM v Secretary of State for Work and Pensions* [2018] UKUT 16 and *CH and KN -v- Secretary of State for Work and Pensions* [2018] UKUT 330 (AAC).

25. In *obiter* remarks in *YM v SSWP,* Upper Tribunal Judge Ward had said in the context of whether *R(M)1/96* applied:

> "11. What is trickier is when two awards may be judged to be inconsistent. The situation where the rules of the benefit remain the same and the claimant's condition has remained the same or worsened is straightforward: if a later decision differs from the decision preceding it, then compliance with R(M)1/96 will be necessary.
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> 12. Where a benefit is changed, such as from incapacity benefit to employment and support allowance or, as in this case, from DLA to PIP, in my view for the reasons below it is not enough on the one hand to point to the law having changed and to claim that as a result an earlier decision is of no consequence and need not be addressed. However, nor is it enough to say, in effect, that a claimant was awarded the benefit intended for e.g. (as here) people with disabilities under a predecessor benefit and so any decision that s/he does not qualify under the successor benefit must necessarily be inconsistent, for there will be many cases when the predecessor benefit is based on an entirely different approach. What is required on the part of the FtT is a degree of analysis as to the potential for a genuine inconsistency…"

26. Judge Ward went on to give some examples. Among these, at paragraph 13, was the high rate mobility component of DLA. He explained that in Great Britain "the borderline between qualifying and not qualifying is thus a somewhat flexible one, but 50 yards or, as it appears to have become without comment, 50 metres, has in my experience and that of others been taken as something of a benchmark". At paragraph 21 he said, "I am not intending to set down a rule of law beyond that where the conditions on which a previous award of a different benefit was made are reasonably capable of being material to whether the conditions for the award of a subsequent benefit are met, where there is an apparently divergent decision on the subsequent benefit, R(M)1/96 should be applied".

27. In *CH and KN -v- SSWP,* Upper Tribunal Judge Markus addressed two questions. The first question is not controversial in the present proceedings – it is common case that a claimant is entitled to have relevant evidence from the previous DLA award set before the PIP

decision maker. The second question was how, if at all, do the principles in *R(M)1/96* apply to a tribunal's duty to give reasons in cases involving transfer from DLA to PIP. In addressing the two questions, Judge Markus conducted an analysis of similarities and differences between DLA and PIP. She endorsed the words of Judge Ward in the context of finding parallels between DLA and PIP when she said:

> "13. In YM v Secretary of State for Work and Pensions (PIP) [2018] UKUT 16 (AAC) at [12] to [17] Judge Ward discussed potential overlap between the DLA test of being "virtually unable to walk" and some of the PIP mobility descriptors. Both tests are about walking, in practice, inability to walk more than 50 metres is relevant both to entitlement to entitlement to the HRMC of DLA and to the standard rate of the mobility component of PIP..."

28. Judge Markus in *CH and KN -v- SSWP* further held at paragraphs 78-80:

78. That aspect of the decision in YM was obiter, but it contains a careful analysis and considered conclusion. Contrary to Ms Leventhal's submission, Judge Ward addressed not only the areas of potential overlap between the two benefits but also a number of substantive differences, in particular at [14] – [17] and [20]. He did not consider the procedural differences applying to the two benefits, but that does not undermine his reasoning. Differences in the assessment processes might affect their quality and weight in a particular case but that is for a tribunal to evaluate where the issue arises.

79. I reject Ms Leventhal's submission that the procedural and substantive differences between the two benefits mean that any perception of inconsistency between awards is entirely a result of the individual's lack of understanding of those differences. In the light of the areas of overlap between the two benefits it is obvious why in some cases it might be thought that the functional limitations giving rise to an award of DLA at a particular level might, all other things being equal, give rise to an apparently comparable award of PIP. Judge Ward's analysis amply illustrates this. Moreover, this submission fails to grapple with one important aspect of the role of reasons, which is to avoid perceptions of unfairness or feelings of injustice (see R(M)1/96 at [15]).

80. Ms Leventhal's next submission was that that awards could not be seen as inconsistent unless there is "a very large degree of overlap" such as between the DLA test of being virtually unable to walk and PIP mobility descriptor 2c or higher, and the condition must not have changed or must have deteriorated and must not be a fluctuating one. I agree that inconsistency will not arise where the relevant condition has improved since the DLA assessment, as was made clear by Commissioner Howell in R(M)1/96. Other than that, I do not consider that Ms Leventhal's submission clarifies the application of the principle. The terminology of "a

very large degree of overlap" is too imprecise to be meaningful. Nor, is it possible to specify exhaustively which areas of overlap would call for an explanation. Judge Ward identified some areas of potential overlap. I agree with him that there may be others. Ms Parker's table is sufficient to indicate as much. Accordingly, I agree with Judge Ward's approach at [21] of YM in setting out the principle but no rule of law beyond that. It is for the tribunal to judge in the circumstances of the particular case whether there is an apparent inconsistency such that reasons are called for.

29. I differ in my approach from Judges Ward and Markus, and the difference arises from my analysis of when inconsistency appears between DLA high rate mobility and PIP mobility decisions. The present case concerns the requirement to give reasons when a claimant, who has previously enjoyed an award of the DLA high rate mobility component, is not awarded the mobility component of PIP. The same issue was addressed by Upper Tribunal Judge Wright in *AW v Secretary of State for Work and Pensions* [2018] UKUT 76, in a decision which built on the principles accepted in *YM v SSWP* and *CH and KN -v- SSWP,* and which further relied on the decision of the Court of Appeal in England and Wales (EWCA) in *R(Sumpter) v Secretary of State for Work and Pensions* [2015] EWCA Civ 103. I explained my reservations in my decision in *JF v DfC*, from which I set out paragraphs 25-32 below.

25. Mr Black's principal submission was that the tribunal has not explained its decision on the mobility component sufficiently in the light of the past decision awarding DLA high rate mobility component. He relied, inter alia, on the decision of Upper Tribunal Judge Wright in *AW v SSWP*, who referred in turn to the decision of the Court of Appeal in England and Wales in the judicial review appeal of *R(Sumpter) v Secretary of State for Work and Pensions* [2015] EWCA Civ 103. Mr Black submitted that this decision inferred a rule of thumb that the appellant's walking distance without severe discomfort was limited to 50 metres. He submitted that this would equate to descriptor 2.c or 2.d and lead to a higher award of points than the 4 for descriptor 2.b that the tribunal actually awarded.

26. Sumpter was a judicial review addressed to the lawfulness of the 2013 Great Britain equivalent of the 2016 Regulations, and in particular the consultation process that took place in Great Britain before their introduction, with particular reference to the thresholds for entitlement to the mobility component. The details of the case are not directly of relevance. However, in *Sumpter* in the EWCA, McCombe LJ said at paragraph 4:

> "… The higher rate was awarded to those who were "virtually unable to walk" and it had come to be accepted (as we were informed by counsel, as a result of decisions before the Commissioners and later in the Tribunals) that a claimant would usually satisfy this test if he or she was unable to walk more than 50 metres…"

McCombe LJ further said at paragraph 6 that:

> "… the criteria for payment of the enhanced rate impose a threshold condition that the claimant cannot walk more than 20 metres, rather than the 50 metre "rule of thumb" that had become the norm under DLA. While that "rule" was not (as such) statutory, it had become the understanding or lore in the field that 50 metres was the qualifying criterion".

27. I am not bound by the EWCA. However, I would normally consider the decision of the EWCA highly persuasive to the extent that I should follow it, in accordance with the principle in *Carleton v DHSS* [1988] 11 NIJB 57. Nevertheless, whether or not the above statement reflects the position in England and Wales accurately, I consider that it does not accurately reflect the position in Northern Ireland, based on my experience as a Commissioner for 8 years and as a tribunal legal member for 9 years before that. I observe the comments of Upper Tribunal Judge Ward at paragraph 13 of *YM v Secretary of State for Work and Pensions* [2016] UKUT 16 and of Upper Tribunal Judge Marcus at paragraph 13 of *CH and KN v Secretary of State for Work and Pensions* [2018] UKUT 330 and conclude that this may well have been an established practice in Great Britain. However, what was said in *Sumpter* and the Upper Tribunal cases was based on evidence relating to Great Britain. I respectfully distinguish this from the position in Northern Ireland.

28. Under regulation 12 of the Social Security (Disability Living Allowance) Regulations (NI) 1992, it might have been open to a tribunal to have found that someone who could not walk more than 50 metres was virtually unable to walk. However, the relevant jurisprudence emphasises that the factor of distance in addressing virtual inability to walk is only one factor among four (speed, time and manner of walking being the others).

29. What is meant by "virtually unable to walk" is a question of law. Therefore, Commissioners have avoided laying down distance benchmarks that do not appear in the legislation. They have dealt with challenges to tribunals decisions on the basis that they go beyond the boundaries of reasonable decision making. Thus, in R(M)1/78 it was held that no persons acting judicially and properly instructed as to the relevant law could have found that a child with epilepsy and cerebral palsy who could walk a mile was virtually unable to walk, overturning the tribunal's decision. At the other end of the spectrum, in R(M)1/91 a tribunal decision that declined to accept that a walking limitation of 100 yards represented virtual inability to walk revealed no error of law. I agree with Commissioner who held in CDLA/717/98 that:

> "it is not for a Commissioner to attempt to lay down a precise formula for determining whether or not a claimant is unable to walk when the legislation does not do so. The legislation allows adjudication officers and tribunals a margin of appreciation".

30. I am aware that the Northern Ireland Commissioners have tested this principle. For example, Mrs Commissioner Brown in C20/05-06(DLA) was to some extent prescriptive when she said:

> 16. In the present case, as regards the mobility component, the instant tribunal's finding was of a walking ability of <u>at least</u> [my emphasis] 100 yards before the onset of severe discomfort. As I indicated above 100 yards is a walking distance (assuming reasonable factors of speed, manner and time of walking) which would entitle a tribunal to conclude that a claimant was not virtually unable to walk. It is unlikely that this amount of walking ability could reasonably be considered as virtual inability to walk though it must be remembered that Parliament has not seen fit to prescribe actual distances, times etc. which can or cannot qualify as being virtually unable to walk. However (R(M)1/91) the baseline is total inability to walk which is extended to take in people who can technically walk but only to an insignificant extent. Therefore, it is only very, very severe walking restrictions which will qualify as virtual inability to walk. I do not think that the above-mentioned walking ability could be so considered and it is unlikely that a tribunal would consider such walking ability to be virtual inability to walk.

31. I am also aware of one Northern Ireland Commissioner's decision having referred to a tribunal applying a 50 metre rule of thumb. In that decision Chief Commissioner Mullan did not need to consider the lawfulness of that approach (see paragraph 16 of the in *LL v Department for Communities* [2017] NI Com 51). However, while at least one tribunal in Northern Ireland has applied a rule of thumb in DLA mobility appeals, it seems clear to me that tribunals generally should not follow such an approach for the distance factor of DLA mobility component.

32. If a decision of a tribunal deciding a DLA high rate mobility component appeal came before me and it appeared that the tribunal was applying a "50 metre rule", I would be likely to hold its decision erroneous in law on the basis that it was fettering its own discretion and failing to address all relevant factors. For these reasons, it appears to me incorrect to link, as the EWCA has done, the fairly precisely prescribed mobility conditions of PIP to those of the DLA mobility component, which permit a much greater margin of appreciation.

30. In short, whereas the Upper Tribunal judges have been content to presume an inconsistency between a previous award of DLA high rate mobility component and a subsequent award of points under PIP descriptors 2(a) or 2(b), I do not accept that there is any automatic

inconsistency. Firstly, the award of high rate mobility component was most commonly made under regulation 12(1)(a)(ii) of the DLA Regulations (set out above), which involves consideration of distance speed, time and manner of walking. Distance was only one factor, therefore. Secondly, when considering distance, I would distinguish the practical situation in Northern Ireland from Great Britain. I decline to endorse any presumption of inconsistency based on a notional 50 metre rule of thumb as the measure of distance in regulation 12(1)(a)(ii) of the DLA Regulations. At the risk of sounding pedantic, the adoption of a rule of thumb in this context is simply wrong.

31. Moreover, I find the reliance on a notional 50 metre rule of thumb in Great Britain to be somewhat undermined by evidence. DLA was abolished earlier in Great Britain than in Northern Ireland, with PIP commencing by way of a phased introduction, I believe, on 27 October 2013. I take judicial notice of published DLA guidance from the DWP that appears in Chapter 61 of DMG Volume 10, dated 31 July 2011. This concerns the distance aspect of the test for the high rate mobility component of DLA and advises DWP decision makers:

    61323 In the absence of any significant indications as to the other three factors, manner, speed and time, (DMG 61276 refers), if a claimant is unable to cover more than 25 to 30 metres without suffering severe discomfort, his walking ability is not 'appreciable' or 'significant'; while if the distance is more than 80 or 100 metres, he is unlikely to count as 'virtually unable to walk'.

32. From this, it appears that the guidance to DWP decision makers indicated that it was open to them to make an award of DLA high rate mobility component if the claimant's walking ability was between 30 and 80 metres. This guidance accords with my own understanding of the margin of appreciation that was open to decision makers and tribunals, rather than the 50 metre rule of thumb that is referred to in the Upper Tribunal decisions. This is why at paragraph 34 of *JF v DfC*, I said:

    34. From the above discussion, it follows that I do not accept the proposition that, in cases where claimants previously enjoyed an award of DLA high rate mobility component, there is a heightened requirement on tribunals generally to give reasons for not finding that descriptors 1(c)-(f) are satisfied. The conditions of entitlement to PIP mobility component do not neatly equate to the DLA conditions of entitlement. Many claimants who would previously have been awarded DLA at the rate of the high rate mobility component will be excluded from the equivalent PIP rate simply because the conditions of entitlement are different.

33. The latter sentence is also relevant to the issue of perceived injustice. I acknowledge the concerns expressed by Judge Markus that an important aspect of the role of reasons is to avoid perceptions of unfairness or feelings of injustice. I can see why this is important in a context where there is a non-renewal of a benefit award based on precisely the same

conditions of entitlement and – as far as the claimant in concerned – no improvement in functional impairments arising from disability. However, the differences between PIP and DLA are based on government policy. Affected claimants had an opportunity to lend electoral support to that policy or to support alternatives. It does not appear to me that there is any requirement for judicial bodies to engage with perceptions of unfairness or feelings of injustice that arise from political decision making.

34. Mr Black submits that there is an inconsistency between my approach and that of Deputy Commissioner Wikeley in *DC v DfC*. He referred me to paragraphs 14 and 16 of that decision, which read.

> "14. The key point to my mind is that the Appellant's evidence was clear that her mobility had worsened since the date (in September 2009) she had been assessed by the EMP for the purposes of her DLA claim. The fact that she then qualified for the higher rate of the DLA mobility component but did not now meet the test for the standard rate of the PIP mobility component called for more by way of an explanation. The Appeal Tribunal referred to only two findings from the EMP report – about the distance she could walk before the onset of severe discomfort and about the potential assistance a rollator could provide. This rather has the appearance of the EMP report's findings being 'cherry-picked' for factors that supported the tribunal's decision under the PIP regime.
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> 15. However, the very fact that the EMP found the Appellant could walk "several hundred metres" before the onset of severe discomfort in itself suggested that there must have been other highly significant factors which justified a finding that she was "virtually unable to walk" within the statutory test for HRMC of DLA. Indeed, as the Appellant wrote in her letter seeking leave to appeal, "The question is not how far I can walk but the manner in which I walk". This is borne out by closer scrutiny of the EMP report. This included the following further findings (from 2009), several of which the Appellant herself cited in her letter seeking leave to appeal:
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> - "unable to walk any distance alone, needs to be supervised, often holds on to someone for balance";
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> - nil function in right foot and substantial impairment of right ankle and lower leg;
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> - "very severe restriction in function R foot … longstanding foot drop … unable to move 4^{th}/5^{th} toes";

- "evidence of muscle wasting and [reduced] reflexes R leg";

- "balance poor when unsupported, tends to sway ++";

- "the customer reports a severe level of disability which is supported by my clinical findings. This is in keeping with the natural history of polio";

- "she is at risk of falls without support";

- "her severe functional restriction is therefore permanent and may deteriorate further in the future".

16. The Appeal Tribunal made no reference to any of those findings, which in aggregate made sense of the previous decision to award the DLA HRMC, despite the fact that the Appellant was adjudged to be capable of walking several hundred metres before the onset of severe discomfort. Those findings were also consistent with the Appellant's account that her ability to mobilise had deteriorated over time. In sum, I agree with the Appellant's representative that the Appeal Tribunal failed to provide an adequate explanation as to why the Appellant qualified for the HRMC of DLA yet did not meet the test for the PIP mobility component. This failure constitutes a failure to provide adequate reasons and a material error of law".

35. The case of *DC v DfC* involved a claimant experiencing the worsening late effects of childhood polio. The DLA award of high rate mobility component was based upon an EMP report that indicated that the claimant was able to walk "several hundred metres", which would appear to be outside the reasonable range within which a claimant might be found to satisfy the test for DLA high rate mobility component. The tribunal referred to this finding on distance when making its decision on PIP. However, on a closer reading, the problem with mobility that the claimant was experiencing was muscle wasting and diminished reflexes in her left leg, along with worsening right foot drop leading to impaired balance and a risk of falls. While the tribunal had made reference to potential use of a rollator, it did not appear to have addressed fully the claimant's mobility difficulties based on all the relevant facts.

36. It appears to me that the Deputy Commissioner in *DC v DfC* was making a decision that was consistent with the line of authorities from *R(M)1/96* onwards. To use the words of Commissioner Howell the tribunal in *DC v DfC* had not made sure "that the reason for an apparent variation in the treatment of similar relevant facts appears from the record of their decision". As indicated above, however, *DC v DfC* was not a decision based on mobility distance, but concerned questions of the DLA high rate

mobility component based upon the manner of walking. In view of regulation 4 of the PIP Regulations this gave rise to question about whether walking could be accomplished safely and to a reasonable standard that had not been fully addressed and reasoned. The Deputy Commissioner indeed said "I agree with the claimant's representative that the Appeal Tribunal failed to provide an adequate explanation as to why the Appellant qualified for HMRC of DLA yet did not meet the test for the PIP mobility component". However, this was in the context of the particular case and was not implying a general rule requiring reasons in all cases where DLA had been awarded but not subsequently PIP. The key to finding that the duty to give reasons arises in such cases, in my view, is whether there is some evident inconsistency in the decision making, affording due allowance for the fact that the rules of entitlement are different. At paragraph 80 of *CH and KN -v- SSWP*, Judge Markus noted that it is for the tribunal to judge in the circumstances of the particular case whether there is an apparent inconsistency such that reasons are called for. I agree with her entirely, while rejecting any proposition that inconsistency automatically arises from PIP mobility component being refused to a claimant who previously had an award of DLA high rate mobility component.

37. In his submissions, Mr Black had referred to a summary on NIDOC of *JF v DfC*. This read: "Where previous award of DLA and PIP is less favourable tribunal must explain why unless obvious from findings". He submitted that this summary should be given weight, understanding that the Commissioners had approved it. However, I explained that NIDOC is not an instrument of the Commissioners but rather of the Department. I ventured the view that the summary was not accurate, and that it was merely a representation by one of the parties to the proceedings. I observe that it has subsequently been amended on the NIDOC website.

38. In the present case, the tribunal has noted the evidence of 2009 upon which the DLA high rate mobility award was based. An examining medical practitioner (EMP) had estimated that the appellant was limited to a walking distance of 15-20 yards without severe discomfort, due to leg and back pain, and shortness of breath. It found that the more recent evidence, particularly that in the HCP's report, did not suggest very significant restriction of mobility. It considered examples of activity from the appellant's day to day life. It found that she satisfied descriptor 2(b), (that she could stand and then move more than 50 metres but no more than 200 metres, either aided or unaided) awarding 4 points. It noted that whereas the appellant had been previously entitled to an award of DLA high rate mobility component, the rules of entitlement to PIP were different, and that while she had some relevant restrictions, these were insufficient for an award of PIP.

39. While the tribunal did not refer to this, I observe that the appellant in evidence in the record of proceedings had said "I could walk about 50 metres and then I would get breathless … I don't know what 50 metres is but I know I can't walk too far. I could manage one side of the City Hall

in Belfast, which I know". This would indicate improvement in mobility since the date of the EMP report. It does not appear to me that the present case involves some obvious inconsistency with the previous DLA award or that the appellant can fail to understand why the particular decision on PIP was reached. I do not accept that this ground of appeal is made out.

Driving

40. Mr Black's second ground was to the effect that the tribunal improperly drew inferences from the appellant's ability to drive a manual car when assessing her functional ability for the purposes of the PIP activities.

41. In the case of *JMcD v Department for Communities* [2019] NI Com 4, at paragraphs 18-20, I said:

> 18. The applicant secondly submits that the tribunal erred in addressing the ability of the applicant to perform certain daily activities in the light of his ability to drive a car up to 4 May 2017. He submits that this indicates that the tribunal gave weight to an immaterial matter. I disagree. The ability of a claimant to perform one type of daily activity which is not within the scheduled activities can be helpful in determining whether he or she has the ability to perform certain other activities which are.
>
> 19. Ability to drive a car is dependent on certain functional and cognitive abilities. Among other things, it requires the ability to open the door and enter and exit the vehicle; to sit without changing position for a period of time; to use the hands to grip and turn the controls and to make nuanced arm movements to steer; to use the feet on pedals to accelerate and brake, and to use the clutch in a manual car; to move the upper body and neck flexibly to look around; to be able to plan a journey and respond to unpredictable circumstances and road conditions; and to have adequate vision and reactions to drive safely.
>
> 20. The ability to drive a car is not consistent with a high level of dependency on others with the activities of daily living. It is legitimate for a tribunal to consider how the actions involved in driving a car may read across into the scheduled daily living and mobility activities. Nevertheless, that general principle is subject to the qualification that the activity in question is genuinely comparable and that it is done with the same level or regularity as the scheduled activity. The ability to perform daily living activities has to be addressed within the context of regulation 4 and regulation 7 of the PIP Regulations. The implication is that occasional driving may not be an appropriate comparator. It is certainly arguable that, unless the tribunal determines whether a claimant could drive on over 50% of the days in the required period, it has not properly addressed regulation 7, for example.

42. In the present case, the appellant had discussed driving with the HCP who recorded:

> "Has a driving licence. Drives an un-adapted manual car. Usually drives every other day to local shops and to visit her friend less than 10 miles away. Has no issues getting in or out of the car".

43. To the tribunal in oral evidence she had said:

> "I go out with my friend once a month to the shopping centre. I do drive. I drive quite a bit. It is a manual car".

44. The tribunal's reasons referred to the fact that the evidence indicated a degree of restriction in the appellant's upper and lower limbs. Taking these restrictions into account, it awarded 2 points for descriptor 1(b) (needing to use an aid or appliance to prepare a simple meal); 1 point for descriptor 3(b)(i) (needing to use an appliance to manage medication); 2 points for descriptor 4(b) (needing to use an aid or appliance to wash or bathe); and 2 points for descriptor 6(b) (needs to use an aid or appliance to be able to dress or undress).

45. Mr Black submitted that the tribunal had placed too much weight on the appellant's ability to drive when assessing her ability to perform the daily living activities. He submitted that it had failed to explain how the functions of driving could be read across into the daily living activities and whether these were performed to the same level of regularity as the daily living activities.

46. It seems to me that the tribunal had evidence before it to the effect that the appellant drove every other day. This was not a situation of infrequent driving where a claimant was only able to drive on an occasional "good day", but rather demonstrated that driving was part of the appellant's normal regular pattern of activity.

47. I asked Mr Black for submissions on where the tribunal had drawn an unjustified inference from the appellant's ability to drive and had excluded an award of points at a higher level. He pointed to the issue of the appellant stating inability to raise her arms high and requiring help with dressing or undressing the upper body. He submitted that this was not a function required for driving, despite the tribunal having ruled out raising arms in the context of the ability to drive. Ms Patterson in her amicus role also indicated some misgivings about the tribunal basing its finding on the appellant's ability to raise her arms on the activity of driving.

48. In relation to dressing and undressing, the appellant had stated in the PIP2 questionnaire:

> "My husband has to dress my top half as I can't lift my arms up to remove or put on a top. He needs to do up my bra and helping [sic] me take it on and off as my arms are in too much pain to do this myself".

49. The HCP had reported:

> "The claimant did not report significant functional problems with this activity in their questionnaire or at consultation, and there was no evidence to suggest otherwise.
>
> The CQ and FH reports arm pain, need help.
>
> This is consistent with nature of condition as reported in HOC and is supported with MSK which reports her upper limb restrictions due to pain. IOs do report a degree of pain, Although she reports not taking regular analgesia due to side effects she is currently receiving ongoing input from her Rheumatologist.
>
> Therefore it is likely that she needs aids to be able to dress and undress to an acceptable standard timely and repeatedly".

50. I understand the acronyms in the HCP report to mean: CQ customer questionnaire, FH functional history, HOC history of condition, MSK musculoskeletal examination, IO informal observation.

51. The tribunal had previous DLA evidence before it. The EMP in 2009 had indicated that the appellant had substantial impairment in both shoulders and needed help dressing and undressing, stating "upper garments difficult". It the statement of reasons, the tribunal referred to making its decision in the absence of any current compelling medical evidence relevant to the date of decision which would suggest a more significant limitation in the activities of … dressing and undressing".

52. The tribunal appears to have based its conclusions on the HCP report, and to have adopted the HCP's assessment that 6(b) – needs to use an aid or appliance to be able to dress or undress – was appropriate. However, there is no reference by the HCP or the tribunal to the nature of any aid that would assist the appellant to dress her upper body. The appellant's own evidence that she needed assistance from her husband to dress her upper body would have attracted 4 points under descriptor 6(e) and would have been material to the outcome of the appeal.

53. I am conscious that the tribunal has seen the appellant, while I have not. However, it appears to me that Mr Black is correct to argue that driving a car does not necessarily indicate the ability to raise the arms above level, as, for example, to put on a top.

54. Additionally, the tribunal has pointed to the absence of current medical evidence. However, in the light of the discussion on reasons and inconsistency in the first section of this decision above, I consider that

this was a case where past DLA evidence in relation to daily living activities was directly relevant. The EMP in 2009 had found limitations in the appellant's upper arms that precluded dressing the upper body. There was a direct read across of this evidence into activity 6 that the tribunal needed to address.

55. Furthermore, whereas the HCP and tribunal indicated that use of an aid was possible to dress the upper body, I am not familiar with an aid to assist with dressing the upper body and I suspect that the appellant may not be. If deciding that use of an aid was appropriate, in order to ensure the fairness of the proceedings, I consider that it would have been necessary for a tribunal to indicate the nature of the aid and put it to the claimant for any submissions on its suitability in his or her case.

56. For these reasons, I accept the submissions that the tribunal has erred in law. I allow the appeal. I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.

(signed): O Stockman

Commissioner

10 March 2020