

Briefing:

Social Security (Personal Independence Payment) Regulations 2013

Eleventh Delegated Legislation Committee

5 February 2013

Introduction

In comparison to the consultation draft, the regulations include many improvements to the PIP proposals, especially to the daily living criteria, although at **Appendix 1** we include a note of some more minor issues which should ideally be addressed before the regulations are passed. We understand the definitions of “reliably, repeatedly, safely and in a timely manner” are now to be included in an amendment to the regulations (see <http://www.dwp.gov.uk/newsroom/press-releases/2013/jan-2013/dwp016-13.shtml>) and we welcome this shift by the Government.

Despite this welcome news, we are still very concerned about the **lowering of the walking distance criteria for the enhanced mobility component of PIP (12 points) from “cannot move... up to 50 metres” to “can move... no more than 20 metres”**. For a broader range of resources on this, see the links at <http://wearespartacus.org.uk/pip/pip-factsheet/>

20-metre distance criteria for the “Moving Around” activity

We have legal advice from Ben Chataway of Doughty Street Chambers (extract included at Appendix 2) stating that: “....it is arguable that the secretary of state has acted unlawfully by adopting eligibility criteria which are fundamentally different from the proposed criteria set out in the consultation documents”. Therefore, if 20 metres remains in the PIP regulations as the walking distance criteria for the enhanced mobility component, they are likely to face a challenge by way of judicial review.

Ben has provided the following summary of the main points of concern (more detail in Appendix 2):

- That the revised descriptors represent a significant change from the way that walking distance has been assessed for the purposes of HRM/DLA claims to date
- That they do not fit with the other measures regarding access and reasonable adjustments, e.g. DfT guidance on the pedestrian/built environment (details below), and that
- The change was not the subject of proper consultation. If the proposed change had been spelt out in the consultation document, then the DWP could have expected a dramatically different response not least because of the two points above.

We are also aware that **if the walking distance criteria is set at 20 metres many wheelchair users, who have high mobility costs, are likely to lose their eligibility for help from the Motability scheme and the Government’s Specialised Vehicles Fund (see below).**

Importance of the “Moving Around” activity & the distance criteria

Claimants with physical mobility difficulties (but with no psychological, cognitive or sensory impairment affecting their ability to plan or follow a journey) can only accrue points for the mobility component of PIP from the Moving Around activity. Therefore, the eligibility criteria, including the “walking distance” criteria, for accruing 12 points – needed for the enhanced mobility component which gives eligibility for the Motability scheme - is critical for physically disabled people currently claiming DLA. Such claimants rely on Motability for their car, wheelchair accessible vehicle, scooter or powered wheelchair, or use the higher rate mobility component of DLA to finance other independent mobility solutions.

There was therefore considerable shock and surprise, both among Parliamentarians and others, when the final descriptor included in the regulations for 12 points under the Moving Around activity was worded: *“Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided”*. The 20 metres appears to have come out of nowhere.

Practical difficulties with a distance criteria of 20 metres

There are a number of practical reasons why 20 metres is NOT an appropriate walking distance criteria for the enhanced mobility component of PIP:

- **20 metres simply does not provide a practical level of mobility:** 20 metres is a very short distance, approximately equivalent to the length of two buses. There is very little a disabled person can achieve outside their home, without a wheelchair, if they cannot walk more than 20 metres.
- **Since most wheelchair users can walk, a qualifying distance of only 20 metres is likely to lead to wheelchair users losing adapted cars or very expensive, converted wheelchair accessible vehicles.** This could include those whose conversions have been part-funded by a grant from the Government’s Specialised Vehicles Fund (which is only available to those eligible for the Motability scheme). For a practical example of how this would affect one individual, see the 2-minute video clip at: <http://janeyoung.me.uk/2013/01/01/how-welfare-reform-will-take-away-my-independence/>. In total, it is estimated that some 200 disabled people in each constituency will lose their Motability vehicle under the 20 metre qualifying distance. However, if the qualifying distance is 50 metres, it is very unlikely that vehicles lost in the change from DLA to PIP will include wheelchair accessible conversions or extensively adapted cars.
- **50 metres has been embedded for many years in guidance on access to the built environment for people with mobility difficulties.** For example, the Government’s own publication, “Inclusive Mobility” (DfT, available at <https://www.gov.uk/government/publications/inclusive-mobility>), referenced in the Approved Document M of the Building Regulations, recommends that seating should be provided on pedestrian routes at intervals of no more **50 metres**. (Paragraph 3.4, Seating) and that parking spaces for Blue Badge holders should preferably be provided within **50 metres** of the facilities they serve (paragraph 5.1, Car Parking).

50 metres is used by some councils for considering residents’ applications for advisory disabled parking bays close to their homes (for which criteria are generally tight). Salford Council, for

example, uses an application form which includes the following question: “Is the applicant ever required to park further than 50 metres from home due to the lack of on-street parking spaces?” (form downloadable from <http://www.salford.gov.uk/disabled-parking-bays.htm>) .

- **If people with mobility difficulties lose their Motability vehicle or the money they need to be independently mobile, eg by taxi, they will need more support.** Our report, Emergency Stop, available at <http://wearespartacus.org.uk/emergency-stop/>, analyses some of these costs using research published in “The Economic and Social Impact of the Motability Car Scheme” published by Oxford Economics and available at <http://www.oxfordeconomics.com/my-oxford/projects/129035>. For example, we estimate that it could cost the public purse about £8 million in hospital transport and other services such as Dial-a-Ride to get disabled people who lose their Motability cars to doctors’ and hospital appointments.

Several councils, including Tory-led councils, have expressed their concern at increased demands on their services due to the replacement of DLA by PIP. Although these concerns relate to PIP in general, the adoption of a 20-metre distance criteria for the enhanced mobility component for people with physical mobility difficulties will undoubtedly exacerbate these concerns.

- **Many disabled people who can walk but only a limited distance are terrified of the isolation they expect to experience if they lose their independent mobility.** Recent media reports (see <http://www.guardian.co.uk/society/2013/jan/22/the-loneliness-epidemic> and <http://www.guardian.co.uk/commentisfree/2012/dec/27/social-isolation-christmas-loneliness>) have quoted research indicating a real health risk associated with the experience of isolation, which has implications both for the well-being of disabled people and the pressure on health and social care budgets. Reverting to the more sensible distance criteria of 50 metres will greatly reduce the number of disabled people at risk of isolation as a result of PIP.

Consultation & decision-making issues re 20 metres

We have considerable concerns over the justification for implementing a 20-metre walking distance criteria for the enhanced mobility component of PIP, and therefore the Motability scheme:

- The Government has failed to provide any research justification for the 20-metre distance criteria. Introducing a distance as short as 20 metres contradicts well-established, research based guidance indicating that 50 metres represents an appropriate distance to define the limitations faced by people with significant difficulty getting around.
- Only one out of the 173 organisations responding to the consultation suggested the walking distance criteria for the enhanced mobility component should perhaps be less than 50 metres. None suggested 20 metres. The Government’s apparent justification for including a 20 metre limit is that respondents to the consultation felt that the mobility criteria were “unclear”.
- 20 metres represents a **massive** reduction on the distance criteria currently used under DLA. Over time “a rule of thumb” has emerged whereby a person would usually expect to be awarded the higher rate mobility component of DLA if their walking is limited to around 50 yards or less. See, for example, the summary guidance published by Disability Rights UK at <http://www.disabilityrightsuk.org/dlalaw.htm#Virtually> (for more details see Appendix 2).

- Even in the 1970's invalid trikes were provided to disabled people who could walk more than 20 metres (but up to about 50 metres); when giving up their trikes, users were assured that they would receive an allowance towards a private car for life.
- There has been no consultation on changing the distance to 20 metres (see reference to legal advice, below).
- The notes to Activity 12 (see <http://www.dwp.gov.uk/docs/pip-assessment-thresholds-and-consultation-response.pdf> page 74) include the claim that 20m is the distance needed to be mobile within the home, although the same notes also state the assessment is meant to be based on normal outdoor conditions, including kerbs . We are concerned that this could mean that those who self-describe as able to get around their own home on their feet will be excluded from gaining 12 points from this activity.

Initial legal advice received from Ben Chataway of Doughty Street Chambers (extract included at Appendix 2) indicates that the above considerations may render the consultation unlawful.

Some of the case studies included in the consultation document (<http://www.dwp.gov.uk/docs/pip-assessment-thresholds-and-consultation.pdf>) referred to claimants whose mobility is limited to less than 50m, yet who would not qualify for the enhanced mobility rate. However this is difficult to reconcile with a straightforward reading of the descriptors. What is clear is that the vast majority of those who responded to the consultation did not appreciate that it was proposed to limit entitlement to the enhanced rate to those who could mobilise significantly less than 50m.

If 20 metres remains in the PIP regulations as the walking distance criteria for the enhanced mobility component, they are likely to face a challenge by way of judicial review.

Appendix 1

There are a few slightly more minor, yet important, issues of concern in relation to the PIP regulations, which it would be preferable to deal with before they are passed:

- For **all activities**, it will need to be clear in whatever guidance there is that doing something through substantial discomfort of **any form** is to be taken as being unable to do it.
- **“Prompting”** is always listed as “prompting to be able to”, rather than “prompting to”, this is very hard to understand. People needing encouragement or reminding are able to do something without prompting, they just won't.
- In relation to the **“Managing toilet needs and incontinence”** activity, the Government has failed to acknowledge that there may be issues specific to managing menstruation, particularly in cases involving mental health, that are not covered by any other activity. Also, prompting is considered for toilet needs, but not for managing incontinence. An oversight, we presume?
- On **Aids and Appliances**, it is unclear why the broader definition used generally is abandoned for the “planning and following a journey” activity. The logic for accepting even “normal” aids that are *necessary* would seem to apply just as well there as in relation to the daily living activities. Restricting the definition of aid for the purpose of this activity to include only those aids specifically designed for use by disabled people means the use of, for example, a navigation aid on a Smartphone by a person with learning difficulties is excluded.
- In relation to the **“Moving around”** activity, the handling of aids is inconsistent, and leaves those using even substantial aids (walking frames, with or without wheels, or those who swing through on crutches) at the discretion of the healthcare professional or decision-maker as to whether they can then move 'reliably' any given distance.
- On the definitions of **safety and risk** and the issue of supervision, we're concerned at the term “serious adverse event”, particularly “serious”, and also that the event must be to the claimant. What about people who need supervising to stop them attacking other people?
- We're pleased to see that the term **“support dog”** has been replaced with the more usual term **“assistance dog”**, but the definition is still narrow. Would a person housebound by seizure risk initially score, but on acquiring an effective seizure alert dog, enabling them to go out, suddenly cease to score (bearing in mind that a visually impaired person in the same situation would maintain their entitlement)?
- **“Communication support”** – it is clear the Government intends to include people experienced only with the claimant, but this is unclear in the regulations; the definition “trained or experienced in helping people” may be interpreted more narrowly than intended and end up excluding people experienced in helping the claimant specifically.

Appendix 2

Selected extracts from advice note dated 10 January 2013 from Ben Chataway of Doughty Street Chambers:

6. In my view it is arguable that the secretary of state has acted unlawfully by adopting eligibility criteria which are fundamentally different from the proposed criteria set out in the consultation documents....

9. DLA has been in existence since 1992. Under the DLA rules, a person is entitled to the higher rate of the mobility component including if “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”: reg.12 of the Social Security (Disability Living Allowance) Regulations 1991. Notwithstanding the importance of other factors identified by reg. 12, over time “a rule of thumb” has emerged whereby a person would usually expect to be awarded DLA if their walking is limited to around 50 yards or less. See, for example, the summary guidance published by Disability Rights UK at <http://www.disabilityrightsuk.org/dlalaw.htm#Virtually> and the decisions of the Social Security Commissioners to which it refers. Any ability to use a manual aid such as a crutch, walking stick or rollator is to be taken into account in assessing their ability to walk, but not the use of a wheelchair....

14. In my view the thrust of the consultation was that, broadly speaking, most claimants who had previously been eligible for higher rate mobility component of DLA on the basis that they were “virtually unable to walk”, would have understood that they were likely to qualify for the enhanced rate of PIP...

15. That understanding of likely continuing entitlement would have been reinforced by the further consultation document issued in March 2012, dealing with the “detailed design” of PIP....

17. The figure of 20m had not appeared in any of the previous consultation documents.

18. The Government seek to characterise the changes as a mere clarification for the draft descriptors: see the 13 December Response at paragraph 6.27 and the memorandum published with the draft regulations at paragraph 8.4. In my view, that characterisation does not bear scrutiny given the wider context of the consultation.....

19. The Government has not simply adjusted the threshold from an arbitrarily chosen figure. For the reasons set out above, the 50m threshold was significant because it was likely to have been understood as a threshold which was broadly consistent with the threshold for entitlement to higher rate DLA. In that context, the adjustment to a threshold less than half of that distance represents a radical change from DLA, and from a fundamental change from the proposals which formed the basis for consultation....

21. Accordingly, my opinion is that if a suitable potential claimant can be found who is currently entitled to the higher rate mobility component of DLA, but who fears they will be refused the enhanced rate of PIP, then in principle it would be appropriate for public funding at the investigative help level to be granted.