

JERSEY / JUDGMENT

D v The Minister for Social Security

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Social Security Medical Appeal Tribunal Case number: [2023] TRS 07 Held at: The Jersey Tribunal Offices, International House, 41 The Parade, St Helier Date: 13 March 2024 Appellant: “D” Respondent: The Minister for Social Security Panel members: Advocate Simon Thomas, Chairman, Dr B Kellett, Dr B Griffiths. Nature of Claim: Long term Incapacity Allowance (“LTIA”) Decision appealed Against The Appellant appeals against a redetermination decision of a medical board dated 5 May 2023 which assessed his loss of faculty for the purpose of Long-Term Incapacity Allowance (“LTIA”) in respect of lower spine impairment and sciatica in the left leg at 45%. The appeal is resisted by the Department for Customer and Local Services (“The Department”).

Background

1. Although this appeal is concerned only with the redetermination decision concerning the Appellant’s lower spine impairment and sciatica, the position is complicated by the fact that he currently has three separate claims for LTIA. In addition to the claim in respect of his lower back he has a claim for loss of faculty in respect of Depression, Anxiety and PTSD (currently assessed at 30%) and a further claim in respect of impairment in both feet (currently assessed at 5%). Taken together with the 45% in respect of his lower spine and sciatica, the Appellant currently receives LTIA at a rate of 80%. 2. The reason for the Appellant having three separate claims for LTIA is because historically medical boards appear to have considered his foot pain to be separate from his back pain with his cerebral impairment being a further separate matter giving rise to a loss of faculty. 3. On 21 December 2022 the Appellant attended a medical board in respect of all three claims. They were each assessed as follows, with a review date set for December 2024. a) Lower spine impairment and sciatica in left leg – 25% b) Depression, Anxiety and PTSD – 30% c) Impairment in both feet – 5% 4. On 20 January 2023 the Appellant requested a redetermination of decision in respect of claim a). He confirmed in writing on 14 February 2023 that his redetermination was limited to this claim and referred to the findings in an MRI scan that he had recently undergone. 5. A second medical board carried out its redetermination on 5 May 2023. Following its examination of the Appellant, the medical board requested his hospital records. Having reviewed those records and noted the development of neurological signs and urinary incontinence, it concluded that the appropriate percentage for loss of faculty was 45%, an increase of 20% on the first medical board’s assessment. In placing the loss of faculty at the upper end of the “moderate” category in accordance with the Guide to back pain assessments issued by the Department.

The board commented that it was difficult to say if the Appellant's foot pain is separate or related to the back pain. Of course, the claim for foot impairment was not before the board for redetermination. A review was set for May 2024. The Appeal 6. The Appellant was informed of the redetermination on 22 June 2023 and submitted an appeal against the redetermination on 7 July 2023. In his grounds he stated that in his view the award did not reflect the extent of his daily pain and suffering, which he said is so extreme of some nights that he wakes screaming in pain. He made reference to not being able to walk because of the pain in his feet and pointed out that he had gone to considerable lengths to provide additional medical evidence for the medical board's consideration. 7. The doctor who carried out the redetermination considered the appeal documentation and concluded that there was nothing contained therein which would cause them to change their assessment. The hearing 8. We heard evidence from the Appellant on his own behalf. The doctor who carried out the second medical board examination was unavailable to give live evidence. The Department had informed the Tribunal Service of the position in advance and indicated that it proposed to proceed with the appeal without calling evidence. 9. The Tribunal informed the Department prior to the hearing that this was an acceptable way to proceed, but that if a factual issue arose as to what happened at the second medical board examination, the weight that could be placed on the documentation completed by the examining doctor may be limited if they were unable to give live evidence. As it transpired, the physical findings of the second medical board were accepted and the issue in the appeal was the proper application of the guidelines, which the Tribunal was well placed to assess without live evidence from the second medical board doctor. The Department's documentation 10. The Department referred us to the proforma document completed by the second medical board doctor dated 14 June 2023. 11. It is clear from that document that the doctor took a full clinical history from the Appellant. The Appellant's development of incontinence was noted as well as the severe nature of his daily pain. It was also noted that the Appellant spoke of pain radiating from his back into his feet. His difficulties in sitting, standing, walking on a level, taking the stairs, bending and lifting were all referred to as were the difficulties he faces in carrying out day to day activities such as housework, driving and dressing. The doctor noted that the Appellant appeared to be in pain throughout the interview and frequently had to adjust his position in his seat. An examination was carried out and, as noted above, the doctor sought up to date medical records before arriving at a final assessment. 12. The reasons for the decision to assess loss of faculty at 45% were given as follows: "From the history, observations, JGH notes and x-rays he appears to have developed neurological signs which were not present prior to the MB before last. He also states that he has experienced some urinary incontinence. This puts him in the moderate category of the back pain guideline, and, given the degree of pain that he is in, I feel that an award towards the top of the range is appropriate." 13. As noted above, the doctor was asked to review the Appellant's appeal documentation in which he had raised the issue of pain in his feet. The doctor said that she was content with the 45% assessment and that if the Appellant maintains that the pain in his feet is related to his back pain then the 5% LTIA assessment for foot impairment should be reviewed. 14. In this regard a representative of the

Department emailed the Appellant on 1 August 2023 observing that his three LTIA claims appeared to overlap and that the Tribunal may find it difficult to consider one in isolation. The Appellant was offered an appointment with a doctor with a view to having all three claims amalgamated. The Appellant declined that invitation and proceeded with the current appeal. The Appellant's evidence 15. The Appellant adopted in evidence what was set out in his appeal documentation. He gave an account of the pain that he suffered daily, which was on any view considerable. 16. He was keen to understand what was causing his pain and referred to investigations that he had undergone. He raised certain criticisms of individual medical practitioners who had reviewed him and generally against the neurology department. It would have been inappropriate for us to consider those complaints further without the individuals being present to answer the allegations and, in any event, it was not necessary for us to do so in order to determine this appeal. 17. The Appellant was asked whether he had any muscle wasting. He said that he had and had lost a lot of weight. Asked whether he suffered spasms in his muscles, he said that he did and suffered severe cramp in his feet. He was asked whether he had derived any benefit from injections administered for his plantar fasciitis. He said that he had not and in his view, it had made his feet worse. 18. Ultimately the Appellant's position was that the assessment of 45% in respect of his back pain was too low and did not take account of the severity of his condition. Discussion 19. It was clear to us that the Appellant is in considerable daily pain. 20. We understand the Appellant's wish to understand exactly what is at the root of his condition, but the task of this tribunal is not to decide the cause of his pain, but rather what the impact of that pain is upon his faculty and his ability to function. 21. The doctor who carried out the redetermination was careful to ensure that they were in possession of all relevant and up to date information. The care with which they approached the assessment is demonstrated by the fact that they sought further medical records before arriving at a final view. In our view they were correct to increase the assessment of loss of faculty from 25%. It merited a significant increase from the original determination. 22. The maximum percentage that the Guide to back pain assessments recommends for back pain is 50% loss of faculty. Although the category is described as "moderate", it is important to note that this category is appropriate for "severe back pain", which properly describes the Appellant's condition in our view. Incontinence is listed in the guide as one of the symptoms of "severe" back pain alongside the note "These cases are rare and this level of severity short lived (unless permanent neurological damage)". 23. Taken with the 5% awarded under his separate claim for foot impairment, the Appellant is at the maximum percentage award under the Back Pain guidance. That being the case we do not consider it appropriate to increase the 45% assessment. 24. An issue remains as to whether the Appellant's foot pain and back pain is related. He maintains that it is. We think therefore that the next review should be a global one which looks at all claims. We cannot bring the review for the foot pain forward to the May 2024 review date which was set by the second medical board as that claim is not before us so we will order that the 45% remain to be reviewed not in May but in Dec 2024 at the same time as the other LTIA claims. Decision 25. The appeal is dismissed. The claim for LTIA in respect of lower back and sciatica will be reviewed in December 2024 and the same

time as the other LTIA claim. Simon Thomas Chair 26 June 2024

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