

JERSEY / JUDGMENT

E v The Minister for Social Security

Source: jerseylaw.je · Research copy typeset by Esheria. Not court-issued or certified.

Social Security Medical Appeal Tribunal Case number: [2022] TRS 004 Held at: The Jersey Tribunal Offices, International House, 41 The Parade, St Helier Date: 17 October 2023 Appellant: “E” 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’s appeals a redetermination decision made by a doctor at a medical board on 8 November that her percentage loss of faculty for the purpose of a claim to Long Term Incapacity Benefit (“LTIA”) was 25%. The Appellant’s LTIA claim is in respect of several conditions, which cumulatively cause the Appellant pain and fatigue on a daily basis.

Background

The Appellant has suffered from Scoliosis for many years, in all likelihood from birth. She also has a long-standing issue with pain emanating from her head and face which she finds debilitating, which interferes with her day to day life and which leads her to become fatigued on a regular basis. On 6 July 2022 the Appellant became unfit for work on account of her condition and submitted a claim for Short Term Incapacity Benefit (“STIA”) in respect of a Temporomandibular Joint Condition (“TJD”), a condition which causes pain in the jaw joint. A week later she submitted a claim for LTIA in respect of TJD, Hashimoto’s disease (an autoimmune disease where the body makes antibodies which attack cells in the sufferer’s thyroid), and headaches accompanied by hearing loss. The Appellant was examined by a doctor at a medical board on 3 October 2022 to assess her loss of faculty for the purpose of her LTIA claim. That doctor applied the “general guide to assessments”. She considered that each of the conditions described by the Appellant fell within the “very mild disablement” category for which a percentage in the range 5 – 10% is appropriate. Considering the conditions together she concluded that the Appellant’s loss of faculty was 20%. On 12 October 2022 the Appellant requested a redetermination, which was carried out by another doctor at the 8 November 2022 medical board. That doctor assessed the loss of faculty at 25% applying not the “general guide to assessments” but the guidelines for chronic fatigue syndrome/myalgic encephalomyelitis (“CFS/ME”). He felt that the Appellant’s loss of faculty fell within the “mild/moderate” bracket of those guidelines, which ranges from 21 to 30%. It would have been open to the Appellant to continue her claim for STIA for the period of 364 days over which such a claim is payable. Instead she chose to pursue the LTIA claim and to challenge the 25% assessment. As such her STIA claim was closed. Whilst not directly relevant to this appeal, we were informed that the Appellant is also pursuing a separate claim for LTIA in respect of depression. That has yet to be assessed. If that claim is permitted, the percentage loss of faculty would be added to the percentage in respect of

this claim to determine the total LTIA payment to which the Appellant is entitled. Grounds of Appeal Having received the LTIA assessment the Appellant emailed the Department for Local and Customer Services (“The Department”) seeking an explanation of how the 25% had been calculated. She received a response from the Department on 29 November 2022 which she did not find acceptable and her appeal seemed to us to focus on the explanation given in that document. She argued that:

- a) The doctor did not take sufficient account of the pain that she was in on the day of the assessment.
- b) She was undergoing investigations into the possibility that she is suffering from connective tissue disorder and also from hypermobility disease. None of this was taken into account.
- c) She suffers from headaches accompanied by a loss of hearing and has done since September 2021. This has a significant impact on her day to day life, particularly caring for her children, and yet there was no reference to this in the explanatory email.
- d) In relation to her claim for Hashimoto’s disease there was no mention of her fluctuating TSH hormone which causes her to fall asleep during the day.
- e) Although air conditioning was referred to as exacerbating her condition, in her view insufficient account had been taken of this, given that air-conditioning is encountered everywhere. f) She felt that because her disabilities are “hidden” it is more difficult to appreciate their severity than more obvious disabilities such as a complete loss of mobility.
- g) She felt that she had been penalised by an overall award that did not sufficiently take into account her separate conditions. The second doctor had considered the appeal documentation along with further medical evidence provided by the Appellant, but this did not cause him to change his assessment. The appeal was referred to the Tribunal under Article 34C(1) of the Social Security (Jersey) Law, 1974, as amended (“the Law”), the Tribunal having the power to confirm, reverse or vary the decision of a second medical board (Article 34C(3)). The relevant provisions of the Social Security (Assessment of Long term Incapacity) (Jersey) Order, 2004 as amended (“The Order”) are as follows: Article 2(1)(a) states that “the incapacitation to be taken into account shall be the whole of the loss of faculty to which, having regard to the claimant’s physical and mental condition at the date of the assessment, the claimant may be expected to be subject during the period taken into account by the assessment as compared with a person of the same age and sex whose physical and mental condition is normal”. Article 2(1)(b) states that “the question whether or not any incapacitation involves loss of earning power or additional expense shall be immaterial.” It was common ground that the Appellant’s scoliosis could not form part of the assessment for the purpose of LTIA as the evidence was that this was a pre-existing condition, predating the LTIA scheme which came into force on 1 October 2004. The issue for us is whether the second doctor’s assessment of the Appellant’s loss of faculty at 25% was appropriate. The Hearing We heard evidence from the second doctor on behalf of the Department and from the Appellant. For the Department The second doctor took us through the proforma that he

had completed following his examination on 8 November. He confirmed that he had the decision of the first medical board available to him along with correspondence from the Appellant's General Practitioner. He did not have access to her full medical notes, although he had reviewed these in the period between his examination and the appeal and there was nothing in them that caused him to alter his assessment. He told us that the Appellant's clinical history was complex. Her concerns appear to have started in 2013 when she developed a stabbing pain in the right side of her jaw. This was exacerbated by air conditioning. It had caused her to leave her employment. She suffered pain throughout her body which had been investigated by several specialists. He had seen the results of these specialist assessments. At the time of his assessment the Appellant was suffering from intermittent headaches which had resulted in hearing loss. The first doctor had operated on the basis that this might be Covid related, but he was not sure about that. He told us that he was aware that the Appellant was under investigation for the possibility of hypermobility and connective tissue disease. He said that for the purpose of an LTIA assessment, a diagnosis is of less importance than the impact of the individual claimant at the time of assessment. The doctor confirmed that the Appellant had struggled to find medication which was effective in alleviating her pain. He took us through what he had been told about the impact on the Appellant's everyday life and said that the theme running through her description of her daily life was fatigue. She seemed to manage with day to day activities, but found most things a struggle. He said that from a medical perspective, cases like the Appellant's are challenging. He said that his practice is to take what he is told at face value. He had no reason to doubt what the Appellant described to him. He told us that he had selected the Chronic Fatigue guidelines because the overriding theme in the Appellant's case was generalised pain and fatigue and it was appropriate to assess this holistically rather than to attempt assessments of individual aspects of her condition. Certain of the features of the Chronic Fatigue guidelines matched what the Appellant described very well. The doctor said that within those guidelines there was an overlap between the "mild/moderate" category and the "moderate" category. He was clear that the former category was appropriate. The Appellant was "unlikely to work" as opposed to "unable to work" and did not have a significant issue walking, which was a key difference between the two categories. He noted that the moderate category was appropriate for someone who had been prescribed a wheelchair for outdoor use on account of their pain, which the Appellant had not. He said that he had not placed the Appellant at the top of the "mild/moderate" bracket (which would have been 30%) because of her physical ability. She told him that she had attended dance classes and was able to go to the supermarket. The doctor did not accept the suggestion that he had taken insufficient account of the pain that the Appellant was in on the day of the assessment. He felt he had taken adequate note of the fact that air conditioning, which exacerbates the Appellant's symptoms was fairly ubiquitous. Overall, the doctor remained firm in his 25% assessment. The Appellant took us through the matters that she had listed on her appeal form which we have summarised above. She maintained her position that inadequate account had been taken of the severity of her symptoms. It was her case that she fell within the "moderate" category of the Chronic Fatigue guidelines. She

explained how her fatigue is there all the time and proves a constant weakness. She described her headaches as terrible. She told us that she experiences shallow breathing and does not know if this is caused by the fatigue. She told us how she avoided places with air conditioning. This had led her to leave a job that she had been looking forward to, shortly into her employment. It also caused her difficulties travelling with her family, particularly in the summer. She said that they tended to drive when visiting family abroad rather than take a plane. Her difficulties affect the amount of times she is able to travel to see family. As to the significance that the doctor appeared to place on her attending dance classes, the Appellant told us that these had been recommended by her doctor and by a specialist in the UK. She said that she only attended on a couple of occasions and was exhausted afterwards. The Appellant did not accept that her headaches were a consequence of Covid, as suggested by the first doctor. She said that there was one occasion pre-covid when she had suffered a headache which impacted on her hearing. She continued to suffer such episodes. The Appellant told us that she often wakes in the night and rarely gets good quality sleep. The pain causes her to wake, as well as worrying about her condition. She told us about ongoing investigations, including an MRI scan on her neck and her appointment to return to the pain clinic within the coming weeks. The Appellant said that she had started a part-time job at an educational establishment in September 2023 where she works for three days a week. She is supposed to work for six hours a day, but this is flexible. She finds tiredness and “brain-fog” to be a problem. Her new workplace does not have air conditioning and she would very much like to continue employment there. The job is desk based and her husband gives her a lift to work.

Discussion The Appellant suffers from several overlapping conditions and, as the second doctor acknowledged, arriving at an appropriate percentage for overall loss of faculty is challenging in such cases. We think that the second doctor’s approach in selecting the CFD/ME guidelines and seeking to arrive at an overall amount was more appropriate than the cumulative approach applying the general guidelines used by the first doctor. The CFD/ME guidelines refer to several features which are present in the Appellant’s case. We bear in mind article 16(6) of the Social Security (Jersey) Law, 1974 (“the Law”) which provides that the percentage reflecting the degree of incapacitation shall not be specified more particularly than is necessary for determining a claimant’s rights in relation to LTIA. In terms of matters that are currently under investigation, and which might in due course result in specific diagnoses, we agree with the second doctor that a diagnosis is of less significance than the pain within which the Appellant presented at the time of the assessment and which she described as part of her everyday life. In our view the second doctor did take account of the level of pain that the Appellant was experiencing. He carried out his assessment based on the information she gave him. He had no reason to doubt what the Appellant told him. It remains to be seen what transpires as a result of the further investigations, and the Appellant has the opportunity under article 34D of the Law to seek a further review of her LTIA if she can demonstrate that there has been a significant deterioration in her condition. As to where the Appellant’s condition falls within the CFD/ME guidelines, we agreed with the sector doctor that these fell within the “mild/moderate” category. There are features of the “moderate” category, for instance concerning impact on

mobility which are not present in the Appellant's case. Moreover, the Appellant is not unable to work as a result of her impairment, which suggests that the "moderate" category is not appropriate. We were concerned to hear about the anxiety that the Appellant suffers as a result of her condition, and carefully considered whether this was a matter that might lead us to increase the percentage loss of faculty. However, she does have a pending LTIA claim for depression and in our view it is more appropriate for mental health issues to be considered in the context of that claim. We considered whether it was appropriate to increase the percentage within the "mild/moderate" category having heard the Appellant's evidence, but we concluded that the second doctor's assessment had been thoughtful and comprehensive and that a 25% assessment was appropriate. Decision The Appeal in dismissed. The LTIA assessment will remain at 25% with a review date in April 2024. Signed: Dated: 10 January 2024 Advocate Simon Thomas, Chairman.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.jerseylaw.je/judgments/tribunal/Pages/%5B2022%5DTRS004.aspx>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/e-v-the-minister-for-social-security-2023>

Prepared on 23 October 2026 · Esheria