

JERSEY / JUDGMENT

“J” v Minister for Social Security

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Social Security Medical Appeal Tribunal Case number: 2017TRS010 Date: 08 Jun 2017 Held at: The Jersey Tribunal Offices, Bath Street, St Helier Before: Chairman S.E. Fitz, Doctor B. Kellett and Doctor N. Charles Nature of Claim: Long Term Incapacity Allowance (LTIA) Hearing Type: Income Support Medical Appeal Appellant: “J” assisted by an interpreter Respondent: The Minister for Social Security

Background

1. This is an appeal brought by the Appellant following a review decision of 27 March 2017 by a medical board doctor appointed by the Minister for Social Security. 2. The decision was that the Appellant had an assessed loss of faculty of 25% in respect of a claim to LTIA made on 12 December 2016 in respect of chest pain. The end date of that assessment was set as 27 March 2019. 3. The medical board decision of 27 March 2017 followed the receipt of a letter on 8 March 2017 from the Appellant’s GP Dr Ryan and from his son requesting that the decision made by the medical board doctor on 27 February be reviewed. 4. On 27 February 2017 the medical board had assessed, for the first time, the Appellant’s loss of faculty for heart disease at 20%. 5. Prior to this the Appellant had claimed short term incapacity allowance for ischaemic heart disease and post CABG and had been paid that benefit between 3 March 2016 and 22 February 2017. From that date under the provisions of the relevant legislation that claim had to cease and a claim to long term incapacity allowance made instead. 6. The subject matter for the appeal is whether the Appellant’s loss of faculty as a result of the relevant medical condition claimed for was correctly assessed on 27 March 2017. The Law 7. The basic provisions relating to the assessment process are in Article 16 of the Social Security (Jersey) Law 1974 [the Law]: “Assessment of Long Term Incapacity Allowance
- (2) The assessment of a claimant’s incapacitation for the purposes of long term incapacity allowance shall take into account the period during which the claimant has suffered and may be expected to suffer from the relevant loss of faculty. (4) If, having regard to the possibility of changes (whether predictable or not) in the condition of a claimant, it does not allow of a final assessment being made up to the end of the period which is to be taken into account under paragraph (2) – (a) a provisional assessment shall be made, taking into account such shorter period as seems reasonable having regard to his or her condition and the possibility of changes; and (b) on the next assessment, the period to be taken into account shall begin with the end of the period taken into account by the provisional assessment. (5) The assessment – (a) shall specify as a percentage the degree of

incapacitation resulting from the loss of faculty; (b) shall specify the period taken into account by the assessment; and (c) shall state whether the assessment is provisional or final.

(6) In the assessment of a claimant's incapacitation – (a) the percentage and the period to which paragraph (5) refers shall not be specified more particularly than is necessary for the purpose of determining the claimant's rights in relation to long term incapacity allowance;

- (c) a percentage which is higher than 5% but is not a multiple of 5 shall be treated as being the next highest percentage which is a multiple of 5. (7) Subject to the other provisions of this Article, provision may be made by order for the definition of the principles on which incapacitation is to be assessed. (8) Any such order may in particular prescribe that a specified loss of faculty shall be treated as resulting in a specified percentage of incapacitation.” 8. The Social Security (Assessment of Long Term Incapacity) (Jersey) Order 2004 [the Order] then provides further detail on the principles of assessment. Article 2 states: “(1) The extent of a claimant's incapacitation shall be assessed, by reference to the loss of faculty incurred by the claimant as a result of the relevant disease or injury, in accordance with the following general principles – (a) 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; (b) the question whether or not any incapacitation involves loss of earning power or additional expense shall be immaterial; (c) the percentage of the degree of incapacitation incurred (whether as the result of one or more claims) shall not be taken to amount in the aggregate to more than 100%; (d) incapacitation shall not be so treated as resulting from a relevant disease or injury in so far as the claimant would in any case have been subject to that incapacitation as the result of a congenital defect or of a disease or injury contracted or received before the relevant disease or injury; (e) incapacitation shall not be so treated as resulting from a relevant disease or injury in so far as the claimant would not have been subject to that incapacitation but for some disease or injury that is contracted or received after the relevant disease or injury and is not directly attributable to the relevant disease or injury; (f) the assessment shall be made without reference to any of the particular circumstances of the claimant except that persons age, sex and physical and mental condition. (g) Article 3 then deals with the assessment of losses of faculty described in the Schedule to the Order. This relates solely to losses resulting from amputation and so is not directly relevant to the Appellant's assessment for heart disease. (h) Article 4 then addresses losses of faculty not described in the schedule as follows: “For the purpose of assessing the extent of the incapacitation resulting from any disease or injury that is not specified in the schedule, a medical board or a medical appeal tribunal may have such regards as is appropriate to the provisions of Article 3.”

9. Medical boards are appointed by the Minister for Social Security under Article 34AA of the Law; "(1) The Minister shall appoint medical boards, each consisting of one or 2 medical practitioners.
- (2) Subject to the provisions of this Law, the Minister may, by Order, prescribe The procedures to be followed by a medical board in the discharge of its Functions under this Law."
10. It then falls to a medical board to assess whether a person has a loss of faculty as a result of a relevant disease of injury. Article 34A of the Law states: "(1) Subject to the provisions of this Law, any questions as to – (a) whether a relevant disease or injury has resulted in a loss of faculty; (b) Whether a loss of faculty is likely to be permanent; (c) the degree at which incapacitation resulting from a loss of faculty is to be assessed; or (d) the period to be taken into account in the assessment of the degree of incapacitation resulting from a loss of faculty, shall be determined in accordance with the following provisions of this Article.
- (2) Where a person claims long term incapacity allowance, the Minister shall refer the case to a medical board for the determination of the questions to which paragraph (1) refers.
- (3) If on that reference, or on any subsequent reference, a medical board provisionally assesses the degree of incapacitation resulting from the claimant's loss of faculty, the Minister shall refer the case again to a medical board before or as soon as reasonably practicable after the end of the period which that provisional assessment takes into account, for determination by the medical board."
11. The relevant appeal rights are in Article 34B of the Law: "Subject to paragraph (3), a claimant shall have a right of appeal to a medical appeal tribunal against a decision of a medical board under this Law. (2) An appeal shall be made in such manner and brought within such time as may be prescribed. (3) An appeal shall not lie in respect of a provisional assessment unless – (a) 2 years has elapsed since the case was first referred to a medical board; and (b) the period taken into account by the assessment does not fall wholly within that period of 2 years. (4) on hearing an appeal, a medical appeal tribunal may confirm, reverse or vary the decision against which the appeal is brought."
12. It should be noted that following an earlier decision of the Minister for Social Security the time restriction specified in paragraph 3 of Article 34B has ceased to be applied to appeals made under this article.
13. Pending an amendment of Article 34B appeals are being allowed to proceed to the Tribunal by virtue of the powers given to the Minister under Article 34C of the Law as follows: "(1) Where the Minister considers that a decision of a medical board ought to be considered by a medical appeal tribunal, the Minister may refer the case to such a tribunal for its consideration. (2) On considering the case, the medical appeal tribunal may confirm, reverse or vary the decision of the medical board." The Dispute

14. The Appellant considered that the assessment of 25% loss of faculty did not fairly reflect his condition.
15. The Doctor who carried out the assessment on 27 March 2017 gave evidence. The Doctor had noted the following: "Diagnosis; Ischaemic heart disease treated by coronary artery bypass graft and medication. At Oxford. Now back under care of JGH and GP. Current problems; Midline anterior chest pain behind the scar. Has angina pain on exercise but only after 20 mins. When he is sitting quietly there is no pain. May get radiation to arms right>left. Pain worse on leaning forward. Needs 2 pillows. Reports intermittent orthopnoea. Also reports some paroxysmal nocturnal dyspnoea. Also some ankle swelling. Dyspnoea on exercise, after 20-30 mins on walking. No dyspnoea on rest. Tiredness. All the time but worse on exercise. Walking on level 30mins. Stairs. Can manage one flight but then feels tired. Can only carry small objects. Recent letter JGH August 2016 'normal heart sounds, clear chest and no ankle swelling' 'it looks to me like he has made a full recovery' (IP) 'does not appear to have any chest symptoms'" The Appellant had stated he could self-care and shower, cook for himself, could not do his laundry, could shop but his family helped with big shop, did walking each day and had been on holiday to Madeira by direct flight on his own. The doctor observed that he sat comfortably and was not short of breath. On examination he found that his heart sounds were normal, his lungs clear and there was slight swelling of the ankles. As there are no specific guidelines for heart disease, medical boards are directed to use a guideline for chronic obstructive pulmonary disease (COPD) the symptoms of which are considered to be comparable. The doctor considered the appellant to be in the mild to moderate category of 21 to 30%. The doctor had taken into account a letter from the Appellant's GP indicating that the appellant had "marked impairment of his function in keeping with the hypokinesia and reduced cardiac function noted in his last echocardiogram. He has marked functional impairment and limitation of effort tolerance." The doctor also had a letter from the appellant himself stating that he: could not change his bed, had to stop 2 or 3 times when hoovering, had to shop everyday as he could not carry much weight, could not walk more than 10 to 15 minutes and got out of breath, had problems getting dressed and took over an hour to get from his address in Don Road to the hospital. Decision 16. The Tribunal considered the Doctor's assessment to have overemphasised the statement from the hospital that he had made a full recovery. The Tribunal considered this related to a physical rather than functional recovery. The only criteria for the mild to moderate range of the COPD guideline is that an individual can walk 500 m on the flat without stopping. This is a very narrow indicator and does not allow for other difficulties the appellant was having with day to day tasks. The medical members of the Tribunal considered heart failure to be significantly different from COPD as the former only causes symptoms when an individual exerts themselves and is not evident at rest, whilst the symptoms of COPD are progressive. It was also noted that the general guide to assessments equated 21 to 30% disablement with the loss of one eye. The difficulties this appellant was experiencing were considered to be significantly more disabling and supported by the objective evidence of the echocardiogram. The assessment was varied to

35% with an end date of August 2018 by which time the Appellant will have been reviewed at the hospital and further evidence of his loss of function should be available. Appeal allowed.
Advocate S.E. Fitz 04 July 2017

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