

JERSEY / JUDGMENT

"O" v The Minister for Social Security

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Social Security Medical Appeal Tribunal Case number: [2021] TRS021 Held at: The Jersey Tribunal Offices, International House, 41 The Parade, St Helier Date: 19 May 2021 Appellant: 'O' Respondent: The Minister for Social Security Panel members: Chairman Advocate S Thomas, Dr M Richardson and Dr M Barrett Nature of Claim: Long Term Incapacity Allowance ("LTIA")

Background

Until November 2019 the Appellant worked as a bricklayer. On 4 November 2019, he was working on a building site when he sustained an injury to his knee caused when he fell from scaffolding and onto a piece of metal which punctured the rear of his right knee. He made a claim for Short Term Incapacity Allowance ("STIA") which was put into payment on 5 November 2019. Shortly before his entitlement to STIA came to an end the Appellant applied for Long Term Incapacity Benefit ("LTIA") on 21 October 2020. On 17 November 2020, the Appellant was assessed by a First Medical Board, consisting of a single doctor in relation to his knee and the percentage of loss of faculty was assessed at 20% with a review date of November

2021. The doctor noted that from the history given by the Appellant and from his examination, the Appellant appeared to be at the upper end of the mild category, which is set out in the General Guide to Assessments used by the Department for Customer and Local Services, formerly the Department for Social Security ("the Department"). That category is appropriate for degrees of incapacity of between 11 and 20%. A notification of the first doctor's assessment was provided to the Appellant on 27 November 2020. On 16 December 2020, the Appellant requested a redetermination by a second medical board. A letter from his general practitioner was provided in support of this request. A second board assessment by a second doctor, took place on 11 February following which the Appellant's loss of faculty was assessed at 30% with a review to take place in February 2022. Having received notice of the redetermination, the Appellant appealed to this Tribunal on the basis that the 30% assessment was too low. In his appeal documentation he pointed out that he was unable to work as a bricklayer on account of his condition. It is standard practice for the second doctor to review their decision once an appeal is lodged. The second doctor conducted such a review, in the light of the matters raised in the appeal documentation and concluded that his original assessment of 30% was correct. The Law The appeal was referred to the Tribunal under Article 34B(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 34B(4)). 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 inability to work, loss of earning power or additional expense shall be immaterial." The issue for us is whether the second doctor's assessment of the Appellant's loss of faculty at 30% was appropriate. The Evidence For the Department The second doctor gave evidence before us. He explained that he had not been able to carry out the usual physical examination of the Appellant on account of the Covid guidance in place at the time. However, he said that whilst this guidance was in force, he tended to give individuals the benefit of the doubt. He did not feel disadvantaged in his assessment of the Appellant's condition because he had not carried out a physical examination. The Appellant told him that although the laceration to his knee had healed, he was unable to continue his work as a bricklayer as he could not squat or bend. The Appellant said that he found walking difficult. He could walk 100 to 200m but had to stop frequently. Although the Appellant was exercising, he still had pain in the muscle behind his knee. Physiotherapy had helped the Appellant regain his range of movement and flexion of the right knee was observed to be greater than 90 degrees. Accordingly, the Appellant's range of movement was not limited to any great extent, but he was continuing to suffer pain. As to the Appellant's mental state, he was suffering from a degree of depression which the second doctor concluded was due to his inability to return to work as a bricklayer. His GP had prescribed him citalopram. The second doctor concluded that the Appellant had sustained a significant leg injury which was not covered directly by any of the guidance issued by the Department. He had referred to guidance that in his view dealt with comparable injuries. He referred to the guidance for non-scheduled ankylosis of the knee in respect of the knee injury itself. He also referred to the guidance for COPD in respect of the Appellant's difficulty walking. As to the ankyloses guidance, ankyloses of the knee joint would justify an assessment of 30%. Although the Appellant demonstrated a good range of knee movement such that his condition was arguably less serious, he was impaired by pain and weakness and the doctor thought that there was value in making that comparison. Although COPD is a completely different condition to that suffered by the Appellant, the mild to moderate COPD category (which ranges between 21 and 30%) is appropriate for someone who would be can only move 100 – 200m without stopping. Finally, the doctor had regard to the Department's general guidance on loss of faculty gives a range of 21 – 30% for mild to moderate disablement. Although there are no comparable injuries within that category, the "moderate" category immediately above is appropriate for a below knee amputation, which plainly represented a more significant incapacity that that suffered by the Appellant. It was, in the doctor's view, clear that the Appellant's rehabilitation from his injury had been interrupted by the Covid pandemic. He hoped that the Appellant's current loss of faculty would be temporary and considered the

30% award to be towards the upper end of what was reasonable. In normal circumstances he would expect the Appellant's rehabilitation to require around six months, but as the ongoing impact of the pandemic was still unclear, he recommended a review of the Appellant's loss of faculty in one year. The doctor did not take account of the Appellant's mental health in arriving at his 30% award. That was because he did not consider the mental health difficulties to relate to the injury. They recalled to social circumstances and finances, in his view. The Evidence For the Appellant The Appellant gave evidence, with the assistance of an interpreter. He told us that nobody appears to understand the severity of the injury that he went through. He was unable to work and his depression, as far as he was concerned, was caused by his precarious financial situation. It is directly related to his inability to work and therefore the accident. The Appellant could not see any prospect of returning to work as a bricklayer in the future on account of his ongoing symptoms. He would be unable to walk carrying bricks with his knee condition. The Appellant told us that housework and cleaning causes him a great deal of pain. Even simple tasks such as bending to reach something from lower drawers causes him pain. As to his mental health the Appellant told us that the accident itself was very traumatic. He had been admitted to the hospital, which had impacted on his mental health. His employer had put a lot of pressure on him, asking when he would get back to work. This made him feel "really bad". He had never had any mental health problems before the accident. The Appellant said that he disagrees with the decision of the second doctor, feeling that it was based on an inadequate assessment and told us that in the very near future he will have no money to live on. He told us that he had always worked and had never sought assistance from social security previously. Discussion The matter for us to determine is the appropriate assessment of the Appellant's loss of faculty as a result of his knee condition. It is important to recognise that LTIA is paid on account of an ongoing loss of faculty. It is not designed to provide compensation for personal injury. Such matters are to be pursued by way of a claim before the civil courts, if appropriate. Unlike STIA, LTIA is not paid on account of an individual's incapacity for work or as a replacement for a person's lost earnings. Indeed, article 2(1)(b) of the Order states that "the question whether or not any incapacitation involves inability to work, loss of earning power or additional expense shall be immaterial." It would therefore be inappropriate to increase a properly assessed LTIA award simply because an individual is struggling to make ends meet. What's more it does not follow from a 30% LTIA assessment that a claimant is 70% capable for work. Other benefits, in particular income support, can compensate for decreased earnings. We were informed by the Department that as at the date of the hearing the Appellant didn't satisfy the residency requirements to render him eligible to apply for income support. However, by 28 June 2021 (i.e. just over a month following the hearing) he would be in a position to so apply. As to the appropriate percentage loss of faculty at the current time, the guidance issued by the Department doesn't bind us, but it is helpful to have regard to it. Having heard the evidence and focussing purely on the injury to the Appellant's knee, we think that 30% was a generous award, representing as it does an award at the very top of the category appropriate for mild to moderate disablement and just below the category for moderate disablement which

would be appropriate for a below knee amputation. We take into account the second doctor's evidence that to a certain extent Claimants are given the benefit of the doubt because physical examination is not possible. We have some sympathy for the Appellant's financial situation and would encourage him to pursue an application for income support when he is eligible to do so. Such an application will have to be assessed on its merits. It was also plain to us that the Appellant has not yet made a full recovery from his injury. Both medical practitioners who sat on this appeal felt that there may be other options open to him to improve his condition. We would encourage him to seek further medical assistance with his rehabilitation. Decision We can see no basis for interfering with the second doctor's assessment of the Appellant's loss of faculty at 30%. There will be a further review in February 2022. Signed: Dated: 27 July 2021 Advocate Simon Thomas

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