

Social Security Medical Appeal Tribunal

Case number: [2017]TRS005

Date: 16 Mar 2017

Held at: The Jersey Tribunal Offices, Bath Street, St Helier

Before: Chairman S.E. Fitz, Dr B. Kellett and Dr N. Charles

Nature of Claim: Long Term Incapacity Allowance (LTIA) / Short Term Incapacity Allowance (STIA)

Hearing Type: Social Security Medical Appeal

Appellant: "E"

Respondent: The Minister for Social Security

Background

1. The Appellant was in receipt of LTIA from 1998 as a result of an accident at work. On 18 July 2012 his loss of faculty was assessed at 15% for impaired spinal function and 30% for impaired cerebral function, described as an "impaired ability to cope with stressful situations". This assessment was to be reviewed in July 2017.
2. On 20 June 2016 the Appellant submitted a medical certificate for the period 17 June 2016 to 17 July 2016 with a request to backdate to 1 April 2016. The certificate gave the reason for an inability to work as "stress", explaining that the Appellant had been off work since 1 April 2016.
3. On 28 June 2016 the Appellant's General Practitioner ("GP") provided further information stating: "I was unaware of the receipt of benefits. His stress at work has substantially worsened meaning any work during the certified period would be problematic- I hope this will be for a short time only."
4. On 1 July 2016 a medical board considered, on the papers, whether the medical certificate could be accepted as a separate claim to STIA and concluded that "stress" was already included in the LTIA. The Appellant was notified that his claim for STIA was disallowed and invited to submit further evidence.

5. On 22 July 2016 the Appellant's GP wrote a letter confirming that circumstances in the Appellant's life had caused considerable added stress such that he was unable to work.
6. On 26 July 2016 a further medical board was held on the papers and concluded that the LTIA covered the Appellant's problems with work stresses.
7. On 6 September 2016 a full medical board was held with the Appellant to assess whether the LTIA assessment of 45% was still valid in the light of any change of circumstances. The board concluded the 45% was indeed still valid. The issue of the medical certificate was not considered at this board. The medical certificate was therefore referred to a further medical board, on the papers, on 26 September 2016 and the board concluded it should not be honoured.
8. On 24 October 2016 a redetermination of the 26 September decision took place, again on the papers and the decision not to honour the medical certificate was confirmed.
9. The Appellant lodged a notice of appeal on 10 November, not against the LTIA assessment of 45% but against the redetermination on 24 October 2016 not to honour the medical certificate and grant either STIA for the period of the certificate or to increase the mental impairment element of the LTIA award to give an overall assessment of 100% for an appropriate period.

The Law

10. 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 continue 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 taking 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 incapacity –*
- 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;*
 - b) if the percentage so specified is lower than 5%, the claimant shall not be entitled to long term incapacity allowance in respect of that incapacity; and*
 - 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 incapacity 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 incapacity.”*

11. 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 incapacity 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 incapacity 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 incapacity involves loss of earning power or additional expense shall be immaterial;*
 - (c) the percentage of the degree of incapacity incurred (whether as the result of one or more claims) shall not be taken to amount in the aggregate to more than 100%;*
 - (d) incapacity 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 incapacity as the result of a congenital defect or of a disease or injury contracted or received before the relevant disease or injury;*
 - (e) incapacity 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 person's age, sex, and physical and mental condition."

12. 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."

13. It then falls to a medical board to assess whether a person has a loss of faculty as a result of a relevant disease or injury. Article 34A of the Law states:

"(1) Subject to the provisions of this Law, any question 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."

14. Further reviews of assessments of loss of faculty made by the medical board fall under Article 34D of the Law as follows;

Further reviews of assessments

"(1) A medical board may review a decision of any medical board or medical appeal tribunal if the reviewing board is satisfied by fresh evidence that the decision was given in consequence of the non- disclosure or misrepresentation of a material fact (whether by the claimant or

another person, and whether fraudulently or innocently).

- (2) Subject to paragraphs (3), (6) and (7), a medical board may review an assessment by any medical board or medical appeal tribunal of a degree of incapacitation if the reviewing board is satisfied that, since the making of the assessment, there has been a substantial and unforeseen aggravation of the results of the relevant disease or injury.*
- (3) A medical board shall not under paragraph (2) review an assessment unless it is of the opinion that, having regard to the period taken into account by the assessment and the probable duration of the aggravation of the results of the relevant disease or injury, substantial injustice will occur if it is not revised.*
- (4) Subject to paragraphs (5), (6) and (7), a medical board may review an assessment by any medical board or medical appeal tribunal of a degree of incapacitation if the reviewing board is satisfied that, since the making of the assessment, there has been a substantial and unforeseen amelioration of the results of the relevant disease or injury.*
- (5) A medical board shall not under paragraph (4) review an assessment unless it is of the opinion that, having regard to the period taken into account by the assessment and the probable duration of the amelioration of the results of the relevant disease or injury, the assessment under review is not justified.*
- (6) A medical board shall not under paragraph (2) or paragraph (4) –
 - (a) review a provisional assessment on any application made within 6 months of that assessment; or*
 - (b) review any other assessment on any application made within 5 years of that other assessment,*unless a medical appeal tribunal gives leave to the reviewing board to do so.*
- (7) Notwithstanding Article 16, if such leave is given under paragraph (6), the period to be taken into account on any revision of the assessment shall not include any period before the date of the application.*
- (8) Subject to the other provisions of this Article, a medical board may on a review deal with a case in any manner in which it may deal with a case on an original reference and, in particular, may make a provisional assessment notwithstanding that the assessment under review was final.*
- (9) The provisions of this Law shall apply to a decision on a review under this Article as if it were an original decision.*

15. The department's guidelines on "Short term deterioration and flare ups" give a useful explanation of how these issues are dealt with:

"Where an LTIA claimant's loss of faculty fluctuates between good and bad days this is already taken into account in the assessment given by the medical board doctor. However a claimant's condition may also be affected by short term flare ups that may or may not be foreseeable.

For example a claimant may have a planned operation or procedure in hospital for the condition included in the LTIA assessment. They may also suffer an injury to the relevant area of their body. In these situations it is impractical to arrange a medical board to consider these short term fluctuations.

However the claimant may as a result of the flare up be suffering from a greater loss of faculty than could have been anticipated by the medical board doctor during the last review.

To address this the department is able to accept as evidence of a flare up a letter from the persons GP or consultant treating them outlining the reason for the flare up and its expected duration. Alternatively a medical certificate can be issued for this purpose.

However if a medical certificate is issued for a condition that is already included on an LTIA claim this can only be accepted as a request for a review of the existing LTIA awarded due to a flare up and not as a separate claim to STIA.

The legal requirements for an early review in respect of prolonged deterioration also apply to flare ups. Therefore where evidence of a flare up is received this must be refer to a medical board doctor to determine whether the flare up is of sufficient severity and will last a sufficient period to warrant a revised assessment being awarded.

The only exception to this is where the evidence submitted is in the form of a medical certificate issued by a doctor at the General Hospital. In this case it has previous been agreed with the medical board doctors that any such claims can be accepted for a n increase in the LTIA assessment to 100% without referral to the medical board.

This is however restricted to a maximum of two medical certificates for a single period of incapacity however long the period is for. Therefore the maximum period that can be covered by this procedure is where the first medical certificate is issued for a period of 4 weeks with a second certificate issued for the following 3 months.”

16. 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 –

- 2 years has elapsed since the case was first referred to a medical board; and
 - 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.”*

17. 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.

18. 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.”

Evidence

19. The Department's Presenting Officer represented the Minister in the absence of the doctor who had carried out the redetermination ("the Doctor") who no longer works in the island. In written argument it was maintained on behalf of the Minister that the Doctor had taken into account all the relevant evidence from the Appellant and his GP and previous medical board reports. Based on these the Doctor had assessed that the Appellant's condition of stress had previously been included in the assessment for LTIA. Consequently a separate claim for STIA could not be made for this condition. Loss of faculty due to different stressful conditions cannot be separated from the loss of faculty the Appellant is already suffering from due to stress as a result of the effects of the cervical spine condition. The Doctor had also considered the flare up of the stress and concluded that the 30% included fluctuations that the Appellant could be expected to suffer. It was argued that, although as a result of a new event affecting the Appellant, the flare up of their stress condition had already been taken into account by the Doctor and is included in the overall LTIA assessment.

20. The Appellant gave evidence. He described the circumstances in his life at the time and how he gave up work as he could no longer cope as a result of the two difficult situations he was facing. He described how this was entirely different from the stress he generally encounters. He used strategies to deal with this particularly difficult period and knew in November 2016 that he had recovered and was able to return to work. He maintained that there had been other stressful periods in his life and times when he was unable to work and he had not sought to seek medical certificates to cover these periods. This period

he saw as truly exceptional. He did not return to work until November but did not seek a further certificate at the expiry of the first, seeing no point, as the first had not been accepted. He understood the department's position on flare-ups and considered he had coped with previous flare-ups in the past. This period in his life he considered to be much greater than a flare up. He also considered this episode to be completely unrelated to his ongoing stress.

Decision

21. The Tribunal considered it understandable that the Doctor had rejected the medical certificate as it merely referred to "stress" and this was clearly included in the LTIA. This decision was made without contact with the Appellant. When the Appellant did have the opportunity to explain his circumstances at the early review medical board, the board was considering the validity of the LTIA claim and did not consider the issue of the medical certificate. The Tribunal, having heard the Appellant give evidence, concluded that the use of the word "stress" on the medical certificate did not adequately reflect the difficulties the Appellant was facing at that time. Words to the effect of "grief, loss and relationship difficulties" would have better reflected the position. Such a description would have indicated the distinct nature of the difficulties from those generally encountered by the Appellant. The tribunal concluded that these difficulties were separate from those included in the LTIA and that the medical certificate should be honoured by means of an STIA award for the period of the certificate. (It was noted that there may have been some uncertainty as to whether the 1 April was the correct date that the Appellant ceased to work. The Tribunal confirms that STIA can only be awarded for the actual period the Appellant was not working). Whether any further medical certificates are granted retrospectively to cover the ongoing period of absence for work is a matter for the Appellant's GP and the department.

Appeal allowed.

Chairman S.E. Fitz

11 April 2017

NB: In relation to the guideline referred to in paragraph 15 the Social Security department would point out that this document has been written solely as an internal guide for the use of Social Security Department Determining Officers and Medical Board Doctors working on behalf of the of the Social Security Department. It is regularly updated as legislation and policy changes are implemented, therefore, it is only correct at 6/3/2017. It illustrates the guidance provided at that time and is not a legal document, nor does it constitute legal opinion. The contents of this document are for information purposes only.