AAT Ruling – Access to the NDIS with fluctuating psychosocial impairments

Access to the National Disability Insurance Scheme (the NDIS) is not solely determined by the existence of a disability, but rather by the degree to which it hampers an individual's ability to participate in various activities across one or more of six domains: communication, social interaction, learning, mobility, self-care and self-management.

Evidence needs to be provided, typically through reports from clinicians and functional assessments, to demonstrate substantial daily impacts due to a permanent disability. A recent case in the AAT underscores the importance of such evidence. The following is a summary of the case. For its complete account, see here.

The Case

Ms B. lives with complex Post-traumatic Stress Disorder (PTSD), Borderline Personality Disorder (BPD), depression and anxiety. She applied to the NDIS in early 2021 and was denied access on the basis that she did not meet the criteria for disability as she did not experience substantial functional limitations on a daily basis. The Agency also determined that Ms B. did not satisfy the eligibility criteria for early intervention access to the NDIS. The case was heard by the AAT on 19 June 2023.

The Evidence

A) Medical Evidence

In the Psychosocial Disability Form dated 24 February 2022, Dr Helen Williams, Ms B.'s GP, stated that she has "BPD, Complex PTSD, Major Depressive Disorder and Anxiety Disorder". According to Dr Williams, these mental health conditions contribute to a comprehensive impairment in Ms B.'s memory, perception of the reality from time to time, thoughts and emotions, abilities to concentrate, focus and plan and involvement in complex daily tasks or problem-solving as she easily becomes overwhelmed. Dr Williams also noted that Ms B. has acute panic attacks and social phobia and experiences social anxiety as the result of which she avoids social interactions. However, Dr Williams emphasised that Ms B. can walk around even during panic attacks or when she experiences suicidal thoughts. As Dr Williams further explained, during periods of high anxiety, Ms B. neglects her personal care, hygiene and grooming, often staying in bed. Communication becomes challenging and deficient with Ms B., and she has trouble maintaining eye contact. Ms B. has had multiple hospital admissions for treatment, most recently at St John of God Hospital (a private psychiatric hospital that offers mental health care through inpatient, day patient and outpatient services) for extended inpatient therapy, Transcranial Magnetic Stimulation (TMS), medication management, psychological support and anxiety programs (Ms B.'s stay in the hospital is documented through discharge papers). Dr Williams asserted that Ms B.'s Borderline Personality Disorder, complex Post-traumatic Stress Disorder (PTSD) and Attention Deficit Hyperactivity Disorder (ADHD) are of a permanent nature, are currently managed by a comprehensive daily medication regimen and would not be resolved through any additional therapies.

Dr Brent Thomas, a psychiatrist who provided treatment to Ms B. at St John of God Hospital, noted that medications, Electroconvulsive Therapy, group and individual therapy, Transcranial Magnetic Stimulation (TMS), art therapy and dialectical behaviour therapy could be beneficial and effective in addressing Ms

B.'s impairments. With regard to additional treatments, such as eye movement desensitisation therapy or other pharmacological interventions, Dr Thomas said that they would not alleviate Ms B.'s impairments.

Ms B.'s psychiatrist Dr Foresti-Zubaran filled out an Evidence of Psychosocial Disability Form on 27 November 2020. Dr Foresti-Zubaran's assessment confirmed Dr Williams' diagnosis of Ms B. and stated that Ms B. would greatly benefit from support from the National Disability Insurance Scheme (the NDIS) while she receives treatment for her mental health condition. Dr Foresti-Zubaran completed a second Evidence of Psychosocial Disability Form on 10 March 2021. In her assessment, she reiterated her previous observation about the severe impairment of Ms B.'s functioning due to her ongoing mental illnesses that are resistant to treatment. However, Dr Foresti-Zubaran emphasised that Ms B. does not have any impairments in mobility, and that she has only a moderate impairment in communication.

Doctor Gopi also completed an Evidence of Psychosocial Disability Form on 13 March 2021. The form acknowledges Ms B.'s diagnoses and states that there are no known, available or appropriate evidence-based clinical, medical or other treatments that are likely to alleviate her impairments, and that they are permanent. Section B of the EPD was completed by a social worker, Ms Marnie Donovan, whose observations confirm other evaluations of Ms B., highlighting the fact that she faced severe difficulties in social interactions, personal care, physical health, medication management, relationships and employment.

B) Allied Health Evidence and Independent Occupational Therapy Assessment

On 18 December 2020, a STRIDE Mental Health support worker, who has been working with Ms B. in the Commonwealth Psychosocial Support Program (CPSP) since 1 September 2020, wrote a letter supporting Ms B.'s application to join the NDIS, stating that Ms B. experienced significant difficulties in self-management and was heavily reliant on support from her husband. Another letter from the support worker, dated 15 March 2021, reiterated these observations.

Ms B. underwent an independent assessment by occupational therapist Mr Glen Dwyer on 15 December 2022. Mr Dwyer's initial and supplementary reports date 13 January 2023 and 20 February 2023, respectively. Based on his evaluation, Mr Dwyer concluded that because of her medical conditions, Ms B. experiences ongoing limitations in her ability to carry out various daily activities to varying degrees.

The Findings

The NDIA acknowledged that Ms B. satisfied the access criteria for "age" and "residence", and that her disability caused by her complex PTSD, Borderline Personality Disorder, depression and anxiety is, or is likely to be, permanent. However, taking account of both good and bad days in Ms B.'s life, the NDIA disputed that her disabilities result in a significant reduced functional capacity.

After careful consideration of the disability requirements, the Tribunal concluded that Ms B. fulfilled the criteria outlined in section 24(1)(a) of the Act, as she had a disability caused by complex PTSD, Borderline Personality Disorder, depression and anxiety. Furthermore, the Tribunal determined that Ms B.'s impairments are either already permanent or likely to be permanent, as stated in section 24(1)(b). In answering the question if Ms B.'s impairments result in substantially reduced functional capacity, the Tribunal draw on *Mulligan v National Disability Insurance Agency* (*Mulligan*), where it found that what the Agency has assessed is not Ms B.'s actual performance but her abilities and limitations. It is satisfactory for an applicant to have a significantly reduced functional ability in just one task as in Ms B.'s case, where she has significantly diminished functional capacity to engage in social interaction. Therefore, the relevant test should not be about the extent to which Ms B.'s life would improve with the NDIS assistance, although such support would likely enhance her overall well-being. Neither should her functional capacity be defined solely by her performance on bad days but by her overall

capabilities on both challenging and better days. Ms B. met the disability criteria for inclusion as a participant in the NDIS and the Tribunal did not proceed with assessing the early intervention requirements.

What can we learn from this case?

To be eligible for the NDIS participation, applicants must satisfy all the criteria outlined in section 24(1) of the NDIS Act. Even if an applicant exhibits fluctuating impairments, resulting in varying functional capacities that change daily as in Ms B.'s case, it is important to show that despite the fluctuations, their daily baseline functioning (i.e., between acute episodes) remains substantially impacted and will require continual support from the NDIS throughout their lifetime.