Dual disabilities – Lessons from the AAT

A recent case before the AAT – MRLK and the NDIS – sheds light on the concept of permanency and describing functional capacity when a person has more than one disability.

You can read the full description of the case online; we have provided a summary below.

The case

MRLK applied to become a participant of the NDIS due to effects of her Crohn's Disease, Anorectal Disease and Generalised Anxiety Disorder. She was declined access and applied to the AAT to review this decision.

MRLK is 26 years old who was diagnosed with Crohn's disease when she was 9 years old. Her diagnosis has resulted the following issues:

- Ongoing surgeries including a full colostomy
- Fatigue
- Abdominal and rectovaginal pain and discharge
- Social isolation
- Anxiety and depression

Despite these issues MRLK works part time (four half days a week) as a disability support worker.

The evidence

Evidence to support the application was provided by the applicant's GP, who had been treating her since 2016, in the evidence the GP outlined the impact of her physical health conditions stating that "her future is very medicalised" and that pain affected her capacity to undertake activities of daily living and her mobility. He further stated that "several factors affect MRLK's mental health, such as her physical condition, medical procedures and anaemia among others".

Additional evidence was provided by an OT engaged by MRLK's solicitors to conduct an in-person assessment to support the AAT application in December 2020. The OT report was based on interview questions, observations in her home environment and demonstrations of selected domestic tasks. MRLK's mother also provided information on the support she provided. Findings of the report stated that MRLK had substantial issues in the domains of self-care, self-management and social interaction. For mobility it was stated that she walked slowly and independently without aids but had significant difficulties due to high levels of fatigue, pain and dizziness. On cross-examination the OT stated that "On her bad days (3-5 days per week) she can walk a maximum of 100 metres. She will spend the day resting in bed or sitting…On a good day, when running an errand she can walk for a 1 km maximum before resting for 5 minutes or so".

No evidence was provided in relation to her anxiety and depression with her GP reporting that "In 2017, MRLK had engaged with a psychologist but was unable to continue due to financial constraints which continue". In

relation to MRLK's mental health, the OT report included the following statement: "MRLK requires an initial consultation with a psychiatrist to establish her diagnoses, treatment goals and plans, prescribe appropriate medications" In cross-examination the OT agreed that the effective treatment of her mental health condition might reduce the frequency of MRKS's bad days.

A further OT assessment in February 2021 by a different OT indicated that MRLK is living with conditions that are unpleasant and impact her life. "MRLK was a stark example of having better functioning days and acute 'flare' days"

Both MRLK and her mother provided witness statements that set out the impacts of her impairments on MRLK's daily life. These were supplemented by verbal statements from MRLK's brother and boyfriend.

The findings

Two access criteria were in contention:

1. If the impairment is likely to be permanent (Section 24(1)(b))

2. Does MRLK have a substantially reduced functional capacity (Section 24(1)(c).

In relation to the first criteria, the AAT was satisfied that there were no known available and evidence-based treatments that would be likely to remedy MRLK's physical impairments but was "left uncertain on the available evidence" regarding her mental health condition. No evidence was provided to the Tribunal from an appropriately qualified professional regarding treatments tried and the evidence from her GP recommended that MRLK consult with a psychiatrist to initiate treatments. In summing up the AAT stated that "It would presumably only be when a psychiatrist has conducted the medical treatment and review that a conclusion could be reached that there are no known, available and appropriate evidence based clinical, medical or other treatments that would be likely to remedy the impairment".

The NDIS Act and Access Guidelines provide guidance on when an impairment results in substantially reduced functional capacity to undertake one or more relevant activities.

The tribunal also went into some detail about what constitutes functional capacity, in particular the concept that capacity based on a functional, practical assessment of what a person can and cannot do and that in a situation where the impairments fluctuate, as in the case of MRLK, that the NDIA will consider the impact of the person's ability to function in the periods between acute episodes.

In addition, the evidence provided made it very difficult for the Tribunal to assess whether MRLK's physical impairments alone resulted in substantially reduced functional capacity as "all three impairments, the Crohn's Disease, the Anorectal Disease and the psychiatric condition are intertwined in the Tribunals assessments and findings regarding her functional capacity" and the "Tribunal cannot be satisfied of the precise contribution MRLK's psychiatric condition has on her functional capacity as opposed to her accepted physical impairments.

Therefore, the AAT concluded that MRLK's impairments do not result in 'substantially reduced functional capacity'.

What can we learn from this case?

This case demonstrates that to show likely permanence of an impairment there must be evidence from an appropriately qualified clinician on the treatments explored along with a statement that there are no further treatments that available to remedy the impairments. Furthermore, stating that a person cannot access a treatment due to cost is not considered an adequate reason for not attempting the treatment.

When applying to access the NDIS for two or more conditions, the functional capacity resulting from each impairment must be described separately to make it easy for the NDIA to determine if each of the impairments meet the access criteria independently of the other impairments.

For situations where there the functional capacity of an impairment fluctuates, describe the impacts that occur on an average day rather than acute or bad days.