



AAT ruling – good and bad days

A [recent case before the AAT](#) gives us insight into aspects of how NDIS access is determined, including:

- Baseline function versus ‘good and bad days’
- Substantial impairment versus doing things differently or more slowly
- How the domains of functioning are interpreted
- The importance of giving accurate and consistent information
- Who should provide support.

The case

Ms Madelaine is afflicted with a number of conditions, including rheumatoid arthritis, chronic regional pain syndrome, reflex sympathetic dystrophy and visual impairment, which have significantly reduced her quality of life.

The AAT relied on Ms Madelaine’s own evidence, along with the evidence of an occupational therapist, Ms Richards, who had undertaken a functional assessment at an earlier date.

According to this evidence, Ms Madelaine can only take quick showers or a sponge bath, she can drive but only within 15 minutes of her home, she uses a four-wheeled walker around the home and can lift into her car or uses a walking stick instead. She can manage online shopping but chooses not to. She has a few friends who she talks on the phone to and occasionally meets, but sometimes she has to cancel. She can prepare simple meals, but not things that are hard to cut like a pumpkin. She can make reminder notes and send short texts. She can do the laundry and fold clothes but needs lots of breaks.

Her NDIS application was found ‘access not met’; this was upheld at review, and the case came before the AAT.

The AAT accepted that her impairments were permanent and her case (like so many) hinged upon whether her impairments result in substantially reduced functional capacity, i.e. did she meet section 24(1)(c) of the NDIS act?

It concluded the following:

Ms Madelaine described many difficulties associated with the activities of daily living – how long they took her to accomplish, how she had to devise compromises and workarounds, how doing this sometimes embarrassed or upset her – but there was, ultimately, very little ... that she could not actually do. On this basis, it is difficult to see how she reaches any of the thresholds for substantially reduced capacity...

Baseline function versus ‘good and bad days’

Ms Madeleine gave evidence that she has good days and bad days, and focused a lot on what she cannot do on a ‘bad day’. For example, she said she can walk for 10 minutes using her walking stick ‘though this is less pleasant to do on a bad day’. On a bad day she cannot shower, so takes a sponge bath. She cannot drop her kids to school, so a neighbour helps out.



The NDIS submitted that functional capacity should not be characterised by what someone cannot do on a bad day, based on 8.3.1 of the [Access to the NDIS Operational Guideline](#), which states:

When considering whether a fluctuating or episodic impairment results in substantially reduced functional capacity to undertake relevant activities, the NDIA will consider the impact on the person's ability to function in the periods between acute episodes.

The AAT said of Ms Madelaine's evidence that 'it was difficult to tell whether a particular self-report of daily capacity described a bad day, a good day, or was of universal application. The Tribunal came away with the impression that much of her testimony regarded (a lack of) functionality on bad days in particular'.

Ms Madelaine told the AAT that Ms Richards conducted the assessment on one of her bad days. Ms Richards observed her undertaking a number of activities, e.g. getting out of bed, walking around the home (albeit slowly), holding a pen and writing, and presenting with normal mood and affect.

The AAT noted that if Ms Madelaine's functioning was reduced on this day, then she might ordinarily be able to do more or better than she demonstrated to Ms Richards.

The AAT also took little consideration of reports submitted by two other occupational therapists, as they were undertaken while Ms Madelaine was severely constrained due to a recent hospitalisation.

Substantial impairment versus doing things differently or more slowly.

Ms Madelaine described a number of daily activities that are difficult for her; for example, she has to leave early to drive her children to the bus stop, because it may take her 10 minutes to walk to the car.

The AAT noted that access rests on what a person can and cannot do – not on how much better they might be able to do if they received certain types of support.

The Access to the NDIS Guideline states that:

A person will be considered to be unable to participate effectively or completely in an activity if they cannot safely complete one or more of the tasks required to participate in an acceptable period of time. Undertaking a task more slowly or differently to others will not necessarily mean a person cannot participate effectively or completely in an activity.

The tribunal quoted Ms Madelaine herself, saying that is not *unable* to complete activities:

I can still function. I can still get out of bed. I may not swing out of bed and pop up, glad to see the sun every morning, but after 15, 20 minutes I can get the legs over and I can actually do it.

How the domains of functioning are interpreted

Without going into the substantial detail presented in this case, the AAT did provide a number of explanations of how the different domains should be interpreted:

Social interaction

This is about having 'the personal skills needed for social interaction', e.g. the ability to observe social boundaries and cope with feelings and emotions when engaging with others. It's not about a lack of opportunity for social interaction due to, for example, limited mobility.

Learning

This is about having the cognitive capacity to absorb and apply new skills. For example, a person might be able to learn the rules of tennis without being physically able to play.



Mobility

The threshold for mobility is relatively low. A person is considered to have functional capacity in the mobility domain if they can move about their home, get in and out of a bed or a chair, and can move about a shop or a park once they have arrived. The AAT suggests that a person who can travel 50m unaided does not have a *substantial* impairment to their mobility.

Self management

The AAT again referred to the Guideline which describes self management as the cognitive capacity to organise one's life, to plan and make decision and to take responsibility for oneself, including completing daily tasks, making decisions, problem solving and managing finances.

Self care

The AAT in this case accepted there are some things Ms Madelaine cannot do, e.g. clean the house by herself, cut her toenails, cut hard foods such as pumpkin. It also noted there are many self-care activities she can do, e.g. dress herself, shower although it is difficult, self-medicate, cook and eat, use a phone. It stated the gaps in her ability to undertake self care 'do not significantly compromise the maintenance of her health, safety and well-being'.

The importance of giving consistent information

Throughout the hearing, Ms Madelaine's evidence was demonstrated to be inconsistent.

The Tribunal stated that it saw Ms Madelaine as a truthful witness with a tendency to exaggerate. For example, she claimed her handwritten notes were 'unreadable' but when presented with her notes she agreed they were readable. A number of examples like this led the AAT to 'treat with caution' Ms Madelaine's own descriptions of her functional capacity where it conflicted with other evidence.

Who should provide support

In concluding, the AAT noted that Ms Madelaine does require support as a result of her impairments; however, the need for *some support* does not qualify her for NDIS support, let alone lifetime NDIS support. In this case, service may be more appropriately provided through another service system.

What can we learn from this case?

This case highlights a number of key points to be mindful of when preparing an access request:

- While it might be tempting to focus on a person's most challenging moments, evidence provided needs to reflect an average or 'baseline' day, not on a bad day.
- Doing things differently or slowly, or struggling with tasks, does not constitute *substantially reduced functional capacity* – it's important to demonstrate what a person *cannot* do.
- Substantially reduced functional capacity needs to be demonstrated in *one or more* domains of daily living. You don't need to demonstrate *some* impact across all domains.
- Evidence provided must be consistent; exaggeration in one area may cause a person's evidence to be questioned more generally.
- Demonstrating the need for some support is not enough to gain entry to the NDIS – a person needs to demonstrate they need support for their lifetime that is most appropriately provided by the NDIS.

Don't forget – this is part of a series of AAT summaries. You can find the others at www.tspforall.com.au/resources.

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