



Chronic pain and access – lessons from AAT rulings

The Administrative Appeals Tribunal (AAT) is an independent tribunal which reviews decisions made by the NDIA. (Visit the [NDIA website](#) to read more about the decision reviews process). Decisions that have gone before the AAT are publicly available via the [AAT website](#) and delve into the detail of how the NDIA makes decisions on things like who can access the scheme and what kind of supports the NDIS will fund.

In a recent decision before the AAT we learned more about how the NDIA makes access decisions for a person living with chronic pain. You can read the full description of the case on the [AAT website](#); we have provided a summary below.

The decision under review

JM is 36 years old and living with chronic pain and fibromyalgia. In his personal statement JM described difficulties with everyday activities such as dressing, showering, doing household chores; he also reported difficulties with sleeping, concentration and irritability, as a consequence of his severe and persistent pain. He relies on his wife for support with most daily activities and uses a number of assistive devices (e.g., wheelchair, brace) to assist with the pain when leaving the house. He has not been able to work for two years, is on the DSP and he no longer participates in social activities that he used to enjoy such as fishing and sport. He manages his pain with daily medications and by avoiding any physical activity as much as possible. He described an average day as watching tv, using the computer or laying down after stretching.

JM applied to access the NDIS; however, the NDIA determined that he did not meet the access criteria. He then applied to review this decision with the AAT.

The evidence

In reviewing the decision, the AAT considered:

- JM's personal statement regarding his impairments and their impact on his life
- the evidence of seven doctors and specialists who had examined or treated JM regarding the diagnoses, treatments recommended and tried, and likely permanence of the impairments
- the evidence of an OT regarding the impact of the impairments on his daily life.

On the request of the NDIA, the tribunal also heard expert evidence about fibromyalgia, its likely permanence and treatment options, from two specialists in the field.



Access criteria

In determining whether JM could access the NDIS, the tribunal considered the evidence against each of the five access criteria. For the decision to be overturned JM needed to meet all 5 criteria.

Does the condition result in a disability?

To access the NDIS a person must show that their impairments (in this case, physical pain, difficulties with mobility, difficulties with cognitive function) resulting from their condition (in this case, fibromyalgia and chronic pain) result in a reduction or loss of ability to perform daily tasks.

The AAT determined that JM met this criteria. They used the evidence from JM's doctors showing that he had been diagnosed with the conditions, and the evidence from the fibromyalgia experts that the condition impacts people's sensory, physical and mental function.

What is interesting to note is that in the initial access decision, the NDIA determined that JM did not meet this criterion because 'the experience of pain does not represent a loss of, or damage to, a physical, sensory or mental function'. The AAT disagreed with this decision on the basis of expert opinion and determined that these conditions can result in disability as per the NDIS definition.

Is the impairment(s) likely to be permanent?

A person is considered to meet this criterion if there are no known, available and appropriate evidence-based treatments that would remedy the impairments (section 5.4 of the legislation, NDIS ['becoming a participant'](#) rules 2016). It is important to note that the NDIA are looking for information about whether the *impairments* (e.g., the pain and its impact) are likely to remain for the person's life – not whether the *conditions themselves* are permanent.

The AAT determined that JM's impairments did *not* meet this criterion. This was based on the evidence from his doctors and the fibromyalgia experts which stated that:

- Whilst fibromyalgia and chronic pain are often lifelong conditions, most people will be able to alleviate the pain through an appropriate treatment regime.
- JM's treating clinicians did not believe that JM had reached 'maximum medical improvement'; however, they did indicate that they were sceptical about the extent to which treatment would significantly reduce the pain.
- Appropriate treatment usually requires participation in exercise programs, pain education sessions, physiotherapy and psychotherapy.
- JM had attended a pain clinic for treatment, which had been initially successful in increasing his strength, activity and social connections, but he had stopped attending on the basis that he felt he no longer needed it.
- JM's current treatment regime (opioid medications and restricted movement) would likely exacerbate his pain, rather than reduce it.

In a nutshell, it was determined that treatment for these conditions is challenging and that pain can be lifelong for a small percentage of people; however, further assessments and participation in treatment programs would be required to determine if this was the case for JM.



Does the impairment(s) substantially reduce the person's capacity to undertake most daily tasks in at least one of the six domains of daily living?

JM's personal statement along with evidence from his GP and his OT were used to determine if the impairments resulted in substantially reduced capacity in *at least one* of the six life domains.

The AAT found that JM met this criterion because he had substantially reduced capacity in the domains of self-care and mobility.

The AAT were not able to conclude that JM experienced *substantial* difficulty in the other domains without a formal cognitive assessment regarding the extent to which his memory, concentration and communication problems impacted daily activities in the domains of communication, self-management, social interaction or learning.

Does the impairment(s) affect capacity for economic or social participation?

The AAT found that JM met this criterion based on the evidence that he has been unable to work since 2016 as a result of his pain and that the condition impacted his capacity to engage in social activities. This was based on evidence from JM, his GP and OT that his inability to work and difficulties socialising were due to his pain.

Note that in order to address this criterion JM did not need to indicate the extent to which these activities were impacted – just that they were impacted.

Is the person likely to require support under NDIS for life?

The AAT determined that JM did *not* meet this criterion. This was based on the evidence that there are treatments available for his pain (the impairment) and that these treatments would be most appropriately funded by the public health system (e.g., Medicare rebates for chronic disease management), not the NDIS.

Summary

In this instance, chronic pain conditions were determined to be a disability for the purposes of the NDIS. However, in this case, on the basis that there are suitable treatment options (which are most appropriately provided by the public health system) that had not been fully explored, the AAT decided not to overturn the original decision because JM's disability was not considered permanent.

Does this mean that all pain cases will be denied access?

No. The NDIS will always consider individual circumstances against the criteria. What we can learn from this case is that if someone is trying to gain access to the scheme on the basis of pain conditions alone they will need to have explored their treatment options and have support needs beyond what the public health system already caters to.

Extending it to the mental health context

Often people with chronic pain will experience co-occurring mental health conditions – either as a result of pain or in addition to their pain. This case largely focused on the extent to which pain could be treated and that, if appropriately treated, the difficulties with daily life, mood and socialising would decrease. To gain access on



the basis of psychosocial disability a person would need to be able to show that even if the pain was treated the mental health impairments would remain.

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