[2012] AATA233

|  |  |
| --- | --- |
| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2012/0108 |
| Re | TY JOHN MACKEY |
|  | APPLICANT |
| And | SECRETARY, DEPARTMENT OF FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS  |
|  | RESPONDENT |

# Decision

|  |  |
| --- | --- |
| Tribunal | **Mr R G Kenny, Senior Member** |
| Date | **24 April 2012** |
| Place | **Brisbane** |

The Tribunal affirms the decision under review.

................[Sgd]..................................

 **Mr R G Kenny, Senior Member**

# Catchwords

SOCIAL SECURITY – Benefits and entitlements - Disability support pension – No impairment from conditions identified during the time-frame relevant under Social Security (Administration) Act 1999 (Cth) – No allocation of impairment rating under the Tables in Schedule 1B of the Social Security Act 1991 (Cth) – Decision under review affirmed.

# Legislation

Social Security Act 1991 (Cth) s 94, Schedule 1B

Social Security (Administration) Act 1999 (Cth) Schedule 2

# REASONS FOR DECISION

**Mr R G Kenny, Senior Member**

24 April 2012

# background

1. On 23 June 2011, Ty John Mackey lodged a claim with Centrelink for disability support pension which is payable under the *Social Security Act 1991* (Cth) (the Act) and the *Social Security (Administration) Act 1999* (Cth) (the Administration Act). His claim was rejected on 2 August 2011. On 18 October 2011, an authorised review officer affirmed the decision as did the Social Security Appeals Tribunal (SSAT) on 5 December 2011.

# Legislation and Issues

1. The qualifications for a disability support pension are set out in s 94 of the Act. It is common ground that Mr Mackey meets the age and residency requirements of that provision. The remaining requirements thereof are:
* that Mr Mackey have a physical, intellectual or psychiatric impairment (s 94(1)(a)); and, if so
* he have an impairment rating of 20 points or more which is calculated under the Impairment Tables in Schedule 1B of the Act ("the Tables") (s 94(1)(b)); and, if so
* he have a continuing inability to work (s 94(1)(c)(i)).
1. All of those requirements must be met at the time of the initial claim or in the period of 13 weeks from the day of the claim.[[1]](#footnote-1) In regard to Mr Mackey’s claim, this is from 23 June 2011 until 22 September 2011 (the relevant period). In the initial decision, it was determined that, during the relevant period, Mr Mackey's impairment totalled zero points under the Tables. In the decision of the authorised review officer, it was determined that the impairment rating under the Tables was zero and that Mr Mackey did not have a continuing inability to work. The SSAT, on 5 December 2011, affirmed the decision on the basis that the appropriate impairment rating under the Tables was zero.
2. It is not disputed that Mr Mackey has physical and psychological impairments. The issues for the Tribunal are whether Mr Mackey has an impairment rating of at least 20 points under the Tables and, if so, whether he has a continuing inability to work as required by s 94(1)(c)(i) of the Act, during the relevant period.

# Evidence

1. In evidence was a medical certificate from hospital practitioner Dr David Ryan which recorded that, on 23 June 2011, Mr Mackey was admitted to the Royal Brisbane Hospital with a cerebral aneurysm. During the relevant period, medical reports were provided by Dr Ryan, dated 5 July 2011, and hospital practitioner, Dr Macdaniel Nixon, dated 9 September 2011. The reports confirm that, on 23 June 2011, Mr Mackey suffered a cerebral haemorrhage secondary to a ruptured cerebral aneurysm. Two further aneurysms were identified during a surgical procedure for the first aneurysm on 24 June 2011. A second aneurysm was the subject of surgical repair on 15 September 2011. The third has not been surgically treated because of the potential danger of the procedure. That condition is being monitored by routine scans every four months.
2. Dr Timothy Briggs is Mr Mackey’s treating doctor. He provided reports dated 29 September 2011 and 28 October 2011 as well as a letter dated 16 December 2011. These postdate the relevant period. In his first two reports, Dr Briggs confirmed the diagnosis of cerebral haemorrhage and noted that it was secondary to a ruptured cerebral aneurysm as well as hepatitis C. His reports advised that Mr Mackey remained in hospital for 9 days after his second surgical procedure on 15 September 2011.
3. Apart from the aneurysms and hepatitis C, no other condition was identified by a medical practitioner as being present during the relevant period. However, in his claim form, Mr Mackey referred to spinal conditions of scoliosis and spina bifida. No diagnosis by a medical practitioner for either of those conditions was in evidence.
4. In his report of 29 September 2011, Dr Briggs wrote that the effect of the aneurysms on Mr Mackey’s capacity to function was expected to be uncertain and would fluctuate. Dr Briggs noted that the symptoms of the aneurysms included memory impairment, headaches, depression and anxiety. On 28 October 2011, Dr Briggs again wrote that the effects of the aneurysms would fluctuate over the following two years. Dr Nixon’s report of 9 September 2009 also described the ability of Mr Mackey to function over the next two years as uncertain. In his two reports, Dr Briggs described minimal effects on Mr Mackey from his hepatitis C.
5. In his letter of 16 December 2011, Dr Briggs diagnosed depression and anxiety secondary to Mr Mackey’s cerebral haemorrhage. Dr Briggs considered that these were likely to persist for at least two years. Additionally, Dr Briggs noted a history of alcohol and drug abuse by Mr Mackey.
6. The evidence also included a Job Capacity Assessment Report, dated 19 July 2011, from registered psychologist, Brett Somers, and another such report completed by Mr Somers and registered nurse, Vanessa Knowles, on 22 September 2011. In the first report, reference was made to the aneurysms and the spinal conditions. The conclusion reached was that none of these were verified as being permanent, fully diagnosed, treated or stabilised and that, therefore, no impairment ratings could be allocated under the Tables. For the second report, Mr Mackey was interviewed on 13 September 2011. The assessors’ opinion was that the aneurysms were permanent and fully diagnosed but not fully treated or stabilised in that Mr Lawrence was awaiting further surgery for his aneurysms and that there was an uncertain prognosis in relation to those circulatory conditions. It was also noted that there was no medical verification of a diagnosis of a spinal condition.

# Submissions

1. Mr Mackey was critical of the approach taken by the assessors. He submitted that his aneurysms were permanent and that he was not undergoing any further treatment. He referred to the types of work he had undertaken in the past from manual labouring to truck driving and submitted that an employer would not hire him because of his conditions.
2. For the respondent, Ms Smith submitted that the assessors’ reports should be adopted in relation to Mr Mackey’s aneurysms and his spinal conditions. This was because they were consistent with the medical reports and were related to the relevant period. As to the psychiatric conditions of major depressive disorder, anxiety and substance abuse, she submitted that there had been no diagnoses of these conditions during the relevant period.

# Consideration

1. Schedule 1B of the Act has an Introduction which provides guidance in the application of the various Tables which it contains. Part of that Introduction reads:

…

4. A rating is only to be assigned after a comprehensive history and examination. For a rating to be assigned the condition must be a fully documented, diagnosed condition which has been investigated, treated and stabilised. …

5. The condition must be considered to be permanent. Once a condition has been diagnosed, treated and stabilised, it is accepted as being permanent if in the light of available evidence it is more likely than not that it will persist for the foreseeable future. This will be taken as lasting for more than two years. A condition may be considered fully stabilised if it is unlikely that there will be any significant functional improvement, with or without reasonable treatment, within the next 2 years.

6. In order to assess whether a condition is fully diagnosed, treated and stabilised, one must consider:

 what treatment or rehabilitation has occurred;

 whether treatment is still continuing or is planned in the near future;

 whether any further reasonable medical treatment is likely to lead to significant

functional improvement within the next 2 years.

 …

1. I have noted Mr Mackey’s criticism of the assessor’s reports. While his description of his conditions may well reflect his present circumstances or, indeed, those of the last six months or so, it is not consistent with his circumstances in the relevant period. The only matters that have medical support during that period are hepatitis C and the aneurysms. The other matters are referred to after the relevant period. Also, I am satisfied on the medical evidence that there were minimal consequences to Mr Mackey from his hepatitis C during the relevant period and that his aneurysms were not fully diagnosed, stabilised and treated during that time. In that regard, I note that he was still in hospital after surgery at the end of the relevant period.
2. A necessary requirement in s 94 of the Act is that Mr Mackey’s physical impairment, as a result of conditions identified above, must equate to 20 or more points under the relevant Tables. I am satisfied that his overall rating is nil during the relevant period. A nil impairment rating under the Tables means that his conditions may not be considered when assessing any continuing inability to work, as required by s 94(1)(c)(i) of the Act, during the relevant period.
3. I am satisfied that Mr Mackey does not meet the qualifying criteria for payment of the disability support pension under s 94 of the Act.

# Decision

1. The Tribunal affirms the decision under review.

|  |
| --- |
| I certify that the preceding 17 (seventeen) paragraphs are a true copy of the reasons for the decision herein of Mr R G Kenny, Senior Member. |
|  |

............[Sgd]................................................

Dated 24 April 2012

|  |  |
| --- | --- |
| Date(s) of hearing | **19 April 2012** |
| Applicant | **In person** |
| Advocate for the Respondent | **Donna Smith, Departmental Advocate**  |

1. See sch 2, cl 3 and cl 4 of the Social Security (Administration) Act 1999 (Cth). [↑](#footnote-ref-1)