Malhas and Secretary, Department of Social Services (Social services second review) [2015] AATA 746 (17 September 2015)

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| Division |  |
| File Number(s) | 2014/6005 |
| Re | Ahmad Malhas |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Professor R McCallum AO, Member** |
| Date | **17 September 2015** |
| Date of written reasons | **24 September 2015** |
| Place | **Sydney** |

The decision under review is affirmed.

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Professor R McCallum AO, Member

# Catchwords

SOCIAL SECURITY – pensions – disability support pension – qualification – whether the person’s impairment is of 20 points or more under the Impairment Tables – decision affirmed

# Legislation

Social Security Act 1991 (Cth), s 94

Social Security (Administration) Act 1999 (Cth), Sch 2, cl 4

# REASONS FOR DECISION

**Professor R McCallum AO, Member**

**24 September 2015**

1. A decision in these proceedings was delivered orally together with reasons at the conclusion of the hearing. Written reasons have been prepared at the request of the applicant. These written reasons were distilled from the transcript of the hearing.
2. Mr Malhas was born in Jordan and immigrated with his wife to Australia in 1998. In Jordan, Mr Malhas worked as a motor mechanic for approximately 15 years.
3. Mr Malhas said in evidence that he is illiterate in both English and Arabic. Mr Malhas does not speak much English and he was aided in the hearing by an interpreter.
4. On 30 August 2013, Mr Malhas lodged a claim for disability support pension (DSP). He also lodged a report from his general practitioner, Dr Alsayed, dated 29 August 2013.
5. Mr Malhas underwent a job capacity assessment on 9 September 2013 and the report was dated 12 September 2013.
6. Centrelink refused Mr Malhas’ application for DSP. Mr Malhas sought review from an authorised review officer and then from the former Social Security Appeals Tribunal but to no avail.
7. The decision of the Social Security Appeals Tribunal dated 29 October 2014 stated as follows:

[6] At hearing Mr Malhas presented in extreme pain but asked the Tribunal to continue with the hearing. His evidence was consistently interrupted with non-verbal/verbal pain indicators including sighs, gasps, moans, groans and cries even whilst seated, facial grimaces and winces including distorted expressions, bracing and clutching onto furniture with the constant shifting of position and rubbing of the affected areas, specifically the back and knee.

[7] Mr Malhas said that this level of pain is unremitting. He has not been hospitalised for it. He gets no relief. His sleep is disturbed. He takes pain medication. He does not know why the pain is so bad. He said that no one can help him and that he is “going to be like this forever”. Mr Malhas asked the Tribunal to “give me a holiday from Centrelink” meaning that its constant requests that he seek work be suspended as it was affecting his physical and mental health. Mr Malhas confirmed that he can do all physical activities but prefers not to because of his pain, maintaining that his pain is activity related, which was at odds with the level of pain demonstrated whilst seated before the Tribunal where he was not required to exert himself physically. When this was put to Mr Malhas he responded by saying, that he could not undertake any task for “too long because of my very bad pain”. The Tribunal again offered a rescheduled hearing given the expressions of pain, although Mr Malhas again requested the matter be finalised today.

**Consideration**

[8] Since lodging the claim in August 2013, surgical interventions have been recommended (for both knees) and referral to a pain management clinic has been made with Mr Malhas to attend the first appointment on 26 November 2014.

[9] Given the overwhelming physical demonstration of pain at the hearing along with Mr Malhas’ statement that it influences his mental state and depression, coupled with the recent referral to the pain management clinic, the Tribunal finds Mr Malhas’ medical conditions cannot be considered as being fully diagnosed, treated and stabilised as his complaints of pain are shortly to be assessed by the Liverpool Department of Pain Management in November 2014. That is, the assessment of his orthopaedic and psychiatric conditions is premature and likely to be distorted because of the influence of pain behaviour which at the date of claim remained untreated.

1. The Social Security Appeals Tribunal took the somewhat unusual course of holding that the overwhelming pain which Mr Malhas was then suffering made it almost impossible to assess whether the physical impairments of Mr Malhas were fully diagnosed, treated and stabilised. In fact, the Social Security Appeals Tribunal held that they were not.
2. Mr Malhas now appeals to this tribunal.

# The legislation

1. The qualification criteria for DSP is set out in subsection 94(1) of the *Social Security Act 1991* which provides:

(1) A person is qualified for disability support pension if:

(a) the person has a physical, intellectual or psychiatric impairment; and

(b) the person’s impairment is of 20 points or more under the Impairment Tables; and

(c) one of the following applies:

(i) the person has a continuing inability to work;

…

1. For a person to obtain DSP the person must show that she or he has one or more impairments. Secondly, the person must show that one or more of these impairments have been fully diagnosed, treated and stabilised. Then the person must show that when these impairments which have been fully diagnosed, treated and stabilised are assessed under the Impairment Tables, the assessment is for 20 points. Finally the person must show that she or he has a continuing inability to work.

## The 13 week qualifying period

1. Under schedule 2, clause 4(1) of the *Social Security (Administration) Act 1999* a 13 week qualifying period is established. Simply put it provides that when assessing the impairment of an applicant like Mr Malhas I must examine those impairments from the date on which the claim was made and the following 13 weeks. Therefore in the case of Mr Malhas, he applied for DSP on 30 August 2013. The claim period is for 13 weeks from 30 August 2013 to 29 November 2013. The date of this hearing today is more than two years after the beginning of the claim period. The date today is 17 September 2015.
2. The case law makes it clear that while I can examine medical reports after the end of the claim period I can only use them to throw light upon the impairments as they existed during the claim period.

# concessions by the respondent

1. Paragraph 36 of the respondent’s statement of facts and contentions is as follows:

The Secretary accepts that during the relevant period the Applicant suffered from a spinal condition, a psychological condition, a lower limb condition, an upper limb condition, GORD, sleep apnoea and an eye anomaly. The Applicant, therefore satisfies section 94(1)(a) of the Act.

# The issues before the tribunal

1. The concessions of the respondent mean that Mr Malhas has satisfied s 94(1)(a) of the *Social Security Act 1991*. That is, he has impairments. I am required to decide, first, whether any of these impairments are fully diagnosed, treated and stabilised during the claim period. Second, I am required to decide whether any of the impairments which have been fully diagnosed, treated and stabilised may be assessed under the Impairment Tables. If Mr Malhas’ impairments rate 20 points under the Impairment Tables I am then required to finally decide whether Mr Malhas has a continuing inability to work.

# The impairment tables

1. The Impairment Tables are detailed and they are used to assess limitations on a person’s activities which are caused by physical, mental and sensory impairments. I will not go through them in detail here. I simply make the point that they require impairments to be diagnosed by medical practitioners. They also make it clear that in examining restrictions it is what the person can do and not what the person chooses to do. It is also the case that it is not permissible to double count, that is, to put several impairments on the one table and double count them. You have to use the appropriate table.

# The documentary evidence

1. In brief, the documents before me are the documents prepared by the respondent pursuant to section 37 of the *Administrative Appeals Tribunal Act 1975* and they are known as the T documents. There is also a bundle of supplementary documents and there are further medical reports. In particular, I note the further job capacity assessment report dated 29 May 2015 and the later report from Dr Alsayed, dated 5 February 2015.
2. The documents are very detailed. By my reckoning there is between 35,000 and 40,000 words of material. The vast bulk of the documents are reports from doctors and assessors. I have examined this material with care.

# The evidence of Mr Malhas

1. Mr Malhas attended today’s hearing and was assisted by an interpreter. Mr Malhas gave sworn evidence and I found him to be a truthful witness. Mr Malhas explained that he had great difficulty in getting work in Australia. In fact from 1998 to 2012 on his evidence he did not do any paid work. He did work as a motor mechanic in 2012 for a few months as the job was arranged by a job provider. Mr Malhas intimated that during this period he had gone back to Jordan on a number of occasions, often staying for six months or so.
2. Mr Malhas said that he was in pain. He explained that he came to the hearing today by train and walked from Town Hall Station to the hearing. Mr Malhas explained that he can dress himself without assistance and that he put his shoes on today himself. Mr Malhas said that he can walk for 15 minutes but then he has to rest. Mr Malhas said that on or about 23 July this year he travelled by aeroplane to Jordan and returned to Australia last week. He went to see his brother who is ill and also to see if he could get a medical opinion on his eye problem.
3. The flight is a long one. Mr Malhas said that he carried his luggage to the luggage counter. Although it was a few shirts, etcetera. He said that he slept on the plane half on the floor and half on his seat. He travelled by himself and he came back by himself.
4. Mr Malhas said that he believed his back pain was getting worse and had got worse. His impairments had deteriorated since the claim period. That is over the last two years since 29 November 2013. Mr Malhas said that he has a driver’s licence, that he does not drive often but that he can drive for 20 minutes. He does go to the grocery store and he can pick items; that is, grocery items from the shelf.
5. Mr Malhas said that he can hang washing on the washing line because it is a low line. In cross-examination Mr Malhas explained that two years ago he was the sold custodian of his three children who are now aged 16, 14 and 10. The children now live with his wife who is back in Australia. Mr and Mrs Malhas divorced in 2009.

# Consideration

1. I now turn to the first issue which I am required to examine. I am going to examine the first two issues, that being whether any of Mr Malhas’ impairments have been fully diagnosed, treated and stabilised and whether they can be rated under the relevant Impairment Table. I now turn to Mr Malhas’ impairments.

## Sleep apnoea

1. Having regard to the oral evidence of Mr Malhas and to the medical evidence I find that the sleep apnoea was fully diagnosed during the claim period. However, again relying upon all the evidence, I find that the sleep apnoea was not fully treated and stabilised during the claim period. In evidence today Mr Malhas said that although a breathing machine was recommended, and that is in the medical evidence, he did not have the money to purchase it and has not used it. I also conclude that he is managing the sleep apnoea well and that is what Dr Alsayed, concluded in his report dated 29 August 2013.

## GORD

1. In relation to Mr Malhas’ GORD stomach reflux, I find there is insufficient medical evidence from all the reports for me to conclude that during the claim period it was fully diagnosed, treated and stabilised. From the medical evidence it does appear that it is well managed.

## Eye condition

1. Mr Malhas has been suffering from an eye condition which is detailed in the medical evidence. Mr Malhas gave evidence today that he is being treated by an eye doctor. He gave evidence today that one of the reasons for going to Jordan was to seek an opinion on his eye problem. I do not know whether much turns upon it. I am happy to find that it was fully diagnosed during the claim period but on the evidence available to me I find that it was not fully treated and stabilised between 30 August 2013 and 29 November 2013.

## Back and neck pain

1. From the medical evidence and from the evidence of Mr Malhas today, I find that Mr Malhas does suffer from back and neck pain, the details of which are set out in the medical evidence. I find that it was the back and neck conditions were fully diagnosed.
2. I note the report in the documents from Dr Alsayed dated February 2015 and earlier reports where he discussed the pain from these impairments. It was recommended that Mr Malhas attend a pain clinic. He did so in late 2014 but did not have any further treatment and from all of that evidence I conclude that the spinal and neck condition was not fully treated and stabilised during the claim period.

## Shoulder conditions

1. From all of the medical evidence, I find that Mr Malhas’ left and right shoulder conditions were fully diagnosed during the claim period. However, from the medical evidence I find that he was having injections after the end of the claim period and therefore I conclude that this condition was not fully treated and stabilised during the claim period.

## Knee conditions

1. From the medical evidence I find that Mr Malhas does have knee impairments and that these are fully detailed in the medical evidence. I find that this was fully diagnosed during the claim period, however after the claim period Mr Malhas had further medical treatment. He had an operation on his left knee and was told that he should have a subsequent operation on his right knee when the left knee healed. Mr Malhas said in evidence that he was reluctant to have a further operation as the first operation on the left knee had not assisted him much. However, again, I have come to the view that the knee condition was not fully treated and stabilised during the claim period.

## Depression

1. I find this the most difficult issue before me. I find from the medical evidence and particularly the medical report in July 2012 that Mr Malhas’ depression was fully diagnosed even before the claim period. It was argued by the respondent that the depression was not fully treated and stabilised because of the intermittent treatment which Mr Malhas undertook. Mr Malhas was recommended to see a further psychologist for treatment in October 2012. From Medicare records he attended that treatment but did not seek a further treatment until December 2013.
2. I also note here the job capacity assessment report dated 29 May 2015 - I note that the assessors did not have available the Medicare records. Even so I found the analysis of the assessors rather compelling in relation to Mr Malhas’ depression.
3. On balance, however, I take the view that the depression was not fully treated and stabilised during the claim period. If, however, I had found that it was fully diagnosed, treated and stabilised at most I would have found it has a mild effect on Mr Malhas’ activities pursuant to table 5 of the Impairment Tables which is titled, “mental function.”
4. Mr Malhas was able to concentrate at the hearing today, to answer questions with some lucidity even though he is working in a different language. I also note from his evidence that he was able to be the solo parent of his children two years ago during the claim period and to take care of their needs with some government assistance. So even if I were to have found that the depression was fully diagnosed, treated and stabilised, at most I would have awarded Mr Malhas five points under table 5 of the Impairment Tables.

# Conclusion

1. From what I have said it is clear that Mr Malhas’ impairments do not attain the level of 20 points under the Impairment Tables. Therefore he does not qualify for disability support pension. It is not necessary for me to examine the issue of whether Mr Malhas has a continuing inability to work. However, I note that during the 18 months before the date of claim, that is 30 August 2013, Mr Malhas had not completed a program of support although from the records he had some days in the program.
2. Let me add that in his evidence Mr Malhas tells me and I believe him that his impairments have deteriorated, particularly his back and neck pain. It is open to Mr Malhas to apply again for DSP if he has medical evidence to show this deterioration. I would hope that before applying he would be able to complete a program of support which would aid his claim.

# Decision

1. The decision of the former Social Security Appeals Tribunal dated 29 October 2014 is affirmed and that decision was that Mr Malhas did not qualify for disability support pension.

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| I certify that the preceding 38 (thirty -eight) paragraphs are a true copy of the reasons for the decision herein of Professor R McCallum AO, Member |

.......................[sgd].............................................

Associate

Dated 24 September 2015

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| Date of hearing | **17 September 2015** |
| Applicant | **In person** |
| Advocate for the Respondent | **Ms A Fletcher, Department of Human Services** |