Gordon and Secretary, Department of Social Services (Social services second review) [2015] AATA 937 (4 December 2015)

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| Division |  |
| File Number | 2014/3179 |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Senior Member N A Manetta** |
| Date | **4 December 2015** |
| Place | **Adelaide** |

The Tribunal affirms the decision under review.

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Senior Member N A Manetta

# Catchwords

SOCIAL SECURITY - pensions, benefits and allowances - disability support pension - whether applicant has severe impairment attracting 20 point rating- decision under review affirmed.

# Legislation

Social Security Act 1991, s 94

Social Security (Administration) Act 1999

# Cases

Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60

# Secondary Materials

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011

Social Security (Requirements and Guidelines - Active Participation for Disability Support Pension) Determination 2011

# REASONS FOR DECISION

**Senior Member N A Manetta**

**4 December 2015**

1. This is an application by Ms Marilyn Gordon seeking a review of a decision of the Social Security Appeals Tribunal (SSAT) dated 30 May 2014. The SSAT affirmed decisions taken within the respondent’s department to reject Ms Gordon’s application for a disability support pension (DSP) under the *Social Security Act 1991* (the Act).
2. Ms Gordon’s claim was lodged on 19 September 2013 and her eligibility for a DSP must be assessed as at that date (or in any event within 13 weeks of that date). My task, I note, is to assess Ms Gordon’s eligibility on the basis of the evidence before me, and not to review the SSAT’s or Centrelink’s decisions for error.[[1]](#footnote-1) Ms Gordon represented herself, assisted by a friend, Ms Cronin; Mr Visser appeared for the respondent.

# Statutory requirements

1. The statutory preconditions for the award of the DSP that are relevant to this case are specified in s 94 of the Act and determinations made under the Act. The determinations are the Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011 and the Social Security (Requirements and Guidelines - Active Participation for Disability Support Pension) Determination 2011.
2. Given that Ms Gordon represented herself, it will be more helpful if I summarise them rather than quote them verbatim.
3. Ms Gordon must be awarded 20 points under the so-called Impairment Tables[[2]](#footnote-2) in respect of eligible conditions if she is to receive a DSP. If she does not receive 20 points, she is ineligible to receive a DSP. If she receives 20 points, but not from a single table, she must demonstrate participation in a program of support[[3]](#footnote-3), without which she will not receive a DSP.[[4]](#footnote-4) Finally, she must be prevented by the impairments arising from her conditions from working 15 hours per week or more[[5]](#footnote-5).

## Summary of conclusion

1. In my opinion, Ms Gordon is not eligible to receive 20 points from a single table in respect of the conditions which are eligible to be considered. She has not participated in a program of support. In these circumstances, she is ineligible to receive a DSP.

# medical conditions

1. I now turn to consider the medical conditions said by Ms Gordon to have resulted in impairments under the Impairment Tables. I note that I may only have regard by law to fully diagnosed, treated and stabilised conditions.[[6]](#footnote-6) Ms Gordon submitted that she suffers from fibromyalgia. I accept that this condition is fully diagnosed, treated and stabilised.
2. The second principal condition (although it may be two conditions) referred to by Ms Gordon comprises depression and anxiety. I do not find that this medical condition was fully diagnosed, treated and stabilised as at the relevant date (or within 13 weeks thereafter) and is, therefore, ineligible to be considered.

**DEPRESSION AND ANXIETY**

1. I now set out my reasons for my conclusion in respect of this second condition. Ms Gordon gave evidence to the Tribunal concerning her depression and anxiety, which I accept she suffers. Having heard her evidence, it is clear to me that Ms Gordon requires further evaluation and treatment before it can be said that her condition has been fully treated and stabilised.
2. The life circumstances referred to by Ms Gordon in her evidence clearly evidence extreme stress in her life. Unfortunately, these have not been the subject of expert evaluation and treatment in my opinion.
3. Ms Gordon’s evidence in this regard was accepted by the Respondent. Ms Gordon is now 60 years of age. She was married, but separated from her husband in 1997 or thereabouts. She has two daughters, the elder of whom is 24 years of age and the younger 21. Both are vision-impaired and have hearing difficulties. According to Ms Gordon, both have fibromyalgia.
4. She raised her children single-handed: her daughters were just six and three when she separated from her husband. Ms Gordon gave evidence that in 2010, her younger child attempted suicide, which has had a severe impact on Ms Gordon’s psychological well-being. Her older daughter has mental health problems and is, according to Ms Gordon, addicted to alcohol. In October 2013, the younger daughter moved out of home to live with her older sister, who had already left home at that stage. The youngest is now, fortunately, enrolled at TAFE full time and works (I assume part-time) at Foodland. The older sister is receipt of a pension for her blindness.
5. Ms Gordon made a general reference in her evidence to the abuse, she said she suffered as a child, and she links that abuse with her fibromyalgia. In addition, she has faced the loss of a number of family members, some prematurely. She described this aspect of her life as “horrific”. She gave evidence that she lost her father-in-law and then her mother. Her first brother died in 1999 and her second in 2008. Her third brother died in 2014 and her last brother is now in a nursing home. Of her two sisters, one has difficulties. She described her life as “one hell of a journey”. She understandably feels she has had many serious challenges in her life and that life has been a terrible burden.
6. It is clear to me from Ms Gordon’s own evidence that she remains deeply affected by the failure of her marriage, her early abuse as a child, her daughter’s attempted suicide, and her other daughter’s alcoholism. These have had, it is clear, a profound impact on her psychological wellbeing. It is also clear that she still feels keenly the premature loss of her siblings.
7. Unfortunately, her evidence was that she only contacted a psychologist in October 2013, after she had lodged her DSP claim form. Dr Soong, her GP, who gave evidence to the Tribunal, confirmed that her prescribed dose of Endep (35mg) is directed towards managing her fibromyalgia and is not at a sufficiently high dose to treat her depression. On the evidence before me, I agree with the SSAT’s assessment that as at the date of the claim Ms Gordon’s depression and anxiety had not been fully diagnosed and had not been stabilised.
8. Although she must have presented to her treating GP or GPs for many years with symptoms consistent with depression and anxiety, the first stage in any sort of planned treatment program only took place in October 2013. The reason for this delay did not emerge from the evidence, even though it seemed clear to me that her fibromyalgia is related to her depression and anxiety, which are described in medical reports as “extensive problems for her”.[[7]](#footnote-7)
9. That will be a matter of concern for Ms Gordon. She gave evidence that she would like to consult a psychologist regularly, but she cannot afford a large gap between the Medicare rebate and the actual charge. I would note here that there is no evidence that Ms Gordon could not find a psychologist to treat her where there would be no gap or in any event a manageable gap.
10. Dr Soong referred Ms Gordon to a psychologist practising in the same set of rooms from which he practises. It appears that no thought has been given to finding a psychologist practising elsewhere who might be willing to treat Ms Gordon on terms she can afford. It seems to me this is a priority issue in the proper handling of Ms Gordon’s circumstances.

### IMPACT ON FUNCTION

1. As I have said, I may only have regard to the impairments caused by diseases that are fully diagnosed, treated and stabilised. My finding in respect of Ms Gordon’s depression and anxiety mean that the impairments caused by these conditions are ineligible to be considered by me.
2. This makes my task in this case somewhat difficult. It appeared to me that Ms Gordon’s impairments were partly related to her fibromyalgia and partly related to her depression and anxiety. Dr Soong gave evidence, which I accept, that the impact of fibromyalgia depends on an individual’s response and what is otherwise happening to that person in his or her life. Clearly, Ms Gordon’s ability to function with fibromyalgia will be impeded by her poor psychological state.
3. The relevant table in respect of Ms Gordon’s fibromyalgia is Table 1.[[8]](#footnote-8) Here Ms Gordon must demonstrate at least a 20-point award if she is to avoid the program of support requirements. I set out the Table so far as it relates to a score of 20 points:

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| 20 | *There is a* ***severe*** *functional impact on activities requiring physical exertion or stamina.*   1. *The person:*    1. usually experiences symptoms (e.g. shortness of breath, fatigue, cardiac pain) when performing light physical activities and, due to these symptoms, the person is unable to:       1. walk (or mobilise in a wheelchair) around a shopping centre or supermarket without assistance; or       2. walk (or mobilise in a wheelchair) from the carpark into a shopping centre or supermarket without assistance; or       3. use public transport without assistance; or       4. perform light day to day household activities (e.g. folding and putting away laundry or light gardening); and    2. has or is likely to have difficulty sustaining work-related tasks of a clerical, sedentary or stationary nature for a continuous shift of at least 3 hours. |
| 30 | *…* |

# APPLYING THE TABLE

1. Ms Gordon herself gave evidence that she could walk around a shopping centre or supermarket without assistance provided she had a trolley on which to lean. She gave evidence that she is also able to take down items she wishes to purchase from eye-level shelves although she requires assistance for higher or lower items. Dr Soong accepted that Ms Gordon is able to negotiate a supermarket at least on a good day. Whilst Ms Cronin gave evidence that she accompanies Ms Gordon on shopping trips regularly, she does not physically assist her to walk around the supermarket.
2. I also find that Ms Gordon can walk from the carpark in a shopping centre or supermarket without assistance. I note that she can and does attend appointments by herself. Ms Gordon gave evidence that she drives and can drive, for example, to the local library. She is more comfortable, however, when she finds a park closer to the entrance.
3. On the basis of her own evidence that she can drive, I do not doubt that Ms Gordon could use public transport. I accept that her anxiety levels may cause her to choose to avoid public transport, but, again, this limitation results from a condition that I must ignore for these purposes.
4. I also find that Ms Gordon is able to perform some light household activities. One example given in the Table (folding laundry) is within her capacity if she has sufficient breaks. I accept that on a bad day she will need help with vacuuming and washing clothes; but I bear in mind that Ms Gordon is largely responsible for her own personal care and cooks for herself. Ms Cronin’s assistance in her home is occasional rather than continuous.
5. I am unable on the evidence before me to determine whether Ms Gordon is likely to have difficulty sustaining work-related tasks of a clerical, sedentary or stationary nature for a continuous shift of at least three hours. I note this will depend in part on her at least having some short breaks during the shift. Given my other conclusions, however, I need not decide this matter finally.
6. In my opinion, given these findings, Ms Gordon is not eligible for 20 points from Table 1.

# OTHER CONDITIONS

1. Ms Gordon referred to other conditions said to warrant impairment points. These were: constant headaches, arthritis, vertigo and high blood pressure. The impairments said to be imposed by these conditions are not corroborated on the evidence and so I must ignore them;[[9]](#footnote-9) but none of them could in any event, either singly or in combination, result in 20 points from a single table or any additional points under Table 1 in my opinion.

# FINAL CONCLUSION

1. If follows, in my opinion, that Ms Gordon has not established an entitlement to 20 points from a single impairment table. From this, it follows that she must demonstrate participation in a program of support as a condition of receiving a DSP. There is no evidence of this before the Tribunal.
2. Given these findings, Ms Gordon is ineligible to receive a DSP and there is no need for me to consider Ms Gordon’s work capacity.

I would reiterate that I have been left with the overwhelming impression that Ms Gordon’s depression and anxiety are impacting her severely and are a core problem in her overall health. These are not conditions which are being treated adequately at the present time in my opinion. The evidence before the Tribunal suggests that her response to fibromyalgia has been influenced, at least somewhat, by her depression and anxiety. For whatever reason, her depression and anxiety have received inadequate treatment in the past. I wish to make that point explicitly because it does seem to me that Ms Gordon’s very unfortunate circumstances do require appropriate investigation and treatment.

**DECISION**

1. The formal Tribunal decision will be to affirm the decision under review.

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| I certify that the preceding 31 (thirty -one) paragraphs are a true copy of the reasons for the decision herein of Senior Member N A Manetta |

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Administrative Assistant

Dated 4 December 2015

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| Date(s) of hearing | **16 and 24 March 2015** |
| Date final submissions received | **4 May 2015** |
| Applicant | **In person** |
| Advocate for the Respondent | **Mr C Visser** |
| Solicitors for the Respondent | **Department of Human Services** |

1. Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60. [↑](#footnote-ref-1)
2. Prescribed in the Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011. [↑](#footnote-ref-2)
3. As prescribed in the Social Security (Requirements and Guidelines - Active Participation for Disability Support Pension) Determination 2011. [↑](#footnote-ref-3)
4. Section 94(2)(aa) of the Act. [↑](#footnote-ref-4)
5. Section 94(2) and (5) of the Act. [↑](#footnote-ref-5)
6. Clause 6(4), (5) and (6) of the Determination. [↑](#footnote-ref-6)
7. Exhibit R1, T25, p 240. [↑](#footnote-ref-7)
8. Functions requiring Physical Exertion and Stamina. [↑](#footnote-ref-8)
9. See the introduction to each table. [↑](#footnote-ref-9)