

Casebase Number: G0068

Title of Payment: Invalidity Pension



Community Law and Mediation Northside
Northside Civic Centre
Bunratty Road
Coolock
Dublin 17

Date of Final Decision: 03/12/2014

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Keywords: appeal – medical – mental health – oral hearing – incapacity – section 317 – section 318

Organisation who represented the Claimant: Community Law and Mediation Northside (CLM)

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Case Summary:

The Appellant applied for Invalidity Pension on 10 May 2013 and this claim was refused on the grounds that the Appellant was found not to be permanently incapable of work. The Appellant sought a review of the decision. The Appellant's review was unsuccessful, and the Department of Social Protection's (DSP) decision was confirmed on 16 August 2013. The Appellant then appealed the decision of the Deciding Officer and submitted further medical evidence as part of this appeal. On 13 January 2014 the appeal was disallowed by way of summary decision; that is, without an oral hearing.

On 27 February 2014 the Appellant requested a review of the Appeals Officer's decision, and provided grounds of appeal by way of letter as well as supporting medical evidence.

CLM, on behalf of the Appellant, gave notice of review to the Social Welfare Appeals Office and made a request for the Appellant's file under the Freedom of Information Act. The Appeals Officer decided to reopen the appeal by way of oral hearing. This was set down for 25 September 2014. On medical grounds, the Appellant requested that this hearing be adjourned, and a new date was set for 11 November 2014.

On 3 November 2014 CLM made a further written submission on behalf of the Appellant, setting out the grounds for revising the Appeals Officer's decision under sections 317 and 318 of the Social Welfare Consolidation Act 2005 (as amended). The written submission included new medical evidence in support of the Appellant's claim.

On 11 November 2014 CLM represented the Appellant at oral hearing; however, at the hearing the Appeals Officer adjourned proceedings due to the Appellant's inability to participate as a consequence of her medical condition.

On 3 December 2014 the Appeals Officer revised the previous decision and allowed the appeal.

Summary of Benefit(s) Received:

Section 118 of the Social Welfare Consolidation Act 2005 ("the Act") provides that a person must be permanently incapable of work in order to qualify for Invalidity Pension in addition to meeting the relevant PRSI contribution conditions.

Section 2 of the Act states that: "*incapable of work means incapable of work by reason of some specific disease or bodily or mental disablement or deemed, in accordance with regulations, to be so incapable*"

The conditions under which a person shall be regarded as being permanently incapable of work are prescribed in Article 76 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007.

In summary, a person may be considered permanently incapable of work if they are regarded as incapable of work for life or, if they have been incapable of work for the previous 12 months and it is shown to the satisfaction of a Deciding Officer or Appeals Officer that they are likely to remain incapable of work for a further 12 months.

Section 317 of the Social Welfare (Consolidation) Act 2005, as amended, provides an Appeals Officer with the authority to revise the decision of another Appeals Officer where the decision is found to be erroneous in light of new evidence or new facts.

Section 318 of the 2005 Act provides the Chief Appeals Officer with the authority to revise the decision of an Appeals Officer if the Appeals Officer is found to have made a mistake in the law or the facts of the case.

Key Arguments:

- The Appellant argued that new medical evidence confirmed that she satisfied the medical criteria in respect of Invalidity Pension.
- The Appellant asserted that she was demonstrably unfit to work for at least a further 12 months because new evidence demonstrated that her conditions of anxiety and depression together with social phobia and panic attacks were continuous and constant and as a result she would not be able to function in the workplace.
- The Appellant submitted that the failure of both DSP Medical Assessors to carry out a physical examination prevented the assessors from gaining a full picture of her conditions and ascertain correctly the impact of those conditions on her ability to secure and maintain employment.
- The Appellant contended that the Medical Assessors' reports did not demonstrate that they had taken into account all of the features of her complex mental health issues including her social phobia and the panic features which she experiences.

- The Respondent contended that the Appellant was not permanently incapable of work and that improvement in her condition was anticipated in the long term.
- The Respondent asserted that the Appellant was unsuitable for Invalidity Pension.
- The Respondent was of the view that although the Appellant has a level of restriction this restriction was not substantial.

Background:

The Appellant was employed as a sales assistant from September 2010 to October 2011. She became ill and was diagnosed as suffering from depression, fatigue and frequent panic attacks. She was in receipt of Illness Benefit from October 2011 to June 2012. On 22 April 2013 she applied for Invalidity Pension. The report of the Appellant's G.P, provided at the time of her application certified that the Appellant was severely affected by her condition and that her condition was likely to last for a further 12 – 18 months.

A Deciding Officer refused the claim on 10 June 2013.

Decision of Deciding Officer: 10/06/2013

"Your case was examined by a Medical Advisor/Assessor who expressed the opinion that you are not permanently incapable of work.

I have, therefore, decided that you are not entitled to Invalidity Pension from 10/05/2013."

The Appellant sought a review of this decision. On 16 August 2013, the claim was again rejected. The DSP Medical Assessor expressed the opinion that the Appellant was "unsuitable for Invalidity Pension". On 23 August 2013 she appealed the decision of the Deciding Officer and submitted further medical evidence as part of this appeal.

A decision was issued on the 13 January 2014 from the Social Welfare Appeals Office disallowing the appeal, as the Appellant is "unlikely to be incapacitated for life". The decision of the Appeals Officer was made on a summary basis; that is, without an oral hearing.

Decision of the Appeals Officer: 13/01/2014

"Social Welfare legislation provides that entitlement to Invalidity Pension is subject to a person being permanently incapable of work. This condition is satisfied where, at the time of making a claim, a person has been continuously incapable of work for:

Twelve months – and is likely to remain incapable of work for a further twelve months, or

Less than twelve months – and is likely to be incapable of work for life.

Having carefully examined the evidence in this case, I have concluded that it has not been established that the appellant is incapable of work for life in line with the qualifying conditions for receipt of Invalidity Pension. In the circumstances, I regret that the appeal cannot succeed.”

The Appeals Officer’s report, dated 13 January 2014, cited two reports of DSP Medical Assessors, both of which concluded that the medical evidence was not consistent with a permanent inability to return to work and that improvement was anticipated in the long term. The Appeals Officer also referred - *“it is recognised that the appellant has a level of restriction but that such restriction is not substantial.”*

On 27 February 2014 the Appellant requested that the Appeals Officer’s decision be reviewed. She submitted the following grounds for review:

- Her mental health substantially affected her ability to undertake full time employment in accordance with the Department of Social Protection’s jobseeking criteria.
- The Appellant’s severe depression, anxiety and social phobia substantially restricted daily life including day to day essential tasks such as going to the shop.
- Her health had been deteriorating for the last ten years and continued to do so.
- There had been no notable improvements in her medical condition to indicate a change of circumstances from the beginning of her Illness Benefit claim to the application for Invalidity Pension, to the present day.
- The Appellant’s depression, anxiety and social phobia are conditions that cannot easily be cured. It was therefore extremely likely that the Appellant’s opportunities for securing employment would be severely restricted as well as her availability for and capability for employment.
- The Appellant contended that the issuance of a summary decision, without allowing her a chance to present her case at an oral hearing was unjust and went against principles of due process and fair procedure.
- The decision to refuse the Appellant’s entitlement to Invalidity Pension was at odds with her presenting health conditions.

In support of her assertions, the Appellant submitted a letter from her GP, her Consultant Psychiatrist and a daily statement of how her anxiety and depression impacts upon her thoughts and actions.

The Appellant then sought the assistance of CLM. CLM, on behalf of the Appellant, submitted notice to seek a review of the Appeals Officer’s decision in accordance with sections 317 and 318 of the 2005 Act.

On 17 June 2014 the Social Welfare Appeals Office informed the Appellant that her appeal was being re-opened by way of oral hearing. The hearing was scheduled for 25 September 2014 however the Appellant's health deteriorated and she was unable to attend on this date. The oral hearing was postponed until 11 November 2014.

CLM submission seeking a review of Appeals Officer's decision in accordance with sections 317 and 318 of the Social Welfare Consolidation Act 2005, as amended; 03/11/2014:

CLM, on behalf of the Appellant submitted the following points:

- New medical evidence demonstrates that the Appellant's conditions of anxiety and depression together with her social phobia and panic features are continuous, constant and debilitating to the extent that she would not be able to function in the workplace.
- From the medical evidence it is clear that the Appellant is unable to look for or maintain employment because she suffers from severe and, as per her GP, "*long-term*" mental health conditions.
- This level of restriction to work is substantial and the Appellant will not be fit for work in the foreseeable future. This satisfies the statutory requirements for receipt of Invalidity Pension under section 118 of the 2005 Act and the relevant regulations.
- It was not evident that the Appeals Officer took proper account of the medical evidence submitted by the Appellant, and furthermore, the Appeals Officer's decision presented as overly reliant on the opinion of the DSP Medical Assessors, opinions that were the result of a flawed assessment process. As a consequence, it was asserted that the Appeals Officer erred in both fact and law.
- It was asserted that the medical report form completed by the Appellant's GP and relied on by the DSP's Medical Assessors when forming their opinion is unsuitable for the purpose of ascertaining the affects of mental health conditions such as depression and anxiety. Specifically, the form provides a very narrow set of criteria for medical professionals to express the non-physical effects of a condition and this places a claimant with a mental health condition at a severe disadvantage in comparison to those suffering from physical conditions.

New Medical Evidence put forth by Appellant:

- Letter from GP outlining medical condition of the Appellant
- Consultant Psychiatrist report
- Letter from the Mental Health Services
- Letter from Counselling Service
- Letters from the Appellant's Counsellor

Oral Hearing: 11/11/2014

In attendance:

A solicitor and trainee solicitor from CLM accompanied the Appellant.

No representative of the Department of Social Protection attended the oral hearing.

At Hearing:

The Appeals Officer adjourned the oral hearing, as the Appellant was not fit to proceed. The report of the Appeals Officer stated:

"The appellant was unfit to present her case at hearing due to her extreme anxiety and mental state. Hearing was stopped. I have based my decision on the evidence available to me and my own observations"

Date of final Decision (decision of Appeals Officer): 03/12/14

"The Appeal is allowed."

"Social Welfare legislation provides that entitlement to Invalidity Pension is subject to a person being permanently incapable of work. This condition is satisfied where, at the time of making a claim, a person has been continuously incapable of work for:

- *Twelve months – and is likely to remain incapable of work for a further twelve months, or*
- *Less than twelve months – and is likely to be incapable of work for life.*

Having carefully examined all the evidence in this case, including that adduced at oral hearing I have concluded that the Appellant has established that she is incapable of work for at least another 12 months in line with qualifying conditions for receipt of Invalidity Pension.

Accordingly the appeal has been allowed."

The Appeals Officer determined that the Appellant has been incapable of work for at least 12 months and is likely to be incapable to work for at least another 12 months.

The Appellant was entitled to arrears dating from the date she was first refused. However it is important to note that her claim may be reviewed in 12 months given the reason for the AO's decision.

Observations:

The issue in this appeal was the question as to whether or not the Appellant was incapable of work. The legislation does not provide that a person may qualify if they are not capable of their ordinary work; rather, the applicant must demonstrate that their condition/s are incapacitating to the degree that they cannot undertake any work for life or, that the applicant has been incapable of work for the past 12 months and the incapacity is likely to persist for a further 12 months. This is an onerous evidential burden, and we suggest that it is particularly difficult in a case involving a mental health condition, as providing a prognosis as to the likely duration of the effects of a condition must be imprecise given the absence of certainty as to the benefits of treatment and recovery in a given case. A Doctor must therefore give an opinion based on their direct knowledge of the severity of the effects of a condition on a presenting patient, and take into consideration the opinion of relevant specialists in the field.

If, based on direct knowledge of a patient's condition/s, an applicant's Doctor expresses the opinion that their patient is incapable of work for at least a further 12 – 18 months, as in this case, it is difficult to accept the rationale for a decision based on a contrary view, if that opinion is formed without the benefit of any consultation with the applicant. In this case the DSP medical opinion was confined to a "desk based" assessment with the opinion of both Medical Assessors confined to a single sentence.

Of greatest concern in this case is the demonstrably flawed decision making on the part of the Deciding Officer in the first instance. In this regard we refer to the apparent fettering of his/her decision making authority, evident in the inappropriate deference given to the opinion of the DSP's Medical Assessor when deciding the claim. The Deciding Officer's decision refers:

"Your case was examined by a Medical Advisor/Assessor who expressed the opinion that you are not permanently incapable of work.

I have, therefore, decided that you are not entitled to Invalidity Pension from 10/05/2013."

Legally, the role of a DSP Medical Assessor is to provide an opinion; that opinion should be examined together with the evidence submitted by the claimant's own Doctor in order that a Deciding Officer make a reasoned finding on the basis of all the evidence before them. At the time of application the Appellant's Doctor had clearly certified that the Appellant was severely affected by her condition and that this was likely to persist for a further 12 - 18 months. Despite this opinion, the reasoning of the Deciding Officer in this case indicates that the opinion of the DSP medical assessor was accepted, unchallenged, as providing sufficient grounds to reject the Appellant's claim.

Furthermore, and crucially, both the Deciding Officer and the Appeals Officer in the first instance, should have dismissed the opinions of the DSP Medical Assessors on the grounds that they were incomplete, as neither assessor had addressed the question of the Appellant's "likely" incapacity for work for the next 12 months. According to the records, the Medical Assessors' opinions were confined solely to the question of the Appellant's long term prognosis.

The first medical opinion refers:

ME (medical evidence) provided is not consistent with a permanent inability to return to work

The second:

...while the AME (available medical evidence) to date suggests a level of incapacity it also suggests that the IP is unlikely to be incapable of work for life

In summary, neither the Deciding Officer, nor the Appeals Officer at first appeal should have made a finding against the Appellant which relied on the opinion of the DSP's Medical Assessors. The Medical Assessors not only confined their considerations to a desk based assessment only, but they also failed to provide an opinion with respect the full statutory medical criteria for receipt of Invalidity Pension; namely, based on the evidence, has the person been incapable of work for the past 12 months; and, is the person likely to be incapable of work for a further 12 months or life?

It is of concern to CLM that the neither the Deciding Officer nor the Appeals Officer appear to have scrutinised or questioned the authority of the Medical Assessors opinions. As a consequence, the Appellant's claim was not properly decided nor was her initial appeal to the Social Welfare Appeals Office. In these circumstances it is not unreasonable to assert that had the Appellant not had legal representation her appeal is unlikely to have been successful.

For *further information*:

http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/disability_and_illness/invalidity_pension.html

http://www.welfare.ie/en/Pages/803_Invalidity-Pension.aspx

For **more information**, contact us at:

Community Law and Mediation Centre, Northside

Northside Civic Centre, Bunratty Road, Coolock, Dublin 17

E: info@communitylawandmediation.ie | W: www.communitylawandmediation.ie

T: 01 847 7804