QUARTERLY DIGEST OF PUBLISHED DECISIONS ABOUT THE NDIS FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

This digest has been prepared by the Living with Disability Research Centre at La Trobe University. It summarises a selection of recent AAT decisions about the NDIS and highlights overarching themes.

By drawing out the implications of AAT decisions for interpreting the provisions of the scheme the digest will inform scheme participants, supporters and advocates and those involved in its administration. The primary intended audience is people who have some familiarity with the scheme, including local area coordinators, advocacy organisations, peak bodies and disability service providers.

The digest has three parts:

- a thematic overview of selected AAT decisions
- summaries of these decisions, each organised under the headings: decision category, questions addressed, facts, Tribunal reasoning, outcome and significance
- an explanatory section, introducing the AAT and the core concepts in the NDIS legislation, with links to more detailed information.

This work is funded by the Brotherhood of St Laurence, to support the development of a sustainable NDIS that is true to its original purpose. The digest is intended to be freely available. The authors are Dr Darren O'Donovan, Professor Christine Bigby and Professor Jacinta Douglas from the La Trobe University Living with Disability Research Centre.

THEMES RAISED IN NDIS AAT DECISIONS

This short section highlights key themes arising from the AAT decisions summarised in this edition.

We aim to capture the way the Tribunal is dealing with some common issues raised in appeals against NDIS decisions. The circumstances of each individual must be considered in conjunction with broader themes. Where the term 'Agency' is used, it means the National Disability Insurance Agency. Below, we highlight five issues that have featured in these decisions:

The need for a proper and balanced use of operational guidelines

Operational guidelines describe the Agency's internal policy and a more generalised approach for some types of decisions. They help to ensure consistent decision-making and streamline the process. Operational guidelines must, however, be consistent with the intentions of the legislation. Several decisions show how rigid reliance on guidelines can be challenged by participants [Sing, Ewin, David]. For example, the Agency's reliance on guidelines for transport costs and participation in competitive sport was successfully challenged for the following reasons.

- The Tribunal held the legislation does not support a categorical distinction between recreational or professional sport – both may contribute to an individual's level of participation and thus can be funded by the NDIS.
- Funding for transport is an individualised decision, with financial sustainability of the NDIS being only one aspect to be considered. The Tribunal has expressed consistent concern about the NDIA's rigid use of guideline amounts. Planners must take into account the circumstances of the individual, including the specific reason for each journey, the availability of informal support, community expectations about reliance on informal support, access to public transport, safety of its use and time or context specific obstacles to its use, such as rain, or need to carry heavy equipment.

These AAT decisions are an important reminder that every NDIA decision must reflect the application of the legislation to the unique circumstances of each individual. The classic phrase 'whose ordinary life is it?', for instance, captures the subjective nature of the right to an ordinary life embedded in the NDIS Act. Everyone's NDIS goals are different, and what an ordinary life looks like for each individual is subjective and person-centred.

Downsides of flexible use of funding

Funding is calculated on the basis of a participant's plan. The Agency categorises funding into broad types of support, such as core supports or capacity building. In two recent decisions the Agency had encouraged participants to use funds allocated for core support flexibly to cover additional items not explicitly named in the plan (Medcalf, David). At first glance flexibility may appear beneficial but as these cases illustrate it cannot compensate for an inadequate level of funding. When Mr Medcalf broke his core funding down line by line, it was clearly insufficient to pay the additional cost of professional evening care.

Both Medcalf and David show the level of skill and determination required to break down a large pool of funds the Agency had aggregated into one amount. They illustrate the value of doing this to counter the argument that using funds flexibly will cover additional items. However this task may be difficult for a participant without skilled support. In weighing up the attractiveness of using funds flexibly participants should not lose sight of the overall adequacy of their funding to meet their needs. A recent report by the Office of the Public Advocate in Victoria explored these issues in the context of individuals with complex needs.

The health system and NDIS interface

The question 'What should be funded by the health system as a health-related need and what by the NDIS as a reasonable and necessary disability related need?' continues to be prominent in these cases. It has also been the subject of a successful campaign by the NSW Council on Intellectual Disability, which argued that NDIS should fund 'swallowing' support for people whose disabilities mean they cannot swallow safely without skilled support. Hence to participate they require swallowing support when out in the community. Three cases [Allen, Mazy and Medcalf[in this digest are similar and help to clarify the health/disability interface. They illustrate that a participant needs to demonstrate the nexus between their health need, disability, and their goals of participation. For example,

- Ms Mazy needed regular medication for diabetes but her disability meant she couldn't administer it herself. She therefore needed help to do this in the community, so that she could participate in her chosen activities.
- Likewise, Mr Medcalf needed a suction pump to ensure he could breathe, and without a portable pump he could not go out with his family. Hence the pump, though a piece of medical equipment, was integral to meeting his goal of family participation.

The importance of impairment

It is often said that NDIS eligibility is based on functioning rather than a medical diagnosis. Decisions about eligibility in this digest highlight the significance of diagnosis and the meaning of impairment (McFarlane, Schwass). These decisions show that difficulties in functioning must originate from an impairment. Determining whether conditions such as fibromyalgia or morbid obesity (which lead to difficulties in functioning) are impairment requires specialist medical knowledge. This knowledge itself may be uncertain or contested.

There are multiple definitions of disability, impairment, and functioning. The way the NDIS uses these concepts can differ from the way the United Nations Convention on the Rights of Persons with Disabilities or the World Health Organization uses them. These decisions suggest the importance of medical diagnosis in determining NDIS eligibility for some people. They also show the challenge for the medical profession of engaging closely with the meaning of key concepts in the NDIS Act, which may be different from those with which they are more familiar.

Affordability and access do not affect 'availability' of treatment

Eligibility for the NDIS requires that a person has a permanent impairment that adversely affects their functioning. The term permanent implies there is no available treatment to remedy the impairment. The Tribunal found the Act takes a strict approach to "available", paying no attention to issues of practical access to treatment or ability to pay the costs of treatment –a form of treatment is either available or not. A person's financial or other circumstance that hinder access to that treatment are irrelevant (Schwass). This is a very different from the social security legislation, for instance, where the term "reasonable access" signifies the relevance of individual circumstances. The role of local area coordinators is potentially important in assisting a person to access treatment where the Agency denies support on the basis that it is available.

DECISION CATEGORY: ELIGIBILITY

MCFARLANE AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 4727 (17 December 2018)

Questions addressed

Meaning of impairment, permanence of an impairment, chronic health conditions

The decision focused on whether fibromyalgia is a medical "impairment" substantially affecting a person's ability to carry out activities of everyday living, and if so, if it was permanent in the applicant's case. The expert evidence provided by both parties highlighted that the meaning of "impairment" is contested.

Facts

The applicant, Mr McFarlane, had lived with fibromyalgia and chronic pain since 2008. His evidence showed this adversely affected his ability to undertake activities of daily living such as dressing, showering, household chores, gardening, cooking, preparing food, and managing finances. He required assistance from his wife, and relied on a wheelchair for mobility ninety per cent of the time. His GP had previously expressed the view that his condition was chronic and unlikely to "go away". He took prescribed opioid analgesics to manage his pain, an issue which became significant during the hearing.

While the matter was being heard, Mr McFarlane was assessed by a consultant rheumatologist/musculoskeletal physician concluded he had "significant fibromyalgia", with some atypical symptoms such as spasm and pins and needles. The consultant recommended further interdisciplinary assessment that might lead to a graded exercise program and further education on the "non-damaging nature of the pain in fibromyalgia". The consultant stated, however, that the recommended actions were "unlikely to change Mr McFarlane's conditions and, based on the severity and duration of his symptoms and his limited response to medications, he appeared refractory to intervention".

Tribunal's reasoning on eligibility

Can fibromyalgia constitute an impairment as required by the Act?

The NDIS Act requires that a person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments. The Act does not expressly define an "impairment". In an earlier decision (Mulligan, No 1), the Tribunal stated that impairment "commonly refers to a loss of, or damage to, a physical, sensory or mental function". The use of the term 'commonly' suggests that the full meaning of the concept is contested.

Reports from a leading consultant physician in rehabilitation medicine, commissioned by the Agency, described the central component of fibromyalgia as "generalised pain", and suggested that the literature concluded it was "not possible to detect [tissue] damage to the body in people with fibromyalgia". At the hearing, the specialist reiterated that he did not view fibromyalgia as an 'impairment' because abnormal pain creates change in the body's "function but not structure". Relying on this evidence, the Agency argued that fibromyalgia was not an impairment because the experience of pain does not represent "a loss of, or damage to, a physical, sensory or mental function" – that is, a person's body may not be impaired if it is continuing to function, but with pain.

A report secured by the applicant from the consultant disagreed with this position. It noted that fibromyalgia was "characterised by the presence of widespread muscular and soft tissue pain and tenderness" and was best understood as a "neurophysiological condition" linked to abnormalities in the person's pain processing. The report cited the leading research on fibromyalgia as concluding:

> *Although the exact cause of FM is unknown, abnormalities in pain processing have been identified at various levels in the peripheral, central, and sympathetic nervous system.*

The Tribunal relied on this evidence for its finding that Mr McFarlane's fibromyalgia and chronic pain syndrome were impairments that *significantly* affected his physical, sensory and mental function.

Was the applicant's fibromyalgia permanent?

Both specialists agreed that fibromyalgia was usually responsive to treatment. They suggested there was an evidence base for various ways of managing fibromyalgia, including education, exercise programs, psychological management strategies and medication. However, one specialist noted that a minority of people with severe fibromyalgia were unlikely to have their impairments remedied by current evidence-based treatment and required lifelong support. This defined group can meet the permanence test.

On the facts, the Tribunal was not satisfied that Mr McFarlane had attempted all appropriate and available treatments. He had attended a pain clinic but contested the conclusion of his treating doctor there that the treatment had resulted in marked progress. The Tribunal found that follow-up of this treatment was appropriate. It also found, based on evidence of both specialists at the hearing, that the opioid medication Mr McFarlane was currently taking could increase the experience of pain. His current prescription needed to be modified in order to make a proper prognosis.

Outcome and significance of the decision

The Tribunal found that fibromyalgia and chronic pain syndrome were impairments, which significantly affected the applicant's functioning. In this specific case, these impairments were not found to be permanent, as treatment options had not been fully pursued.

Specialist knowledge is vital in determining whether a condition is an "impairment". This is the topic of another decision included in this digest (see Schwass). As these cases illustrate, a disability or condition is not the same as "impairment" under the Act. In this case, the condition "fibromyalgia" was unpacked as an impairment, namely, "abnormal or impaired pain processing". The conclusion of the leading medical study linking the fibromyalgia to abnormality in pain processing was key to the outcome. While the NDIS adopts a functional definition of disability, qualification often requires a clear diagnosis that is linked to loss or damage to bodily functions. The Agency's broader submission that the experience of pain does not represent an "impairment" under the Act remains live for other conditions apart from fibromyalgia.

The decision underlines the importance of the medical community engaging with and debating NDIS language and concepts. In giving evidence, doctors must be precise in distinguishing a permanent impairment from a condition that is currently stable and responsiveness from remedy. The findings regarding opioid medication recall the original intention that the NDIS access process can function as "a one stop shop" where, even if individuals are rejected from the scheme, they are connected to services and solutions for their situation.

DECISION CATEGORY: ELIGIBILITY

SCHWASS AND NATIONAL DISABILITY INSURANCE AGENCY

[2019] AATA 28 (17 January 2019)

Questions addressed

Meaning of impairment, permanence, morbid obesity

This decision was about whether morbid obesity, by itself, constitutes an impairment under the Act. The decision underlines that demonstrating loss or damage to body function is essential to accessing the scheme. It also featured discussion about the meaning of "available" treatment and whether the expense of, or practical difficulties in, accessing treatment are relevant.

Facts

Mr Schwass has morbid obesity and osteoarthritis and was applying for access to the scheme. He was on the Disability Support Pension and the Agency conceded that he had substantially reduced functional capacity to undertake certain activities, particularly mobility and self-care.

Tribunal's reasoning on eligibility

Were the applicant's impairments, if any, likely to be permanent?

The Tribunal made several important observations about the requirement that there be no "known, available or appropriate" treatment for the applicant's impairments. The applicant had not continued with an obesity management program which had led him to lose around 4 kilograms. The Tribunal found that the difficulties that Mr Schwass faced in arranging transport to the clinic were not sufficient to show the program was not available to him.

Counsel for Mr Schwass also argued that bariatric surgery was not available to him, as it was "not funded in the public health system and it was not affordable to him in the private sector". The Tribunal was not satisfied that this surgery was not available treatment, finding:

> *... **available** in this context has the meaning of accessible or within reach; had the drafter intended it to mean **affordable** it would have been a simple matter to indicate that.*

The Tribunal found that the proposed surgery did not represent an unacceptable risk for the applicant. It might also address his established osteoarthritis.

Can morbid obesity constitute an impairment under the Act

The Tribunal found there was no evidence that a diagnosis of morbid obesity *necessarily* entails a loss of, or damage to, a physical, sensory or mental function. In making this finding, the Tribunal accepted the Agency's argument that the previous AAT decision, *Pomeroy v National Disability Insurance Agency*, did not fully explain why obesity constituted an impairment. It found that the decision only identified the adverse impact of obesity on that applicant's functional capacity under section 34(c) of the NDIS Act.

Eligibility for the NDIS requires not only diagnosis of a condition, but also evidence as to how that condition reflects, represents or causes abnormalities in the body's functioning. While the Tribunal has a working definition of impairment as "*commonly refers to a loss of, or damage to, a physical, sensory or mental function*", the boundaries of abnormal functioning are still evolving. In this matter, the Tribunal discussed the WHO Guidelines on the *Classification of Functioning, Disability and Health* which are drawn on for the purposes of determining eligibility (as stated in the Explanatory Statement to *National Disability Insurance Scheme (Becoming a Participant) Rules 2013*). The WHO guidelines state that an impairment can include "*a deviation from certain generally accepted population standards in the biomedical status of the body*". The Tribunal found that these guidelines which, "can be interpreted as lending weight, at various points, to [either side's] interpretations of *impairment*", are not directly incorporated into the legislation. The Tribunal found that the applicant had not shown how obesity either involves, reflects or causes the abnormal functioning of body systems, physiology or structures.

Outcome & significance of the decision

The Tribunal found that there were two possible avenues to reducing the applicant's weight which he had not fully explored. The Tribunal's comments about availability of treatment options have significant consequences for those of limited means, or living in regional areas. The relevant NDIS rule differs from the test for the Disability Support Pension, in that it does not state that "reasonable" treatment options should be explored. As a result, it ignores any practical barriers an individual faces in obtaining the treatment, in determining what is 'available'.

The Tribunal concluded in this matter that "the obesity results in a *disability* within paragraph (a), but is not itself an impairment, nor is it caused by an impairment". There is also the possibility that obesity, as a status or condition, *results in impairment*. Future appeals may see applicants delve into the detail of the consequence or causes of obesity, such as such as reduced range of muscle movement and strength, hypertension or limited aerobic capacity. These common side-effects of morbid obesity would fit the WHO guidelines that "*impairments may be part or an expression of a health condition*". It would be more difficult to see how the by-products of obesity could be viewed as reflecting abnormal "physiological functions" or dysfunctional "biomedical status" Confronting this type of technical language will be core to future decisions.

Finally, the key finding of *Pomeroy* which featured in the November 2018 edition of this digest was that the applicant's obesity:

> *substantially reduces her physical function in terms of her ability to mobilise and to undertake self-care.*

The Tribunal's use of the word "physical" needed to be explained in more detail. It might have implied that the Tribunal was finding the applicant was unable to perform certain movements due to lack of muscle power or microvascular abnormalities due to high blood pressure. This physical inability then led to everyday impacts on their self-care. The discussion in *Schwass* and *Pomeroy* will ensure that future decisions clearly identify how a person's body function is impaired before moving on to an assessment of how this adversely affects their ability to perform everyday tasks.

DECISION CATEGORY: ELIGIBILITY

ALLEN AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 3851 (15 October 2018)

Questions addressed

Substantially reduced capacity, early intervention, health system interface

This decision was about an unsuccessful application for access to the scheme by an applicant with a genetic syndrome, hypermobile Ehlers Danlos. It provides insights into when a program of early intervention support should be appropriately funded instead by the health system.

Facts

Ms Allen sought access to the NDIS. She has hypermobile Ehlers Danlos Syndrome (hEDS), which is a prevalent genetic disorder of connective tissue but often subject to delayed diagnosis in Australia. The Tribunal noted:

> *It is defined by the association of generalised joint hypermobility, joint instability complications, widespread musculoskeletal pain, (minor) skin features and/or pelvic/rectal/uterine dysfunction and [is associated] with the potential to affect multiple systems of the body including the cardiovascular autonomic system, the gastrointestinal system and mast cell activation.*

As a result of the condition the applicant experiences joint dislocations and subluxations. She has comorbid fibromyalgia.

Tribunal's reasoning on eligibility

The Tribunal assessed whether the applicant met the disability requirements under section 24 of the Act or could be admitted as an early intervention participant under section 25.

Should the applicant be admitted under the disability pathway?

While her condition was permanent, the Tribunal found Ms Allen did not have the **substantially reduced** functional capacity required under section 24(1)(c). Her social interaction was largely confined to her family, other mothers and a weekly playgroup. In terms of mobility, she was able to walk for 800 metres on a flat concrete surface, though her occupational therapist noted that she did have pain and some anxiety when walking or moving around her home.

While noting that her hEDS "causes her pain and discomfort" and she has "great determination to carry out these daily activities for her and her family", the Tribunal concluded these did not, as yet, meet the statutory threshold for access.

Should the applicant be admitted as an early intervention participant?

The Tribunal rejected the Agency's argument that as Ms Allen's condition was deteriorating early intervention would not benefit her by reducing her need for future supports. This reasoning seems to imply that "early intervention" support can only be justified if the person's condition is worsening and early support would delay more serious losses in function. Under the Act, early intervention may be aimed at preserving capacity for as long as possible, not just situations where it can be restored or loss avoided.

The Tribunal was not, however, satisfied that the supports requested by Ms Allen were most appropriately funded by the NDIS. She sought a physiotherapy program to strengthen the muscles around her joints, to help manage her condition. This was in addition to 10 allied health sessions funded through the public health system. She also sought occupational therapist support hours to help her "develop sustainable routines, pacing techniques and incorporate assistive technology into her daily life".

The Tribunal found that both the occupational therapy and physiotherapy supports were "time limited, goal oriented" therapies whose predominant purpose was directly related to Ms Allen's health. As such they were more appropriately funded by the health system rather than NDIS.

Outcome & significance of the decision

The Tribunal found that Ms Allen did not qualify as an NDIS participant through either the disability or early intervention pathway. It could be argued some aspects of the proposed occupational therapy were functional supports aimed at building Ms Allen's capacity. Here the wording of section 25(3) is important. It requires the decision-maker to consider whether "the early intervention support" is more appropriately provided outside the scheme. The Tribunal therefore had to decide whether the proposed program, **as a whole**, was predominantly health oriented. This entails a judgment about which system can best administer or fund *the bundle* of proposed supports. The presence of a small amount of functional or health supports in an early intervention program may not alter its overall character. The use of "appropriateness" as the yardstick for these decisions provides little guidance, and policymakers may in the future take a more direct and detailed approach to designating specific early intervention programs. It is clear that some NDIS applicants will need support to identify and list the early intervention supports that may be available to them.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

MAZY AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 3099 (9 August 2018)

Questions addressed

Health system interface, intellectual disability, nursing support

This decision is an important reflection on the boundary between the health system and the NDIS and whether the scheme should fund the provision of a registered nurse to assist a person with intellectual disability to administer the doses of insulin to control her type 1 diabetes.

Facts

Ms Mazy has a severe intellectual disability and is also blind and hearing impaired. In January 2018, her family were informed that funding would cease for the administration of her insulin. At that time, it was funded by the NSW Department of Ageing, Disability and Home Care and provided by Nurses on Wheels.

Five days later, her family on her behalf lodged an application for review of her plan requesting that funding for this service be included. It was requested that: a registered nurse visit Ms Mazy at 8:00 am, 12 noon and 4:30 pm each day to monitor her blood sugar levels and administer the appropriate insulin dose given in four injections with each site visit; that on three days a week the nurse would meet her at an outdoor location, to enable her to participate in activities such as swimming and visits to parks and beaches with a friend. The Agency rejected the request on the basis that administration of insulin was the responsibility of the health system.

Ms Mazy's doctor gave evidence that a monitor or insulin pump was not an appropriate form of treatment for her. He testified that if Ms Mazy did not have the disabilities she has, she could be taught to self-administer and adjust the doses of insulin herself. If the variable dose injections were not provided she faced likely hospitalisation and potentially life-threatening consequences. The registered nurses also had the training to adjust Ms Mazy's food plans as required and to look for signs of infection. The cost of the Nurses on Wheels service was $105 a day. Without the service, Ms Mazy would likely have to leave her current home of 19 years and live in different accommodation at an estimated additional expense of $1,000 a week.

Tribunal's reasoning on reasonable and necessary supports

The central issue was whether the nurse's role was most appropriately funded by the NIDS under the provision of section 34(1)(f) of the NDIS Act. The division of responsibilities between the health system and the NDIS is addressed in *Support Rules 7.4 and 7.5 and the COAG Principles*. While rule 7.5 states that the NDIS is not to be responsible for the clinical treatment of health conditions, rule 7.4 provides that it:

> *will be responsible for supports related to a person's ongoing functional impairment and that enable the person to undertake activities of daily living, including maintenance supports delivered or supervised by clinically trained or qualified health practitioners where these are directly related to a functional impairment and integrally linked to the care and support a person requires to live in the community and participate in education and employment.*

The Tribunal held that the nursing supports were related to Ms Mazy's functional impairment and enabled her to undertake activities of daily living. Her need for support was not attributable simply to her diabetes, but was also due to her disability, without which she would be able to self-administer her insulin.

The Agency also argued that the nursing support was not value for money, as, less expensive alternatives might exist. It argued that options such as an insulin pump had not been "fully investigated" by the applicant. The Tribunal rejected this and underlined that neither party to Tribunal proceedings bears an onus of proof. It was satisfied the family had investigated alternative accommodation and Ms Mazy's treating specialist had deemed an insulin pump inappropriate. The Tribunal commented that where participants provide relevant evidence that options are not practical, "it will not be sufficient for the Agency simply to take the position that an Applicant has not fully investigated the alternative supports which may be available".

Outcome & significance of the decision

The Tribunal found that the NDIS should fund the nursing supports necessary to administer Ms Mazy's insulin. It shows that the NDIS may fund supports where a person's disability necessitates additional maintenance by clinical staff. This decision turned on the direct relationship between the supports and the person's disability. This distinguished it from *YPRM*, an earlier Tribunal decision, which found that the NDIS was not responsible for funding nursing support in the classroom for young children with diabetes. In that case the age of the child, rather than their impairment, was the reason they could self-administer medication.

The case together with *Medcalf* (also in this digest) provides a clearer picture of how the boundary between health and the NDIS is evolving. *Medcalf* underlines that NDIS funding for support from clinical staff or a piece of health equipment is more likely to be allowed where it plays an integral – ideally irreplaceable – role in a *specific* daily activity or functional goal in an individual's plan. An argument for a maintenance support is much stronger where it "turns the key" for the delivery of an individual's plan of supports.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

MEDCALF AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 3893 (16 October 2018)

Questions addressed

Health system interface and NDIS, assistive technology, support hours, dietician consultations

This decision covers a range of assistive equipment requirements which sit at the boundary between the NDIS and the health system. It underlines the importance of connecting a requested piece of equipment with a specific daily activity or functional goal. It also provides an example of how requests for dietitian consultations might be dealt with under the scheme.

Facts

Mr Medcalf is a young man aged 25, living with his parents in northern New South Wales. He requested a review of his initial plan which had been approved on 7 November 2016. Three extra pieces of equipment had been approved on 2 May 2017. The reviewer rejected most of his claim for additional funding, finding that the support offered was sufficient to complement informal supports and mainstream health care to provide a reasonable and necessary level of care.

The applicant appealed, seeking an expanded range of supports. After the Tribunal hearing, the Agency agreed to fund a hoist, a bed, leg splints, ramp and rails, and accepted the need for fortnightly physiotherapy, and staff training (at $7,893.36 twice per annum), 104 hours of support coordination and at level 3 as set out in the transport guidelines. This concession was made after the hearing before the decision. The remaining contested supports were determined by the Tribunal.

Tribunal's reasoning on reasonable and necessary supports

This case involved a range of potential supports.

Purchase of a portable suction pump

Mr Medcalf requires suctioning with a pump every 10 to 15 minutes to avoid fluid entering his lungs. He had a heavy suction pump in his bedroom, funded by the health system. Since the health system will only fund one pump, Mr Medcalf requested funding for a second, portable suction pump. The Tribunal found that this was to be funded by the NDIS.

To be funded, equipment or support needs to be "integrally linked" to a particular act of social and economic participation. The portable suction pump in this case was practically essential to the applicant's expressed goal of spending time with his family. It was not simply delivering a general health outcome.

The Tribunal was satisfied there was no alternative to the portable pump that would deliver the benefits of family participation. While the applicant also had a manual foot pump for use when travelling, using it was found to be "laborious", with Mr Medcalf's parents having to take turns operating it. The Tribunal found that the Agency's suggestion that the suction pump in the bedroom be placed on a trolley was risky and impractical.

Supply of a nebuliser

The applicant had a nebuliser on loan from NSW Health, which he was required to return. The Tribunal found that a replacement nebuliser should not be funded by the NDIS. The nebuliser was used to prevent infections. Unlike the suction pump, it was not integrally linked to enabling greater independence or participation in a specific activity which would further his chosen goals. The purpose of the device was delivering a "basic health" outcome, and responsibility for it lay with the health system.

Funding for a wheelchair

The Agency argued that the existing occupational therapy report was incomplete and insufficient to justify funding a replacement wheelchair. The applicant submitted a revised report following the hearing. Funding was approved given the occupational therapist's finding that Mr Medcalf required "specialized, individual and specific posture to ensure safe respiratory function, safe skin integrity, safe postural positioning for mobility, meals and personal care". The report provided specific evidence as to how the applicant's current chair was not delivering this.

Core support hours

The applicant argued that he needed an additional $60,000 funding for core support. His main reason was the unavailability of offsite respite care, and his need for five hours of professional care in the evening. The Agency proposed its existing funding model of $313,000 in core support as flexible and submitted that the family could work with their service providers about how they would like to spend the amount. The applicant, supported by Legal Aid NSW, broke down the $313,000 and showed that the ability to use the funds flexibly did not alter the fact that the overall amount was insufficient.

The Tribunal preferred the specific model created by the applicant's case manager to that of the Agency. This type of line by line exercise illustrates the difficulty and complexity of assessing large core support figures. The Tribunal accepted that there were barriers to accessing suitable respite accommodation and rejected the Agency's inbuilt assumption that the amount of core support would cover the cost. The Tribunal's reasoning here supports the principle that large global figures need to cover the identified needs of the applicant.

Quarterly case management meetings

The Tribunal refused to approve the funding of quarterly team meetings. The applicant had argued that this was required to ensure that the separate services working with him had "a consistent approach in caring". The Agency submitted that NDIS providers have on-costs built into their budgets to cover meeting costs, and noted that it had incorporated substantial support coordination and staff training into the revised plan.

The Tribunal seemed to recognise that the issue of case management was likely to recur and ruled that it was unable to make "a clear finding" and exercised "the benefit of the doubt" in favour of the Agency on this occasion.

Case management for participants with complex needs is a source of much discussion within the disability sector. A recent report of the Victorian Office of the Public Advocate criticised what it viewed as the lack of effective case management and collaboration within the NDIS. Future cases need to include evidence of what communication and cooperation between providers is already required in the NDIS terms of business, the new Quality and Safeguarding regulations and the client service agreement. They will then need to describe the goals and nature of the proposed case management support and provide evidence of the benefits it would deliver.

Quarterly dietician consultations

Mr Medcalf sought funding for quarterly consultations with a dietician with the necessary equipment to weigh him in his wheelchair. The Tribunal found that, on the evidence, weighing was not the only method of monitoring the diet for Mr Medcalf's PEG feed. He was entitled to funding under the Medicare Benefits Schedule, which supports five dietician consultations where the applicant does not need to be weighed.

Outcome & significance of the decision

In implementing its rulings, the Tribunal adopted the increasingly common approach of incorporating them in an approved new plan to run for 12 months.

The decision confirms that the boundary between the health system and the NDIS rests on contextual judgment rather than categorical definitions. To be funded under the scheme, the equipment or support needs to be "integrally linked" to a particular act of social and economic participation rather than simply delivering a general health outcome. The portable suction pump in this case had that close connection – it was practically essential to the applicant's expressed goal of spending time with his family. The question of whether, and to what extent, funding for the support may be available within the health system also influences the analysis. Participants will need to present a more specific argument than "if I am unwell I cannot meet my goals"; instead they need to show that the requested support, in its delivery or design, is specifically directed at *enabling a particular activity* core to their NDIS plan goals.

The approach to dietician supports in this decision should not be perceived as ruling dieticians out of the scheme on grounds that "they belong in the health system". The Agency has previously stated in Senate estimates that it adopts a case-by-case approach to this cluster of supports. There will be instances where additional dietary supports are linked to the applicant's specific NDIS goals rather than simple baseline health monitoring. For instance, where an applicant has a specific goal related to diet, for example, "greater self-confidence through a healthier lifestyle to enable stronger inclusion in the community" further analysis would be needed.

The decision underlines the need for further reflection on the need for collaboration between those involved in a person's life and provision of support and holistic case management within the scheme, the degree to which these processes are covered within the existing scheme of supports and the possible benefits of additional targeted case management funding.

The complexity of analysing and fixing the range of supports required underlines the importance of the Agency's new complex support needs pathway which was announced in November 2018 and is currently being piloted.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

LJJY AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 3506 (18 September 2018)

Questions addressed

Value for money, autism supports

This decision concerns the contribution of two hours of after-school in-home support offered by a junior therapist to the goals a child with autism, whether this support represented value for money relative to the benefits and or costs of alternative support and whether the support was likely to be effective, beneficial and reflect good practice. The decision underlines the value of clear documentation of the aims, benefits and outcomes of support hours.

Facts

This case was taken by a family on behalf of a seven year old NDIS participant with level 3 autism. They appealed the Agency's refusal to fund in-home care for two hours per day, two days per week. The Agency argued that the care requested was essentially child-minding rather than disability related therapy.

The applicant attended an autism-specific school five days a week. His difficulties with social awareness and communication meant he found it hard to perceive risks, particularly around traffic and interacting with others and needed to be accompanied by an adult. His father, due to his employer's work flexibility policy, was able to escort him to his assisted school transport in the morning and to be present at home after the applicant returned from school. His mother was working full time and was unavailable during normal business hours.

The applicant's parents engaged a junior therapist to assist him after school. She provided a two-hour session, twice per week, meeting the child off the bus in the afternoon, escorting him home and engaging him on a one to one basis in activities that included 'reciprocal book reading', modelling social interactions, and encouraging creativity which were seen to assist in improving things such as language, self-care skills and independent communication. Her services cost $44.72 per hour. While the parents had explored after-school care options, they had been informed that he would need a support worker if he were placed in a non-specialist care environment.

Tribunal's reasoning on reasonable and necessary supports

The Tribunal found that there was insufficient evidence that the two-hour blocks of after school support were value for money under the Act. It found that the evidence provided indicated "that the benefits of the support requested are limited and have not been assessed". While the service provider supplied a description of the general program offered, it was not established that the specific two-hour blocks would be effective, and there were no monthly evaluations by a programme supervisor. The Tribunal also noted that the family were unaware of possible alternative funding including the Inclusion Support Programme, designed to support the inclusion of children with disabilities in mainstream child care or after school programs.

The Tribunal was not satisfied as to the effectiveness of the sessions for the individual, and their relationship with his broader program of support and his schooling.

Outcome & significance of the decision

The decision underlines that it is important for service providers to express and monitor the "value add" of each element of their proposed program of supports. In the aftermath of the *McGarrigle* Federal Court decision, there is likely to be a greater focus by the Agency on the specific number of hours approved, with participants (and in turn providers) being asked to demonstrate distinct benefits of additional hours.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

SING AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 4411 (26 November 2018)

Questions addressed

Funding for participation in competitive sports, value for money

This appeal concerned a decision to deny funding for wheelchair tennis lessons, coaching and gym support and discussed the Agency's policy limiting funding for high level or representative sports.

Facts

The applicant had been denied funding for a training programme which would improve her tennis skills with a view to competing in international tournaments and wheelchair tennis in the 2020 Paralympics.

Tribunal's reasoning on reasonable and necessary supports

The first issue in this case concerned the Agency's approach to competitive and representative sports. At the time of this decision, Chapter 10 of the relevant operational guideline stated that Agency funding was limited to:

> *Recreation supports which consist of aids and equipment are generally funded at a level that allows independence at an entry level to the activity and are not intended to facilitate participation in representative competitions (for example, competing in state or national championships), nor professional level involvement (for example, competitions with significant prize money or performance contracts).*

This limit on funding reflected the Agency's view that funding for competitive or professional support was not related to the participant's disability. The Agency referred to the general principle in section 4(1) of the Act, that people with disability have the *same* right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development. It also noted that the Operational Guideline, *Overview of the NDIS*, paragraph 4.1, stressed that NDIS aimed at providing people with a disability with the reasonable necessary supports necessary for an *ordinary life*. It also relied upon rule 5.1(b) of the Support Rules that provides that a support will not be funded under the NDIS if it is not related to the participant's disability.

The Agency argued that the requested supports were not related to the applicant's disability, as they were aimed not at putting her "on an equal footing with other members of the community, but to assist her to compete at an elite level". Also the cost of transport to Sydney was not related to the applicant's disability – as "finances and family circumstances limited all tennis players in Australia from attending Tennis Australia's National Academy".

The Tribunal rejected this approach, finding that the support requested would address the applicant's fitness, particularly in her trunk and upper limbs, and develop the specific level of skills to enable her to play competition tennis while confined to a wheelchair. These skills would assist her to achieve her own aspirations, to participate in social and, potentially, economic life if she was successful. The Tribunal found that the NDIS Act did not permit the Agency to make this type of categorical distinction between recreational and professional sports. The Tribunal relied on the broader goal of inclusion promoted in the Act. Section 17(c), for instance, refers to supporting the individual to "participate in and contribute to, social and economic life, to the extent of their ability". Section 17(h) places an emphasis on advancing inclusion so that the participant can achieve "his or her individual aspirations". The aim is to allow people with disability to maximise independent lifestyles and full inclusion in the community. The Act does not seek to dictate the form or level of social or economic participation a person chooses to pursue. Decision-makers should concentrate on whether the requested support to facilitate that participation meets the reasonable and necessary criteria.

In applying these criteria, however, the Tribunal was not satisfied that the funding sought for two or three hours of tennis coaching a week represented value for money. There was limited evidence of the outcome of the applicant's current funding to indicate that the support would substantially improve her life stage outcomes or be of long-term benefit for her. It was also not apparent that she would be prevented from continuing to play competitive tennis were the funding not provided.

Outcome & significance of the decision

While the Tribunal found that the requested supports did not represent value for money under the Act, it found that the scheme can fund supports, if reasonable and necessary, relating to competitive or representative sport, not just recreational sport. This decision is an example of the Tribunal ruling that the Agency's operational guideline was inconsistent with the purposes of the legislation. There are competing ideas of equality which appeared in this matter. The Agency adopted an "equality of opportunity" argument, where reasonable and necessary supports are aimed at ensuring that individuals can enter society. The Tribunal decision underlines that an "ordinary life" includes the right to aspire to different forms of social or economic participation. Any supports requested by the person must pass the "reasonable and necessary" criteria, but the fact that a person successfully chooses to pursue a particular talent does not directly disentitle them to support. The use of the phrase "ordinary life" in the Agency's operational guidelines should not result in NDIS supports being denied to those who chose to pursue a particular elite career. The reasonable and necessary criteria will ensure that support for participation in sports are of sufficient long-term benefit to the person and that the individual draws on other funding sources where these are available.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

BIJD AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 2971 (10 August 2018)

Questions addressed

Childcare support, financial sustainability of the scheme, value for money

This case involved a request to fund child care for a child unable to attend a mainstream day care facility due to their disability. The case is significant for its consideration of when a proposed support can be said to be related to the person's disability. It also contains important comments on when and how the financial sustainability of the NDIS as a whole can be taken into account in frontline decision-making.

Facts

The child suffers from a severe, life-threatening, congenital heart disease, and an acquired brain condition. As a result of strokes, his spleen had been damaged and he had lost his left kidney, reducing his ability to fight infections. He had been approved for a transdisciplinary level 2 NDIS early childhood intervention package. It was accepted that the risk of contracting illnesses from other children was unacceptably high, and his contact with other children was limited to his sister and two cousins.

The Agency refused the family's request for in-home support for the child for two days per week. This support had previously been supplied by a community organisation, but was now being supplied by a support worker. The Agency argued that the requested support was a substitute for childcare and aimed at providing respite to the mother that allowed her to work. The Agency had told the family to investigate other programs that supported child care. The applicant's mother gave evidence that she had enquired about other options but no other program could affordably provide this form of support to the family.

Tribunal's reasoning on support

Was the support related to the applicant's disability?

The NDIS only funds those supports which relate to a participant's disability, rather than day to day living costs. In this case the Agency argued that the requested support was "childcare by another name". Responsibility for this, therefore, rested with the childcare subsidy scheme in combination with the Inclusion Support Programme.

The Tribunal ruled that one aim of this support was respite, finding that "the freedom to leave the family home and go to work is indeed a form of respite". The fact that respite was one purpose of the support did not, however, mean there was not also a disability related goal. It could equally be claimed that the support would provide therapeutic and developmental assistance to James. The Tribunal was satisfied that the requested support was related to his developmental delay and aimed to provide assistance to overcome his disability. His health condition ruled out use of mainstream service options. Ultimately, in cases where a support may have more than one purpose, the best approach is to apply the reasonable and necessary criteria to the request.

Was the requested in-home care reasonable and necessary?

The Tribunal accepted that an in-home carer had helped the applicant achieve developmental milestones, such as overcoming separation anxiety, and this support did facilitate, if only in a marginal way, the applicant's social and economic participation. For example, the in-home carer (who was not a therapist) took the applicant on excursions, and there was some social interaction with adults. It found, however, that the estimated annual cost of $42,060 was not *reasonable* under section 34(c) of the Act. Firstly, the benefits of the support were "relatively limited", allowing James to interact with his in-home carer, and potentially encounter other adults during excursions. Most parents, even taking into account the significant disability of the applicant, facilitate this type of interaction at minimal cost.

The Tribunal also took into account the overall financial sustainability of the scheme, which section 3(3)(b) of the Act requires decision-makers to do. The Agency tabled a report from the Scheme Actuary estimating an annual cost of $617.4 million were it to provide a similar support to all families with a young child who had a congenital heart defect. The Tribunal accepted that the decision might help shaping future decision making by the Agency. It found

that while some families with children with congenital heart defects would rely on family members, most would seek a similar support, many for more than two days a week. The Tribunal concluded that, "set against the other challenges the scheme is evidently facing", the financial case was not made for expanding the funding of in-home care for this cohort.

Very specific features of this case led the Tribunal to make a finding on financial sustainability. Firstly, the applicant's need for child care was due to the fact that he was unable to attend mainstream childcare. Secondly, the Tribunal identified only a number of qualified generic benefits to in-home interaction with a non-therapist support worker. Both of these elements allowed the Tribunal to find that if they funded the applicant, there would be a large number of directly comparable requests for funding.

The Tribunal then made a very significant comment about the role of financial sustainability in frontline decision-making, which should be quoted in full:

> *It should be observed that the enquiry demanded by section 3(3)(b) is flavoured with methodological uncertainty. If the section is to be construed as saying that any decision which adds significantly to the cost of the Scheme is to be eschewed, then the Tribunal would have little difficulty in finding for the Agency. However, financial sustainability surely entails the making of value judgements about the cost of widening the Scheme's scope versus the benefits so conferred. Significant additional cost may be justified if the benefits thus conferred are also significant … It might also be suggested that the notion of a scheme's* ***financial sustainability*** *is itself a function of the nation's overall liquidity and its priorities, matters over which the Tribunal may lack competency to make findings.*

A claim that the financial sustainability of the scheme requires a particular outcome should be used sparingly. It is not always the case that an individual's situation is directly comparable to a significant number of other participants. Decision-makers should carefully consider an individual's unique needs, goals and available family support before ever claiming that funding them would represent some kind of costly precedent. The idea of value for money in section 34 is also designed as a two-sided cost/benefit analysis. Where a support is delivering a concrete benefit that reduces the applicant's future need for supports, recourse to financial sustainability arguments will be especially contestable in light of the insurance logic of the scheme.

The Tribunal also found that it was reasonable to expect the family to provide the type of developmental interactions the support worker was facilitating in this case. It accepted there was some risk to the psychological and financial wellbeing of James's family in not approving the support. It concluded, however, that the Australian community would expect that where a child is unable to interact with other children for medical reasons they "would obtain the benefits of interaction with adults through the activities of their own families".

Outcome & significance of the decision

The Tribunal concluded that the two days a week of in-home care requested did not meet the reasonable and necessary criteria, as it did not represent value for money as required by the Act. The decision is important for its reflection on financial sustainability, and how this should be handled by frontline decision-makers. In the Federal Court Case of McGarrigle, Justice Mortimer specifically commented that this was "an important issue which should await determination in an appropriate case". Her Honour did warn that when considering the broader economic impact of an individual decision, decision-makers should not speculate in the absence of any proper factual material. Any claim that a particular decision would endanger the scheme's financial sustainability needs to precisely identify how and why that individual's situation can be generalised and mapped directly onto other people's plans. The applicant in BIJD was a rare instance where this could be established to the Tribunal's satisfaction.

This decision highlights the tension between the use of reference packages and guideline figures and the individualised planning process. While the Act requires decision-makers to take financial sustainability into account, it does not provide clear guidance on how to do so or the weight to be accorded to the scheme's cost pressures. Cases like BIJD can inform a public debate about the judgments, and the importance of legislators providing clear guidance to both the Agency and the Tribunal.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

DAVID AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 2709 (8 August 2018)

Questions addressed

Transport funding

This case is another successful transport appeal where the Tribunal refused to apply the general guideline amounts in the transport operational guideline. It also illustrates the difficulties some people with disabilities have in accessing public transport.

Facts

The applicant was a wheelchair user, with a lifelong condition causing muscle weakness and respiratory issues. He required the use of a ventilator 24 hours a day. He appealed the refusal of the Agency to fund taxi fares for a number of purposes, particularly trips to work for two days per week, Victorian Electric Wheelchair Sports Association (VEWSA) meetings, local and interstate sporting events and visits to his father.

At the time of this appeal, the applicant was endeavouring to take public transport as much as possible due to the denial of funding for taxis. His wheelchair is equipped with a "primary ventilator" mounted in a specially designed carrying bag. He also has a back-up to ensure constant, reliable ventilation. His nearest train station, Keon Park, is more than 4 miles from his home. On a number of occasions the applicant had taken public transport unassisted. The funding level needed to ensure his safety was a central issue to this decision.

Tribunal's reasoning on supports

Was the applicant capable of using public transport?

The applicant tabled evidence from occupational therapists which identified serious risks if he was forced to rely on public transport. For example, on a busy commuter train his ventilator could be disconnected by the simple act of someone bumping against it. He would need a support person to swiftly reconnect it or the situation could be life-threatening. The Tribunal was also troubled by any expectation that the applicant could travel to and from the train station from his home. Clear safety issues were raised if it rained heavily, paths were blocked or if the applicant's wheelchair broke down. The Agency attempted to rely on the fact that the applicant had pushed himself to take public transport on a number of previous occasions. The Tribunal preferred the evidence of occupational therapists which established that public transport was an unacceptable risk that the applicant should not be required to take.

Was the requested transport funding reasonable and necessary?

The Tribunal found that the proposed funding and travelling by taxi would further the applicant's goal of increasing his independence and preparing to move out of home, by reducing his reliance on informal support. Requests to fund transport to sporting activity reflected his long established participation and had a direct connection to his chosen goals.

Paragraph 54 of the Tribunal's decision stressed the value of the applicant's role as President of VEWSA. The Tribunal did not accept the Agency's submission that the applicant should attend VEWSA meetings by skype. It also found that the Agency had not established that the applicant had any entitlement to work remotely: while an employee can request flexible work arrangements, it did not "seem unreasonable to suggest that most employers would require their employees to work from their business premises".

In relation to the role of informal supports, the Tribunal noted that the applicant had already reduced his funding request to reflect the contribution made by other sources of transport, particularly using the van owned and driven by his mother. The family and their representatives at Victoria Legal Aid had also clearly identified what alternative services could be secured through LINK Community

Transport. The LINK transport alternative requires pre-booking, cooperation with timetabling and sometimes delays. The Tribunal found that the flexibility offered by taxis was important to an applicant with this type of disability and the applicant's specific circumstances.

A further contention by the Agency was that the applicant could use his core funding of $75,553.26 "flexibly" and this could be directed towards transport. This type of claim is quite common and the Tribunal noted that the applicant's plan provided that core supports were described as being for "daily personal needs – higher intensity". However, the use of the funds for social activities risked the erosion of funds intended for intensive day and night care needs.

Finally the Tribunal chose not to apply or refer to recommended levels of transport funding contained in the NDIS operational guideline on transport.

Outcome & significance of the decision

This case underlines the importance of an assessment grounded in the everyday circumstances of the applicant and his ability to public transport. The preparation of this case was exemplary and the family emerged as experts in their own daily lives.

The case is potentially a reminder of the value of funding leadership roles in the community, particularly as advocates and representatives of people with disability. Such roles are often an avenue for employment of people with disabilities. The case suggests that all parties involved in the NDIS should consider including leadership and advocacy as a goal in NDIS plans. This would help ensure that activities that would otherwise be dubbed recreational or community access are properly linked to their professional and employment potential. This case also illustrates the importance of identifying the long-term benefits of a support to the applicant's goals.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

EWIN AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 4726 (21 December 2018)

Questions addressed

Accessibility of public transport, funding for petrol costs, recommended funding levels for transports, reasonable adjustments, day-to-day living costs

This case considered whether the NDIS should fund petrol costs where an applicant cannot use public transport for accessibility or safety reasons. It included an important analysis of day-to-day living expenses, and considered the use of recommended levels in the Agency's operational guideline on transport as potentially distracting decision-makers from the individual's circumstances.

Facts

The applicant is a wheelchair user employed by a major Australian bank and lives with his wife and two children. He appealed Agency decisions about funding for transport and assistive equipment to store items while travelling. The applicant was able to drive independently but also relied on public transport in getting to work. He also had a shoulder impairment which at times caused him pain and impacted his ability to propel his wheelchair when carrying or lifting heavy items.

Tribunal's reasoning on reasonable and necessary supports

In what circumstances can the NDIS fund petrol expenses for participants?

The Tribunal approved funding for petrol in the following specific circumstances:

1. Travel between Mr Ewin's home and work, on days when it is raining, for a distance of 672 km per annum
2. Travel between his home and lawn bowls away games on Saturdays or at night where these are held in venues close to the Hurstbridge train line.
3. Car trips between his home and the location of his children's weekly swimming lessons or netball games.

The appeal was unsuccessful in relation to other transport funding requests. This summary will focus the successful funding requests. Firstly, they were ones where the participant would not have to use public transport if not for his disability. Secondly, requests were granted where public transport was unsafe and inaccessible to the applicant due to the destination, time or the available service. Thirdly, they were granted when it was unreasonable to expect family members or friends to transport the applicant.

The Tribunal found that funding petrol costs would further the applicant's goals "by removing the disincentives he would face given that public transport was impractical, inconvenient or simply not possible due to the impacts of his disability".

For each nominated transport support item, a central question was whether the requested support was *solely and directly related* to the applicant's disability. The key finding was that petrol costs were appropriately funded by the scheme (section 34(1)(f) of the Act) although NDIS rules did not address this category of transport support, neither specifically excluding nor including them. Crucially, the Tribunal highlighted the statement in the COAG Principles that:

> *The NDIS will be responsible for supports related to daily living that a person would require irrespective of the activity they are undertaking (including personal care and support and transport to and from work).*

Relying on this provision the Tribunal was satisfied that funding petrol costs was not inappropriate.

The Tribunal considered each journey in detail. For trips to bowls matches near the Hurstbridge train line, it found that were it not for his disability, the applicant could use public transport. He would have been able to walk without difficulty from one of the stations to the local bowls club while carrying a set of lawn bowls. Petrol costs for travel to these venues were therefore funded. The use of public transport on rainy days was found to be impractical for the applicant, requiring him to use his car. Being unable to use an umbrella while wheeling his chair, he and his clothes would become wet and soiled as he travelled to work. The Tribunal also found that petrol costs for transporting his children to sporting activities should also be funded due to the inaccessibility of these venues for wheelchair users.

The circumstances in which funding was refused are helpful to understanding the judgments here. In relation to other bowls matches held at venues not on the Hurstbridge line, it was felt that people in the applicant's locality would choose to drive. The applicant's petrol for these venues was not, therefore, NDIS fundable as it was a day to day living cost not attributable to his disability. Similarly, the Tribunal found that petrol costs for supermarket trips were not to be funded. Most members of the local community would not walk the distance to the relevant train station while carrying four full reusable shopping bags. The request was not directly related to the applicant's disability, but represented an ordinary day to day living cost.

After these considerations, each support item was assessed against the availability of family and informal support under section 34(1)(e). It was found that the existing family and full- time work commitments of the applicant's wife meant that her role in transporting had to be limited to maintain the family's wellbeing. The Tribunal did find it reasonable that she drive the applicant to family dinners. The Tribunal also found it was reasonable for the applicant's wife and teammates to provide one off assistance in dropping and picking him up at the train station to facilitate his attendance at an annual bowls event in Bendigo.

The need to safely transport the applicant's documentation and laptop

The applicant was unsuccessful in his submission that he should be reimbursed for petrol costs on days when he wished to work from home in the evening. This funding was requested on the basis that he could not safely control his wheelchair when carrying documents or other heavy items. While this request reflected his disability, it was found that his employer was likely responsible for providing him with a laptop and printer so he could work from home.

This aspect of the decision highlights the importance of investigating or requesting other supports or reasonable adjustments that may be available. The Tribunal noted that the applicant had not made inquiries with his employer about whether it would be prepared to provide him with a laptop. The applicant did indicate that he was on a twelve-month contract and was worried about burdening his employer with requests. Nevertheless, his employer's inclusion policy appeared to contemplate the funding of a laptop to enable flexible working. The applicant was also unaware of an Australian Government scheme – the Commonwealth Employment Assistance Fund for which he was possibly eligible.

The use of guideline levels of funding

The Tribunal made strong findings in relation to the use of guideline or recommended amounts in the Agency's operational guideline on transport. At the time of this decision this provided for three levels of funding, based on whether the individual was seeking to access the community, study or work. It stated that "the levels are used to provide a transport budget for participants". The document noted that "in exceptional circumstances" participants may receive higher funding if the participant has general or funded supports enabling their participation in employment.

Paragraphs 81 and 82 of this decision emphasised the risk that the nominated amounts could result in only partial funding to a participant who would otherwise meet the reasonable and necessary criteria. Pointing out that the decision-maker should focus on these statutory criteria, in particular the question of whether the benefits to the specific individual are reasonable relative to the cost. Where these criteria are met, unreflective reliance on recommended amounts "may produce an unjust result" or be inconsistent with the Act. This aspect of the decision has similarities with the comments on financial evidence made in the *BIJD*. The approach here is also reflected in *Perosh* and *David*, where the operational guidelines did not feature in the Tribunal's reasoning.

The Tribunal criticised the inclusion of categorical statements that funding transport assistance is limited to those who cannot use public transport due to their disability. This statement featured in a fact sheet provided by the NDIS and shortcuts the statutory criteria – the focus must again be on applying the reasonable and necessary test rather than adopting inflexible policy rules. Planners need to analyse the accessibility of the proposed trips on the relevant service rather than rely on a general, decontextualised appraisal of the person's general capacity.

Outcome & significance of the decision

This matter gives attention to the additional expense that people with disability often incur in their everyday lives. It challenges planners to avoid categorical approaches and interrogate disability related expenditure using the reasonable and necessary criteria. While every individual must pay for transport or petrol to shop, the applicant in this matter successfully highlighted the elements of his spending that were attributable to the impacts of disability. Planning conversations with participants need to identify where an individual is encountering barriers to social and economic participation in their daily lives and whether these needs are met by other service systems or fall within the NDIS. Decisions such as *Ewin* and *David*, also underline the complexity of the transport choices, how these intersect with the availability of family members and the accessibility of transport at specific locations. It is a very challenging task for a participant, in the context of a planning meeting, to identify and narrate *all* these elements – they will need to be actively supported to do so by local area coordinators, advocates and Agency staff.

This decision reflects a trend where Tribunal members have expressed concern at reliance on guideline or reference amounts set in policy rather than a focus on statutory criteria. While the figures in the current transport guideline may reflect judgments about the financial sustainability of the scheme, these must be fully explained and cannot replace a full and individualised consideration of the benefits of the proposed support. The Tribunal is underlining the difference between a test required by legislation and the recommendations of a policy document. The transport guideline will likely have to be amended to reflect that the decision-maker must make a specific finding based on the individual's particular circumstances.

The decision also underlines the importance of requesting reasonable adjustments from participant's employers. The NDIS will not fund supports which properly fall within the responsibilities of employers or service providers under relevant state and federal disability discrimination legislation. Given the complexity of Australian discrimination law, and the reactive nature of its enforcement, this can function as a difficult evidential threshold for participants. In this matter, the applicant was employed by a major ASX listed company, which had a published corporate policy relating to workplace inclusion. This enabled the Tribunal to analyse in some detail what might be available were it requested. This would be considerably more difficult in smaller or less transparent employers. The deeply contextual nature of any reasonable adjustment determination can make a person's entitlements difficult to identify and obtain in practice. There are also a range of reasons, not related to the person's disability, why a reasonable adjustment can be refused. The requirements of the particular role and the costs incurred by the relevant business are variables that are difficult to assess in the abstract. NDIS participants will have to lodge requests and have these determined – a complicated and trying process at ground level.

This is not to contest the legal reality that the NDIS Act requires planners to determine what reasonable adjustments are available to the applicant and not to fund these. Policymakers must, however, monitor closely the experiences of NDIS participants in their attempts to secure the necessary support from employers. The success of the NDIS plan and the investment of public funds it represents, is premised on the existence and successful functioning of such supports. As we move towards a revised National Disability Strategy, decisions such as Ewin underline that an accessible and clear discrimination law framework represents an essential piece of supporting infrastructure for the NDIS.

THE ADMINISTRATIVE APPEALS TRIBUNAL AND THE NDIS

What are applicants' appeal rights under the NDIS?

Any person that is directly affected by a reviewable decision of the NDIA can submit an application for an Internal Review of a decision. Section 100 of the NDIS Act provides for review of a range of agency decisions. The two most common are *access decisions* and *decisions to approve the supports in your plan*.

A request for internal review of a decision must be made **within three months** of receiving notice of the decision from the NDIA. It can be made orally or in writing. The internal review is undertaken by the NDIA. The NDIA member who works on the internal review will not have been involved in the original decision. This person will decide whether to confirm, vary or set aside and substitute the original decision.

Asking for a review of a decision to approve your initial statement of supports is **different** from asking for an **unscheduled review** of an existing NDIS plan. Unscheduled reviews of NDIS plans are most commonly requested when there is an important change in your circumstances, for instance if your day to day support needs have significantly changed.

If they are unhappy with an internal review outcome, how do applicants access the AAT?

The AAT **cannot** review a decision until you have had an internal review performed by the Agency.

An application can be made to the AAT within **28 days** of being notified of the Internal Review decision. Individuals should be informed of their right to appeal a decision in the letter they receive advising them of the outcome of their internal review.

The AAT has a case management policy which ensures that parties attempt to conciliate an outcome prior to a hearing. The latest statistics indicate that 95% of NDIS AAT matters are settled before hearing. This quarterly digest contains those matters in which settlement was not possible and the Tribunal had to take a formal decision.

How does the AAT go about its work?

The Tribunal's role is to make the *preferable* decision on the material in front of it. It "stands in the shoes" of the original decision-maker, and has all the powers of that person. Applicants to the Tribunal will usually leave the Tribunal with a full decision, not just a limited finding that the original decision was wrong.

For those working the disability sector, published Tribunal decisions therefore represent best model examples of NDIS decision-making. The long term goal for everyone is to align "first instance" frontline decision-making with the emerging approaches we are seeing in the Tribunal.

What are the outcomes the AAT can order?

The AAT can **affirm** the decision – which means it is left unchanged. It can **set aside** the original decision, **and substitute** what it views as the preferable outcome. It can also **vary** parts of the decision. It also has the ability to **remit** a matter – where it sends the appeal back to Agency (this usually accompanied by general directions as to how the case should then be determined)

Does a decision to vary the original decision, or substitute a new one, mean the original one was incorrect?

No. A decision to change an outcome may be based on new information or reports which emerged after the original decision or internal review. An AAT matter is a fresh consideration and the Tribunal will consider the available information and testimony at the time of hearing. Equally a decision to leave a decision unchanged, might be driven by information tendered by the Agency which was not available originally.

Is the AAT bound by the Agency's policy (operational guidelines)?

As the Tribunal is standing in the shoes of the Agency decision-maker, they are required to take the Agency's operational guidelines into account. Policy is essential to administration as it promotes consistency.

Policy itself however, must employed in a way that is consistent with the NDIS Act and the rules, in particular the purposes and principles outlined in the legislation. The Tribunal can depart from the general approaches outlined in Agency operational guidelines, where there are "cogent reasons to the contrary". This includes where the rigid application would work an "injustice in a particular case", by not furthering the purposes and principles in the legislation. The *weight* or degree of importance that is given to policy depends on the circumstance.

It is also important to underline that policy cannot force a decision-maker to arrive at a particular conclusion in individual cases. Policy exists to guide or channel decision-makers' discretion not to "lock in" specific outcomes. This is reflected in the Agency's own drafting; the guidelines themselves are written to leave room for exceptions and compelling circumstances.

Are Tribunal decisions binding precedents?

When you first read these summaries, you should be struck by how fact and circumstance driven the Tribunal's decision-making is. This is particularly the case under the NDIS Act where every decision centres on valuing each individual's support needs, family circumstances and personal goals. This is always why statements within this quarterly digest do not, and cannot, constitute legal advice, being for informational or study purposes only.

Tribunal decisions are not formally binding precedents in the way that higher court decisions are, but they have a very significant persuasive force, especially given the importance attached by administrators to consistency. The last section of each case note identifies the general principles that might be taken from a case. It is essential however, for the reader to always consider if a future case is sufficiently similar or different on the facts.

It is important to note that the Agency or the applicant may choose to challenge a past Tribunal decision in the courts. This has so far occurred in the Federal Court cases of *McGarrigle* and *Mulligan*. In a judicial review, the Court will ask if the Tribunal has taken a lawful decision. The Court will audit the Tribunal's reasoning for certain legal flaws, like failure to take into account a relevant consideration or a misunderstanding of the Act. If the Court finds these criteria of lawfulness are not met, the Tribunal would hear the matter again and retake the decision without the flaws.

Where can I find support to make an AAT appeal?

It is important to note that contacting the Agency and requesting an internal review of the decision is the first step in every case. As part of the new participant pathway, the Agency is investing heavily in improving its internal appeal processes.

- The Australian Government funds services to assist people applying for review of NDIS decisions. You can contact **a support person in your area** who can help you understand the AAT process, assist with preparing documents for the review, attend conferences and hearings with you, and help you to put your case to the AAT. The support person is independent of the AAT and the National Disability Insurance Agency. Their services are provided free of charge.
- You can find NDIS Appeals providers, state and territory advocacy providers as well as National Disability Advocacy Program providers through the new online Disability Advocacy Finder, made available by the Department of Social Services: **Access the Disability Advocacy Finder**.
- You might also be eligible for legal services provided by the Legal Aid Commission in your state or territory if the Department of Social Services determines that your case raises complex or novel issues. You can ask a support person about this.
- You may also seek help from family, friends or other trusted supporters in preparing your case or supporting you on the day.
- You can engage your own lawyer to represent you.

Where can I read the full versions of the decisions?

The decisions are available on publicly accessible database, Austlii: http://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/AATA/

NDIS: CORE CONCEPTS

For ease of reference, this section summarises the main criteria for access and funding under the NDIS. It also explains the various sources of law and policy that can shape an NDIS decision.

What are the criteria for accessing the NDIS?

There are two main pathways for entering the Scheme. An applicant can, firstly, meet the **disability requirements**. These are outlined in section 24 of the National Disability Insurance Scheme Act, which provides that the Agency must be satisfied that:

a the person has a disability attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or one or more impairments attributable to a psychiatric condition;

b the impairments are likely to be permanent;

c the impairments result in substantially reduced functional capacity or psychosocial functioning in undertaking, at least one of the following activities; communication; social interaction; learning; mobility; self-care or self-management;

d the impairments affect their capacity for social or economic participation; and

e the person is likely to require support under the NDIS for their lifetime.

There is also an alternative, **early intervention pathway**, which has the following requirements:

a the person's impairment is likely to be permanent;

b early intervention supports are likely to benefit the person by reducing their future needs for disability related supports;

c the National Disability Insurance Agency is satisfied that the provision of early intervention supports will improve, mitigate, avoid the deterioration of, the person's functional capacity; and

d the Agency is satisfied that early intervention support for the person is most appropriately funded or provided through the NDIS.

What is the test for funded support under the NDIS?

In order to be funded under the NDIS, a support must be found to be "**reasonable and necessary**". The criteria for this are defined, in general terms, by section 34 of the Act:

a the support will assist a participant to reach the goals and aspirations outlined in their participant statement;

b the support will facilitate the participant's social and economic participation;

c the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;

d the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice;

e the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide; and

f the support is most appropriately funded or provided through the NDIS, and is not more appropriately funded or provided through other general systems of service delivery.

What are the NDIS rules?

The NDIS rules are binding secondary legislation passed to add further detail and explanation to broad terms of the Act. The rules which will feature regularly in this quarterly digest are:

1 *NDIS (Becoming a Participant) Rules 2016*: https://www.legislation.gov.au/Series/F2016L00544

2 *NDIS (Supports for Participants) Rules 2013*: https://www.legislation.gov.au/Series/F2013L01063

These rules include certain examples or relevant principles or criteria which must be applied.

What are operational guidelines?

Operational guidelines are statements of approach prepared by the National Disability Insurance Agency. They outline the Agency's internal policy in relation to making various types of decisions. They are not permitted to contradict the Act or the NDIS rules, and have been drafted to be consistent with them. They aim to guide, (not control), decision-makers in achieving consistent results, while still responding to the individual participant or applicant.

As the Tribunal "stands in the shoes" of the decision maker, it will apply policy unless doing so would fail to promote the principles and purposes of the legislation. The role of policy is explained further in the Tribunal explainer section, and in the cases themselves.

The operational guidelines which feature most prominently in this quarterly digest are:

- *The Operational Guideline on Access* https://ndis.gov.au/operational-guideline/access.html
- *The Operational Guideline on Planning* https://ndis.gov.au/operational-guideline/planning.html
- *The Operational Guideline on Including Specific Supports in Plans* https://ndis.gov.au/Operational-Guideline/including.html (this lays out important principles in relation to specific supports such as transport, carers and others)

If I have been subjected to an unreasonable delay can I lodge an appeal application with the tribunal?

We draw attention to recent developments about the tribunal's ability to hear appeals when there has been an unreasonable delay in determining approved supports. The tribunal decision in *FJKH and National Disability Insurance Agency* **[2018] AATA 1294** (15 May 2018) initially supported the principle that it may intervene where an unreasonable delay has occurred. This position was, opposed by Deputy Forgie in *LQTF and National Disability Insurance Agency* **[2019] AATA 631** (2 April 2019). This decision identified a technical flaw in the drafting of the NDIS Act, which seems to result in the tribunal having no jurisdiction to take up a delayed planning appeal. It seems likely that this point will attract future tribunal or judicial discussion.

While this is disappointing to those experiencing delays, it is important to note commitments which have been made to address delay within the Agency – including designated teams and escalation procedures. Reflecting the need for urgent policy engagement with these issues, we underline Deputy President Forgie's comments about the current review structures:

> *In giving these reasons, I have set out the steps that must be followed in seeking review of a statement of participant supports and review of a participant's plan. I have done so in order to illustrate the complexity of the review process provided for in the NDIS Act. It is a process that I respectfully suggest is often too complex for a participant to navigate with any ease, let alone with any confidence, and that is not conducive to the NDIA's being able to respond quickly to the needs of participants. It is a process that may leave both the participant the NDIA disagreeing about the proper characterisation of the decision that has been made.*

Given the findings of Audit Office and Ombudsman investigations and participant feedback, delay and the over-complexity of review processes represents a critical risk to the scheme's functioning. These issues were discussed further in the last edition of the digest, in our analysis of the decision in *Simpson and National Disability Insurance Agency* **[2018] AATA 1326** (22 May 2018).

Further information

Contact **Living with Disability Research Centre**:

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