



EMPLOYMENT TRIBUNALS

Claimant: Miss M Hall

Respondent: Dudley College of Technology

Heard at: Birmingham (Maple House, in public) **On:** 9 October 2024

Before: Employment Judge Edmonds

Representation

Claimant: In person

Respondent: Mr P Bownes, solicitor

RESERVED JUDGMENT ON DISABILITY

1. The claimant was disabled by reason of degenerative spine condition between February 2022 and September 2023

REASONS

Introduction, Claims and Issues

1. The claimant's claim relates to alleged failures to make reasonable adjustments and harassment relating to disability. She says that she was (and is) disabled by reason of depression and anxiety and degenerative spine condition.
2. The respondent concedes that the claimant was disabled at the relevant time by reason of depression and anxiety and therefore the purpose of this hearing was to determine whether she was disabled at the relevant time by reason of degenerative spine condition. Although the claimant also says that she suffers from migraines, she has not pleaded that she is disabled by reason of migraine.

3. The issues to be determined in relation to disability were set out at a Preliminary Hearing before Employment Judge Codd on 15 December 2023, and were as follows:

Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1. *Did they have a physical or mental impairment: A degenerative spine condition, as between February 2022 until 20th September 2023?*
 2. *Did it have a substantial adverse effect on their ability to carry out day-to-day activities?*
 3. *If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*
 4. *Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?*
 5. *Were the effects of the impairment long-term? The Tribunal will decide:*
 - a. *Did they last at least 12 months, or were they likely to last at least 12 months?*
 - b. *If not, were they likely to recur?*
4. Whilst not set out in the List of Issues, I clarified at the hearing that it appeared to me that it was also important to consider whether the claimant had a progression condition, under paragraph 8 of Schedule 1 of the Equality Act. Therefore it is also necessary to consider:

*Did the claimant have a progressive condition?
If that condition had an effect on her ability to carry out normal day-to-day activities, but not a substantial adverse effect, is the condition likely to result in the claimant having such an impairment? If so, she will be taken to have an impairment which has a substantial adverse effect.*

Procedure, and Documents Heard

5. The following adjustments were put in place to assist the claimant:
 - a. the hearing was held at Maple House (and not the usual hearing centre) which met the claimant's accessibility requirements
 - b. the claimant was provided with a supportive padded chair with arm rests
 - c. the claimant was provided with regular breaks (approximately hourly except on one occasion where the claimant confirmed specifically after an hour that she was able to continue to finish her evidence before the next break). The claimant was also informed to notify me at any stage if she needed an additional break;
 - d. a valid PEEP was in place
6. There was a brief delay at the start of the hearing to obtain a further copy of the hearing bundle for the witness stand, as this was unfortunately not brought over from the main Tribunal hearing centre. The respondent's representative helpfully offered to print a further copy on buff paper (which the claimant finds easier to read) and this only caused a short delay of around 15 minutes in commencing evidence.

7. It was not possible to reach a decision and deliver oral judgment at the hearing because the claimant's evidence took longer than anticipated (in part because it transpired that her impact statement did not cover the whole relevant period, as set out below).
8. I was presented with a bundle of documents of 158 pages, which included an impact statement from the claimant which was used as her witness statement. The claimant's impact statement focused on her health from December 2022 onwards and in particular in relation to September 2023. I explained to the claimant that the Tribunal would be assessing whether she was disabled at the time of the events complained about which was between February 2022 and 20 September 2023 and I permitted the claimant to give supplementary evidence about that earlier period. In addition, I asked the claimant some questions myself about that earlier time period to ensure that I had all the information that I needed to consider the issue fully.
9. It was also clear that the impact statement I was presented with was a second impact statement, and that there was a first impact statement which had preceded it. The claimant explained that she had produced the second one once her claim was amended to include allegations of discrimination on 20 September 2023 (and this was why she focused on that time period in her second impact statement). The first impact statement was not included in the Bundle.
10. The claimant had clearly misunderstood what was required in only addressing her health in the later period in her second impact statement, and given the information available to the respondent and the fact that they were aware of her earlier impact statement, I consider that the respondent should at the very least have sought to clarify with her whether that earlier impact statement should also have been included. In the circumstances, I dealt with the absence of the earlier impact statement through allowing the supplementary evidence and asking additional questions myself as explained above. I did not consider that it was appropriate to postpone the hearing in order to locate the additional documents as I could address the matter with the claimant directly and the case had already been subject to several preliminary hearings and I did not wish to delay matters further unnecessarily.
11. The claimant had also not asked to include an Occupational Health report in the bundle, despite it being relevant to the issue of disability. When I asked the respondent why it was not included, I was informed by the respondent that the documents in the file were those that the claimant had provided alongside her impact statement. Again, if there was a document that was known to be relevant, I consider that the respondent should have included it even if the claimant did not refer to it in her impact statement. The parties are reminded of the Overriding Objective to enable Employment Tribunals to deal with cases fairly and justly, and their duty to assist the Tribunal.
12. Page references in these Reasons are to the relevant pages in the Bundle.
13. I generally found the claimant to be an honest witness who was clearly trying her best to recall matters and provide the requested detail to the Tribunal. At times there were long pauses, but I consider that this was because the claimant was trying to ensure that she recalled things accurately before

answering. The respondent has submitted that the claimant's oral evidence does not align to the written medical evidence in the file. I find that it does and that the respondent has over-relied on certain individual words within the medical referral documentation, but when the medical evidence as a whole is considered I find that it does in fact align to the claimant's evidence, as set out below.

Facts

14. The claimant commenced employment with the respondent on 28 February 2022 as an Exams Officer, and that employment remains ongoing. As this Reserved Judgment and Reasons relates only to whether the claimant was disabled by reason of degenerative spine condition at the relevant time, I do not set out here any other facts regarding the claimant's employment more generally (save as referred to below in the context of her health).
15. In around 2011 / 2012, the claimant had issues with her back. She could not pick up her son, had six months off work and ultimately had to leave her employment because she worked in a special school and could no longer work in that environment based on Occupational Health advice. She moved to work in a mainstream school instead. I have seen a letter dated 18 April 2012 from Leicester General Hospital Department of Rheumatology stating that her diagnosis was "*Degenerative disease of the spine with Schmorl's nodules*" (page 101). Ever since then she has had oversensitivity in that area and she described that her body gives the wrong pain signals.
16. The claimant explained that the Occupational Health advisor had told her in 2012 that if she had another "injury" like that she would end up in a wheelchair, and she was told that she had to be careful. We discussed what was meant by "injury" because the claimant had a tendency to use this terminology without there having been a specific accident or incident to refer to. I find that the claimant uses the word "injury" interchangeably with "flare up".
17. The next flare up that the claimant had was in 2016. In around October 2016 she had issues with poor grip, numbness, tingling and pain in her hands, wrists and arms. She was dropping things and had what she described as "weird" sensations in her hands. She was issued pain medication and referred for physiotherapy. Since that time she has been on some form of medication permanently, however it is relevant to note that some of the medication also relates to her mental health and in fact the same medication in some instances serves a dual purpose. Therefore, the claimant quite candidly explained in evidence that she was unable to say definitively during what period of time each medication related to each condition. However, overall I do find that since 2016 the claimant was taking medication to alleviate pain symptoms as well as to treat her mental health.
18. It was not until 2018 that the medical professionals were able to pinpoint the claimant's difficulties because her anxiety medication had been masking certain elements, and in 2018 it appears that she came off at least some of that anxiety medication. She was referred to neurology who ordered an MRI scan in April 2018. In correspondence dated 30 April 2018 (page 111) the clinician noted that the claimant was no longer working and that she had

significant problems with grip. The letter also referred to a mid-back injury in 2012 when a child fell on her, and set out that the claimant was taking gabapentin three times daily, amitriptyline daily and naproxen twice daily.

19. The MRI dated 11 June 2018 showed "*forminal narrowing C5/6 likely bilateral C6 nerve root compression*". Her GP notes record the result as "abnormal" (page 79). This was for the cervical region.
20. Between 2018 and 2020 (exact dates unknown) the claimant was unable to work due to her health: the respondent pointed out that there were no fit notes covering this period but the claimant explained that, as she was not employed at that time, no fit notes were required. She explained in evidence (and I accept) that during that period she could not hold a knife and fork and had to pick up food with her hands, and also was unable to hold her partner's baby in case she dropped the baby.
21. In February 2020 the claimant's prescription of duloxetine was increased (page 97). This was a prescription that was originally prescribed for her mental health, but serves a dual purpose as a pain medication for her back which is why the prescription was increased at that time.
22. During 2020, following chronic lower back pain and numbness in her leg, the claimant was then diagnosed with sacroillac joint pain and prescribed co-codamol, with a further diagnosis of sciatica on 16 May 2020. This was then followed by a further MRI on 25 August 2020 which found amongst other things "*degenerative disc desiccation without significant loss of intervertebral disc height*" at L3/4, various bulges and other matters at L5/S1 and L3/4 and L4/5, some of which were described as "*mild*" or "*moderate*" and no significant disc bulge at other levels (page 133 to 136). The notes record that the claimant had a three month history of lower back pain: whilst that may be what these notes record, I accept the claimant's evidence that her condition pre-dates that time, notably given her MRI in 2018. The claimant suggested that the reason for this comment would be because there is a requirement to have a three month history as a minimum to get a referral, which is a plausible explanation and I accept this to be the case, noting that a later referral in 2023 referred to the duration of symptoms as being over 4 years (page 138).
23. From then until 2022 there is no indication of further deterioration or discussion with medical professionals about her condition. I accept the claimant's evidence that this does not mean that her condition had gone away or that she had no symptoms, but that she was receiving medication to control her ill health and therefore did not require further investigation or treatment. I find that the claimant did not discuss the matter further with her GP. I also accept the claimant's evidence that it was relevant that this period was during the Covid-pandemic (the suggestion being that she would have sought less support during that period).
24. In April 2022 the claimant had concerns about her office chair at work. The claimant explained in evidence, and I accept, that she would have been carrying out stretches and moving her legs under her desk at this stage because she was struggling to sit for hours, and that she was in pain at that time. She was using techniques that had been taught by her physiotherapist

and was taking medication that she had on repeat prescription, such as co-codamol, naproxen and diazepam.

25. The claimant had an acute flare up of her spinal condition in late 2022. The claimant did not visit a doctor about her health conditions between around August 2020 and 16 December 2022. However, I accept her oral evidence that her GP had been managing the symptoms of her chronic condition through pain management alongside physiotherapy and stretches, and therefore she only needed to see the specialist or consultant when there was a particular flare up / decline in her health. I also accept her evidence that her health deteriorated considerably from around November 2022.
26. On 1 December 2022 (page 129) Dr C Andres of the Clement Road Medical Centre recorded that the claimant's MRI confirmed spinal disc protrusion with nerve impingement and narrowing of the passage where the spinal nerve root runs. It stated that she had been referred to orthopaedics in the past, was awaiting a new physiotherapy assessment and that her medication was being reviewed. At the bottom of the letter it included details from the MRI that she had had in August 2020 which had recorded at that time a three month history of lower back pain with right lateral lower leg numbness. Amongst other details, it recorded "*degenerative disc desiccation*" a "*diffuse disc bulge and a small focus of high T2 signal in the posterior disc annulus in keeping with a fissure*", "*mild bilateral lateral recess effacement. No significant central canal stenosis or bilateral foraminal narrowing*", "*moderate central canal stenosis*" (in L4/L5), "*moderate right neural foraminal narrowing*" and "*no significant disc bulge at other levels*". Whilst it is clear that in respect of some of the reported matters there was no significant bulge and/or only moderate / mild issues, I accept the claimant's evidence that this related to specific regions of the spine and does not mean that overall her condition was mild.
27. On 16 December 2022 the claimant was referred for a musculoskeletal assessment (page 118). The referral was completed by her GP surgery. Within the assessment a comment from the claimant's physiotherapist recorded that the claimant "*seems to hold firm structural beliefs*". Whilst that may be the case, that does not detract from the fact that the claimant had a genuine medical condition for which she was taking substantial pain relief and which required further investigation.
28. On 18 April 2023 the claimant had an MRI on her spine, in relation to the lumbar region (in contrast to the 2018 one which was focused on the cervical region). By this point the claimant's health had deteriorated to such an extent that she required a mobility aid (walking poles from the autumn of 2022 and a more extensive rollator (which she had with her at this hearing) since around February or March 2023.
29. The consultant radiologist recorded that (page 117):

"There are degenerative changes throughout the lumbar region. These are very modest in the upper to mid lumbar region but slightly more prominent at L3/4 and at L4/5. Small posterior annular tears are seen within both discs. At L4/5 there is a modest circumferential disc bulge together with mild facet OA. The central canal is well preserved with no evidence of any significant nerve root compression. Previous study in 2020 had shown a large right-

sided disc protrusion at this level. This is no longer evident. Elsewhere there is no evidence of any significant disc protrusion or nerve root compression.

Conclusion

Degenerative disc disease as outlined above. No evidence of central canal stenosis and no evidence of any nerve root compression”

30. The claimant had a discussion with her GP on 21 April 2023 regarding her results and the GP notes record that *“improvement with the last scan”* (page 81).
31. The claimant asserts that this represents a deterioration in her health because in previous scans there had been damage to L5 but not to L3/4 (page 129). The respondent asserts that this is showing an overall improvement. I find that there is a distinction between L5 and L3/L4 and that the comment is specific to L5, which had improved. Also, whilst it records that some of the degenerative changes are very modest, this does not change the fact that there had been degenerative changes and also this comment relates to certain aspects and not the overall spinal condition. That said, the GP interpreted it as an improvement and overall it does appear that there was some improvement in her condition. To be clear, however, I do not find that there was considerable improvement, nor that this substantially changed the impact that her condition had on her on a daily basis or the medication that she was taking (I can see from the notes that pain relief was reviewed but there is no suggestion that the prescription was reduced in any way).
32. Around this time she also commenced physiotherapy sessions. She had also been referred to Occupational Therapy in late March 2023 however her home assessment did not take place until September 2023.
33. In July 2023 the claimant visited Occupational Health and an Occupational Health report was provided. This was not included in the bundle for hearing as explained above.
34. In September 2023 the claimant had a home assessment from Occupational Therapy, following the referral in March 2023. She was provided with a bath-board and it was noted that she already had grab rails around the shower area but not near the toilet. She was provided with ergonomically shaped walking sticks to replace the walking poles she had purchased separately and which were no longer suitable for her.
35. On 9 October 2023 (therefore after the end of the relevant period for the purposes of this claim) a further musculoskeletal referral was carried out (page 137). The respondent has noted that within this referral the words *“mild”* and *“very modest”* are used, and there is referenced to some areas being *“well preserved”* with *“no evidence of any significant disc protrusion or nerve root compression”*. The conclusion is *“mild degenerative disc disease”*. Whilst after the relevant period, the comments within the referral relate to the period leading up to September 2023. The claimant explained that this referral specifically related to the C7 region, and not to all of the areas that had been investigated previously. Whilst the report does not clarify specifically that this only relates to C7, it does record that the claimant has *“worsening neck pains with pins and needles in left C5, C6, C7 region. We are aiming to optimise pain relief, but patient still symptomatic”* and requests

a referral to the spinal team. It is therefore clear that the claimant is still symptomatic, is complaining of pain which is getting worse and that this is considered to warrant further investigation.

36. The claimant has not provided any medical evidence which demonstrates the exact prognosis that her condition will have on her. She submits that, by the very nature of the condition being labelled as “*degenerative*” this means that it will continue to degrade. I agree with the claimant that this does indicate that her condition is one which is known to degrade (although note that this does not indicate to what extent or over what time period that would occur, and see the law and conclusions sections below regarding the test to be applied to determine whether a condition is progressive).
37. She struggles to twist and lift, and cannot sweep or Hoover standing up any more (although the exact dates on which those effects occurred is not entirely clear). She has learned to cope with this by doing things on her hands and knees. Overall, from the evidence I heard it is clear that the claimant has periods when her health improves (but never completely and always subject to continued medication), and periods of flare up where things become more challenging for her. She explained that during those periods her muscles go into spasm around the injury, and this causes the most restriction. Physiotherapy assists with her recovery when that happens.
38. In addition to medical treatment the claimant has purchased certain ergonomic equipment to assist her in her home office, in particular a sculpt keyboard and mouse, ergonomic chair, ergonomic foot stool, heated desk pad, wrist braces, compression gloves and sleeves, a back brace (which is no longer required) and a rollator, although the exact dates when these were purchased and whether it was during the relevant period is not known. She also uses home massage techniques.

Law

39. Section 6 of the Equality Act 2010 (“the Equality Act”) provides that:
 - (1) *A person (P) has a disability if –*
 - a) *P has a physical or mental impairment, and*
 - b) *The impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.*
40. This comprises four separate questions for the Tribunal (**Goodwin v Patent Office 1999 ICR 302, EAT**):
 1. Did the claimant have a mental and/or physical impairment?
 2. Did the impairment affect the claimant’s ability to carry out normal day-to-day activities?
 3. Was the adverse effect substantial?
 4. Was the adverse condition long term?

It is for the claimant to satisfy the Tribunal, on the balance of probabilities, that they were disabled at the relevant time (i.e. when the alleged discrimination took place). It will not be an error of law if the Tribunal does not follow these in rigid consecutive stages, so long as all relevant matters

are addressed (**J v DLA Piper UK LLP 2010 ICR 1052, EAT** and **Sullivan v Bury Street Capital Ltd 2022 IRLR 159, CA**)

41. Appendix 1 to the Equality and Human Rights Commission Equality Act 2010 Statutory Code of Practice” (“the EHRC Code”) makes clear that there is no need for a claimant to show a medically diagnosed cause for the impairment: what is important is the effect of the impairment not the cause. However, where a person has an adverse reaction to workplace circumstances, but in other respects suffers no or little apparent adverse effect on normal day-to-day activities, this will not necessarily amount to a mental impairment. Tribunals should be mindful of the distinction between clinical depression and a reaction to adverse circumstances (**J v DLA Piper UK LLP, above**) The effects of medical treatment or other corrective aids should be disregarded.
42. “Substantial” means “more than minor or trivial” (section 212(1) of the Equality Act). The Tribunal should compare the claimant’s ability to carry out normal day-to-day activities with the ability the claimant would have if not impaired. The focus should be on what the person cannot do, or can only do with difficulty, rather than on what they can do (paragraph B9 of the Guidance on matters to be taken into account in determining questions relating to the definition of disability).
43. “Normal day-to-day activities” are “*activities which are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people...*” (Appendix 1, EHRC Code).
44. Under paragraph 2(1) of Schedule 1 to the EA, the effect of an impairment is long-term is it has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of their life. Likely means “could well happen” (**Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL**). The question is not whether the impairment is likely to last 12 months, but whether the substantial adverse effect is likely to last for at least 12 months. An impairment will be treated as continuing to have a substantial adverse effect if it is likely to recur.
45. In relation to progressive conditions, paragraph 8 of Schedule 1 of the Equality Act states that:
 - (1) *This paragraph applies to a person (P) if –*
 - (a) *P has a progressive condition,*
 - (b) *As a result of that condition P has an impairment which has (or had) an effect on P’s ability to carry out normal day-to-day activities, but*
 - (c) *The effect is not (or was not) a substantial adverse effect.*
 - (2) *P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.*
46. It is not sufficient for the claimant to show that they have a progressive condition, they must show that, on the balance of probabilities, it is likely to have a substantial adverse effect in their particular case (**Mowat-Brown v**

University of Surrey 2002 IRLR 235, EAT). The statutory guidance to which Tribunals must have regard "Disability: Equality Act 2010 – Guidance on matters to be taken into account in determining questions relating to the definition of disability" makes clear at paragraph B19 that the individual would still need to show that the progressive condition is "long term"

Conclusions

47. I address each of the issues from the list of issues in turn, and apply the relevant law in reaching my conclusions on those issues.

Did the claimant have a physical or mental impairment: A degenerative spine condition, as between February 2022 until 20 September 2023?

48. It is quite clear from the medical evidence that the claimant did have a degenerative spine condition between those dates (and before and after those dates). This is a physical impairment.

Did it have a substantial adverse effect on their ability to carry out day to day activities?

49. There is some difficulty with this assessment in that, whilst the claimant's impact statement contains detail of various impacts on her ability to carry out day to day activities, it is not specified during what period and I am aware that the claimant's impact statement was prepared erroneously based on the position only from December 2022 onwards, and focusing predominantly on September 2023. I therefore approach the information set out in that document with caution. In addition, whilst the claimant quite clearly had considerable mobility issues at the hearing before me, that falls after the relevant period and I must assess her health during that period and not at the present time.

50. However, through her oral evidence I was able to establish that:

- a. In 2011 / 2012 the effect on her ability to carry out day to day activities was such that she could not work for over 6 months, and ultimately had to leave employment in a special school.
- b. Since that time she has an oversensitivity to pain and receives the wrong pain signals in the effected area, cannot twist, lifting is difficult, cannot sweep standing up or hoover and so she has had to do such tasks on her hands and knees.
- c. She next went downhill in 2016 and at that time there was an additional impact on her ability to carry out day to day activities in that she would drop things due to the sensation in her hands.
- d. In 2018 she had a particular difficulty with her neck and she explained that this is why she needs the specialist ergonomic equipment at work. She also referenced not having the right sensations in her fingers and thumb, and not being able to work between 2018 and 2020. Examples of impacts on her ability to carry out normal day to day activities were not being able to hold a knife and fork, and not being able to pick up her partner's baby;
- e. In April 2022 she felt uncomfortable in her chair and was struggling to sit for hours at a time.
- f. Since the autumn of 2022 she had used walking poles;

- g. Since around February or March 2023 she has used a rollator;
- h. In her impact statement (relating to the period towards the end of the relevant period) she details being uncomfortable sitting upright, stairs being challenging / painful, difficulties showering safely and washing her hair, tying her shoelaces, and putting on socks, shoes and lower garments. Her trips out are limited due to her mobility issues and struggles to prepare meals safely.

- 51. It is clear that, by the time of the period covered by the impact statement, there was such a substantial adverse effect. Her difficulties affect her not only in the workplace but at home and in particular in carrying out the normal day to day tasks associated with raising a child, personal hygiene, managing in the home and when outside of the home.
- 52. It is also clear that at various periods prior to February 2022, there was a substantial adverse impact on her ability to carry out day-to-day activities. Specifically, in 2012, she could not lift her son and was unable to work for a period of time due to the level of impact on her, ultimately having to change working environment on a permanent basis. Whilst that in itself does not mean that there was a substantial adverse effect on her ability to carry out day-to-day activities, I find that there was a substantial adverse effect at that time.
- 53. In 2016 the claimant was dropping things. Whilst this was clearly having an impact on her day-to-day activities, I do not consider that I have sufficient information to assess whether it was substantial or not. However, by April 2018 I consider that it was. From 2018 to 2020 she struggled to hold a knife and fork and could not pick up her partner's baby for example. Again she was unable to work and whilst not determinative I do consider that the level of impact on her ability to carry out day-to-day activities was substantial.
- 54. There is then a gap in the medical evidence and I have not seen evidence that, between the latter part of 2020 and the autumn of 2022, there was a significant adverse effect on her ability to carry out normal day-to-day activities. Although it is clear that the claimant raised mobility issues and requested equipment when she commenced employment at the respondent and that she says that her chair was uncomfortable in April 2022, I do not find that she has shown that her impairment had a substantial adverse effect on her ability to carry out day-to-day activities at that time.
- 55. However, from late 2022 I consider that the position changed again. The claimant had another flare up and at this stage she started using walking poles. This is a clear indicator that her mobility was impaired to a significant effect in a manner which would impact her ability to carry out day-to-day activities (notably walking). It is also from late 2022 onwards that the descriptions of the impact of her health on her in the impact statement become relevant (although the focus of this is on September 2022 the claimant did say in oral evidence that it related to the period from December 2022 onwards). This again shows a clear substantial impact on normal day-to-day activities, such as cleaning, cooking, washing, getting dressed and going out.

56. Therefore, over the years there were periods where the impairment did have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, and periods of time when it did not. In relation to the relevant period between February 2022 and September 2023 specifically, I conclude that there was no such substantial adverse effect prior to late 2022, but from late 2022 there was.

If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?

57. I consider these questions together as they are interlinked. I have found that the claimant was taking various medication from 2016, and throughout the relevant period. In addition, since around April 2023 she has had physiotherapy (although this only relates to the latter part of the relevant period).

58. Although I have not seen medical evidence specifically on this point, I consider that the claimant has shown that if she had not taken medication, there would have been a substantial adverse effect on her ability to carry out day-to-day activities. She is overly sensitive to pain and has been on a variety of medication since 2016, which serve to mask some of her symptoms. Without this, I consider that there would have been a significant impact on the claimant and her ability to conduct normal day-to-day activities. At no stage have the medical professionals sought to remove the claimant's medication, suggesting that it has a positive impact on her.

Were the effects of the impairment long-term? The Tribunal will decide:

- (a) Did they last at least 12 months, or were they likely to last at least 12 months?*
(b) If not, were they likely to recur?

59. I assess the position first of all at the start of the relevant period, February 2022. At that time, the effects of the impairment were not substantial and the particular effects that she had at that time had not lasted at least 12 months.

60. Turning next to late 2022, when she had a flare up. At that time, in that flare up, the effects had not lasted at least 12 months, and in the initial stages the claimant has not shown that they were likely to last at least 12 months. However, by early 2023 I consider that the claimant has shown, on the balance of probabilities, that the effects were likely to last at least 12 months. "Likely" in this context means "could well happen". In the claimant's case, she had had various flare ups over the years, and I note in particular that the 2018 – 2020 flare up lasted over 12 months. At the stage where the claimant's flare up became sustained (which I find was around the end of 2022) I consider that it was also likely (i.e. could well happen) to last at least 12 months.

61. By the end of the relevant period in September 2023, the claimant's flare up had almost lasted 12 months and therefore it was certainly likely to last at least 12 months.

62. However, throughout the entirety of the relevant period, from February 2022 onwards, I conclude that the effects were in any case likely to recur. There had been episodes / flare ups in 2011 to 2012, 2016 and 2018 to 2022. Whilst there were some positive comments in the medical evidence from April 2023 about some improvement, there was no suggestion at any time that the condition would go away and/or that the claimant would not continue to suffer the effects of it. I also consider that those recurrences were likely to have a substantial adverse impact on her ability to carry out normal day-to-day activities given that this had been the case previously.
63. Therefore, throughout the relevant period I consider that the effects of the impairment were long-term.

Did the claimant have a progressive condition?

If that condition had an effect on her ability to carry out normal day-to-day activities, but not a substantial adverse effect, is the condition likely to result in the claimant having such an impairment? If so, she will be taken to have an impairment which has a substantial adverse effect.

64. During the periods when I have found that the condition did not have a substantial adverse effect on her ability to carry out normal day-to-day activities, I conclude that it did nevertheless have an adverse effect (albeit not substantial). At all times in the relevant period the claimant has needed medication to control her pain and symptoms and upon commencing employment with the respondent she requested ergonomic equipment because the condition had an adverse impact on her. Although she did not visit the doctor for lengthy periods, this is simply because there were no ongoing investigations at that time, not because there were no adverse effects.
65. The respondent quite rightly points out that it is not sufficient for the claimant to show that the type of condition she has is progressive generally, this must be assessed based on the likely impact on her. In addition, the fact that her medical condition has the word “*degenerative*” in its name does not automatically mean that it is progressive in her case.
66. However, it is clear to me that the claimant does have a progressive condition. I acknowledge that in April 2023 there was some improvement, however the overall thrust of the medical evidence is that she is over time experiencing difficulties in additional areas of her spine and that over time her condition has been deteriorating, to the point that from the autumn of 2022 she has been using mobility aids as part of her day-to-day life. The improvement in April 2023 is in the context of the claimant having been in an acute period of flare up since the autumn of 2022 and does not suggest that the claimant is in improved health overall in comparison to the rest of the period from 2011 / 2012 when she first had symptoms.
67. Whilst the word “*degenerative*” is not determinative, it is also clear that the claimant has been informed by medical professionals that each time she has an injury, her condition is likely to worsen, and I have found that by “injury” this means in effect a flare up rather than a new separate medical incident. This indicates that the opinion of the medical professionals is that it is progressive in the claimant’s specific case.

68. I conclude that during the entirety of the relevant period from February 2022 to September 2023, the impairment either did, or was likely to result in the claimant having a substantial adverse effect on her ability to carry out day-to-day activities. Therefore she is to be taken as having an impairment with a substantial adverse effect throughout the relevant period, given that I have concluded separately above that the effects were long-term throughout the relevant period.
69. Therefore, I conclude that the claimant was disabled at the relevant time, from February 2022 to September 2023, by reason of degenerative spine condition. Even during the periods when I have found that there was no substantial adverse effect on her ability to carry out day-to-day activities, I have found that there would have been such an effect if the effects of medication were disregarded and/or that the condition fell within the circumstances set out in paragraph 8 of Schedule 1 of the Equality Act in relation to progressive conditions. I have also concluded that the effects of the impairment were long-term and/or were likely to last at least 12 months and/or were likely to recur.
70. The case is already listed for a further Preliminary Hearing on 26 February 2025, where arrangements for final hearing can be discussed.

Employment Judge Edmonds

25 November 2024

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