Administrative Appeals Tribunal decisions

Handicapped child's allowance

COLUSSI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/4)

Decided: 18 April 1984 by R.C. Jennings.

In September 1981, Gillian Colussi applied to the DSS for a handicapped child's allowance for her child Jacqueline. The child, who was born in 1967, suffered from diabetes mellitus.

The DSS rejected Colussi's application apparently on the basis of 'Notes for Guidance of Commonwealth Medical Officers' which reads as follows:

> 36. Diabetic children requiring diet, oral tablets or insulin injections, would not qualify unless there are other medical disabilities necessitating constant (or almost constant) care and attention.

Colussi then sought review of that decision from the AAT.

Eligibility: a 'handicapped child'

Section 105J of the *Social Security Act* provides that a handicapped child's allowance shall be paid to a person who has the custody, care and control of a severely handicapped child if that person provides constant care and attention for that child in their 'private home'.

Section 105H(1) defines a 'severely handicapped child' as a child with a physical or mental disability needing 'constant care and attention' (permanently or for an extended period).

Section 105JA of the *Social Security Act* provides that the Director-General may grant a handicapped child's allowance to a person who has the custody, care and control of the handicapped child if the Director-General is satisfied that the person provides care and attention (only marginally less than the care and attention needed by a severely handicapped child) and that the person is suffering severe financial hardship.

According to s.105H(1), a 'handicapped child' is a child with a physical or mental disability requiring care and attention, only marginally less than that needed by a severely handicapped child (permanently or for an extended period).

The AAT referred to the decision in *Maroney* (1984) 18 *SSR* 182, from which it derived five propositions:

(1) a severely handicapped or handicapped child need not be confined in a private home;
(2) continually recurring and regular (rather than spasmodic) care would qualify as 'constant care and attention';
(3) 'only watchful care' could be 'constant', so long as it was recurring;
(4) daily school attendance did not necessarily preclude entitlement; and
(5) the margin between 'constant care and attention' (s.105J) and 'only marginally less than constant care and attention' (s.105JA) should not be narrowly drawn.

Evidence was given to the Tribunal of the care and attention provided by Colussi for her daughter: daily blood sugar tests; insulin injections; a controlled diet; supervision of exercise; encouragement of self-reliance and responsibility; and a constant readiness to provide emergency treatment.

The Tribunal said that the range of physical and mental disabilities which require constant (or marginally less) care and attention was 'incapable of description'. The need for that care and attention was established if medical opinion advised it. Medical opinion was to the effect that diabetes was 'a life-long chronic disorder requiring continuity of care; that there is an increased risk during adolescence that the diabetic may default'; and that 'the family is the most important and the most vulnerable link in the therapeutic chain': Reasons, para. 13.

The Tribunal concluded that Jacqueline needed care and attention only marginally less than constant and she was a 'handicapped child'.

'Severe financial hardship'?

Accordingly, Colussi would be entitled to the allowance if she could satisfy the Director-General that she was suffering severe financial hardship because of the care and attention provided for her daughter.

The AAT noted that Colussi had been obliged to give up her employment as a social worker in December 1978 in order to care for her daughter. As a result, she and her husband had been forced to sell the family home, and her husband had borne 'the substantial annual expenses' caused by his daughter's condition. Having noted (in para 17) that Part VIB of the *Social Security Act* 'recognises only the mother of the child of a marriage', the AAT concluded:

> 25. When it is considered that the allowance paid for a handicapped child is something less than $85 per month and that the legislation being construed is a social remedial law, it is very difficult to imply an intent to impose a strict means test. 'Serious financial hardship' is established for the purpose of s.105JA in my view if the financial circumstances of the person who provides the necessary care and attention have been so severely affected as to amount to hardship.
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> 26. In this case I find that the applicant was at the material time, by reason of the provision of the care and attention she provided, subjected to severe financial hardship.
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> 27. Accordingly, I will exercise the discretion conferred on the Director-General to grant a handicapped child's allowance to the applicant.

Date of payment: misleading advice

Section 102(1) of the *Social Security Act* provides that a family allowance is payable from the date when a claim is lodged but can be backdated 'if a claim is lodged within six months after the date on which the claimant became eligible . . . or, in special circumstances, within such longer period as the Director-Genral allows . . .'

By s.105R, that provision applies to the payment of handicapped child's allowance.

In June 1977, Colussi had asked a paediatrician, a hospital social worker and an officer of the DSS if she was eligible for handicapped child's allowance. Each of them had said she was ineligible. (At that time, the allowance was only payable for a 'severely handicapped child' – s.105JA was introduced in November 1977. But, the AAT observed, it was likely that she would have received the same answer after November 1977 – that is, she would have been told that diabetic children would not qualify either as severely handicapped or as handicapped: see the guidelines for CMOs quoted at the beginning of this report.)

The AAT said that the decision whether handicapped child's allowance should be backdated would often raise quite different problems from the decision whether a family allowance should be backdated. Eligibility for handicapped child's allowance could not be determined until after the DSS had considered an application and reviewed a range of factors – medical diagnosis, residence, the question of care and attention and financial hardship:

> 33. Inability to ascertain eligibility [for HCA] by mere reference to the terms of the statute must be a circumstance to which the Director-General should have regard when considering whether he should allow a longer period for lodgement of a claim.

But family allowance was generally payable on the basis of undisputed facts. So a person seeking the back-dating of 'family allowance should have great difficulty in establishing "special circumstances" ': Reasons, para. 34.

While it had been established that ignorance of the existence of the legislation was not a special circumstance (*Wilson* (1981) 3 *SSR* 27), there might well be special circumstances, the AAT said. when a person was 'advised that she is not eligible by persons who might reasonably be thought to know the true situation': Reasons, para 38.

In the present case, the applicant was misled by the DSS into believing that she was not eligible to make a claim and this deterred her from taking the matter further. This, the AAT said, plus 'the circumstance that she could not have ascertained entitlement without making a claim [was] sufficient to warrant the exercise of discretion to permit late lodgement of the claim': Reasons, para 44.

The date on which Colussi had become eligible was 1 January 1979 (she had given up her job in December 1978 and her 'severe financial hardship' dated from that time) and the discretion in s.102(1)(a) should be exercised so as to permit payment of the allowance from that date.

Formal decision

The AAT set aside the decision under review and substituted a decision that Colussi was entitled to handicapped child's allowance under s.105JA of the Act, the payment of which was to date from 1 January 1979.

YATMAS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/448)

Decided: 6 April 1984 by J. Dwyer.

Zahide Yatmaz had been granted a handicapped child's allowance from December 1978 for her daughter, Hatice, who had suffered an attack of poliomyelitis when an infant. The allowance was paid on the basis that she was a 'severely handicapped child': s.105J of the *Social Security Act*.

Following a review in April 1982 (after Hatice's 16th birthday) the DSS decided that Hatice was no longer a 'severely handicapped child' but a 'handicapped child'; that her mother was not subjected to 'severe financial hardship' within s.105JA of the Act; and that her mother was not, therefore, qualified to recieve the allowance.

Yatmaz asked the AAT to review the DSS decision.

No 'constant care and attention'

The AAT agreed with the DSS that Hatice did not fall within the definition of a 'severely handicapped child' in s.105H(1) of the *Social Security Act*: she did not need constant care and attention by reason of her disability – rather, she needed relatively little attention: while she was not completely independent, she was able to dress herself, assist with household chores and travel to and from school by taxi. Therefore, Yatmaz did not qualify for handicapped child's allowance under s.105J of the *Social Security Act*.

No 'financial hardship'

The Tribunal then considered whether Yatmaz qualified for the allowance under s.105JA of the Act. The critical question was whether Yatmaz was suffering 'severe financial hardship'.

The Tribunal referred to DSS guidelines for assessing 'severe financial hardship'. These guidelines measured a family's gross weekly income (less expenses associated with the child's disability) against the 'average minimum weekly award wage for adult males' plus the maximum weekly rate of handicapped child's allowance plus $6 for each child in the family.

The family's gross weekly income less expenses was $404.82. But the allowable income for the family (according to the guidelines) was $245.

The Tribunal noted that the guidelines were not binding on it; but it accepted the points made in *Sposito* (1983) 17 *SSR* 166, that 'the fixing of a generally applicable income limit serves the valuable purpose of ensuring even-handed administration of the Act', and that the guidelines provided a reasonable indicator of financial hardship so long as the applicant had the opportunity to show that there might be special reasons for departing from those guidelines in her case. No such reasons had been advanced in this case and, accordingly, the AAT concluded that Yatmaz did not suffer 'severe financial hardship'.

(The Tribunal said it was unnecessary to decide whether Hatice was a 'handicapped child' – that is, a child requiring care and attention only marginally less than constant. The whole area was so complex that it was better not 'to add further to the confusion in interpretation of the definitions in sub-section 105H(1)': Reasons, para. 26.)

Formal decision

The AAT affirmed the decision under review.

DAMALAS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/709)

Decided: 13 April 1984 by B.J. McMahon.

Anastasia Damalas was granted a handicapped child's allowance for her son George in December 1982, on the basis that he was a 'severely handicapped child': s.105J of the *Social Security Act*. The Director-General refused her request to backdate payment to November 1978 when her son had been born with spina bifida.

Damalas then applied to the AAT for review of that decision.

'Special circumstances'

Sections 102(1)(a) and 105R give the Director-General of Social Security a discretion to backdate payment of a handicapped child's allowance in 'special circumstances'.

Damalas claimed that, for a variety of reasons, she had not known of the existence of handicapped child's allowance and that these reasons amounted to special circumstances.

The Tribunal found that, for much of the relevant period, Damalas and her first child (born in 1973) had been undergoing psychiatric treatment; that, even amongst that family, there was little or no acknowledgement that George had any special problems; and that her husband (an unskilled shift worker) had no real opportunity for contact with likely sources of information.

The Tribunal said that it felt bound to follow earlier decisions to the effect that ignorance of entitlement was not, by itself, 'special circumstances' within s.102(1)(a) of the Act. (The Tribunal apparently felt some uncertainty about whether such a rule was 'appropriate to social welfare legislation in contemporary Australia', but there were so many AAT decisions to this effect that they should be followed: Reasons, pp. 6-7.) The Tribunal continued:

> In the Tribunal's view, however, lack of knowledge should not be looked at in isolation as the respondent appears to have viewed it in this case. It is relevant to take into account the totality of the family condition and history in determining whether special circumstances exist. The concept of special circumstances is still, in that sense, at large. Ignorance, while not amounting to special circumstances can be a component of special circumstances to be understood only be reviewing all the family circumstances.

(Reasons, p. 7.)

In the present case, a series of factors showed that Damalas had lived in real isolation from sources of information. These were her mental illness, her cultural background (she and her husband had been born in Greece) and her limited mobility and ability to meet other people. These limitations were a result of the intensive care needed by the child with spina bifida and the psychiatrically ill daughter. Together with the lack of 'comfort and support of friends or even understanding parents' and her husband's lack of opportunity for obtaining information, these added 'up to restrictions that are just as valid as if the applicant had been living in a geographically remote area': Reasons, p. 8.)

That isolation was sufficient to amount to 'special circumstances' within s.102(1)(a) of the *Social Security Act*.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Damalas be paid handicapped child's allowance from the date on which she first became entitled to it.

PUCCINI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S82/98)

Decided: 13 April 1984 by R.C. Jennings.

In October 1980, Ada Puccini applied for handicapped child's allowance for her child Rosetta, who had been born in 1967. The DSS granted the allowance, on the basis that the child was a 'handicapped child', under s.105JA of the *Social Security Act*, with payment of

the allowance dating from November 1980.

Puccini said that she had not claimed the allowance earlier because she had not known of its existence and she asked that payment be backdated to 29 November 1977, the date on which she would have been eligible for the allowance – that is, the date on which s.105JA was inserted in the Act.

The Director-General refused to backdate payment and Puccini applied to the AAT for review of that decision.

'Special circumstances'

Sections 102(1)(a) and 105R of the *Social Security Act* give the Director-General a discretion to backdate payment of a handicapped child's allowance 'in special circumstances'.

The Tribunal found that, over the period between 1977 and 1980, Puccini had a series of physical and emotional difficulties. Her daughter Rosetta had epilepsy and was aggressive and violent towards her younger sister; in 1978 Puccini had a miscarriage following an incident with Rosetta; in 1979 Puccini gave birth to her fourth child after a difficult pregnancy; that child had a range of serious illnesses; in 1980 Puccini was seriously burnt in a kitchen fire; her husband became ill and was forced to abandon his market garden; and, throughout this period, it was Puccini rather than her husband who was responsible for dealing with persons and agencies outside the family – her husband spoke no English and was illiterate.

In addition, Puccini had little contact even in the Italian community and 'accepted the Italian view that Rosetta's problems could not be discussed with anyone outside the family': Reasons, para. 23.

The AAT noted the decision of *Wilson* (1981) 3 *SSR* 27, where the Tribunal had said that ignorance of the existence of the legislation was not by itself a special circumstance within s.102(1)(a); and the decision in *Cassoudakis* (1983) 14 *SSR* 138, where the Tribunal had not accepted the applicant's cultural differences as special circumstances.

But, the AAT said, this case could be distinguished from those two decisions. There were sufficient special circumstances to justify backdating payment under s.102(1)(a). While there may have been odd periods, between 1977 and 1980, when Puccini could have learnt of the existence of handicapped child's allowance,

> it does not accord with the object of social welfare legislation to apply too rigidly the general principles enunciated in *Wilson* and followed by *Cassoudakis*. I regard those cases as no more than authority for the proposition that mere ignorance of the existence of legislation is not of itself sufficient to warrant a special exercise of discretion. The circumstances in which the applicant found herself during the relevant period virtually denied her any realistic opportunities to ascertain entitlement and make claim for the allowance.
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> 26. Therefore I find that by reason of all the matters which contributed to her ignorance of the existence of legislation and the right to make a claim for a handicapped child's allowance there were special circumstances which the respondent could and should have taken into account to permit late lodgement of the applicant's claim.

Formal decision

The AAT set aside the decision under review and substituted a decision that Puccini was entitled to payment of arrears of handicapped child's allowance from 29 November 1977 to 14 November 1980.

WENT and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/40)

Decided: 21 May 1984 by G.D. Clarkson.

Went's first child Andrew was born in 1975 and was diagnosed at an early age to be suffering from asthmatic bronchitis. In September 1982 Went applied for a handicapped child's allowance and this allowance was granted by the DSS, on the basis that the child was substantially handicapped rather than severely handicapped.

However, the DSS refused to backdate payment of the allowance to November 1977, when the *Social Security Act* had been amended to provide an allowance for a substantially handicapped child. Went asked the AAT to review that decision.

The legislation

Sections 102(1) and 105R permit payment of a handicapped child's allowance to be back-dated (to the date of eligibility) if the claim is lodged within six months of that date or 'in special circumstances'.

No 'special circumstances'

Went knew of the existence of the handicapped child's allowance: she had worked for several years as a nursing aide; but she had assumed that her child would not qualify. She claimed that the 'special circumstances' of her case were

- her misunderstanding that an asthmatic child would not qualify;
- the ill-health of her other children – one was a schizophrenic, the other an epileptic;

- the family's financial hardship – her husband was unemployed and she was medically unfit for work;
- the family's itinerant lifestyle, between 1976 and 1982, made it difficult for her to receive advice and information about the allowance and her son's eligibility; and
- her need to buy expensive aids for the child.

None of these factors, the AAT said, was a special circumstance: ignorance of eligibility was a common, rather than an unusual, cause of delay in claiming the allowance; financial hardship would not normally be a special circumstance, because the allowance could only be granted for a substantially handicapped child where the parent suffered severe financial hardship (s.105JA of the Act); against the family's itinerant lifestyle had to be balanced the fact tha Went had trained and worked as a nursing aide and that she and her husband were part of the social cultural environment in which they lived.

Financial hardship

The Tribunal also indicated that, in its view, Went had not become eligible for allowance until June 1982 (rather than November 1977). Section 105JA of the *Social Security Act* provides that an allowance is payable to a person providing care and attention (marginally less than constant) to a handicapped child in their private home, if that person is suffering 'severe financial hardship' because of the provision of the care and attention.

In the period from 1976 to May 1982, Went's husband worked as an itinerant fruit picker. His and the family's income averaged $250 a week in that period. Went said that the family (in which there were four children) 'learned to live within our means', was 'not well off' and 'needed every cent we could get but we managed'.

In May 1982, the family moved to Western Australia and had lived on unemployment benefits ever since.

The Tribunal said that, on the evidence, there was no severe financial hardship: 'No debts were incurred which could not be paid and there was no evidence of any deprivation of necessities': Reasons, p. 9. When the family moved to Western Australia and had to survive on unemployment benefits, there was 'severe financial hardship' the AAT said

It followed, the Tribunal said, that Went had only become eligible for the allowance in May 1982. It would be appropriate for the DSS to pay the allowance from that date because she lodged her claim within six months of that date. The AAT did not make a formal decision in those terms but invited the DSS to do so because, it said, 'the decision to pay the allowance from 15 September 1982 is not under review': Reasons, p. 13.

Formal decision

The AAT affirmed the decision under review.