SOCIAL SECURITY

Reporter

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Administrative Appeals Tribunal decisions

Handicapped child's allowance

In this issue:

McKERROW and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. T81/27)

Decided: 26 January 1983 by R. K. Todd.

Jillian McKerrow asked the AAT to review a DSS decision, rejecting her application for handicapped child's allowance for her 14-year-old daughter.

The legislation

Section 105H(1) of the *Social Security Act* defines a 'severely handicapped child' as a child who

(a) has a physical or mental disability;

(b) by reason of that disability, needs constant care and attention; and

(c) is likely to need such care and attention permanently or for an extended period.

Section 105J provides that a person, who has the custody, care and control of a severely handicapped child and provides constant care and attention for that child in a private home which is the person's and the child's residence, is qualified to receive a handicapped child's allowance.

(An allowance may also be paid for a 'handicapped child', who requires less care and attention than a severely handicapped child, if there is 'severe financial hardship': s.105JA.)

The evidence

The daughter had an intellectual handicap, the result of brain damage suffered at birth. She had been assessed as having an IQ of 47; she had a severe speech impairment nad her expressive language and comprehension level were those of a four-year-old.

Her need for care and attention was assessed by an educational guidance officer in the following terms:

> Zara's mother can look forward to a lifetime of supervision of Zara . . . in a sense of being always responsible and knowing that Zara can accept very, very little responsibility for her own actions . . .

The daugher attended a special school and stayed four nights a week at a hostel associated with the school. McKerrow's application for handicapped child's allowance was confined to those periods (weekends and school holidays) when her daughter was not at the hostel.

Was the care 'constant'?

The Tribunal said that the daughter had a physical and mental disability and needed care and attention permanently. The question was whether that care and attention was 'constant'. Adopting the approach spelt out in *Yousef* (1981) 5 *SSR* 55 (was the need for care and attention 'continually recurring'?), the AAT said:

> Her mother has, I am satisfied, to keep this 14 year old child constantly under her eye when she is at home. The statutory requirement of the need for constancy in care and attention is satisfied.

(Reasons for Decision, para. 18)

The daughter's residence at a hostel

Turning to the daughter's residence at the hostel, the Tribunal said:

> 19. The provisions of s.105J can only be satisfied where the applicant provides such care and attention in the home. *Prima facie* this would permit payment of the allowance in respect of weekends and holiday times. But in respect of ordinary weekends during school terms the [hostel] . . . receives in respect of Zara an allowance known as Handicapped Persons Benefit of $5 per day including those days when she is absent for short periods, including such weekends. Hav-

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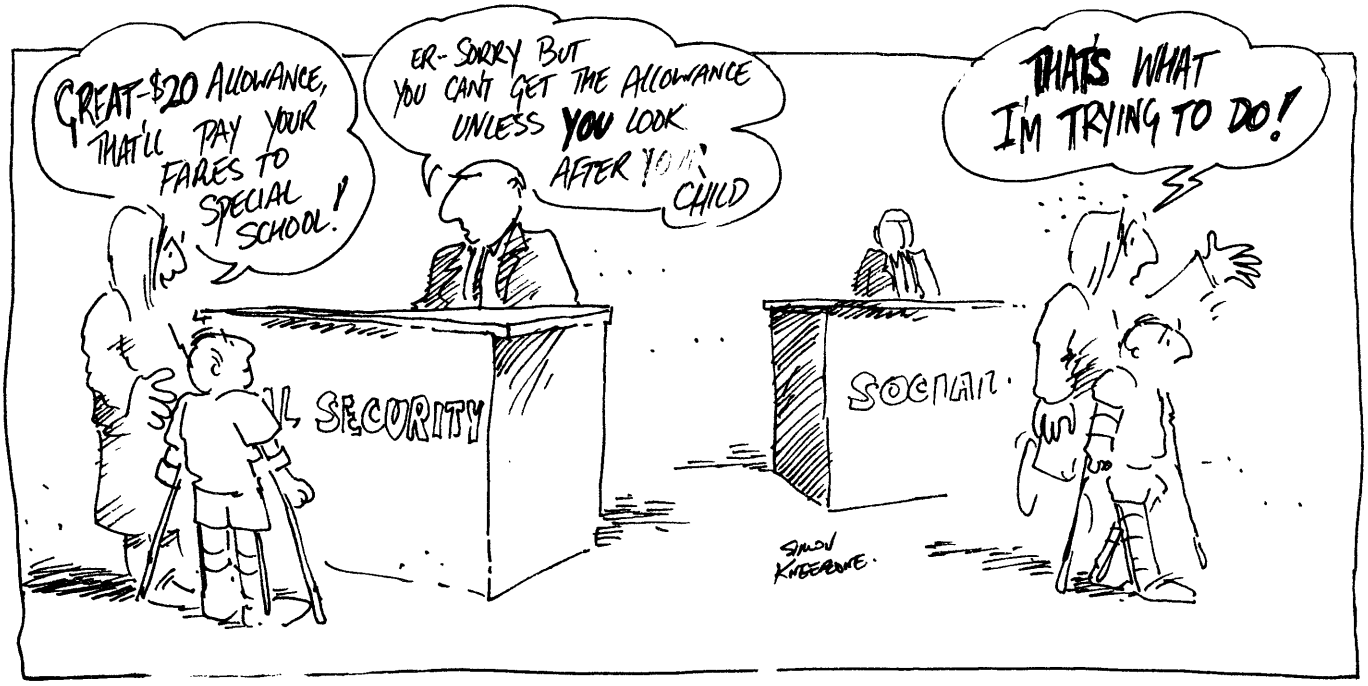

ing regard to s.105M of the Act, the amount of any such benefit is to be deducted from any entitlement to handicapped child's allowance. It follows in this case that the applicant will only be entitled to such allowance when Zara is home on holidays.

[Section 105M provides for a direct 'set-off' of any benefit paid to an institution against the rate of handicapped child's allowance otherwise payable. The maximum rate of that allowance is now $85 a month. Accordingly, that allowance was very quickly eliminated by the modest benefit paid to the hostel under the *Handicapped Person's Assistance Act* 1974 (Cth).]

Formal decision

The AAT set aside the decision under review and decided that McKerrow was entitled to handicapped child's allowance for those periods during which the daughter lived at home, subject to the 'set-off' under s.105M of the *Social Security Act*.

MELOURY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/133)

Decided: 12 May 1983 by I. R. Thompson.

Elaine Meloury applied to the AAT for review of a DSS decision cancelling a handicapped child's allowance paid for her daughter Rebecca.

A mental disability

The Tribunal considered, first, whether Rebecca was a 'severely handicapped child' within s.105H(1) of the *Social Security Act*, which refers to a child who

(a) has a physical or mental disability;
(b) by reason of that disability, needs constant care and attention; and
(c) is likely to need such care and attention permanently or for an extended period.

Rebecca, who was 10 years of age, had an intellectual handicap which was, the AAT said, a mental disability.

Need for constant care and attention

Rebecca's parents constantly supervised all her activities (apart from her time at a special school). That supervision was not necessary for the bare survival of the child. But it was needed for

> the minimization of the child's disability so as to enable the child to develop as much of its potential as it can and to lead as normal a life as is possible . . .

(Reasons, para. 8)

The Tribunal adopted this second approach to the 'need' for constant care and attention because 'the purpose of the Act is remedial'.

The extent of the care and attention

That need was 'continually recurring' and so was constant. (The approach adopted in *Yousef* (1981) 5 *SSR* 55.) It was also likely to be needed for at least another 10 years which was a sufficient 'extended period' within s.105H(1).

Constant care 'in a private home'

Section 105J provides that a person is qualified to receive a handicapped child's allowance if that person has the custody, care and control of a severely handicapped child and provides constant care and attention for that child in a private home which is their residence.

In this case, Rebecca attended a special school on each school day. Adopting what was said in *Schramm* (1982) 10 *SSR* 98, the AAT said that,

> because Rebecca attends the Special School and is therefore absent from home for much of every school day, the applicant is not herself providing in the residence of Rebecca and herself constant care and attention in respect of Rebecca.

(Reasons, para. 11)

Meloury was not, therefore, qualified to receive the allowance under s.105J. (Similarly, she was not qualified to receive an allowance under s.105JA, as a person providing 'marginally less' care and attention because 'all the care and attention required by a handicapped child should be provided to him . . . in the private home': Reasons, para. 12.

Section 105KA, dealing with entitlement during temporary absences from home, did not apply (the AAT said) because that section dealt with absences for a day or a series of days, not absences during part of a day. (On this point, the AAT followed *Schramm* (1982) 10 *SSR* 98.)

Law reform

The AAT observed that Meloury and her husband were suffering severe financial hardship because of the care and attention which they provided to Rebecca and another handicapped child. They had six children and their only income was an invalid pension and a wife's pension. Were it not for the care and attention needed by these children, Meloury could undertake part-time work. But, as the *Social Security Act* stood, their financial hardship could not be alleviated by a grant of handicapped child's allowance for Rebecca. This 'unfortunate limitation' indicated a need for law reform: Reasons, para. 13.

Formal decision

The AAT affirmed the decision under review.

[Comment: The contrast between this decision and *McKerrow* (see this issue) is striking. In each case, the child was attending a special school. In *McKerrow*, the child spent five days and four nights in that school (and its hostel): a part handicapped child's allowance (for weekends and vacations) was granted by AAT. In *Meloury*, the child spent a part of five days, but no nights, in the school: but no allowance at all was granted by the AAT. In *Meloury*, the Tribunal assumed that the only flexibility which it might have was provided by s.105KA of the Act—but that this section could not help Meloury because, the AAT said, the child was absent for a portion of each day. But it was not s.105KA which produced the result in *McKerrow*. The section was not even mentioned, and is clearly irrelevant to the problem, in that case. Section 105KA allows the Director-General to ignore absences from home where the absence was or is 'of a temporary nature'. The absence in *McKerrow* was not temporary (it was a regular absence), nor did the AAT ignore that absence: it granted an allowance only for the periods when the

childd was not absent.

TIThe point is that the result in *McKerrow* reflelects a flexible approach to the basic sectionns dealing with qualifications for the alloowance and does not, as far as I can see, depeend on any of the technical exceptions to tthose basic sections. The puzzle remains, howwever: why was the AAT able to adopt suchh a flexible approach in *McKerrow* but not t in *Schramm* (both of those were decided b by R. K. Todd) or in *Meloury* (decided by I I. R. Thompson)? **PH]**

CAGCCIOLA and DIRECTOR-GENERAL OF ? SOCIAL SECURITY
(Noo.182/185)

Decicided: 29 April 1983 by J.B.3.K. Williams.

Cheryl Cacciola gave birth to a child in December 1977. In March 1982 she lodged a claim for handicapped child's allowance and the DSS granted the claim on the basis that the child was, and had been since his birth, severely handicapped.

But the DSS refused to back-date payment to the child's birth. Cacciola asked the AAT to review this refusal.

Sections 105R and 102(1) of the *Social Security Act* provide that (when a claim is lodged more than six months after the date of eligibility) handicapped child's allowance is payable from the date of the claim, or from an earlier date if there are 'special circumstances',

Cacciola and her husband said that, while they had known their child had spina bifida, they had not known that this was covered by handicapped child's allowance; and, until January 1982, none of the many medical authorities consulted by them had raised the possibility that the child would be covered.

The Tribunal rejected as 'special circumstances', the fact that the DSS did not publicise the disabilities which would make a child 'handicapped' and the fact that no medical practitioner suggested the possibility. On the other hand, there had been no default or delay on the part of the DSS; and the Cacciola's were both intelligent and literate persons—they were under no disability or disadvantage which dould explain their ignorance. Accordingly, there were no 'special circumstances'.

Formal decision

The AAT affirmed the decision under review.

Imcome test

BRRETTELL and DIRECTOR-GEENERAL FOR SOCIAL SEECURITY
(Ndo. Q82/191)

Deecided: 6th May 1983 by J. B. K. Wililliams, D. S. Howell and M. S. McLelland.

Joyyce Brettell applied to the AAT for reviview of a DSS decision to reduce her age penension by $23 a week over a period of two moonths in 1982. During that period, Brettelll had let her home unit (for $100 a week) andd rented another unit in the same town (at t a cost of $130 a week): she had done this beccause she was anxious that her invalid moother should live with her and her mother coould not cope with the stairs in her unit.

A c discretion to ignore income?

Thhe DSS had treated the $100 per week receceived by Brettell as part of her income. Brrettell did not dispute this approach, but arggued that the Director-General had a disscretion whether or not to reduce her pensiopn and that the discretion should be exercisssed in her favour, because Brettell's actiopn in caring for her mother at home was in herr mother's interest and led to a substantialal saving for the Commonwealth, which woould not be required to contribute to the cossst of her mother's care in a nursing centree.

TThe basis of the claimed discretion was s.446 of the *Social Security Act*:

> 46.(1) If—
> (a) having regard to the income of a pensioner;
> (b) by reason of the failure of a pensioner to comply with either of the last two preceding sections; or
> (c) for any other reason,
> the Director-General considers that the pension which is being paid to a pensioner should be cancelled or suspended, or that the rate of the pension which is being paid to a pensioner is greater or less than it should be, the Director-General may cancel or suspend the pension, or reduce or increase the rate of the pension, accordingly.

I However, the tribunal pointed to s.28(1) whhich provided that the rate of pensionpaid to a pensioner 'shall not exceed the maximum rate fixed by or in accordance with the next eight succeeding sub-sections'. Section 28(2) provided that the rate of a pension should be reduced by reference to the pensioner's private income. The Tribunal pointed out that s.28(2) was 'mandatory in its terms' and rejected the claim that s.46(1) allowed the Director-General to 'fix any rate of pension without having regard to the constraints placed upon him by the legislation'. That section, the AAT said, was a machinery position which allowed the Director-General to take action in response to any change in a pensioner's circumstances—where, for example, 'the rent received by [Brettell had] been reduced $100 per week to say $50 per week'.

The Tribunal conceded that, if Brettell's mother had remained living with her, there would have been a saving to Commonwealth revenue substantially greater than the $23 a week deducted from Brettell's pension. However, the Tribunal said, 'both the Director-General and this Tribunal are bound to consider the matter in the light of the relevant provisions of the *Social Security Act*'.

Formal decision

The AAT affirmed the decision under review.

SHEPPARD and DIRECTOR-GENERAL OF SOCIAL SECURITY

Decided: 11 May 1983 by G. D. Clarkson.

Mrs E. M. Sheppard had been granted an invalid pension in September 1978. In January 1979 she married and the rate of her pension was reduced because of her husband's income: see s.29(2) of the *Social Security Act*.

Shortly after the marriage, Mr Sheppard's employment obliged him to move from Perth to Bunbury. He left his home unit in Perth and rented a flat in Bunbury, where both he and Mrs Sheppard lived for the next four years. Apparently, the DSS did not learn of this arrangement until 1980 and it then claimed that the rent received by Mr Sheppard was part of his income and should affect the level of Mrs Sheppard's pension. The DSS calculated that Mrs Sheppard had been overpaid $1124.50 between January 1979 and February 1980. The DSS refused to set off against this income the rent which Mr Sheppard was obliged to pay for accommodation in Bunbury.

Mrs Sheppard applied to the AAT for review of that decision.

The legislation

Section 18 of the *Social Security Act* defines 'income' to mean:

> Any personal earnings, moneys, valuable consideration of profits earned, derived or received by [a] person for his own use or benefit by any means from any source whatsoever, within in or outside Australia . . .

No 'set-off' for rental income

The Tribunal pointed out that s.18 did 'not provide expressly for deductions from gross rent of landlord's expenses . . . and it is arguable that gross rental received is income for the purposes of s.18 of the *Social Security Act*'. However, it was not necessary to consider that question because 'the department will in general accept the same deductions as are permitted for income tax purposes or if tax returns are not available will allow a deduction of one third of the gross rent as an allowance to cover rates, taxes, insurance, repairs and periods of unoccupancy. Interest on a mortgage of the rented property is also allowed as a deduction'.

These deductions had been allowed in the present case and the Tribunal did not think that the DSS was required to do any more. Indeed, 'it might not be required to do as much': Reasons, p.4. In particular, there was no provision in the Act which permitted a set off of the kind claimed by Mrs Sheppard.

Formal decision

The AAT affirmed the decision under review.

RIDLEY and DEPARTMENT OF SOCIAL SECURITY
(No. S82/83)

Decided: 14 April 1983 by I. R. Thompson.

Mr Ridley was granted an age pension on 17 November 1980. (His wife was already in