SOCIAL SECURITY

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Administrative Appeals Tribunal decisions

Handicapped child's allowance

JOHNSTONE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/449)

Decided: 9 November 1983 by J.O. Ballard.

The applicant's son was born on 4 June 1971. Shortly after birth it became apparent that he suffered from a condition which caused marked dwarfism among other problems. An application for handicapped child's allowance was not made until 22 April 1981. This application was rejected on 13 July 1981. The applicant sought review of this decision by the AAT and also a decision not to backdate the allowance to 30 December 1974, the date on which she claimed she became eligible for the allowance. (That is the date upon which the benefit was first introduced.)

Severely handicapped child: constant care and attention

It was not in issue that the applicant's son was a handicapped child for the purposes of the *Social Security Act*. The question was whether he was a severely handicapped child as defined in s.105H(1) and s.105J which read:

> 105H(1)
>
> ...
>
> 'severely handicapped child' means 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.
>
> 105J. Subject to this Part, where a person who has the custody, care and control of a severely handicapped child provides, in a private home that is the residence of that person and of that child, constant care and attention in respect of that child, that person is qualified to receive a handicapped child's allowance in respect of that child.

Did the applicant's son need constant care and attention? At one time he attended a school at which the applicant taught. Later he attended a high school 10 minutes away from home, at which the applicant did not teach.

Johnstone resumed teaching at the school to which her son went to make herself available to provide care and attention for him there as well as at home. The AAT found that this amounted to constant care and attention for this period. (See *Yousef* (1981) 5 *SSR* 55).

Care in home

However, did that care (at the school) fail because it was not provided at home? The AAT thought that:

> ... s.105J [cannot] be read as meaning that a severely handicapped child must be confined in the home as though in rigorous custody. For myself I find it hard to differentiate between going for a walk, to the shops or to school. On these facts the applicant's son] was living at home and essential aspects of his life took place at home.

(Reasons, para. 12)

Change in care provided

Since her son commenced high school however, the applicant had not provided constant care and attention for her son. Arrangements were made in order to allow him to attend high school without that constant care. (See *Schramm* (1982) 10 *SSR* 98, *Meloury* (1983) 13 *SSR* 125). The AAT found that from the date her son attended high school she was entitled to a handicapped child's allowance.

In this issue:

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Backdating of payment: 'special circumstances'

Section 105R applies s.102(1) and s.102(2) to claims for handicapped child's allowance. Those sub-sections provide that where a claim is lodged more than six months after the claimant becomes eligible, only in 'special circumstances' will backdating to the original date of eligibility be allowed.

The applicant's husband gave evidence that doctors at the Royal Children's Hospital discouraged him from applying for the allowance – this occurred in 1976. As these doctors provided information to the DSS upon which they based their decision as to the granting of the allowance, the applicant argued that they should be seen as an extension of the DSS.

The AAT did not accept this contention. Also it had to be considered that these statements (by the doctors) were made in 1976. A claim was not made until 1981. This indicated a lack of investigation of the possibility of a claim on the applicant's part. Lack of awareness did not constitute 'special circumstances' for the purposes of the Act.

Formal decision

The AAT set aside the decision under review and substituted a decision that the applicant is entitled to a severely handicapped child's allowance under s.105J from the first payment period after the claim until her son commenced high school and to a handicapped child's allowance under s.105JA thereafter.

MRS. M and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/68)

Decided: 16 November 1983 by J.D. Davies J., J.G. Billings and I.A. Wilkins.

The applicant sought review by the AAT of a DSS decision to refuse to grant her a handicapped child's allowance in respect of her son.

Mrs. M's. son was born with a cleft lip and palate and required numerous operations. He also appeared to suffer from a slight personality problem. The question was whether her son needed constant care and attention as required by s.105H(1) of the Act (set out in *Johnstone*, this issue) or only marginally less than that as required by s.105JA. (There was no question that Mrs. M. suffered severe financial hardship in relation to her son.)

Constant care and attention: school attendance irrelevant

The applicant's son was a full time student at a secondary school. Did this fail to meet the 'constant' care requirement of the Act?

> The fact that a child who lives at home and attends school has little significance in this respect . . .
>
> [A] child may be the subject of an allowance notwithstanding that the child 'is receiving full-time education at a school, college or university'. See s.105H(3). The fact that the child receives full-time education at a school, college or university does not preclude the child from receiving constant care and attention 'in a private home that is the residence of that person and of that child'. In this respect, we would not be prepared to follow the reasoning in some decisions of the Tribunal.

(Reasons, p. 9)

The AAT concluded, however, that Mrs. M's. son did not require constant care and attention. His disability required 'spasmodic' care and attention rather than constant.

Formal decision

The Tribunal affirmed the decision under review.

[**Comment**: *Mrs. M.* and *Johnstone* (this issue), reflect a more flexible approach to the basic sections dealing with qualifications for the allowance in regard to attendance at school and the need for 'constant' care and attention. They should be constrasted with the decisions in *Meloury* (1983) 13 *SSR* 126, *Gilby and Gilby* (1983) 14 *SSR* 151 and *Gardner* (1983) 15 *SSR* 152. **BS**]

Widow's pension: cohabitation

H.M. and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/403)

Decided: 18 August 1983 by R. Balmford, W.B. Tickle and R.G. Downes.

Mrs. M. had been in receipt of a widow's pension since 26 May 1981. On 11 March 1982 the DSS cancelled that pension on the basis that she was no longer a 'widow' within the meaning of s.59(1) of the *Social Security Act* as she was 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him'. The applicant applied to the AAT for review of that decision.

This question has been well canvassed by the AAT. The Tribunal referred to *Waterford* (1981) 1 *SSR* 1 and *Lambe* (1981) 1 *SSR* 5 and the Federal Court's decision in *Lambe* (1981) 4 *SSR* 43. In that latter case the Federal Court said that 'all facets of the inter-personal relationship of the two persons need to be taken into account'.

The evidence

Mrs. M. lived in the same house as Mr. V. with three of her daughters. It appeared from the evidence that this was an arrangement of convenience. She had separated from her husband and gone to live with V. who initially had been 'her boyfriend'. However, although she had a child to V. there was no evidence that any relationship akin to a marriage existed.

In looking at the criteria in *Lambe* the Tribunal concluded:

> Mrs. M. and Mr. V. are on friendly terms. But there was no suggestion in the evidence that there had ever been any deep emotional attachment between them, despite the use of the word 'boyfriend' and the occasional occurrence of sexual relations. The fact that one of those occurrences happened to produce a child cannot be regarded as necessarily evidence of a serious relationship between the parties; . . .
>
> Mr. V. pays all the expenses of his own baby, but leaves the daily care of that baby to its mother. So far as Mrs. M's daughters are concerned, her attitude to his disciplining of C showed none of the indicia of a family unit; it was indicative of a relationship of unconnected adults sharing a house in which were the children of one of them. Mr. V. pays no expenses for the girls except that he provides a roof over their heads and pays (now) for gas and electricity and other household items such as toilet paper . . .
>
> Mrs. M. uses her own name, they do not go out socially together . . . The finances of the two are clearly separate, even to the buying of separate food . . . Mr. V. is providing little more than a roof for Mrs. M. Although he is now paying the whole of the gas and electricity bills because of the cancellation of her pension, this is a case of necessity. Meals are prepared from separate food, paid for separately and often eaten separately.

This indicated an arrangement of convenience said the AAT and Mrs. M. was not therefore 'living with a man as his wife on a *bona fide* domestic basis' at any relevant time.

Formal decision

The AAT set aside the decision under review and directed the DSS to pay the applicant a widow's pension from the first pension payday after the date of cancellation.

JUKIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/458)

Decided: 18 August by C.E. Backhouse.

The applicant was paid a widow's pension from 11 December 1975. On 10 January 1983 the DSS decided to cancel this pension on the basis that she no longer came within the definition of 'widow' in s.59(1) of the Act.

Jukic claimed that her husband had left her in June 1975. He had returned two months later but it was contended by the DSS that the separation continued although under the same roof.

Lack of corroborative evidence

The applicant had continued to hold out to the world that she and her husband were a married couple. They had jointly acquired a second home in July 1980 and had travelled together to Yugoslavia with their children in 1978. In Feburary 1978 the applicant gave birth to a child which her husband had fathered.

The AAT found that the applicant had sufficient funds to purchase a home in her own right in 1980. Her husband did not move in with her in 1980 but about