Administrative Appeals Tribunal decisions

Handicapped child's allowance: school attendance

MARONEY and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. T82/44)

Decided: 21 February 1984 by R.K. Todd.

This was an application for review of a DSS refusal to grant handicapped child's allowance to Emily Maroney for her 13 year-old son Dale. Dale suffered from ear infection but attended school on a full time basis.

The legislation

Section 105J of the *Social Security Act* provides that a handicapped child's allowance 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 Section 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).

Earlier decisions: some confusion

The Tribunal focussed on Dale's attendance at school and on the conflict between earlier decisions of the Tribunal which had considered this issue.

For example, in *Schramm* (1982) 10 *SSR* 98 the Tribunal had said that the qualifications for handicapped child's allowance could not be met when the child attended school. This, the Tribunal had said, was because the *Social Security Act* demanded that the child receive constant care and attention (or only marginally less than constant care and attention) from its parent or guardian in their private home. *Schramm* had been followed by the Tribunal in *Meloury* (1983) 13 *SSR* 126, *Gilby* (1983) 15 *SSR* 151 and *Ferdinand* (1983) 17 *SSR* 166.

On the other hand, the Tribunal had decided in *Johnstone* (1983) 16 *SSR* 157 and *Mrs M* (1983) 16 *SSR* 158 that the child's attendance at school did not prevent payment of handicapped child's allowance, so long as the parent or guardian was providing the necessary care and attention.

The intention of the legislation

The Tribunal pointed out that, at the time when the *Social Security Act* was amended in 1974 to introduce the handicapped child's allowance, the Minister for Social Security had said that 'the child's attendance at a day school or training centre will not affect eligibility for payment of the allowance'.

However, the drafting of the original legislation suggested, the Tribunal said, that the allowance was only payable where the child remained at home.

On the other hand, amendments to the legislation in 1978 (when s.105H(3) was inserted) and in 1982 (when s.6B was inserted) strongly implied that the allowance was to be paid when the child was attending school.

The AAT's reading of the Act: school attendance not decisive

After making a strong call for review of the legislation, which the Tribunal said could not be fairly and properly administered, the Tribunal said that it would follow the views expressed in Mrs M, 'in the interests of conformity of administration'. Consequently, entitlement to the allowance could arise despite the fact that the child attended school if it could be shown that the parent or guardian was providing the necessary care and attention. The Tribunal accepted what had been said in the earlier decision of *Sposito* (1983) 17 *SSR* 166 that 'constant care and attention' provided by the parent or guardian was an essential ingredient in the qualifications for the handicapped child's allowance, at least under s.105J of the Act. The Tribunal concluded:

> Without wishing to appear to force the cases that may possibly arise into fixed categories, my comment is that his analysis has the likely effect that it will remain difficult for entitlement under section 105J to arise where the child is absent from home for a full school day (but cf. the situation in *re Johnstone* where the parent was present at the school). The way will however remain more readily open for entitlement to arise under section 105JA.

The Tribunal then reviewed the medical evidence and decided that, although Dale had a number of medical problems, they were treatable and manageable and they did not require constant care or marginally less than constant care and attention. He was therefore neither a severely handicapped child nor a handicapped child within the meaning of s.105H(1) of the *Social Security Act*.

Formal decision

The Tribunal affirmed the decision under review.

[Footnote: The DSS told the Tribunal that it was reviewing those earlier decisions (such as *Schramm*, *Meloury*, *Gilby* and *Ferdinand*) in which application for handicapped child's allowance had failed on the ground that the child was attending school. The Tribunal commended this review because it feared, 'that, in view of the construction of the Act now to be adopted inequity may have flowed from some previous decisions': Reasons, para. 37.]

BUSUTTIL and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N82/98)

Decided: 9 March 1984 by C.E. Backhouse.

This was an application for review of a DSS decision to cancel payment of handicapped child's allowance to Margaret Busuttil for her 13-year-old son.

It seems that Busuttil had been granted the allowance in 1977 on the basis that her son was a 'severely handicapped child', as defined in s.105H(1) of the *Social Security Act* 1947. (See *Maroney* in this issue of the *Reporter* for a summary of the relevant legislative provisions.) At the time of grant, the child was assessed as suffering from mental retardation and physical disabilities. However, when the grant was reviewed in 1980, the DSS was told by a Commonwealth medical officer that the child was not mentally retarded and that his physical disabilities were only minor.

The Tribunal was presented with a range of medical evidence on the child's mental and physical capacities but it did not proceed to draw any conclusions about the degree of the child's handicap. The Tribunal believed that it was not necessary to do this because

the evidence showed that the child had, since at least 1976, been regularly attending school.

The Tribunal referred to the decision in *Schramm* (1982) 10 *SSR* 98, where the AAT had pointed out that, to qualify for handicapped child's allowance (for a severely handicapped child), the parent or guardian must provide constant care and attention to the child in their private home: *Social Security Act*, s.105J. But, the AAT had said in *Schramm*,

> neither the demand that the requisite care and attention be in fact constant nor the demand that it be in fact provided in a private home are satisfied once it happens that the child goes away from the home to school ...

In this case, the Tribunal pointed out that, even if the child were a handicapped (rather than severely handicapped) child, very much the same requirements must be met – care and attention only marginally less than constant must be provided by the parent or guardian in the private home: *Social Security Act*, s.105JA.

The Tribunal said that it adopted the views expressed in *Schramm* and continued:

> I am satisfied that, because Paul attends school and is therefore absent from home for much of every school day, the applicant is not herself providing in the residence of Paul and herself constant care and attention in respect of Paul. The applicant is therefore not qualified to receive a Handicapped Child's Allowance in respect of Paul under the Provisions of Section 105J while Paul is attending school. It follows that the applicant would not qualify to receive a Handicapped Child's Allowance in respect of Paul under the Provisions of Section 105JA of the Act as she does not satisfy the requirements of Section 105JA (a), for the same reason that she does not satisfy the requirements of Section 105J. Financial hardship by itself is not a qualification.

(Reasons, para. 17)

Formal decision

The AAT affirmed the decision under review.

[**Comment**: Presumably, this Tribunal was not aware of the series of more recent decisions which have modified the restrictive rule laid down in *Schramm* that the allowance cannot be paid for a child who attends school.

This Tribunal did not refer to other AAT decisions such as *Johnstone* (1983) 16 *SSR* 157, *Mrs M* (1983) 16 *SSR* 158 and *Sposito* (1983) 17 *SSR* 166, where the Tribunal took quite a different view of the effect of a child attending school. Nor did this Tribunal refer to *Maroney*, noted in this issue of the *Reporter*, where R.K. Todd (who had decided *Schramm*) abandoned the restrictive view which he had adopted in *Schramm*.

This Tribunal's apparent ignorance of the more recent decisions is disturbing: it suggests that the AAT has not been able to set up an effective system for informing its own members of its decisions. **P.H.**]

Overpayment: discretion to recover

SAMES and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V82/479)

Decided: 10 February 1984 by R. Balmford.

This was an application for review of a DSS decision to recover overpayments of age pension amounting to $1052, of which $624 had been recovered.

The decision to recover was based on s.140(2) of the *Social Security Act* which gives the Director-General a discretion to recover, by deductions from a current pension, an amount of pension which has been overpaid, for whatever reason.

In this case, overpayments of age pensin were made to Dorothy Sames over a period of four years because of the DSS' failure to adjust the level of her pension in response to increases in her husband's income from part-time work.

The Tribunal accepted that the DSS had been informed of these increases and had either not recorded or lost the information. However, the AAT said, the cause of overpayment did not affect recovery under s.140(2). For the purposes of that section, the critical question was whether the recovery would cause financial hardship to the pensioner.

Mr Sames was 79 and Mrs Sames 72. Their only income came from age pensions. Mr Sames had been a diabetic for 37 years which required medication and a special diet. Deductions from Mrs Sames' pension 'had meant that she and her husband had had to do without things, particularly extra food'. Even when no deductions were being made there was a very small margin ($1 or $2 a week) between their income and their necessary expenditure.

The Tribunal noted that the amount involved in the case was public money which had been overpaid; and that the innocence of the applicant and her husband was not relevant to recovery. But, taking account of the age of the couple, Mr Sames' medical condition and 'the bearing which their age and that condition have on their extremely tight financial circumstances' the Tribunal considered that no further recovery should be made.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that no further action be taken for recovery of the overpayment.

GJOMAKAJ and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/152)

Decided: 10 February 1984 by R. Balmford.

Rexhep Gjomakaj had been granted family allowance for three of his children in November 1978. Payments of this allowance were paid directly into his bank account.

In March 1980, he received a letter from the DSS asking him to list all children in his care, custody and control. The letter continued that the DSS would 'then be able to commence paying you family allowance'. He completed the enclosed form with the assistance of a neighbour who inadvertently inserted her address on the form.

Subsequently a cheque arrived at the neighbour's address for Gjomakaj. He confirmed with the DSS that this cheque was intended for him. Over the next 18 months Gjomakaj received and banked regular cheques from the DSS for family allowance. Payments of the allowance were also being made into his bank account.

In September 1981 the DSS realised that Gjomakaj was in receipt of two payments of family allowance. On 2 November 1981 a decision was taken to recover $1132.20 in overpaid allowance by deductions from the allowance paid to Gjomakaj. (This was apparently a decision to recover the overpayment under s.140(2) of the Act.) In April 1982 a further decision was taken to recover the amount at a rate of $75.90 per month, effectively cancelling all family allowance payable to Gjomakaj.

Gjomakaj applied to an SSAT which upheld his appeal; but a delegate of the Director-General did not accept that recommendation although the amount to be recovered was reduced to $7.50 a fortnight.

The applicant then applied to the AAT. (By July 1983 $485.40 had been recovered thus leaving $646.80 outstanding at the date of the hearing.)

Discretion to recover: relevant factors

The AAT was critical of the manner in which the applicant was informed of the decision to recover the overpayment.

> Not only is there no expression of regret or apology for the departmental inefficiency which was the cause of the overpayment; there is no suggestion that the Director-General had any discretion as to whether or not to recover the overpayment, and no request for evidence of hardship or any other matter which might enable him to decide whether, or in what manner, that discretion might be exercised . . . Further, although the file record of the decision to recover the overpayment includes the words 'Don't forget to advise of appeal rights', there is no indication in the letter that the applicant has any right of appeal against the decision.