Administrative Appeals Tribunal decisions

Handicapped child's allowance

SPOSITO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/338)

Decided: 23 December by I. R. Thompson.

In August 1978, Mary Sposito had been granted a handicapped child's allowance for her 10-year-old daughter Leanne, who suffered mental retardation.

In March 1981, the DSS terminated the allowance and confirmed that termination, in June 1982, after review by an SSAT. Mrs Sposito then applied to the AAT for review of the DSS decision.

The AAT found that Leanne was 'mildly intellectually handicapped' and that she required constant adult supervision of her activities and assistance with dressing, washing and other day-to-day tasks. This was necessary, the AAT said, 'not for bare survival' but 'to minimize the child's disability and enable [her] to develop as much of [her] potential as [she] can and to lead as normal life as possible': Reasons, para. 14.

Leanne attended a special school for seven hours each school-day. The adult supervision and assistance were provided by the school during that period and by her mother, at home, for the remaining time.

'Severely handicapped child'?

Section 105J of the *Social Security Act* provides that a handicapped child's allowance is to be paid to a person who has the custody, care and control of a severely handicapped child and 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).

The AAT concluded that Leanne was a severely handicapped child: there was a 'continually recurring' need for care and attention to minimize her disability, to develop her potential and to allow her to lead a normal life.

However, the AAT said that Mrs Sposito was not qualified, under s.105J, to receive a handicapped child's allowance for Leanne. Attendance at school did not, by itself, prevent the child receiving constant care and attention in their private home: see *Johnstone* (1983) 16 *SSR* 157 and *Mrs M* (1983) 16 *SSR* 158. But, because Mrs Sposito provided no care or attention to her daughter while she was at school (i.e. for seven hours each school day), she was not providing the constant care and attention demanded by s.105J:

> 21. Where, because a child is at school, there is a gap of seven hours in the provision of care and attention by the person having custody, care and control of the child the only basis on which that person might possibly be regarded as qualified to receive a handicapped child's allowance under section 105J would be if that section were taken to require only that frequently recurring care and attention be provided by that person *while* the child is at home. In my view, that would require that the words of the section be given a meaning which they are not capable of bearing.

'Handicapped child'?

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 a handicapped child if the Director-General is satisfied that the person provided care and attention (only marginally less than the care and attention needed by a severely handicapped child) and that the person was suffering severe financial hardship.

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

The AAT said that Leanne, who was a severely handicapped child, should also be treated as a handicapped child: 'It is proper . . . in the administration of this remedial legislation to apply the principle that the greater compromises the lesser and to regard a severely handicapped child as a handicapped child for the purposes of s.105JA': Reasons, para. 25.

However, the AAT said, Mrs Sposito was not qualified, under s.105JA, to receive handicapped child's allowance for two reasons. First, the AAT doubted whether the care and attention provided by Mrs Sposito was only marginaly less than constant. [Although this was not spelt out, it seems that, again, Leanne's attendance at school, where the school provided care and attention, was critical here.]

'Severe financial hardship'?

Second, Mrs Sposito was not suffering 'severe financial hardship' through providing care and attention for her daughter. The AAT took account of guidelines used by the DSS in assessing this hardship. These guidelines treated a family unit as suffering hardship if its income fell below the 'average minimum weekly wage' (as recorded by the Australian Bureau of Statistics each month) plus $6 for each child.

While the AAT was not obliged to accept these guidelines, and while the DSS should not apply its guidelines inflexibly,

> the fixing of a generally applicable income limit serves the valuable purpose of ensuring even-handed administration of the Act . . . It seems reasonable, in view of the manner in which wages are fixed in Australia, to regard the average minimum weekly wage as an appropriate indicator, provided that the number of children in the family is also taken into account.

(Reasons, para. 31)

The Sposito family income was well above the standard fixed in the guidelines. Accordingly, the AAT said, Mrs Sposito could not be said to be suffering from severe financial hardship.

Formal decision

The AAT affirmed the decision under review.

ARTHUR and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S82/103)

Decided: 23 December by I. R. Thompson.

This was an application for review of a DSS refusal to grant handicapped child's allowance to Dianne Arthur for her eight-year-old daughter Marisa.

Marisa suffered from asthma which required complex medication: various drugs needed to be administered, through the day and night, by her mother, who also had to be constantly alert for signs of an asthmatic attack requiring hospital treatment.

Although Marisa attended school, her mother remained, as the AAT put it, 'on the alert, available to go immediately to deal with any asthmatic attack suffered by Marisa at school or wherever else she may be'.

'Severely handicapped child'

The AAT found that Marisa needed 'care and attention round the clock' and was a severely handicapped child as defined in s.105H(1) of the *Social Security Act*: see *Sposito* in this issue of the *Reporter*.

The applicant was qualified to receive a handicapped child's allowance for her daughter because she provided that constant care and attention in their private home, as required by s.105J of the Act—see *Sposito*. Marisa's attendance at school did not prevent this finding, because the applicant had to remain at home throughout the day, ready to rush to the school and deal with an emergency which might occur at any time.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that the applicant was qualified to receive a handicapped child's allowance.

FERDINAND and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/414)

Decided: 8 December 1983 by J. B. K. Williams.

Iona Ferdinand applied to the AAT for review of a DSS decision refusing to backdate the payment of a handicapped child's allowance granted to her in May 1980 for her adopted son.

Ferdinand had first applied to the DSS for a handicapped child's allowance in March 1977. The application had been rejected, according to DSS records, on medical grounds (the boy had lost his left leg); but Ferdinand had received the im-

pression that the rejection was based on her son's adoptive status.

The boy's condition deteriorated early in 1979 (a delayed reaction to a head injury suffered when he lost his leg). Ferdinand sought treatment but, she said, assumed that she was ineligible for handicapped child's allowance. It was not until late April 1980 that, on professional advice, she again claimed the allowance. When she lodged the claim it was granted on the basis that the boy was severely handicapped.

'Special circumstances' for back-dating?

The DSS based its refusal to back-date payment (to early 1979) on s.102(1) of the *Social Security Act* (which, because of s.105R, applies to handicapped child's allowance). That section provides that an allowance is payable from the date when a claim is lodged, but can be back-dated '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-General allows . . .'

Ferdinand argued that there were special circumstances in her case because she had 'unfortunately gained the impression [in 1977] that she was not eligible for any allowance', to quote her solicitor's submission to the AAT.

Eligibility and school attendance

The AAT did not inquire whether there were any special circumstances to explain Ferdinand's delay in lodging her second claim. It said that the first question to decide was when Ferdinand had become eligible to claim the allowance. And, in the AAT's opinion, it had not been shown that Ferdinand had become eligible to claim the allowance at any time.

This was because Ferdinand's son had attended primary school and special school from 1977 to the present date. Section 105J of the *Social Security Act* provided that the allowance was only payable for a severely handicapped child where the applicant was providing constant care and attention in their private home. According to the AAT decisions in *Schramm* (1982) 10 *SSR* 98, *Meloury* (1983) 13 *SSR* 126 and *Gilby* (1983) 14 *SSR* 151, a parent could not provide constant care and attention for a child 'when its custody and the required care and attention are handed over to others . . . at school'.

Accordingly, it had not 'been shown that the applicant "became eligible" to use the words of s.102(1)(a) to claim a handicapped child's allowance': Reasons, p.9.

The AAT observed that 'it may well be . . . that the applicant is not entitled to the allowance'; but, as this was not an issue before the Tribunal, this question was left open.

Formal decision

The AAT affirmed the decision under review.

[**Comment:** A review of the submission that there were special circumstances for the late claim would have raised some interesting questions: it is at least possible, for example, that the terms in which the DSS formally rejected the first application, in 1977, were cryptic (the Reasons for Decision support that possibility, at p.2) and contributed to Ferdinand's misunderstanding of her rights. Unfortunately, however, the AAT did not investigate this question.

On the question of eligibility for handicapped child's allowance, the AAT did not refer to the more recent decisions in *Johnstone* (1983) 16 *SSR* 157 and *Mrs M* (1983) 16 *SSR* 158 which were decided three to four weeks before this case, and which took a much more flexible approach to the question of school attendance and 'constant care and attention' at home. This decision, and its inflexible approach to that question, should also be contrasted with the more recent decisions in *Sposito* and *Arthur*, discussed in this issue of the *Reporter*. **P.H.**]

VASILELLIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/48)

Decided: 23 December 1983 by J.O. Ballard, R.A. Sinclair and J.T.B. Linn.

The AAT *affirmed* a DSS decision not to grant retrospectively a handicapped child's allowance to Katina Vasilellis for her daughter.

Apparently, Vasilellis claimed the allowance about eight years after she had become eligible for it, that is, when the Act was amended in 1974 to introduce the allowance. Section 102 of the *Social Security Act* gives the Director-General a discretion to backdate payment of a handicapped child's allowance if there were special circumstances for the late application.

Ignorance not 'special circumstances'

Mrs Vasilellis said she had not known of the availability of the allowance because of her isolated place of residence (Broken Hill), her lack of knowledge of English and the fact that her child had been born before the allowance was introduced.

The AAT pointed out that there was a long line of cases where it had been decided 'that lack of knowledge of the legislation was not a special circumstance enabling the grant of arrears of handicapped child's allowance'. These included *Wilson* (1981) 3 *SSR* 27, *Cassoudakis* (1983) 14 *SSR* 138 and *Johnstone* (1983) 16 *SSR* 157.

The Tribunal adopted a statement from a 1911 decision of the English Court of Appeal, *Roles* v *Pascall & Sons* [1911] 1 KB 982 at 985, to the effect that the court would be 'really repealing' any limitation period in an Act,

> if we were to say that a person could escape from that and bring his claim any time afterwards if he could prove that he had never heard of the existence of the Act, or did not know anything about its contents. In my opinion that cannot be right.

LANG and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/361)

Decided: 20 January 1984 by R. Balmford.

Annette Lang asked the AAT to review a DSS decision that she should be paid a handicapped child's allowance for her daughter at the rate appropriate for a handicapped, rather than a severely handicapped, child.

The Tribunal accepted that, on the medical evidence, Lang's daughter did not require 'continually recurring' (that is, constant) care and attention, although she did require more care and attention than the average child. Accordingly, she was not a severely handicapped child, but was a handicapped child.

The AAT noted that the distinctions between the two classes of handicapped child's allowance had been criticised in earlier AAT decisions – *Yousef* (1981) 5 *SSR* 55; *Schramm* (1982) 10 *SSR* 98; *Meloury* (1983) 13 *SSR* 125; *McKerrow* (1983) 13 *SSR* 126.

The Tribunal added its own criticisms, in particular pointing out that a parent needed to show 'financial hardship' to obtain the allowance for a handicapped child; but no such hardship had to be shown if the child was severely handicapped.

Formal decision

The AAT affirmed the decision under review.