Administrative Appeals Tribunal decisions

Handicapped child's allowance: constant care . . .

SHINGLES and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/102)

Decided: 10 September 1984 by J. Dwyer.

Shirley Shingles had applied to the DSS for a handicapped child's allowance for her child S in December 1981. Following the rejection of that application, she applied to the AAT for review of the DSS decision.

Evidence given to the Tribunal established that S had significant handicaps in a number of areas: hydrocephalus; epilepsy; behavioural and co-ordination problems; hearing loss; and deformities to his thumb, shoulder and left leg. The AAT was satisfied that, because of his disabilities, S needed constant care and attention and was likely to need that care and attention permanently or for an extended period. Accordingly he was a 'severely handicapped child' as defined in s.105H(1) of the *Social Security Act*.

School attendance—a bar to eligibility?

The central question in this review was whether Shingles could qualify for a handicapped child's allowance under s.105J of the Act: that is, was she providing constant care and attention to S in their 'private home'? It seems that there was no dispute that, during the periods that S was at home, Shingles provided constant care and attention; but the real issue was whether the child's attendance at school for some hours every day meant that Shingles was not providing constant care and attention in their 'private home'.

The AAT pointed out that there was some conflict and confusion in the earlier Tribunal decisions on this point. It referred to some 12 earlier decisions which had adopted opposing points of view on this point.

The Tribunal noted that in one of the more recent decisions, *Maroney* (1984) 18 *SSR* 182, the Tribunal had referred to the second reading speech of the then Minister for Social Security (W. Hayden), when introducing the original legislation for handicapped child's allowance. The Minister had said that 'the child's attendance at a day school or training centre will not affect eligibility for payment of the allowance'. But, in *Maroney*, the Tribunal had said the terms of that speech 'cannot affect the meaning of the legislation'. While that might have been so in February 1984 when *Maroney* was decided, the AAT said, the situation was now different. In the light of the enactment (in June 1984) of s.15AB of the *Acts Interpretation Act*, it was preferable, the AAT said, to have a fresh look at the meaning of ss.105J and 105JA.

Section 15AB of the *Acts Interpretation Act* permits reference to extrinsic material in order to assist in the interpretation of legislation if the legislation is ambiguous or obscure or if the ordinary meaning of the legislation is manifestly absurd or unreasonable. The AAT said that the ambiguity of ss.105J and 105JA was obvious from the conflicting decisions of the Tribunal. The AAT also said that strict literal reading of those provisions would lead to manifest absurdity and unreasonableness. That is, the requirement that constant care and attention (s.105J) or marginally less than constant care and attention (s.105JA) be required in a 'private home' would require not only:

> that the child be confined in the home, but also that the mother or applicant be confined. It may even be that attendance by applicant and child at medical appointments or hospital would remove eligibility for the allowance. When one considers that meaning, taking into account the purpose or object underlying the Act which must surely be to promote the welfare of handicapped children and their families, it is clear that such a meaning is manifestly absurd or unreasonable.
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> 32. The welfare of handicapped children is surely best promoted not by confining them either to institutions or their homes but by allowing them to participate as fully as possible in the life of the community including wherever possible attendance at school . . . It is indeed absurd if those parents who succeed in supporting their handicapped children so that they can attend schools and benefit from normalisation in education should thereby lose any entitlement to handicapped child allowance.

Because of the ambiguity in the provisions, and because a literal meaning of the sections was both absurd and unreasonable, the AAT was entitled to take account of the Minister's second reading speech: *Acts Interpretation Act*, s.15AB(2)(f). The second reading speech showed quite clearly that a child's attendance at school should not affect eligibility for the allowance. The proper interpretation of the requirement that constant care and attention be provided in their 'private home' was the interpretation suggested in *Mrs M* (1981) 16 *SSR* 158—namely, to distinguish 'care and attention at home from care and attention given in an institution' and in *Garrety* (1984) 20 *SSR* 213—namely, 'that in the context of this section, *in* includes *from*'.

The AAT's assessment

Returning to the facts of this case, the Tribunal said that S needed constant care and attention both at home and at school:

> He lives with his family including the applicant in a private home. One aspect of the care and attention provided by his mother is that she facilitates Shane's attendance at school . . . I regard facilitating Shane's attendance at school as just as important for him as facilitating his attendance at medical appointments. It is because of Mrs Shingles' care and attention that Shane can obtain the educational and social benefits of joining in a normal school environment.
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> In my view any interpretation of the legislation which would have the effect of rendering Mrs Shingles ineligible for handicapped child's allowance because she enables Shane to attend normal school is manifestly absurd and unreasonable and the meaning intended when the legislation was introduced as explained by Mr Hayden is to be preferred.

(Reasons, para. 35)

The Tribunal concluded by noting that the approach adopted in the decision of *Seager* (noted in this issue of the *Reporter*) was 'consistent with the explanation of Mr Hayden in his second reading speech when introducing the relevant legislation' and consistent with the conclusions reached in this case.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Shingles be granted a handicapped child allowance from the date of her claim, 17 December 1981.

SEAGER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/31)

Decided: 3 September 1984 by J. D. Davies J, I. A. Wilkins and J. G. Billings.

Janet Seager had lodged a claim for handicapped child's allowance for her two children, B and K, in June 1982. Following the DSS rejection of that claim, she sought review by the AAT.

The central issue before the Tribunal was whether Seager qualified for handicapped child's allowance under s.105J of the *Social Security Act*, on the basis that her children were 'severely handicapped' or whether the fact that her children attended school prevented her from qualifying for the allowance.

The legislation

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 gives to that child constant care and attention 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.

'Constant' means frequently recurring

Each of the two children suffered from asthma, epilepsy and behavioural problems. Turning to the questions whether the children needed constant care and attention and whether Seager was providing that constant care and attention in their 'private home', the AAT referred to earlier decisions in *Yousef* (1981) 5 *SSR* 55 and *Mrs M* (1983) 16 *SSR* 158. The AAT adopted the views expressed in those decisions, that 'constant care and attention' indicated something more than spasmodic care but did not include frequently recurring care and attention.

The AAT pointed out that handicapped child's allowance was 'no more than a moderately small income supplement'. It was not an allowance appropriate for a person providing full time care to a handicapped child: a special benefit under s.124 of the Act was appropriate payment for that situation.

School attendance not a serious obstacle

However, the AAT recognised, a child's attendance at school had created some difficulties in previous decisions and there was a considerable conflict of opinion amongst earlier decisions on this point. For example, in *Mrs M* (above) the AAT had said that a child's full time attendance at school did not prevent the child from receiving constant care and attention in a private home. On the other hand, 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.

The AAT said that, despite the conflict between those decisions and many other decisions of the Tribunal, it would adopt the views expressed in *Mrs M* (above). The AAT said that it was important to adopt the correct time frame when assessing the constancy of the care and attention provided to the child:

> The legislation requires 'constant care and attention' simpliciter not 'constant care and attention every day'. The rate of HCA is, by s.105L, calculated on a monthly basis and the disability must be for an 'extended period or permanent'. Thus, we feel that, rather than taking a restricted view of 'care and attention' on an hourly time scale, the circumstances should be viewed over a much longer period of time. If a 24-hour period is examined, there may be no dispute but that a 7-hour gap provides an interruption that renders attention non-constant. If, however, activities are examined over months, continuity is provided between days and not between hours.

(Reasons, p.20)

The AAT also pointed out that the term 'private home' was used in the Act in contra-distinction to 'institution':

> If a child is away from home during school hours, the issue is not whether the 'care and attention' has ceased to be provided in a private home, but rather whether the constancy of the 'care and attention' has been broken. It is a question of degree whether the break is serious enough to render the 'care and attention' non-constant. A break while a child is at school may not of itself be sufficient to interrupt the constancy of the care and attention, though it is a factor to be taken into account.

(Reasons, p.21)

The Tribunal also said that the relatively small value of handicapped child's allowance made it 'inconceivable that Parliament intends that the small income supplement . . . should be lost simply because the handicapped child attended a school': Reasons, p.22. Moreover, such a conclusion would be inconsistent with s.105H(3) which declares that the allowance is payable for a child between the ages of 16 and 25 who 'is receiving full-time education at a school, college or university'.

The Tribunal's assessment

Turning to the facts of this case, the AAT decided that Seager provided constant care and attention to each of her children in their private home, although B attended school for two hours a day, four days a week and K attended school for six hours a day, five days a week.

The AAT noted that Seager attended to her children's conditions and was watchful for any outbreak of asthma or convulsions while they were at home; and that, while her children were at school, she was ready to provide assistance:

> It is not essential that a person remain watchful at all times while the child is at school to satisfy the provisions of the Act but such watchfulness contributes to the care and attention provided.

(Reasons, p.25)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Seager be granted handicapped child's allowance for both her children.

MRS W and DIRECTOR-GENERAL OF SOCIAL SECURITY

Decided: 17 August 1984 by R. Smart, B. J. Howell and A. P. Renouf.

The AAT was asked to review a DSS decision to cancel a handicapped child's allowance which had been granted to the applicant in July 1979 for her child.

The child had been born in 1968 and suffered from asthma and diabetes mellitus. The AAT was told that the applicant supervised daily blood tests and insulin injections and prepared three special full meals and three half meals each day for the child. She also regularly attended a hospital and a pharmacist to obtain supplies and accompanied her child for medical checks at least once every month.

'Constant care and attention'

The AAT said that the child did not need constant care and attention but did need care and attention which was only marginally less than constant. He was therefore a 'handicapped child' within s.105H(1) of the *Social Security Act*. The constant routine, the AAT said, of preparing the child's food, when coupled with her other family duties, left the applicant no free time. When that routine was added to the emotional support which the applicant provided the child and the regular trips to the doctor, pharmacist and hospital, it was clear that the applicant was qualified under s.105JA of the *Social Security Act*, because she provided care and attention, only marginally less than constant, in their 'private home'—that is, the care and attention provided was 'home based as distinct from being provided in an institution'. The visits to the doctor, pharmacist and hospital were 'an integral part of the home care', the AAT said.

The Tribunal made the point that the applicant was responsible for caring for two children, a husband who had suffered severe injuries (he was an invalid pensioner) and their family home:

> These tasks are regular, ever present and time-consuming. In the ordinary order of events the mother's lot is often quite a busy and demanding one. It is into this situation that constant care and attention or only marginally less than constant care and attention has to be fitted. On any view she has a limited amount of time available. In giving constant care and attention only marginally less she is not expected to neglect her husband, her other children or her other duties.

(Reasons, p.11)

The AAT then suggested a scale or standard by which 'constant care and attention' could be assessed. It said that if a mother spent 1½ to 2 hours a day, in addition to her normal household duties the AAT would regard this as constant care and attention; and 1¼ to 1½ hours a day would be marginally less than constant care and attention. The AAT pointed out that where the time spent was 'fragmented throughout the day or the mother has to be available on call this would have to be considered. Effectively, the necessary care and attention may tie up most of the day'.

Consistent with that approach, the AAT said that the constant care and attention could be spread throughout the day or might be concentrated in, for example, the early morning or the evening:

> There may be periods during the day while the child is at school, college or university when the mother is involved in necessary preparatory work for the care and attention to be administered later that day. At times there may be an element of the mother being available and on call throughout the day to collect, care and attend to the child if he should become ill. As Milton wrote 'They also serve who only stand and wait'.

(Reasons, p.14)

Taking account of all those matters,the AAT said, there was no difficulty about the payment of a handicapped child's allowance when a child was absent for seven to nine hours at school. Section 105H(3) envisaged that a child attending school could receive constant care and attention.

'Severe financial hardship'

Turning to the facts of this case, the AAT repeated its assessment that the applicant provided to her child only marginally less than constant care and attention. The Tribunal then decided that the second requirement of eligibility stated in s.105JA of the Act, namely that the provision of that care and attention involved 'severe financial hardship', was clearly satisfied in this case. The proper care of the child involved a special diet, extensive travel and the maintenance of a telephone. The family's income came from an invalid pension which was inadequate to meet the needs of the family. The pension was paid fortnightly and, although the pension provided enough food for the family for the first week of each fortnight, during the second week the parents often went without food for the sake of their child.

The Tribunal then considered the rate at which the allowance should be paid to the applicant. Section 105L gives the Director-General a discretion to fix the rate of an allowance payable under s.105JA (but not exceeding $85 a month). The DSS suggested a figure of $12 to $15 a week, which would cover the extra cost of caring for the child.

However, the AAT said, that figure 'did not take into account the loss Mrs W has suffered by reason of her not being able to engage in any remunerative employment'. The appropriate allowance, the AAT said, was the maximum rate of $85 a month.

Formal decision

The AAT set aside the decision under review and directed that Mrs W's handicapped child's allowance be restored, at the maximum rate, from the date of its cancellation.

ASLEY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/151)

Decided: 20 June 1984 by R. Balmford.

The AAT *set aside* a DSS decision rejecting Rhonda Asley's claim for a handicapped child's allowance for her 9-year-old daughter who suffered from diabetes mellitus.

The Tribunal decided that the daughter was a 'handicapped child' as defined in s.105H(1) of the *Social Security Act*: that is, the child had a physical disability, and needed care and attention only marginally less than constant care and attention. Asley was required to plan and supervise her daughter's meals, to give her daughter regular injections of insulin and to carry out regular blood tests. Although Asley's daughter attended a normal primary school, Asley always accompanied her on school excursions and to sports days in order to monitor her blood sugar level. The AAT pointed out that the margin between constant care and attention and the care and attention needed by a 'handicapped child' was a significant margin. On that basis, the care and attention needed by Asley's daughter was sufficient. On this point, the AAT adopted the views expressed by another Tribunal in *Colussi* (1984) 19 *SSR* 194.

The AAT adopted the view expressed in *Mrs M* (1983) 16 *SSR* 158 and *Maroney* (1984) 18 *SSR* 182, that attendance of the child at school did not prevent Asley from meeting the requirements of s.105JA of the *Social Security Act* – the requirement that the parent provide, in a private home, care and attention (marginally less than constant) to the child.

The AAT also accepted that Asley was suffering 'severe financial hardship' because of the care and attention given to her daughter, thereby satisfying the second requirement for qualifying for a handicapped child's allowance under s.105JA of the Act. The AAT found this financial hardship because Asley needed to buy expensive food and syringes and because she had been obliged to give up her part-time job in order to care for her daughter.

SACHS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/460)

Decided: 4 June 1984 by W.A.G. Enright.

The AAT *affirmed* a DSS decision to cancel a handicapped child's allowance paid to Edda Sachs for her 8-year-old son who had his right leg amputated below the knee in April 1978.

The Tribunal noted that the child had a physical disability which was permanent and which needed care and attention. But the Tribunal decided that the care and attention needed by the child was not 'constant' nor 'marginally less than' constant. In assessing the extent of that need, the AAT said that it should adopt an objective standard:

> [T]here surely can hve been no legislative intention that the subjective view of a worried mother caring and attending, but compassionately, needlessly or even mistakenly, could qualify for this particular allowance. The general thrust of the Act is to require objective testing of personal needs and there is no reason to think that this allowance is any exception.

(Reasons, para. 9)

SCORER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/96)

Decided: 21 June 1984 by G.D. Clarkson, I.A. Wilkins and J.G. Billings.

The AAT *set aside* a DSS decision to cancel a handicapped child's allowance being paid to L.D. Scorer for her 7-year-old daughter, who was suffering from diabetes millitus.

The AAT noted that the cancellation of the allowance was based on the opinion of a medical specialist who had assumed that the 'constant care and attention' (needed to qualify for the allowance) referred to care and attention 'all the time'. The AAT pointed out that earlier decisions had established that care and attention would be 'constant' if it was continually recurring: see *Yousef* (1981) 5 *SSR* 55.

The Tribunal also said that the child's attendance at school would *not* prevent eligibility for the allowance where it was necessary for the parent to be available while the child was at school.

The Tribunal discussed the type of care and attention required by a child with diabetes mellitus: the purpose of that care was to control the condition through medication and diet. The AAT said that much of the care provided for the child by Scorer was 'preventative and repetitive'. Nevertheless it was 'care and attention in respect of a physical disability namely diabetes mellitus.'

ELIAS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/232)

Decided: 26 June 1984 by C.E. Backhouse.

The AAT *set aside* a DSS decision to cancel a handicapped child's allowance granted to Nagat Elias for her 6-year-old son.

The Tribunal decided that the child, whose left foot had been amputated, was a 'severely handicapped child – he needed constant care and attention because of his disabilty. His mother provided that constant care and attention in a private home and so was qualified to receive the allowance under s.105J of the *Social Security Act*.

School attendance

The AAT noted that the child attended a primary school. In *Busuttil* (1984) 18 *SSR* 182, the same Tribunal member had decided that a child's school attendance prevented the parent qualifying for handicapped child's allowance, because constant care and attention could not be provided in a private home.

However, the AAT said, there was a series of decisions which had taken a different view and had indicated that school attendance did not prevent the granting of the allowance. These included *Mrs M* (1983) 16 *SSR* 158, *Maroney* (1984) 18 *SSR* 182, *Sposito* (1984) 17 *SSR* 166 and *Sachs* (in this issue of the *Reporter*).

S and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/397)

Decided: 3 August 1984 by R. Smart, J. H. McClintock and H. Pavlin.

The AAT *set aside* the DSS decision rejecting a claim for handicapped child's allowance lodged by S for her 9-year-old child.

The AAT was told that the child suffered from asthma (a reversible lung disease) and from collapsed airways (a rare and irreversible lung disease). The AAT said that the care and attention which the child needed and received was on the border line between constant care and attention and marginally less than constant care and attention. It was, therefore, unclear whether S would qualify for handicapped child's allowance under s.105J or under s.105JA of the *Social Security Act*.

The Tribunal said that, even if the child required only marginally less than constant care and attention, the mother would still qualify for a handicapped child's allowance under s.105JA of the Act because she was suffering severe financial hardship because of the care and attention which she provided to the child. The AAT noted that there were considerable costs associated with caring for the child (treatment, transport, swimming therapy and a telephone for emergencies); and the family's income came from an invalid pension paid to the child's father and a wife's pension paid to the applicant: 'The additional costs involved in [the child's] care and attention in such a financially poor family must impose severe financial hardship on the mother': Reasons, p.7.