Handicapped child's allowance: financial hardship

COLUSSI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/4)

Decided: 17 August 1984 by R. C. Jennings.

This was an application brought to the AAT by the DSS following the decision in *Colussi* (1984) 19 *SSR* 194. In that case, the AAT had said that Gillian Colussi was eligible for handicapped child's allowance for her daughter under s.105JA of the *Social Security Act*—that is, on the basis that her daughter was a handicapped child and that Colussi was suffering 'severe financial hardship' because of the care provided by her to her daughter.

In reaching the decision that Colussi was suffering severe financial hardship, the AAT had noted that Colussi had been obliged to give up her employment in order to care for her daughter and had declined to take account of the general financial situation of Colussi's husband.

Following that decision, the DSS considered what rate of allowance should be paid to Colussi. Section 105L gives the Director-General a discretion to fix the rate of an allowance granted under s.105JA; and the DSS indicated that, if it were to follow the normal departmental guidelines, the rate of allowance paid to Colussi would be nil.

The DSS guidelines

A copy of the departmental guidelines produced to the AAT showed that, in fixing the rate of allowance for a handicapped child (that is, a child covered by s.105JA), the DSS applied an income test which took 'into account the family's income, special costs associated with the child's disability and the average minimum weekly wage'. This income test worked on the assumption that a person could not show 'severe financial hardship' unless that person's 'adjusted family income' fell below an income standard calculated by adding together—

- the current average minimum weekly wage, as measured by the Australian Bureau of Statistics;
- the maximum rate of handicapped child's allowance; and
- $6 for each dependant child in the family.

Guidelines rejected as illegal

The AAT noted that these DSS guidelines had been approved in *Sposito* (1983) 17 *SSR* 166 and *Yatmaz* (1984) 19 *SSR* 195. However, the Tribunal said the legislation dealing with handicapped child's allowance (Part VIB of the *Social Security Act*) did not demonstrate 'a legislative intention to apply a family means test to persons qualifying for a handicapped child's allowance by reason of their personal financial hardship': Reasons, p.11. Consequently, those parts of the DSS guidelines which made eligibility for the allowance dependant upon a family income test could 'no longer stand': Reasons, para. 13.

While the calculation of the rate of allowance to be paid was a separate question, the Tribunal indicated that the discretion given to the Director-General under s.105L should not be used so as to reimpose a family income test. That discretion could be used where, for example, the cost of caring for the child was less than the maximum allowance (currently $85 a month) or where the parent or guardian was also receiving money from another source such as an award of damages.

Looking at family income

It did not follow, the AAT said, that the income of Colussi's husband was irrelevant in determining the amount she should be paid by way of handicapped child's allowance:

> [H]is income may be relevant in determining the extent, if any, to which he was able to compensate her for her loss of income.

(Reasons, p.14)

In the present case, while Colussi's husband was receiving more than the average minimum wage, he had substantial commitments (including a wife and four children) and he was, in the opinion of the AAT, not able to compensate his wife for her loss of personal income.

Formal decision

The AAT remitted the matter to the Director-General with a recommendation that Colussi be paid handicapped child's allowance at the maximum rate applicable.

Handicapped child's allowance: late claim

MOGRIDGE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W.83/82)

Decided: 17 August 1984 by G. D. Clarkson.

The AAT *affirmed* a DSS decision not to back date, for a period of some 4½ years, payment of a handicapped child's allowance granted to the applicant in respect of her foster child.

The applicant had claimed that there were 'special circumstances' which justified back payment of the allowance under s.102(1)(a) of the *Social Security Act*. According to the applicant, the special circumstances were that, when she had made arrangements to foster the child she had been told by a welfare agency that she was eligible for a foster allowance, but that neither the agency nor the DSS had told her that she was eligible for the handicapped child's allowance.

The AAT pointed out that the applicant had been granted an allowance on the basis that the child was substantially handicapped (s.105JA) rather than severely handicapped (s.105J). The legislation providing for such an allowance dated from November 1977, more than four years after the applicant had begun to foster the child. Moreover, the Tribunal said, it had for some time appeared doubtful whether the applicant would qualify for any allowance for the child, even on the basis that the child was substantially handicapped.

Given the relatively late extension of eligibility for the allowance and the substantial doubts about the child's meeting the definition of a 'handicapped child', the AAT said that it was 'expecting too much of the officers concerned to say that the officers of the welfare agencies with whom the applicant had had contact should have encouraged the applicant to apply for the allowance'.

GOULD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/56)

Decided: 17 August 1984 by G. D. Clarkson.

Jennifer Gould gave birth to a child, C, in September 1976. In August 1977, the child was seriously burnt when he fell into a hot bath. Over the next five years, the child received hospital treatment (as an inpatient and an outpatient) on 30 occasions. Over much of that period, Gould provided considerable care and attention to the child in their home.

In October 1982, Gould applied for a handicapped child's allowance and, although the DSS conceded that C had been severely handicapped between August 1977 and August 1979, this claim was rejected because it had not been lodged within the time limit set by s.102(1) of the *Social Security Act*. Gould applied to the AAT for a review of that decision.

Late claims and 'special circumstances'

Section 102(1) of the *Social Security Act* provides that a handicapped child's allowance can be paid from the date of eligibility if a claim is lodged within six months of that date or at the Director-General's discretion, 'in special circumstances' if the claim is lodged within a longer period.

Evidence was given to the Tribunal that, following C's accident, Gould was under considerable emotional stress (because she felt that she was personally responsible for the child's injuries) and was socially isolated (because she was living in a small country town to which she had recently moved).

Gould told the AAT that she had not learned of the existence of the allowance until after her child had made a substantial recovery from his injuries and that, even then, she had thought that the allowance was only paid for retarded and crippled children. It was, she said, not until late 1982 that she realised that C's former condition would have entitled her to a handicapped child's allowance. That evidence was substantially corroborated by a Children's Hospital social worker who said that very few parents whose children had been burned enquired about eligibility for handicap-