Administrative Appeals Tribunal decisions

Handicapped child's allowance: eligibility

WILLIAMS and SECRETARY TO DSS (No. W84/159)
Decided: 4 October 1985 by H.E.Hallowes.
Valerie Williams appealed against a decision by the DSS that her nephew, R, of whom she had custody, care and control, was a handicapped child rather than a severely handicapped child (see s.105H(1) of the *Social Security Act*).

R, who was 10 years old, suffered from encopresis and enuresis. He soiled his clothes 3-4 times a day and wet his bed at nights. This meant Williams was required to wash every day and clothes and mattresses needed replacing more frequently than normal. R was also subject to temper tantrums and required constant reminding to go to the lavatory and rinse his clothes. He had recently commenced consultation with a psychologist which required about 2 hours a week from Williams. Apart from these difficulties R could undertake most tasks required of 10-year-olds. Williams had 3 other children.

The AAT concluded that R was not a 'severely handicapped child' but a 'handicapped child'. Although Williams was 'involved in frequently recurring care and attention for R which is unremitting in that it is a problem she faces day after day', R was able to do all the tasks required of most 10-year-olds: he could dress and feed himself, take himself to school and play with neighbouring children.

The AAT went on to decide that Williams was subject to 'severe financial hardship' because of the care and attention required by R and she was thus eligible to receive the income-tested handicapped child's allowance.

Formal decision
The Tribunal affirmed the decision under review.

WEBB and SECRETARY TO DSS (No.N84/408)
Decided: 4 October 1985 by A.P.Renouf.
Shirley Webb appealed against a decision that she was not eligible for a handicapped child's allowance for her son, Ray. The DSS conceded that the child had a disability but decided that the child did not need or receive 'care and attention only marginally less than the child would need if he were a severely handicapped child' (s.105JA(a)of the *Social Security Act*) and that the degree of care and attention provided by Webb did not subject her to 'severe financial hardship' (s.105JA(b)).

The tribunal was confronted with conflicting evidence from the applicant, psychologists, social workers and others. They concluded that Webb's son was mildly mentally retarded and presented some behavioural problems. They noted that the boy attended school and, though this was not decisive, when he was at home he did not need 'care' so much as 'attention' -

> 'except when he is unco-operative or forgetful or aggressive. Such occasions are not numerous enough, I judge, for the 'care' than [sic] needed to be termed "constant".'

(Reasons, para.16)

The Tribunal also concluded that Webb suffered no financial hardship because of this care and attention: she did not incur any additional expenditure because of Ray's disability and she was unable to work not because of his disability but because of her own illness; and, as the applicant stated, work would not be available in the country town where she lived.

Formal decision
The Tribunal affirmed the decision under review.

NANNUP and SECRETARY TO DSS (Nos W85/17 and W84/162)
Decided: 10 September 1985 by J.R.Dwyer, I.Wilkins and J.G.Billings.
Patricia Nannup had 2 children, M born in 1971 and D born in 1979.

In April 1983 she claimed handicapped child's allowance for each child. The DSS accepted that M was a 'handicapped child' and that Nannup was suffering severe financial hardship and granted her an allowance for M at the maximum rate. However, the DSS decided that D was not a handicapped child; and it also decided that payment for the allowance should not be backdated. In June 1984, the DSS decided that Nannup was no longer suffering severe financial hardship and it cancelled payment of her handicapped child's allowance for M.

Nannup asked the AAT to review the DSS decision that D was not a 'handicapped child', the decision that Nannup had not been in severe financial hardship since June 1984, and the decision that handicapped child's allowance was only payable for M (or D if he was eligible) from the date of the lodging of her claim in April 1983.

The legislation
Section 105JA of the *Social Security Act* provides that the Secretary may grant a handicapped child's allowance to a person who has the custody, care and control of a 'handicapped child' if the Secretary is satisfied that the person provides care and attention (only marginally less than the care and attention needed by severely handicapped child) and that the person is suffering severe financial hardship. According to s 105H(1) a 'handicapped child' is a child with a physical or mental disability requiring care and attention, only marginally less than the care and attention needed by a severely handicapped child. (A 'severely handicapped child' is defined as a child with a physical and mental disability needing 'constant care and attention'.)

Section 105L provides that the rate of handicapped child's allowance to be paid for a 'handicapped child' is 'such rate as the Secretary in his discretion, from time to time, determines, but not exceeding' $85 per month.

Section 102(1) (read with s.105R) provides that a handicapped child's allowance is payable from the date of eligibility where the claim is lodged within 6 months of that date or 'in special circumstances, within such longer period as the Secretary allows'.

'Handicapped child'
Before the AAT, the DSS conceded that M and D were handicapped children - that is that they suffered from physical disabilities as a result of which they required care and attention only marginally less than constant. In each case, the physical disability consisted of ear infections, loss of hearing and poor control over bladder and bowel movements. Nannup did not claim that the children were severely handicapped.

'Severe financial hardship'
Accordingly, the major question before the AAT was whether Nannup could be said to be suffering from 'severe financial hardship' by reason of the care which she provided to the children. The AAT accepted that the cost of caring for M amounted to $27 a week and the cost of caring for D amounted to $7 a week. But the DSS claimed that the Nannup family income precluded Nannup from being regarded as suffering 'severe financial hardship'.

For much of the period in question, Nannup's husband was employed and receiving a weekly wage which, according to DSS guidelines, removed the family from the category of 'severe financial hardship'. These guidelines (paras 6.600 - 6.643 of the Family Allowances Manual) declared that 'an income test is applied as a guide in determining if the family is suffering severe financial hardship' (para.6.601). According to para.6.640, the family's gross weekly income, less expenses associated with the child's disability (the 'adjusted family income') was to be measured against the average minimum weekly award wage for adult males plus the maximum weekly rate of handicapped child's allowance plus $6 for each dependent child in the family (the 'allowable income').

These guidelines had been applied by the AAT in *Sposito* (1983) 17 *SSR* 166. In that matter, the Tribunal had accepted the guidelines as reasonable and as serving 'the valuable purpose of ensuring even-handed administration of the Act.' On the other hand, another AAT had rejected these guidelines because they took account of family income rather than the income of the parent who was caring for the handicapped child: *Colussi (No 2)* (1984) 21 *SSR* 233.

In the present case, the AAT said that, provided that the income test was indeed applied 'as a guide', it was not inconsisted with 'the principles expressed in the reasons for decision in *Colussi* and *Sposito*': Reasons, para.22. The AAT said that the detailed income test in para.6.640 might

create difficulty unless it was regarded as simply indicating one way in which 'severe financial hardship' might be demonstrated. The AAT noted that paras 6.642 and 6.643 showed that the guidelines were not to be applied inflexibly.

The AAT said that, in the present case,the detailed income test set out in para.6.640 was not the appropriate way of determining whether the cost of caring for M and D caused 'severe financial hardship' to Nannup. This was firstly because the detailed income test made insufficient allowance for the cost of raising children: it allowed only an additional $6 a week for each child when the cost of maintaining a child ranged from $20 to $40 a week, depending on the child's age.

(These costs were supported by a paper from the Institute of Family Studies, 'Cost of Children in Australia', a paper from the Institute of Applied Economics and Social Research, 'Poverty Lines Australia February 1985' and by evidence from Nannup that she had been paid $30 to $40 a week for caring for foster children.)

Given that there were 6 children in the Nannup family, the inadequate extra allowance for each child operated more harshly in their case than it would for smaller families.

The second reason for disregarding the detailed income test in para.6.640 was the evidence given by Mr and Mrs Nannup on their family budget: it was clear that, even when Mr Nannup was working, the family could not meet their financial commitments, even though their family income might be higher than that allowed for in the guidelines.

Accordingly, the AAT found that Nannup was suffering 'severe financial hardship' by reason of the care and attention provided to M and D and that she was therefore entitled to a handicapped child's allowance for each of them.

Rate of allowance

The DSS conceded that the allowance paid for M should be at the maximum rate of $85 a month. The AAT decided that, because the extra cost of caring for D was $7 a week, the allowance paid for him should be at the rate of $30.30 a month. If Nannup were to incur extra costs in the future by reason of additional care and attention for D, it would be appropriate (the AAT said) for her to apply for an increase in the allowance.

Backdating

Nannup's claim for backdating of the allowance related only to M. She maintained that M's disability and his need for care and attention had dated from 1974. The AAT accepted that this was so but pointed out that allowances for handicapped (as opposed to severely handicapped) children had only been introduced from November 1977. Accordingly, Nannup could only have been eligible for the allowance from November 1977 and then only if she had suffered 'severe financial hardship' by reason of the care and attention provided for M since that time.

Putting on one side the question whether that 'severe financial hardship' could be established for the period between 1977 and 1983, the AAT turned to the question whether there were 'special circumstances' to justify backdating payment of the allowance to 1977.

Nannup told the AAT that she had not been aware of the existence of the allowance until 1983, when a social worker had advised her of its existence and her possible eligibility. The other factors which, she claimed, amounted to 'special circumstances' were:

- The failure of representatives of the DSS and medical advisers to tell her of the existence of the allowance;
- her geographical isolation at the time when the allowance for a handicapped child was introduced in 1977 (she and her husband were undergoing a successful rehabilitation programme to cure their alcoholism);
- the special difficulties which she and her husband, as Aborigines, had in dealing with officials;
- the lack of education of Mr and Mrs Nannup;
- their previous alcoholism;
- their responsibility for caring for their 6 children and various foster children and other Aboriginal people needing support; and
- the desperate financial position of the family.

The AAT accepted that all of these matters had been established from the evidence and that they were special within the meaning of s.102(1) of the *Social Security Act*. In particular, the AAT noted that 'the poverty of the family is a substantial contributing factor to the health problems M and D have experienced.' If sufficient additional money came into the family, their poor social circumstances (crowded housing, inadequate bedding and poor food) could be removed and this would have a significant effect on the children's health. The AAT endorsed the point made in *Bowles* (1985) 24 *SSR* 284:

> 'Where a family's poverty is such that it adds to the handicaps of a handicapped child, it seems that a grant of arrears to reduce the handicaps from which the child suffered would comply with the object of social welfare legislation.'

The AAT then pointed out that it would be necessary for Nannup to provide evidence establishing the date from which she had begun to suffer 'severe financial hardship' because of the care and attention provided for M. That would be the date from which she would be eligible to receive the allowance for M. The rate for which the arrears of the allowance would be paid would depend upon the costs which Nannup had incurred for that period in caring for M.

Formal decision

The AAT set aside the decisions under review and remitted the matters to the Secretary with the following directions:

- that Nannup suffered 'severe financial hardship' because of the care and attention provided to D and M since April 1983;
- that she should be paid handicapped child's allowance at the maximum rate for M and at the rate of $30 30 a month for D;
- that there were 'special circumstances' to justify backdating payment of the allowance for M;
- that the date to which payment should be backdated should be determined after Nannup had provided evidence relating to the severe financial hardship suffered because of the care provided to M; and
- that the rate at which the arrears of handicapped child's allowance should be paid to M should be determined on the basis of information provided by Nannup as to the cost of the care and attention provided by her to M in the period before April 1983.