

\$6000. The figure for a married couple was \$10,000. That decision also noted that these guidelines were to be applied with some flexibility.

The DSS argued that having regard to the decision in Doyle, the applicant's funds should not be seen as limited to the income from her investments. The whole of her \$40,000 should be taken into account. It was argued that the applicant could not retain this amount and expect to receive a pension.

The AAT did not accept this view. However, the AAT said it would accept the submission put by the DSS if it were amended to accord the applicant a reserve of \$10,000. This allowance would suit the applicant's situation. The AAT concluded that although the property farmed by the applicant's son could not be sold, realised or used as security for borrowing, the applicant would suffer severe financial hardship if the hardship provisions did not apply, given her cash reserves.

#### Formal decision

The AAT affirmed the decision under review.

[Comment: The AAT seemed to regard \$10,000 as a reasonable figure for a single person to control and still qualify under the hardship provisions. The DSS guidelines suggest \$6000. Does this indicate a difference in attitude between the AAT and the DSS, even allowing for the flexible application of the guidelines?]

## Handicapped child's allowance: late application

### PHILLIPS and SECRETARY TO DSS

(No. W85/174)

Decided: 19 August 1986 by R.D. Nicholson, J.G. Billings and P.A. Staer.

The applicant sought review of a DSS decision not to allow the backdating of a claim for handicapped child's allowance.

#### The facts

The applicant had given birth to 19 or 20 children in her lifetime although in June 1969 only eight dependent children were living with her and her spouse.

In October 1969 the applicant became ill. Her condition was diagnosed as Korsakow's psychosis which included extreme loss of memory and depression. This condition had been brought on by alcoholism. The applicant applied for and received invalid pension from October 1969.

The applicant also suffered from a series of other medical conditions in subsequent years. She was hospitalised on one occasion for a heart condition in 1979 and other conditions required treatment in 1981.

In June 1972 the applicant's son had been diagnosed as having diabetes mellitus. He suffered from profound growth retardation and pubertal delay. On 4 June 1981 the applicant applied for handicapped child's allowance in respect of this son. This was granted from 15 July 1981. The application for review before the AAT related to the period from 31 December 1974, when the allowance was first introduced, to 14 July 1981. The issue to be determined was whether 'special circumstances' existed which would justify the backdating of the allowance.

#### The legislation

Section 105R of the *Social Security Act* applies sub-sections 102(1) and (2) (which relate to family allowances) to the payment of handicapped child's allowance. Sub-section 102(1) reads:

(a) if a claim is lodged within 6 months after the date on which the claimant

became eligible to claim the family allowance, or, in special circumstances, within such longer period as the Secretary allows from the commencement of the next family allowance period after that date; or (b) in any other case - from the commencement of the next family allowance period after the date on which the claim for family allowance is lodged.

#### Did 'special circumstances' exist?

The Tribunal referred to the Federal Court decision in *Beadle*, (1985) 26 SSR 321. In that case it was held that it was not possible to lay down precise rules as to whether special circumstances exist in a particular case. Generally, special circumstances would be those events which would render the six month time limit as unfair or inappropriate. In the case of a lengthy delay, weighty factors would be needed to establish special circumstances.

The applicant claimed that she had been ignorant of her entitlement and that the disability of her son would have qualified for the allowance. It was also claimed that her bad memory was a special circumstance. However, the AAT observed that as soon as an elder son became aware of the entitlement the application was made without delay. Thus it could not be claimed that bad memory was a factor which contributed to the delay in applying for the allowance. It was a different case to *Garlett* (1985) 26 SSR 311. She may not have been told of the allowance but there was no evidence that she had been misled by a departmental officer or that her ignorance was the result of a third party.

The social isolation of the applicant was also claimed to be a special circumstance. The applicant's counsel referred to the Tribunal's decision in *Damalas* (1984) 19 SSR 195 where it was decided that there was no real difference between physical isolation and isolation caused by an inability to communicate due to family and health reasons. However, the AAT did not consider that the applicant's situation

approached the circumstances in *Damalas*.

The AAT concluded nevertheless that taking into account all the family circumstances of the applicant (her spouse was also in ill-health and had been in receipt of an invalid pension since 1971), her illness, the number of children in the family and the family's social isolation that there were special circumstances in this case.

#### Backdating for lengthy period - extremely special circumstances required?

The AAT then considered the length of time for which it was asked to backdate the allowance, a period of just over six and a half years. The arrears would total approximately \$4,582.

The AAT concluded that weighty factors would be needed to justify the finding of special circumstances so as to backdate payment in such a case. While the facts of the case would have justified an extension of the time to lodge a claim if a shorter period had been involved, the AAT concluded that the circumstances were not so special as would justify a six and a half year extension of the period.

#### Formal decision

The Tribunal affirmed the decision under review.

### REIDY and SECRETARY TO DSS

(No. W86/31)

Decided: 19 August 1986 by R.D.

Nicholson, J.G. Billings and P.A. Staer.

The applicant, of Aboriginal descent, had four children. In 1977, one of her daughters developed an ear condition which required hospitalisation in March 1978 followed by regular out patient visits. Her condition also required care and attention by her mother in the changing of dressings, ear drops and ear toilets and travelling 170 kilometres to the hospital for her visits. In September 1984 a further operation was required but

by August 1985 her condition was normal.

Mrs. Reidy had lodged an application for handicapped child's allowance after the condition was cured. The claim related to the period March 1978 to September 1974. The DSS decided that special circumstances did not exist to justify backpayment of the allowance. Mrs Reidy applied to the AAT for review of that decision.

It was found by the AAT and does not appear to have been disputed by the DSS that in terms of the basic eligibility for the allowance the applicant's daughter satisfied the qualifying criteria for the allowance as a 'handicapped child'.

#### The legislation

The applicable legislation is set out in *Phillips*, this issue. For payment to be backdated beyond the six-month time limit 'special circumstances' must exist.

#### Did 'special circumstances' exist?

The applicant argued that her physical isolation together with the isolation from immediate sources of advice from community welfare offices (the nearest was 32 miles from the applicant's residence) and the cultural isolation of the family living in a small siding town culminating in her ignorance constituted 'special circumstances'. The applicant's Aboriginality, the financial circumstances in which she lived and her health were also mentioned.

However, the AAT did not consider that the circumstances were weighty enough to warrant the extension of the period for lodgment of the claim for a period of just over six years.

#### Formal decision

The AAT affirmed the decision under review.

### MICHAEL and SECRETARY TO DSS

(No. W85/201)

Decided: 21 August 1986 by H.E. Hallowes.

Barbara Michael applied for handicapped child's allowance on 18 August 1982 in respect of her son who was born in 1972. It was claimed that she became eligible for the allowance on 8 June 1979 and she therefore asked the DSS to backdate the payment to that date. The DSS refused to backdate the payment to the date of eligibility. The applicant sought review of that decision.

#### The legislation

Section 105R of the *Social Security Act* applies section 102(1)(a) to the payment of handicapped child's allowance (the legislation is set out in *Phillips*, this issue). Essentially, for payment to be backdated beyond the six-month time limit for applications 'special circumstances' must exist.

#### Were there 'special circumstances'?

Michael, who was of Aboriginal descent, had seven children in her care. She left school at 13 and could read and write although she needed assistance in completing government forms. In 1979 her son was diagnosed as being hearing impaired. The applicant had enquired at the Hearing Assessment Centre and National Acoustic Laboratory, to which she had to take her son for hearing tests, about the availability of financial assistance for deaf children. She was advised that there was none. It was argued on behalf of the applicant that this lack of advice, together with her family circumstances, constituted special circumstances.

The Tribunal referred to the Federal Court decision in *Beadle & Ors* (1985) 26 SSR 321. It was observed that 'the special circumstances must include events which would render the six months unfair and inappropriate' (Reasons, para.8). Also, as a lengthy delay was involved, weighty factors were required to establish circumstances.

As for the lack of advice proffered by the hearing centres, this was but one of the circumstances to consider. The Tribunal referred to the decisions in *Smithies* (1985) 27 SSR 331 and *Corbett* (1986) 31 SSR 387 and observed that there was no absolute duty on health or welfare professionals to provide such advice. The weight to be given to such a failure depended on the severity of the disabilities: the more borderline the case, the less weight given to such a failure.

In the circumstances, the Tribunal could not find that special circumstances existed. While the applicant may have been socially disadvantaged, she did not live in a remote area (although she was socially isolated to a degree) and had managed to obtain other benefits and allowances. In total the factors were not of sufficient weight to justify.

#### Formal decision

The Tribunal affirmed the decision under review.

### OGLE and SECRETARY TO DSS

(No. W85/169 & W85/170)

Decided: 21 August 1986 by H.E. Hallowes.

Margaret Ogle had lodged a claim for handicapped child's allowance in respect of her son on 3 May 1984 and another claim in respect of her foster daughter on 24 July 1984. Payments commenced from the start of the next respective pay periods. On 22 October 1984 the applicant applied for arrears of the allowance in respect of both children. It was accepted by the DSS that the applicant first became eligible in respect of her son in March 1978 and in respect of her foster child on 29 March 1983 (the date she came into the

applicant's care). The DSS rejected the claim for backpayment and the applicant applied to the AAT for review of that decision.

#### Were there 'special circumstances'?

Section 102(1) of the *Social Security Act* requires 'special circumstances' before the backdating of handicapped child's allowance may be authorised.

The applicant was caring for eight children at the date of the hearing. Two of these children were fostered by the applicant. She was in receipt of supporting parent's benefit. She had been living with a particular man 'on and off' over the last eighteen years but he was unreliable and left her on average two or three times a year. There was some evidence that he physically abused the applicant.

Ogle had some sinus and chest problems and although she had been attending a doctor for her condition and also for her son since 1978 she was not informed of the availability of handicapped child's allowance. She did lodge, by mail, applications for other allowances and pensions in this period.

In 1981 the applicant's younger sister was diagnosed as having cancer. This sister's six week old son came to live with the applicant at this time. When the sister died the applicant's aunt suffered a heart attack on hearing the news and died on the same day. The nephew of the applicant's de facto was killed in a road accident, also on the same day. In particular, the applicant was extremely anxious following the death of her sister. Soon after her sister's death the applicant's mother went into hospital for treatment of a blood clot on the brain. Her stepfather also had a leg problem that required hospital treatment in 1982.

The AAT accepted that Ogle had 'suffered a number of traumatic experiences through which she had to remain the mainstay of her family'. The Tribunal also noted that she had first become aware of the existence of handicapped child's allowance in September 1982. However, she had thought that the allowance was only available in respect of children with overt physical problems due to the misinterpretation of DSS poster. Only when she discovered that her sister-in-law was receiving the allowance in respect of a child with an ear problem did Ogle first lodge a claim.

The Tribunal referred to the Federal Court decision in *Beadle* (1985) 26 SSR 321. The special circumstances must be such as to render the six month time limit 'unfair or inappropriate'. Reference was also made to the decision of the Tribunal in *Corbett* (1986) 31 SSR 387 which the AAT considered to be very similar to the present case.

As with Miss Corbett, Mrs Ogle's financial problems have been considerable

The Department has been satisfied that by reason of the provision of care and attention the applicant has been subject to severe financial hardship in terms of paragraph 105JA(b) of the Act. Mrs Ogle ...shares with Miss Corbett a lack of awareness of the existence of the allowance and a later misconception as to her eligibility. Deputy President Hall had this to say about the responsibility of authorities to alert applicants to their entitlement:

However, the failure of persons with whom Miss Corbett was in contact to alert her to the possibility that she may be entitled to handicapped child's allowance is only one of the totality of considerations to which regard must be paid in deciding whether special circumstances exist. There are some problems, in my view, with the problems that arise in cases of misleading advice. The weight to be given to either factor may vary in the light of considerations such as the severity of the disabilities and the extent to which they would obviously require care and attention of such constancy as to attract eligibility for the allowance.

(Reasons, para. 15)

The Tribunal said that the applicant's living environment could be characterised as disadvantaged. However, she did not live in a remote area and had access to welfare agencies.

#### Eligibility in respect of son

As to the backpayment in respect of her son, the Tribunal, after taking into account all the considerations of the case, did not consider that they were weighty enough to warrant the conclusion that special circumstances existed such as would allow payment to be backdated six years.

#### Eligibility in respect of foster daughter

The conclusion was different with respect to the applicant's foster child. She was not the child of the applicant. She had come into the care of the applicant soon after the death of her sister and the AAT was satisfied that the applicant had still not recovered from the traumatic experiences of that time. Also, there had been the misunderstanding as to the qualification for handicapped child's allowance which led her to believe that her foster child did not fall into the same category as her son. In the circumstances there were therefore special circumstances which warranted the backdating of payment of the allowance for a period of 18 months prior to the date of the claim.

#### Formal decision

The AAT affirmed the decision under review in respect of the son of the applicant and set aside the decision in respect of the foster daughter of the applicant.

## PARKINSON and SECRETARY TO DSS

(No. W85/185)

Decided: 2 September 1986 by R.D. Nicholson, N. Marinovich and K.J. Taylor.

The applicant sought review of a decision by the DSS to refuse to backdate her claim for handicapped child's allowance. She applied to the AAT for review of that decision.

#### Legislation

Section 102(1) of the *Social Security Act* (which is applied to handicapped child's allowance by s.105R) provides for the period for lodgment of the claim to be extended in 'special circumstances' beyond the normal six month period. (The legislation is set out in *Phillips*, this issue).

#### The facts

Mrs Parkinson had four children. Her second youngest son was involved in a car accident in 1981 when he was 5 years old. Some 8 to 12 months after the accident he was diagnosed as an epileptic. At about the same time the applicant and her husband separated. The applicant was on supporting parent's benefit for two years until 1982. She then was in receipt of unemployment benefit in 1982. In 1983 she was in paid employment but continued to receive unemployment benefits. The applicant was charged and convicted of offences under the Act in relation to the receipt of those benefits.

The AAT observed that the applicant had many contacts with the DSS since 1972 involving change of address and advice of bank account references for payment of benefits due. Contact was regular.

She did not become aware of the availability of handicapped child's allowance until April 1984. Up until that time apart from her contacts with the DSS she had been visiting the hospital and various physicians with her son. She did not enquire of them about the allowance and they did not volunteer any information about its availability.

Upon making enquiries about the availability of the allowance for her eldest son, who was in a special class at school, in June 1984 she learnt from the DSS that the allowance was available in respect of her younger son. She then lodged a claim.

The applicant said that she did not realise that her son would qualify as a 'handicapped child'. She thought that that term was misleading and that he would have to go to a special school before being entitled to the allowance.

#### Did 'special circumstances' exist?

The AAT accepted that the applicant's son was a 'handicapped child' within the meaning of s.105H(1) of the *Social Security Act*. They also accepted that the

applicant was subjected to severe financial hardship in respect of the provision of care and attention to her son as required by s.105JA of the Act. Being eligible to claim the allowance from March 1982, the critical question was whether special circumstances existed to allow for the extension of time for lodgment of the claim and backdate payment to that date.

Having regard to the principles applied in *Beadle & ors* (1985) 26 SSR 321 the AAT concluded that there were not sufficient factors to warrant the extension of the period for lodgment. In particular the Tribunal observed that:

The principal argument for the Applicant is that while she knew at all relevant times of the existence of the handicapped child's allowance she had a misconception as to her eligibility for it. That misconception was that the allowance only applied to mentally retarded or paraplegic children and that normally a child would have to be in a special class or a special school to be eligible for the allowance.

Despite her long history of dealing with the Department the Applicant did not choose to test this understanding with it. When the potential application of the allowance was brought to her attention, as a consequence of her enquiries concerning her son John, there was a further delay of two months in making an application with respect to Shane. She did not pursue enquiries in relation to her rights. Given the level of experience of the Applicant in dealing with the Department, including regularly notifying them of changes of account and address, it is surprising she did not follow up her eligibility with respect to a handicapped child's allowance for Shane with greater alacrity.

(Reasons p.16)

#### Formal decision

The Tribunal affirmed the decision under review.