

Administrative Appeals Tribunal decisions

Handicapped child's allowance: late application

VULICH and SECRETARY TO DSS
(No.W86/49)

Decided: 13 October 1986 by J. R. Dwyer, J. G. Billings and K.J.Taylor

Cheryl Vulich claimed handicapped child's allowance in respect of her son in August 1984. Payment commenced in September 1984. Her son was born in June 1977. An ear condition had been diagnosed when he was almost 4 years old. This condition required a lot of supervision according to the applicant. In December 1984 the applicant applied for arrears of the allowance. This claim was rejected and she applied to the AAT for review of the decision.

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) makes the allowance payable:

- (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 the applicant come within s.102(1)(a)?

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 unfair or inappropriate. In the case of a lengthy delay, weighty factors would be needed to establish special circumstances.

The AAT identified the following factors mentioned in *Beadle's Case* as relevant to the present case: whether the claimant had been misled by a departmental officer or the negligence of a third party, ignorance, illiteracy, isolation or illness.

Each of these factors was examined by the Tribunal. No case could be made out for the application of the factor such as would constitute 'special circumstances'. The Tribunal concluded:

There is no suggestion that Mrs Vulich was misled as to her rights by a Departmental officer or any other person...Mrs Vulich is not illiterate, in fact she is a competent, intelligent woman who has shown an ability to exercise her rights when she is aware of them. Although she was certainly under stress due to the demands of four young children, one of whom was handicapped, we do not feel that we can regard that condition as 'special' in the sense in which that word is used in s.102(1)(a) of the Act.

Formal decision

The AAT affirmed the decision under review.

LITTLE and SECRETARY to DSS
(No.W85/67 and W85/177)

Decided: 17 October 1986 by R.Balmford

The applicant applied to the AAT to review decisions of the DSS to pay her handicapped child's allowance in respect of her son as a 'handicapped child' and to refuse her arrears of the allowance.

Jurisdiction

At the hearing the applicant indicated that she did not wish to proceed with the application in respect of the decision to grant her the allowance at the rate for a 'handicapped child' save that she wished the Tribunal to review the rate of payment pursuant to s.105L of the

Social Security Act. [That section gives the Secretary a discretion to pay handicapped child's allowance in respect of a 'handicapped child' at a rate not exceeding that payable in respect of a 'severely handicapped child'].

Section 15A of the Act requires that before the AAT may review a decision of the DSS the matter must have been reviewed by an SSAT. The issue here was whether the decision as to the rate of payment was reviewed by an SSAT.

The Tribunal considered that a decision on entitlement was separate from a decision on rate of payment. While there was material that indicated that the DSS had reconsidered the rate prior to the SSAT hearing, the AAT was unable to say whether the SSAT had turned its mind to the question. The Tribunal concluded:

'Reviewed' in sub-section 15A(1) is a word which was no doubt deliberately selected to be of broad and general effect. I do not wish to attempt to define it. However broad and general the meaning of that word, and whether or not the material before them included any information relevant to the determination of the rate, I cannot find that the SSAT in this case 'reviewed' any decision as to the rate. Accordingly, I have no jurisdiction to consider any such decision, and do not do so.

(Reasons, para 7)

The AAT affirmed that decision.

Should arrears be paid?

The AAT then considered the second application for review of the decision to refuse backpayment. The applicant's son had a speech problem together with other conditions which required marginally less than constant care and attention. The applicant first learnt of the allowance through a friend. She had not been advised about its availability by any doctors she had encountered. She could read and write and bore the main responsibility for caring for her children.

After referring to the Federal Court's discussion of 'special circumstances' in *Beadle* (1985) 26 SSR 321 the Tribunal concluded that the circumstances of the applicant did justify backdating of the allowance.

Formal decision

The AAT affirmed the decisions under review.

KRAKOUER and SECRETARY TO DSS

(No.W86/26)

Decided: 17 October 1986 by R.Balmford

The applicant applied to the AAT for review of a decision not to backdate payment of handicapped child's allowance in respect of her asthmatic son.

Were there 'special circumstances'?

The legislation is set out in *Vulich*, this issue. The question before the Tribunal was whether there were special circumstances in the present case such as would allow the backdating of the payment by three years.

The AAT referred to *Beadle* (1985) 26 SSR 321 and *Corbett* (1986) 31 SSR 387. The latter case was very similar to this case. Though the hospital staff encountered by the applicant did not advise her of the availability of the allowance it would not have been obvious from her son's condition that he was eligible. While the applicant's living conditions were disadvantaged she did not live in a remote area and had access to welfare agencies. Though shy, she was intelligent and articulate. She did not describe her financial circumstances as desperate. She was aware of the allowance but did not realise that she may be able to claim it in respect of her son.

Having regard to all these matters, the AAT could not find any 'special circumstances'.

Formal decision

The AAT affirmed the decision under review.

BODNEY and SECRETARY TO DSS (No. W85/150)

Decided: 19 August 1986 by R.D.Nicholson, J. G. Billings and N.Marinovich.

The Tribunal *affirmed* a DSS decision to reject the applicant's claim for handicapped child's allowance in respect of his asthmatic son. The Tribunal accepted that the son was a 'handicapped child' as required by s.105H(1)(b) of the Act in that he 'needed marginally less care and attention' than a severely handicapped child. But the Tribunal found that he did not need this care for an extended period: s.105H(1)(c). There was also no evidence of severe financial hardship under s.105JA.

Backdating

Nevertheless, the Tribunal considered whether, if the applicant had qualified, he would have been able to claim a backdated allowance under s.105R (that section applies s.102 which requires the existence of 'special circumstances').

The Tribunal looked to:

...the fact that the applicant is a male parent with sole responsibility for such care: the failure of agencies with which the Applicant was dealing to

inform him of his right to apply for a handicapped child's allowance and his prompt lodgment of an application following advice that such a course was possible; the fact that the Applicant is not in a strong position to deal with bureaucracy and in any event is not comfortable in appearing before welfare agencies; the lifestyle of the Applicant and his family as Aborigines in a near city environment; the financial circumstances of the Applicant; and the Applicant's intention given in evidence to use any backpayments to buy [his son] and his brother some decent clothes, to furnish the house a bit better and to buy [his son] a bike.

However, these circumstances and all the circumstances of this application must be viewed against the length of the period in question, namely 1980 to 1983. Seen in that light they are not, in the Tribunal's view, sufficiently weighty to warrant a finding that there exist special circumstances for allowing extension of the period for lodgment...

Handicapped child's allowance: eligibility

PIGOTT and SECRETARY TO DSS (No. V85/546)

Decided: 17 October 1986 by R.Balmford, G.Brewer and D.Sutherland

The applicant asked the AAT to review a DSS decision to cancel payment of handicapped child's allowance in respect of her daughter.

The facts

The applicant's 16 year old daughter suffered from Sturge-Weber syndrome. In June 1984 she entered a boarding school where she stayed from Sunday evening to Friday afternoon of most weeks during term time. She remained at the school until April 1986.

While the daughter attended the school the applicant only received handicapped child's allowance during term holidays. It was that decision to cancel payment during term that she sought to have reviewed. It was not in issue that the child was 'severely handicapped'.

The legislation

Section 105K of the *Social Security Act* provides:

Handicapped child's allowance is not payable in respect of a

child for any period unless, in respect of that period, family allowance is ... payable under Part II in respect of the child to a person, other than an institution.

Section 95(1) states that family allowance is payable where:

...a person who has the custody, care and control of a child (not being a child who is an inmate of an institution) or an institution of which children are inmates...

Was the applicant eligible to receive family allowance?

The applicant was only eligible to receive handicapped child's allowance if she was entitled to receive family allowance for the time her daughter was in school. The school had been in receipt of family allowance during the term. Was this correct?

The question was whether the child was an 'inmate of an institution' during the school term. If she was then, under the terms of s.95(1) the applicant could not receive family allowance and would not therefore be able to claim the handicapped child's allowance. It was accepted that the Secretary had approved the school as

an institution for the purposes of the section.

The AAT said:

...the coupling of the terms 'inmate' and 'institution' would, prima facie, discount the [dictionary] definition which points to mere co-residency. In this context, it would seem that some formal admission and permanency in the residence at the institution is required. A temporary visit, say for one night, would not make a person an 'inmate'. In this instance, the word 'inmate' means a person admitted to, and residing in, a hospital, nursing home, charitable hostel, etc., for protracted periods even though those periods may be interspersed with time actually spent away from the institution. [The child] by staying at [the school] for numerous periods of five days and nights at a time, over almost two years, clearly falls within the term 'inmate'.

(Reasons, para. 20)

As family allowance was not payable to the applicant during term, then she