Administrative Appeals Tribunal decisions

Handicapped child's allowance: late claim

RYAN and SECRETARY to DSS
(No. N88/477)
Decided: 15 September 1988 by B.J. McMahon.

Lynette Ryan asked the AAT to review a DSS decision not to grant her arrears of handicapped child's allowance for her intellectually disabled son Wayne from 26 June 1978, when he was first diagnosed as having 'Fragile X syndrome', to October 1986 when she claimed and was granted the allowance.

Ryan told the Tribunal that, although her son was being treated for his condition at a special clinic, and although she herself worked in a hospital, she had had no knowledge of the existence of handicapped child's allowance until her father who lived in Brisbane was told about it by a neighbour who was an employee of DSS.

The legislation

It was not disputed that Wayne was a severely handicapped child within the meaning of s.105J of the *Social Security Act* (as it then provided).

Sections 105R and 102(1) dealt with claims for handicapped child's allowance. Under those provisions, in order to be paid from the date of eligibility, a claim needed to be lodged within 6 months after eligibility is established. If it was lodged later, the claimant needed to show 'special circumstances' in order for the allowance to be backdated.

In her claim for arrears, Ryan relied on the fact that she was unaware of the existence of the allowance and that she had not been informed of its availability by the treating professionals with whom she had dealt. She also relied upon general community ignorance of the existence of the allowance.

Special circumstances

The AAT first rejected the latter claim on the basis that 'special circumstances' meant circumstances special to the applicant. Accordingly, general community ignorance was not a factor special to her. (Reasons, para.11).

As to the other grounds, the Tribunal started by considering the decision of the Federal Court in *Beadle* (1985) 26 *SSR* 321. After quoting extensively from the judgment, the Tribunal stated that '[r]eliance on ignorance does not necessarily mean that special circumstances do not exist'. Rather, the ignorance has to be considered in the context of all the circumstances of the particular case (*Re E.D. Smith*, AAT 12 March 1988).

After discussing the responsibilities of health and other professionals to provide advice about the existence of the allowance (*Corbett* (1986) 31 *SSR* 387; *Scrivener* (1986) 31 *SSR* 386; *Vulich* (1987) 35 *SSR* 442), the Tribunal stated:

> '18. Factors that have been taken into account in determining whether the ignorance they caused resulted from special circumstances include unawareness of the entitlement and its applicability; the need for positive assistance in pursuing that entitlement; the level of the applicant's literacy, education and understanding; the extent of her access to welfare agencies and information; the failure of other persons and agencies to advise her of her entitlement; her need for assistance in completing forms; the degree of financial hardship incurred in relation to the handicapped child and the length of the delay in claiming, given that the Act is concerned generally with current payments and not with large capital payments.'

Applying these factors, the AAT held that Ryan did not suffer from any language or cultural barrier. She was a trained nurse who had undertaken a post graduate course in midwifery and although the existence of the allowance was not dealt with as part of the course for trainee nurses 'there was ample opportunity for a woman in her position, with continuing responsibility for Wayne, to enquire': Reasons, para.20.

Nor was there any evidence of either incorrect advice from the department, nor of serious financial hardship. Ryan also stated that she had not read the information concerning handicapped child's allowance on the back of the family allowance claim form she completed following the birth of her third child.

The AAT noted the period of time involved, stating 'the longer the delay the weightier must be the circumstances to which the applicant can point as constituting special circumstances'.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

WEEDING and SECRETARY TO DSS
(No. S87/103)
Decided: 23 September 1988 by J.A. Kiosoglous

Patricia Weeding asked the AAT to review a decision refusing to grant her arrears of handicapped child's allowance in respect of her son, Mark, from the date of his birth, 3 August 1978, to 15 May 1986.

Some 6 weeks after his birth, Mark had been diagnosed by a general practitioner as suffering from albinism. At that time, Weeding was living in Broken Hill. The family subsequently moved to Wilcannia where medical facilities were minimal and the only medical support available was by way of the Flying Doctor Service. Nor was there a DSS office in Wilcannia.

Shortly after Mark was diagnosed, Weeding took him to a specialist at Adelaide Children's Hospital. Neither that doctor, nor a subsequent specialist whom she consulted in Melbourne, informed her of the availability of handicapped child's allowance.

In 1984, Weeding and her family moved to Adelaide in order to secure better care for Mark. It was not until the establishment of an Albino Support Group in Adelaide in 1986 that Weeding learned of the existence of handicapped child's allowance. She lodged a claim which was granted from 15 May 1986.

The DSS did not dispute that Mark was a severely handicapped child, within the meaning of s.105J of the *Social Security Act* (as it then provided). However, the DSS rejected a claim for payment of arrears of handicapped child's allowance back to Mark's birth in 1978.

The legislation

At the relevant time, ss.105R and 102(1) required a claim to be lodged within six months of the date of eligibility in order for payment to commence from that time. There was also provision for lodging a claim

'within such longer period as the Secretary allows' where there were 'special circumstances'.

The discretion to pay arrears

The AAT pointed out that, in a number of AAT and Federal Court decisions, (see *Beadle* (1985) 26 *SSR* 321), it had been held that 'mere ignorance of the existence of the allowance is not *per se* a "special circumstance" although particular facts may render it so, as for example, illiteracy, isolation, or misinformation'. And, 'the more lengthy the period of arrears in question, the more weighty must be the facts established in order to find a claim for "special circumstances"': Reasons, para.23.

Weeding argued that special circumstances arose from her ignorance of the allowance due to isolation; the rarity of Mark's handicap; unusual expenses incurred and salary foregone as a result of Mark's handicap; and resulting emotional effects and stress.

Considering each of these in turn, the AAT reiterated that mere ignorance of the existence of handicapped child's allowance did not justify arrears. Nor did the Tribunal consider isolation significant as Weeding had attended specialist doctors in Adelaide and Melbourne. The AAT conceded the rarity of Mark's condition but did not consider that there had been any financial hardship demonstrated. Finally, on the issue of stress and emotional effect the Tribunal held that Weeding 'has not allowed these to deter her . . . and . . . has courageously overcome many of those difficulties and provided correct care and attention when possibly other women in such a situation may not have been able to do so': Reasons, para.33.

After considering a number of previous decisions on the discretion to backdate handicapped child's allowance claims, and relying in particular on the Federal Court's decision in *Beadle* (above), the AAT held

> 'that the applicant's circumstances do not demonstrate "special circumstances" as that phrase has been interpreted and applied [in other decisions] sufficient to justify the exercise of the discretion to pay the applicant the allowance in respect of Mark, for a period in arrears of some seven and a half years.'

(Reasons, para 35).

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Time limit for appeal

ROBERTSON and SECRETARY TO DSS

(No. S87/256)

Decided: 23 September 1988 by R.A. Layton.

In early 1986, Alicia Robertson applied to the DSS for supporting parent's benefit. The DSS rejected her claim on 22 May 1986.

In May 1987, Robertson lodged a second claim for supporting parent's benefit, which claim was then granted with effect from 28 May 1987.

On 9 June 1987, Robertson made an appeal to the Secretary, under the former s.16 of the *Social Security Act*, against the officer's decision of 22 May 1986. This appeal was reviewed by a SSAT, which recommended that the appeal be upheld. However, on 15 September 1987, the Secretary dismissed Robertson's appeal. She then applied to the AAT for review of the Secretary's decision. The AAT arranged for a preliminary hearing on the point whether, even if Robertson's appeal succeeded, there would be any substantial benefit to her, given her long delay in lodging the appeal.

The legislation

Section 168(4) of the *Social Security Act* imposes an effective 3-month time limit for appeals to the Secretary against decisions of officers of the DSS. The provision limits the effect of any decision of the Secretary, when exercising the appeal powers in s.16. The Secretary's decision can only take effect from the date of the decision which is under appeal if the appeal is made to the Secretary within 3 months of the decision under appeal. If there is a longer delay, the Secretary's decision can only take effect from the date of the Secretary's decision - it cannot be retrospective.

This effective time limit was introduced, with effect from 1 July 1987, by the *Social Security and Veterans' Entitlements Amendment Act* 1987, s.3(11) of which provided that the effective time limit would only apply in relation to appeals to the Secretary made on or after 14 May 1987.

No effective relief for applicant

The AAT noted that s.3(11) of the *Social Security and Veterans' Entitlements Amendment Act* 1987 preserved the position of a person who had appealed to the Secretary under the former s.16 of the *Social Security Act* before 14 May 1987: such a person would not be affected by the 3-month time limit on appeals.

However, in the present case, Robertson had made her appeal to the Secretary after 14 May 1987. She was therefore affected by the 3-month time limit. The effect of that time limit was that any favourable decision of the Secretary, when dealing with the appeal against the DSS officer's decision, could only take effect from the date on which Robertson had lodged her appeal to the Secretary (9 June 1987) and not from the date of the officer's decision (22 May 1986).

The AAT noted that, when exercising its social security review jurisdiction, the AAT was reviewing the Secretary's appeal decision; and that the AAT's powers were limited to the powers and discretions of the Secretary (s.43(1), *AAT Act*). Accordingly, in the present matter, even if the AAT made a favourable decision on the merits of Robertson's original claim for supporting parent's benefit, the AAT's decision could only take effect from the date when Robertson had appealed to the Secretary (9 June 1987). By that date, the AAT pointed out, Robertson was already receiving the supporting parent's benefit granted to her from 28 May 1987.

It followed, the AAT said, that if the present matter were to proceed to a hearing on the merits, there was no effective relief which the Tribunal could grant to Robertson.

Interim decision

The AAT decided that the relevant date from which any decision it might make could take effect was 9 June 1987 and that there was no relief which could be granted to Robertson if the matter proceeded to hearing on the merits.

[P.H.]