

Administrative Appeals Tribunal Decisions

Additional family payment: claim in writing

HAITIDIS and SECRETARY TO THE DSS
(No. 13270)

Decided: 10 September 1998 by
R.C. Gilham.

Background

Before 19 June 1993 Mr Haitidis was receiving newstart allowance, and Haitidis' family payment was calculated on that basis. Haitidis was paid basic rate family payment from 24 June 1993, and lodged a claim for additional family payment on 9 July 1993. On 31 August 1993 the claim was rejected. On 25 July 1997 Haitidis provided details of her combined taxable income for the 1995/1996 financial year, following a request from DSS, and requested that her rate of family payment be reassessed from 1993. A delegate decided to pay family payment at the higher rate from 31 July 1997, being the payday after Haitidis asked for a reassessment. This decision was affirmed by the SSAT.

The legislation

Section 887(3) of the *Social Security Act 1991* (the Act) states that if a person applies for review of a decision relating to family payment more than 13 weeks after the making of that decision, the changed decision after the review takes effect from the day on which the review was sought. Section 1069-D15 of the Act states that an application for additional family payment must be in writing in a form approved by the Secretary. It may be made as part of a claim for some other payment made by Centrelink or a separate claim.

The issue

Whether Haitidis should be paid family payment at the higher rate from 9 July 1993 when she first claimed additional family payment, or from 25 July 1997.

The evidence

Haitidis stated that she had made many requests to the DSS from mid 1993 to mid 1994, asking for increased payment, though not necessarily specifying that she was claiming additional family payment. The DSS accepted that Haitidis had made these requests, and that she would have qualified for additional family pay-

ment, but argued that she could not be paid, because there was no claim.

On 18 April 1994 Haitidis returned a form entitled 'About Your Family Payment in 1994' sent to her by DSS, in which she gave information about her taxable income for 1992/1993, which was about \$20,000.

In June 1997 a data-matching exercise revealed a discrepancy between taxation notices of assessment and family payment rates, and internal documents record that Haitidis was entitled to maximum rate of family payment.

In July 1997 the DSS sent Haitidis a form entitled 'Changes to your Income and Assets', which she returned with information relating to taxable income for the years 1993/1994, 1994/1995 and 1995/1996. Haitidis was granted additional family payment as a result of this 'claim'.

Claim in writing

The AAT discussed the similarities between the form 'Changes to your Income and Assets' which was accepted as a 'claim' in 1997, and the form 'About your Family Payment in 1994' which was not accepted as a claim. It decided that the 1994 form, received by the DSS on 18 April 1994 could be regarded as a claim in writing for the purposes of s.1069-D15. The preamble to that form stated 'To make sure that you are receiving the correct amount of Family Payment, we need to update our records' and, having indicated that entitlement would be based on a family's combined taxable income, sought details of that income. The AAT said:

'In the Tribunal's view it would be entirely reasonable for an applicant to expect that, having completed this form, on which is printed the reassuring message "to make sure you are receiving the correct amount of Family Payment . . .", the respondent would assess the applicant's total entitlement to family payment and pay accordingly. There is nothing on the form to suggest otherwise, particularly in view of the statement on the form that "Family Payment is paid according to a family's combined taxable income". There is nothing on this form to distinguish between basic family payment and additional family payment. There was no reference on the form at T23, which was accepted as a claim, that it was a claim for family payment of any kind or, indeed, for any particular benefit. The heading of the form "About your family payment in 1994" suggests that that form and the form . . . headed "Application for Family Payment" have the same purport.'

(Reasons, para.18)

The AAT found that there had been a valid claim for additional family payment, made on 18 April 1994.

Formal decision

The AAT set aside the decision under review and remitted the matter with directions that Haitidis be paid her entitlement to additional family payment from 18 April 1994.

[A.B.]

Age pension arrears: notification of a decision

WILLS and SECRETARY TO THE DSS
(No. 13315)

Decided: 25 September 1998 by
K. Beddoe.

Background

On 9 February 1994 the applicant's late mother, Joyce Wills, entered a nursing home. A DSS officer sent Mrs Wills a letter on 1 April 1996 advising that because it was 2 years since she had left her former home, the DSS would have to regard her as a non-homeowner, and therefore the asset value of her former home would be included in the assessment of her age pension.

On 27 April 1996 another letter was sent to Mrs Wills stating that her pension rate had been reduced from 16 May 1998 because the value of her assets had increased. The rate had been automatically calculated, but on the basis that Mrs Wills was a homeowner. The DSS had overlooked changing Mrs Wills' computer record to indicate that she was a non-homeowner. This resulted in an underpayment of pension as the value of her assets, which now included her former home, was over the limit to receive the maximum rate of pension as a homeowner, but was under the limit to receive the maximum rate as a non-homeowner.

When the error was discovered the DSS refused to backdate an increase in the rate of pension because Mrs Wills did not seek a review of the rate notified to her in the letter of 27 April 1996, within

3 months. Subsection 80(2) of the *Social Security Act 1991* (the Act) provides that if notice of a decision is given and the person applies within 3 months for a review of the decision, then, if a favourable determination is made as a result of that review, it takes effect on the day on which the previous determination took effect. Subsection 80(3), however, provides that if notice of a decision is given and the person applies for a review more than 3 months later, then a favourable determination takes effect on the day on which the person sought the review.

Notification of a decision

The AAT found that:

'... the Department set out to assess Mrs Wills for an age pension on the basis that she was a non-homeowner, and I am satisfied that was the decision which had been made in the process of assessing Mrs Wills' eligibility for a pension. The notification of 27 April that was sent to Mrs Wills ... was not ... notification of a decision but rather a computer generated notification of a continued application of the former coding to the rate calculator. This notification did not involve any consideration by a Departmental officer as to whether or not the advice generated correctly notified a decision within the terms of the Act.'

(Reasons, para. 10)

The AAT held that the date of effect was determined by s.80(4). This provides that where no notice of a decision is given and a person applies for review of the decision, a favourable determination takes effect on the day on which the previous decision took effect. As the DSS had not given Mrs Wills notification of the decision to treat her as a non-homeowner, the rate of pension could be increased retrospectively from the date it was incorrectly reduced.

Formal decision

The AAT set aside the decision under review and substituted a new decision that Mrs Wills was entitled to be paid age pension as a non-homeowner with effect from 16 May 1996.

[K.deH.]

Family payment: arrears following cancellation

SECRETARY TO THE DSS and
HARTMANN
(No. 13323)

Decided: 28 September 1998 by B. Gibbs.

Background

Hartmann was receiving family payment (FP) for 2 children when a review form was sent to her last known address on 2 January 1992. She had moved in June 1991 but had not informed the DSS. She did not receive the form and it was not returned to the DSS. FP was suspended from 9 January 1992, and on 14 January 1993 the DSS sent to Hartmann a notice advising that it had been cancelled. She did not receive the notice.

It was not until mid 1996 that her husband noticed that bank deposits of FP had stopped in 1992. On 19 November 1996 a new claim for FP was lodged and it was granted from 21 November 1996. A request made on 25 February 1997 for arrears from 1992 was refused. The SSAT decided that arrears were payable from the date of suspension, and the DSS sought a review by the AAT.

The law

It was apparently not in dispute that under the present provisions of the *Social Security Act 1991* (the Act), payment of FP could not resume from a date before Hartmann sought a review of her entitlement on 25 February 1997.

The AAT noted, however, that the facts were similar to those in *Secretary to the DSS v Sevel & O'Connell* (1991) 71 SSR 1029. In that case the Full Federal Court had agreed that once the decision to cancel FP was set aside, the entitlement which had existed until cancellation would continue until some other event or act in law terminated that entitlement. This meant that full arrears were payable, despite provisions in the *Social Security Act 1947* similar to s.887(3) of the 1991 Act which is in the following terms:

'If:

- (a) a decision (the "previous decision") is made in relation to a family allowance; and
- (b) a notice is given to the recipient advising the recipient of the making of the previous decision; and
- (c) the recipient applies to the Secretary under section 1240, more than 13 weeks after the notice is given, for review of the previous decision; and

- (d) a favourable determination is made as a result of the application for review; and
- (e) subsections (6), (7) and (8) do not apply to the determination;

the determination takes effect on the day on which the recipient sought the review.'

The AAT noted that two legislative changes had been made in response to *Sevel & O'Connell*. The first was the insertion of s.1302A, with effect from 24 December 1992, which deemed a notice of a decision to have been given to a person if it had been posted to the address of the person last known to the DSS.

The second change was to insert s.1243A of the Act with effect from 24 December 1993. The relevant parts are:

'1243A.(1) If:

- (a) the Secretary makes a determination (the "first determination") that:
 - (i) a social security payment is granted or is payable to a person; or
 - (ii) a social security payment is payable at a particular rate to the person; and
- (b) the Secretary makes a determination (the "second determination"):
 - (i) to cancel the social security payment; or
 - (ii) to reduce the rate at which the social security payment is payable; and
- (c) notice of the second determination is given to the person; and
- (d) the person applies under s.1240 for review of the second determination; and
- (e) the application is made more than 13 weeks after the notice is given; and
- (f) a decision (the "review decision") is made by the Secretary, the CEO, an authorised review officer, the Social Security Appeals Tribunal or the Administrative Appeals Tribunal; and
- (g) the review decision, or the effect of the review decision, is:
 - (i) to set aside the second determination; or
 - (ii) to affirm a decision setting aside the second determination;

the following provisions have effect:

- (h) the second determination does not become void from the time when it was made;
- (i) the mere setting aside of the second determination does not of itself revive the first determination.

1243A.(2) In this section, a person is taken to have applied for review of a determination (the "primary determination") if:

- (a) the person applies for review of another determination or decision; and
- (b) an examination of the primary determination is necessary to resolve the issues raised by the review of that other determination or decision.

Note 3: This section does not apply to a determination by the Secretary to suspend a social security payment. If the Secretary's determination to suspend a social security payment is set aside on review, the recipient is placed in the position that he or she would have occupied if