

Administrative Appeals Tribunal

Carer payment: whether child profoundly disabled

HARRISON and SECRETARY TO
THE DFaCS
(No. 2001/1001)

Decided: 10 December 2001 by N. Bell.

The issue

The applicant's son James was born in July 1985, and suffers from a chromosomal abnormality with resulting physical and intellectual disabilities. In May 2000 the applicant applied for carer payment in respect of her son, but this application was rejected on the basis that James did not meet the legislative definition of 'profoundly disabled child'. This decision was in turn affirmed by the SSAT in November 2000.

The law

The requirements for eligibility for carer payment are set out in s.198(2) of the Social Security Act 1991 (the Act) which provides that, to be eligible, a

- ... person must personally provide constant care for ...
- (b) a profoundly disabled child (the care receiver) aged under 16....

The term 'profoundly disabled child' is itself defined in s.197(2) to mean that:

- ...
- (c) the child's disability or condition includes 3 or more of the following circumstances —
 - (i) the child receives all food and fluids by nasogastric or percutaneous enterogastric tube;
 - (ii) the child has a tracheostomy;
 - (iii) the child must use a ventilator for at least 8 hours each day;
 - (iv) the child ... has faecal incontinence day and night ...;
 - (v) the child ... cannot stand without support ...;
 - (vi) ... the child has a terminal condition for which palliative care has replaced active treatment;
 - (vii) the child ... requires personal care on two or more occasions between 10pm and 6am each day ...'

It was not in dispute that James is severely disabled, and it was accepted that he satisfied two of the conditions listed in s.197(2) — in particular, that he has faecal incontinence and requires care on two or more occasions at night.

The issue for the Tribunal was whether he met the requirement for a third condition under the definition of 'profoundly disabled', and in particular whether he could 'stand without support' (s.197(2)(c)(vii)).

Discussion

The Tribunal heard evidence that James could rise from a seated position, and remain standing, but would frequently wobble and fall over. He was described as clumsy, awkward and with poor balance. He rarely remained motionless for more than 30 seconds at a time. His frequent movement and tendency to lurch forward meant he was constantly at risk of falling, particularly on uneven or unfamiliar ground. The applicant's evidence was that, notwithstanding these difficulties, James could stand without assistance on familiar ground, but that he could not '... stand unsupported in places that most people would manage well'.

The Tribunal considered that the list of circumstances included in s.197(2)(c) was restrictive and specific, referring to particular medical conditions ('has a tracheostomy' or periods of time ('for at least 8 hours each day')). The Tribunal noted that the reference to 'cannot stand without support' was unqualified by any words such as 'often' or 'generally'. The Tribunal concluded that the ordinary meaning of the words 'cannot stand without support', the restrictive context in which they appear, and the absence of any qualification in the legislation for those words, meant that James could not be said to be unable to 'stand without support'.

It followed, as the applicant's son did not meet at least three of the conditions listed in s.197(2)(c), she was not eligible for the carer pension.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]

Carer payment: two or more disabled children

BORG and SECRETARY TO THE
DFaCS
(No. 2001/1047)

Decided: 10 December 2001 by
W.J.F. Purcell.

The law

Carer payment is an income support payment under the Social Security Act 1991 (the Act) for people who are unable to support themselves through full-time work because of the demands of caring for adults, children or both. Under s.198 of the Act a person is qualified for a carer payment (CP) if, amongst other things, the person personally provides constant care for a profoundly disabled child aged under 16, or for two or more disabled children aged under 16.

Section 197(2) of the Act provides:

- (2) A child is a profoundly disabled child if:
 - (a) the child has either:
 - (i) a severe multiple disability; or
 - (ii) a severe medical condition; and
 - (b) the child, because of that disability or condition, needs continuous personal care for:
 - (i) 6 months or more; or
 - (ii) if the child's condition is terminal and the child's life expectancy is less than 6 months — the remainder of the child's life; and
 - (c) the child's disability or condition includes 3 or more of the following circumstances:
 - (i) the child receives all food and fluids by nasogastric or percutaneous enterogastric tube;
 - (ii) the child has a tracheostomy;
 - (iii) the child must use a ventilator for at least 8 hours each day;
 - (iv) the child:
 - (A) has faecal incontinence day and night; and
 - (B) if under 3 years of age, is expected to have faecal incontinence day and night at the age of 3;
 - (v) the child:
 - (A) cannot stand without support; and
 - (B) if under 2 years of age, is expected to be unable to stand without support at the age of 2;
 - (vi) a medical practitioner has certified that the child has a terminal condi-