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.

Section197(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-

tion for which palliative care has replaced active treatment;

(vii) the child:

(A) requires personal care on 2 or more occasions between 10 pm and 6 am each day; and

(B) if under 6 months of age, is expected to require care as described in sub-subparagraph (A) at the age of 6 months.'

Section 198(8) provides:

> If the care receivers are the 2 or more disabled children mentioned in paragraph (2)(c), the Secretary must be of the opinion that the children require a level of care that is at least equivalent to the level of care required by a profoundly disabled child.

Departmental Policy Guidelines state that for the purposes of CP, two or more disabled children must require a level of care that is at least equivalent to the level of care required by a profoundly disabled child. That is —

(a) each child has a severe disability or a severe medical condition; and

(b) each child needs continuous personal care for at least 6 months unless one of the children has a terminal condition; and

(c) between the children the test in s.197(2)(c) is met.

The facts

Borg unsuccessfully claimed CP on 22 March 2001. She has two disabled children and she receives carer allowance for both. The following facts were found by the AAT.

Shanae, aged 10, suffers from epilepsy, an intellectual disability and global delay. She has the developmental age of a 3 or 4 year old, although her language is that of about an 8 year old. She has suffered seizures since birth. The frequency varies but she has about two or three a month. There are indications that she also has nocturnal seizures. She is irritable two to three days before a seizure, and takes one to three days to recover. She is incontinent during a seizure, and suffers one-sided weakness afterwards.

Shanae needs all her food cut up and close supervision whilst eating. Sometimes she suffers faecal incontinence. She needs help wiping her bottom and needs underpants changed every day.

Shanae wakes between 5.30 and 6 am, and is very active all day. Her behaviour is such that the house is consistently in disarray, her brother is constantly harassed, and Borg is obliged to follow her around at all times to clean up the 'trail of disaster'. Her parents are trying to get assistance with developing behavioural management strategies for her. It is difficult to implement them because of the nature of her conditions, and because she does not understand the concept of consequence for behaviour.

Shanae attends school where she gets additional help for five hours a week. The rest of the time she just wanders around at school. Borg has three meetings a week at school on average as needed to communicate a great deal with the school, and she finds herself there most days doing what she termed 'SOS work'.

The care she provides for Shanae prevents Borg from working. Borg and her husband are overwhelmed by the amount and extent of care Shanae needs every day, and this is affecting all the relationships within the family.

Nathan, aged 11, suffers from learning difficulties and gait difficulties requiring orthotic treatment. He requires extra tuition at home twice a week, and between half and one hour of assistance with his homework each night. He has to do a total of one hour of exercises daily and his parents supervise them. He is seeing a psychologist about the impact of Shanae's demands, her impact on his social relationships and the fact that she hits him.

The decision

The AAT noted that the disabilities of Shanae and Nathan combined do not include at least three of the circumstances set out in s.197(2)(c) of the Act, and that in affirming the decision to reject the CP claim the SSAT had adopted the Departmental Guidelines as correct in law.

The AAT considered it was clear on the evidence that each child has a severe disability, and needs continuous personal care. Shanae's level of mobility and destructiveness (as opposed to a lack of mobility and interaction with siblings contemplated by the circumstances set out in s.197(2)(c) of the Act) require, as a matter of fact, a level of care and intervention which is at least equivalent to the level of care required for a child who is a profoundly disabled child. It followed that combined the two disabled children also required at least that level of care.

Formal decision

The AAT set aside the decision under review and substituted a decision that Borg was qualified for payment of carer payment as at 22 March 2001.

[K.deH.]

Disability support pension: when condition to be regarded as fully treated and stabilised

HENWOOD and SECRETARY TO THE DFaCS
(No. 2002/0024)

Decided: 17 January 2001 by J. Cowdroy.

The criteria

Subsection 94(1) of the *Social Security Act 1991* (the Act) provides that to qualify for disability support pension (DSP) a person must have, among other things, an impairment which attracts a rating of 20 points under the Impairment Tables contained in Schedule 1B of the Act. A rating can only be given for a fully documented, diagnosed condition which has been investigated, treated and stabilised, and is considered to be permanent. The Tables state: 'it is accepted as being permanent if in the light of available evidence it is more likely than not that it will persist for the foreseeable future. This is taken as lasting for more than two years.'

[In addition, the effect of s.39(3) of the *Social Security (Administration) Act 1999* is that a claim for DSP may be granted if a person is not qualified when the claim is lodged but becomes qualified within 13 weeks of lodging the claim.]

The evidence

Henwood's claim for DSP lodged on 22 December 2000 was rejected. He suffers from disabilities of both feet. His toes are misshapen. The left foot is slightly better than the right. His working history is as a labourer, but he is unable to wear safety boots. He told the AAT that his skills are of the practical, 'hands-on' variety, he is not computer literate, and he believes he would get 'flustered' if asked to perform clerical work. He said he was keen to undergo any form of retraining if it would result in him obtaining employment.

On 24 May 2000 he underwent fusion of the tarso-metatarsal joints of the right foot to correct a collapsed arch. He also underwent surgery to the left foot with a pin inserted to try to correct a hammertoe. A further operation to the right foot was done in October 2000. It was thought that another might assist but it had since been decided that further surgical intervention would not be of benefit. The pin in the toe of his left foot