[2018] NZSSAA 19

Reference No. SSAA 091/17

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of XXXX against a decision of a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

K Williams - Member

C Joe - Member

DECISION

[1] At the request of XXXX (the appellant) and with the consent of the Chief Executive, this appeal is determined on the basis of the parties' written submissions.

Background

[2] The appellant receives a Supported Living Payment, an Accommodation Supplement and Disability Allowance (DA). She appeals the decision, upheld by a Benefits Review Committee (BRC), to reduce her DA from $61.69 to $45.75 per week and to stop her Temporary Additional Support (TAS) from 10 April 2017.

[3] On 20 March 2017, the Ministry increased the appellant's DA to $61.69 per week and TAS from $35.69 to $132.74 per week (the first decision).[1] On 4 April 2017, three weeks later, the Ministry made the decision to reduce her entitlement (the second decision). The effect of the second decision was to reduce the appellant's weekly benefit from $488.07 to $344.28 per week, a reduction of $48.72 from the sum of $393.00 per week (the sum she received before the first decision). The appellant now appeals the second decision.

[1] Section 12K Report at 186.

Issues

[4] The issues for the Authority to determine are:

a) On 4 April 2017, was the Chief Executive entitled to review the appellant's level of entitlement to DA and TAS?
b) If so, what was the appellant's entitlement at that time?

Relevant Law

The power to review entitlement

[5] Section 81 of the Social Security Act 1964 (the Act) provides the circumstances in which the Chief Executive may review a benefit:

> **81 Review of benefits**
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> (1) The chief executive may from time to time review any benefit in order to ascertain—
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> (a) whether the beneficiary remains entitled to receive it; or
>
> (b) whether the beneficiary may not be, or may not have been, entitled to receive that benefit or the rate of benefit that is or was payable to the beneficiary—
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> and for that purpose may require the beneficiary or his or her spouse or partner to provide any information or to answer any relevant question orally or in writing, and in the manner specified by the chief executive. If the beneficiary or his or her spouse or partner fails to comply with such a requirement within such reasonable period as the chief executive specifies, the chief executive may suspend, terminate, or vary the rate of benefit from such date as the chief executive determines.
>
> (2) If, after reviewing a benefit under subsection (1), the chief executive is satisfied that the beneficiary is no longer or was not entitled to receive the benefit or is or was entitled to receive the benefit at a different rate, the chief executive may suspend, terminate, or vary the rate of the benefit from such date as the chief executive reasonably determines.

[6] The scope of the power of review in s 81 was considered by the Supreme Court in *Arbuthnot v Chief Executive of the Department of Work and Income*.[2] The Court in that case observed that, prior to an amendment to the Act in 1991, the power in s 81 was limited to reviewing entitlement in the event of a change of circumstances. Section 81(1)(b) now extends this power to include an assessment of past entitlement and whether there has been any overpayment.

[7] In *Arbuthnot*, the Court considered whether the Chief Executive had the power to review a decision which had been reviewed by a BRC. The Court concluded that:

> [35] … it would have to be an unusual case to justify a further review under s 81 where no change of circumstances has occurred and no new factual information bearing upon the eligibility for the benefit has come to the attention of the Department. Beneficiaries are persons of limited means who are likely to be dependent on the continuity of their benefit payments. They are entitled to expect that decisions once made by the Department will not be disturbed save for very good reason. To use s 81 simply as a means of re-appraising facts already known to the Department at the time of an earlier review would run counter to that expectation. The Chief Executive's discretion under s 81 should be exercised with this consideration in mind.
>
> [36] In a case like the present, however, and assuming no change in the circumstances of the beneficiary, we consider that the Chief Executive would be entitled to use the power of review under s 81 to re-assess eligibility for continuance of a benefit in the future once an inconsistency has been created by a decision of the Appeal Authority. While this might result in suspension or termination of the benefit, when past payments have been made as a consequence of a decision of a BRC, upon which the beneficiary has been relying, it would seldom be appropriate for the Chief Executive to "reasonably determine" under s 81(2) to recover them as from a past date.

[8] The Court held that the Chief Executive has no right of appeal from a BRC decision because a decision of a BRC has the same standing as a decision of the Chief Executive personally. The principles applied in *Arbuthnot*[3] to a review by a BRC under s 81 must also apply to an original decision by the Chief Executive. Accordingly, once the Chief Executive has reviewed entitlement to a benefit, unless there has been a change of circumstances, a further review will only be justified in unusual circumstances.

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[2] *Arbuthnot v Chief Executive of the Department of Work and Income* [2008] 1 NZLR 13.
[3] Ibid at [35].

Entitlement to TAS and DA

[9] The Act provides for payment of TAS and DA in certain circumstances:

> **61G Temporary additional support**
>
> (1) The purpose of temporary additional support is to provide temporary financial assistance within the prescribed limits as a last resort to alleviate the financial hardship of people whose essential costs cannot be met from their chargeable income and other resources, while ensuring that people seeking or granted that assistance take reasonable steps to reduce their costs or increase their chargeable incomes.
>
> **69C Disability allowance**
>
> **…**
>
> (2A) A disability allowance is not payable to or on account of any person except to the extent that—
>
> (a) the person has additional expenses of an ongoing kind arising from the person's disability (subject to section 68A); and
>
> (b) the assistance towards those expenses available under this Act or any other enactment is insufficient to meet them.

Relevant Facts

[10] The chronology and background to the first and second decisions is set out in the documents produced by the parties. Given the proximity between the first and second decision, the information available at the time of the first decision is relevant to this appeal.

The first decision: to increase assistance to the appellant

[11] From September 1985, the appellant was on a sickness benefit which then became an invalid's benefit. In July 2013, the benefit type changed again to the current Supported Living Payment. Medical records show that, at least from 2011, the appellant has suffered from digestive system issues and unexplained, abnormal weight loss.

[12] On 7 March 2017, Ms A, a community dietician with the XXXX District Health Board, wrote to Work and Income New Zealand (WINZ) and called the Ministry's Contact Centre to seek further financial assistance for the appellant.

Ms A said the appellant needed this assistance because she had lost a significant amount of weight, required nutritional supplements to increase her calories and was unable to tolerate certain foods.

[13] Ms A's records show that, between 15 April 2016 and 7 March 2017, the appellant's weight dropped from 55.4 kg to 46.4kg. Her normal weight is recorded as 57 kg. Ms A recommended that the appellant should take Ensure, a meal supplement, twice a day as well as a daily probiotic tablet, and that the Meals on Wheels service should increase from three to five times a week.

[14] The WINZ Service Centre manager called the appellant to discuss a review of her disability allowance and told the appellant that she needed to provide verification of her dietary needs. The appellant provided a certificate and letter from Ms A supporting the additional expenses, and a disability certificate and letter signed by Dr B, her GP, explaining a trial diet. The letter from the doctor referred to a quote for gut supplements, and the quote dated 8 March 2017 is included in the Ministry's report.

[15] The Ministry decided to increase the appellant's DA to $61.69 per week and TAS to $132.74 per week, effective from 20 March 2017. This was the first decision.

The second decision: to reduce assistance to the appellant

[16] The Ministry's records show that on 25 March 2017, after the appellant was notified of the decision to increase her DA and TAS, the appellant contacted the Ministry to clarify the increase to her entitlement. She called again, later that same day, asking whether the TAS payment could increase further based on a change of circumstances with her medical condition. The records show she mentioned a naturopathic clinic.

[17] On 27 March 2017, the Ministry called the appellant and explained that only essential costs supported by a doctor were included in TAS payments and that significant costs were already included in her DA and TAS.

[18] On 29 March 2017, the Service Centre Manager records:

> See previous notes — client continues to enquire about additional costs being included in her DA which is paid at max (so TAS rate change only). *Costs are so extravagant* and what client advises is all are totally essential and Dr supports them for her to be well. Need someone to contact her to validate her heath (sic) condition and whether all costs being provided are actually

> essential. Have referred to Health team for advice. Advised client we would be contacting her Dr and would be in touch. (emphasis added)

[19] The Service Centre Manager then requested the assistance of the Regional Health Team because the appellant requested additional assistance when her DA was already being paid at the maximum rate.

[20] On 29 March 2017, the appellant submitted a disability allowance review form, and a form consenting to release of health and disability information to WINZ. She also provided another disability certificate and letter dated 28 March 2017 from Dr B confirming the cost of Meals on Wheels, supplements, and a prescription.

[21] The doctor's letter of 28 March 2017 states that:

> [The appellant] is experiencing a number of digestive symptoms that are probably related to food intolerances. She is awaiting specialist review. She has been reviewed by a dietician who recommended Ensure supplements, probiotics and meals on wheels. We are trialling [the appellant] on a restrictive FODMAP diet to see if they ease the symptoms. [The appellant] has also received a quote from [the pharmacy] for a month of gut supplements — $247.94. I am not sure whether this can be funded by WINZ also. I have completed the disability allowance medical certificate today. She may need to trial this for 6-12 months.

[22] On the Disability Certificate, under items/services/treatments/pharmaceuticals, Dr B wrote: "Pharmacy vitamins/supplements $150 to $250 per two months — she could obtain quote from retailer. Trying gluten free diet also protein drinks."

[23] The Ministry's file notes record that on 3 April 2017 Ms C, the Regional Health and Disability Co-ordinator, spoke to someone from the medical centre the appellant attended. Ms C does not identify the name or position of the person she spoke to. However, she states that she was told that: the appellant only needed to be seen once per month; the doctor recommended Ensure and probiotics and said that she may benefit from Meals on Wheels; no other special foods or supplements were recommended; the appellant has not been diagnosed with coeliac disease or any other food intolerance.

[24] Ms C states that the medical certificate issued on 28 March by Dr B included supplements of $150 to $250 per month but says "no specific products were listed". She records that she confirmed with the hospital dietician (unnamed),

apparently by telephone although no details are provided, that the need for vitamins and supplements was adequately met with Ensure and probiotics.

[25] Ms C does not address the apparent inconsistency between what she says she was told on 3 April 2017 and other information on the appellant's file, including the letter from Dr B written a few days earlier and the information from Ms A.

[26] Ms C then directs that DA and TAS are to be reviewed from the first available date and disallows the Meals on Wheels service. The only consumables she authorises are probiotics ($5 per week) and Ensure ($18.20 per week). Her reason is that the dietician confirmed these costs and they are the only specified consumables on the medical certificate.

[27] Ms C then states that:

> If the client chooses to continue with Meals on Wheels, she can do so but this is a choice and falls within the normal costs of healthy eating. Furthermore, as per MAP policy, Disability Allowance cannot be paid for foods subsidised or paid for through Health, extra costs of a self-imposed diet or lifestyle choice or the normal costs of healthy eating.
>
> Meals on Wheels are provided by MoW Health [XXXX] and are therefore subsidised through Health.

[28] Ms C recommends that TAS not be paid over the upper limit unless the appellant meets the disability exception criteria. She notes that the upper limit for a person receiving a main benefit is 30 per cent of the net rate.

The Case for the Appellant

[29] The appellant states that her situation did not alter between the time when the Ministry increased her entitlements and when they were reduced. On her Application for Review of Decision form, dated 5 April 2017, she states that for more than two years prior to the first decision her DA was $61.69 and her total benefit payments were $393. She cannot understand why her entitlement was reduced below this level. She relies on the information from her doctors confirming that she has food intolerance and asks that her benefit be reinstated.

[30] The appellant refers to a letter that Dr D (who is from the same practice as Dr B) wrote to the WINZ Service Centre Manager on 12 April 2017 which states that:

> [The appellant] is a patient of this clinic. She was seen by my colleague few weeks ago in regards to her WINZ payments.
>
> [The appellant] has been on a FODMAP diet in view of her ongoing and chronic food intolerances and having been seen by the community dietician.
>
> Her circumstances have not changed, as mentioned in your letter dated 7/4/17.
>
> She still requires food supplementation and I would be obliged if the $45.75 weekly payments be reinstituted to make the cost of her payments to the original amount of $473.20.

[31] The appellant saw another doctor, Dr E, on 11 October 2017. Dr E completed a Disability Certificate and wrote a letter stating that the appellant had a long history of food intolerances, her overall health had improved and she had gained weight from taking Ensure supplements and receiving Meals on Wheels. The doctor supported ongoing financial assistance with food consumables.

[32] The appellant wants these letters and certificates to be taken into account in this appeal.

[33] The appellant raised the question of which health professionals can complete a medical certificate. Given our decision, we do not need to consider this issue.

The Case for the Chief Executive

Power to review benefit entitlement

[34] The Ministry submits that s 81(1) of the Act empowers it to review the appellant's benefit entitlement. It accepts that this power must be used cautiously because beneficiaries rely on regular benefit payments. However, the Ministry says a review was triggered when the appellant submitted additional documents and receipts which were not congruent with her previous disability certificates. This led the Service Centre Manager to seek the assistance of Ms C, the Regional Health and Disability Coordinator, who then conducted a review.

[35] The Ministry does not address the threshold for the exercise of the s 81 power of review or the criteria in the Act, other than to say that it had inconsistent information. The alleged inconsistencies are not clearly identified or referenced

to in specific documents. There is no analysis of any inconsistencies nor any apparent attempt to reconcile or explain them, if they did exist. There is nothing to suggest that, if there were inconsistencies, the appellant was given an opportunity to explain them. Nor is there any reasoning showing why the Ministry decided to accept the information obtained by Ms C as being more reliable or accurate than that provided by the appellant.

The level of entitlement on 4 April 2017

[36] The Ministry states that on 3 April 2017 Ms C submitted a report recommending a reduction in the appellant's DA to $45.75 a week and stopping the TAS. The only document produced by the Ministry containing recommendations is Ms C's computer-generated notes; it appears this is what the Ministry regards as her report.

[37] Ms C excluded the cost of Meals on Wheels and gut supplements, reduced the cost of medical appointments from $38 to $17.50 a month and added $100 per annum to cover the cost of prescriptions. The allowances for telephone and gardening were not changed.

[38] We note that the Section 12K Report writer states that, when the decision was made on 4 April 2017, the latest disability certificates and letters from Ms A and Dr B were dated 10 and 18 March 2017. This is incorrect. Ms C refers to the letter and certificate dated 28 March from Dr B.

[39] Exhibit 28 to the Ministry's report is an email that Ms C wrote to the Appeals Officer on 27 September 2017, after this appeal was filed. Ms C attaches file notes that she obtained on that day from the medical centre. The notes were made by Dr B on 28 March 2017 (the date of his second letter and disability certificate).

[40] In this email, Ms C states, possibly in response to a query from the Appeals Officer:

> Here are the file notes from [the medical centre]. It does look like he [Dr B] did see her in May, but was still a locum then. Perhaps he was a locum for more than 2-3 weeks after all, but this is not important for the purposes of this case I wouldn't think.

> Now, of most importance, you will see from these notes that [Dr B] did NOT recommend or note that he was overseeing the prescription of gut supplements or any alternative treatments. His notes state/indicate that [the appellant] was advising him of her treatment ... Nowhere in [Dr B]'s notes does it state he is recommending these products, nor overseeing them. He is merely noting [the appellant's] requests.

[41] The Authority directed that, if the Ministry was relying on Ms C as an expert witness, it was to file a brief of evidence and provide a schedule of the information she used to reach her decision, and the reasons for that decision. The Ministry confirmed that it would not rely on Ms C as an expert witness.

Discussion

Was the Chief Executive entitled to conduct a review of the appellant's entitlement?

[42] The power of the Chief Executive to review any benefit entitlement is limited by ss 81(1)(a) and 81(1)(b) of the Act to reviewing retrospective or current entitlement. It is only for these two purposes that the Chief Executive may require the beneficiary to provide information which he then uses to review entitlement. The threshold for an investigation under s 81 must be low enough to allow the power of review to be reasonably exercised but the investigation must be for one of the purposes provided.

[43] The Ministry is not suggesting that the purpose of its review was to determine whether or not the appellant remained entitled to the benefits she was receiving as a result of the first decision. In its report, the Ministry states that the Service Centre Manager requested the assistance of the Regional Health Team, which conducted the review, because the appellant continued to ask for additional costs to be included in her Disability Allowance.

[44] In our view, a request for further assistance does not permit the Chief Executive to conduct a review of entitlement under s 81. Such a request can only trigger an assessment of whether or not that request should be granted. There was no justification for using the appellant's request for further assistance to review her existing entitlement.

[45] The appellant's comprehensive medical records, including the most recent certificates, demonstrate that the appellant's health issues and her resulting need for assistance did not change for several years. We are satisfied that on 4 April 2017, when the Ministry undertook the review that led to the second

decision, there was no change in the appellant's circumstances that could justify a s 81 review.

[46] We have endeavoured to ascertain whether there are any discrepancies which were identified in the Section 12K Report by examining the three types of assistance sought by the appellant: the cost of gut supplements, Meals on Wheels and medical fees.

[47] The Ministry relies on the medical certificate dated 15 March 2017 for its decision to reduce the allowance for gut supplements. The Ministry states that this certificate did not include the list of supplements and the registered dietician did not include them in her certificate dated 10 March 2017. The Ministry also refers to the letter dated 12 April 2017 (after the second decision) from Dr D which stated that the appellant required food supplementation. Ms C says that when she contacted Dr D to get further clarification, he said that he would prescribe Ensure and probiotics only. As stated, there is no record of this conversation, other than Ms C's notes. The Ministry also refers to subsequent enquiries carried out by Ms C including her review of the appellant's medical notes.

[48] The Ministry has preferred to rely on the unsubstantiated conclusion of Ms C, who has no apparent qualifications to make such assessments, to that of a qualified doctor. As noted at [21], Dr B stated on 15 March 2017 that the appellant had a quote for a month of gut supplements and "I am not sure whether this can be funded by WINZ also". If Ms C was not aware of the quote, she should have asked the appellant to provide it. We are satisfied that because the doctor included these items in his letter, he considered them necessary.

[49] The Ministry acknowledges that the cost of the Meals on Wheels service was considered by the doctor and dietitian as a necessary item. The Ministry decided to exclude this cost on the basis that Meals on Wheels is subsidised by the Ministry of Health and the provision of meals would save the appellant costs.

[50] The Ministry did not provide any legislative justification for excluding the cost of a service on the basis that it was already subsidised by another government department, despite the fact that it met the criteria for being covered by a DA or TAS. Section 1A(c)(ii) of the Act allows the Ministry to take into account any

financial support that people receive from other publicly funded sources when providing assistance. However, the Ministry routinely accepts that medical costs, including the costs of prescriptions, which are also subsidised by the Ministry of Health, are costs which can be covered by a DA or TAS.

[51] The Ministry's reasoning appears to be that the need to eat is a normal requirement of day-to-day life and not an additional expense resulting from the appellant's disability. We do not accept this reasoning. The overwhelming evidence of the health professionals is that the appellant has significant unexplained weight loss which is debilitating. She requires assistance with meal provision as a result. At the time of the second review, the appellant's doctor noted that she was waiting for further diagnostic assessment. We are satisfied that as at 4 April 2017 the appellant required Meals on Wheels as a result of her disability and was entitled to this service five days per week, as requested by her doctor and dietician.

[52] On 15 March 2017, Dr B certified the cost of medical appointments at $17.50 per month and prescription costs at up to $100 per month.[4] Since 2011, the appellant's entitlement for medical fees had been calculated on the basis of $38 per week. The Ministry submits that it was justified in reducing her entitlement for medical costs when it made the second decision on the basis of this doctor's certificate. However, this certificate was available and presumably considered when the first decision was made. Therefore, there was no discrepancy in the information provided on medical costs between the first and second decision.

[53] The Ministry's assertion that there were inconsistencies in the information provided by the appellant does not justify the comprehensive review it undertook. The Ministry appeared to ignore the fact that it had already made a decision, the first decision, after considering all information relevant to the appellant's entitlement at that time.

[4] The date on this certificate is not clear. In some instances, the Ministry refers to this date as 15 March 2017 and in others as 17 March 2017. We are satisfied that the reference is to the same certificate.

Conclusion

[54] The appellant was asked to provide information to support her request for additional support. Because the Service Centre Manager considered that the costs were extravagant (and it is not clear whether she was referring to expenses which were accepted by the Ministry when it made the first decision or those requested subsequently) she referred the file for review.

[55] Although the threshold for a review of entitlement under s 81 of the Act is not high, in circumstances where entitlement has been recently reviewed, a further review can only be justified in unusual circumstances or where there has been a significant change of circumstances. There were no such circumstances in appellant's case and therefore the Ministry was not entitled to review her benefit or associated allowances.

[56] Accordingly, the appellant is entitled to have her benefit reinstated from 10 April 2017 at the level determined on 20 March 2017.

[57] Although we did not need to consider the appellant's level of entitlement at the date of the second decision, we note for completeness that the medical information relied on for the first decision is not displaced by the material and opinion that the Ministry relied on for the second decision.

Order

[58] The Ministry is to reinstate the appellant's DA to $61.69 per week and TAS to $132.74 per week immediately, backdated to 10 April 2017.

[59] The parties may seek further directions if they cannot agree on the amount payable by the Ministry to the appellant.

Observations

[60] The review of the appellant's benefit which resulted in the first decision to increase her entitlement was initiated by concerned health professionals. The second review and decision to significantly reduce her entitlement appears to be the Ministry's response to the appellant's attempts to clarify her increased entitlement and establish whether further support was available.

[61] The Ministry carried out the second review without any consideration of the effect on a person identified as vulnerable by her medical professionals. It failed to conduct the review with any transparency or involvement from the appellant. Not only did the Ministry fail to provide any medical evidence to justify its conclusion, but it put its own, unqualified, interpretation on the medical certificates that the appellant relied on.

[62] The effect on the appellant of the second decision to reduce entitlement is apparent in the notes of the District Health Board psychiatric services. On 5 May 2017, a consultant psychiatrist recorded that the appellant presented with severe anxiety, looked emaciated, and was extremely anxious about her physical health.

[63] On 1 November 2017, the psychiatrist reported that the appellant does not suffer from any mental health issues other than anxiety over her living costs and being able to afford supplements and good quality food as she is physically fragile.

[64] These reports show the unfortunate effect of the Ministry's decision to significantly reduce the appellant's entitlement based on an investigation conducted by someone with no apparent relevant qualifications or experience.

Dated at **Wellington** this 7th day of May 2018

S Pezaro
Deputy Chair

K Williams
Member

C Joe JP
Member