

[2016] NZSSAA 065

Reference No. SSA 157/15

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Dunedin against a decision of a
Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace - Chairperson
Mr K Williams - Member
Lady Tureiti Moxon - Member

HEARING at WELLINGTON on 16 June 2016

APPEARANCES

No appearance for the appellant

Ms J Hume for the Chief Executive of the Ministry of Social Development

DECISION ON THE PAPERS

Introduction

[1] The appellant appeals against a decision of the Chief Executive; upheld by a Benefits Review Committee to grant Domestic Purposes Benefit – Care of Sick and Infirm (DPB – CSI) from 7 May 2009 rather than 3 February 2006, which was the date the appellant’s child was born.

[2] The Chief Executive’s decision has since been varied and DPB – CSI has been granted from 2 July 2007.

[3] The issue in this appeal is whether or not the appellant was entitled to receive DPB – CSI from the date of her son’s birth on 3 February 2006 to 2 July 2007.

Background

[4] The appellant's son XXXX was born on 3 February 2006.

[5] The appellant was receiving Sickness Benefit at the time. She transferred to Domestic Purposes Benefit – Sole Parent on 13 February 2006.

[6] The Ministry say that between that date and 6 May 2009 she had many contacts with the Ministry but there is no reference to the appellant advising that her son had any particular medical condition in its records.

[7] In May 2009, the Ministry received advice that XXXX, who was by that time aged three years, had a developmental disorder. A computer note made by the Ministry's Regional Health Advisor confirms that "this child requires attention and supervision in excess of that normally required by another child of the same age and meets the eligibility criteria required for child CDA".

[8] Child Disability Allowance was granted to the appellant for XXXX from 7 May 2009. Between 2009 and 2013, there were various contacts with the appellant.

[9] In May 2013, the appellant applied for DPB – CSI. She also requested that the grant be backdated.

[10] Initially DPB – CSI was granted from 20 May 2013, but a short time later it was backdated to 7 May 2009. This was the date that Child Disability Allowance had been granted for Lucas.

[11] The appellant sought a review of decision. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee upheld the decision of the Chief Executive. The appellant then lodged an appeal with the Authority.

[12] The appellant did not attend the appeal hearing, although it was arranged for her to attend by way of video conference call.

[13] The appellant's notice of appeal says that:

"There is numerous medical information to support the fact that XXXX was born with the medical condition 'Autism spectrum disorder'. As a consequence of this medical condition my costs have increased to the point where I am living in financial hardship and have accrued a personal debt."

[14] The day before the hearing, the Authority received a communication from a doctor in Christchurch which states as follows:

“XXXX has severe autism which has been present since birth. He has required continual supervision above normal for a child of his age since birth. He has been reviewed by specialists and requires special schooling.”

[15] This report encloses the first page of the report from a joint paediatric assessment carried out on 2 July 2009.

Decision

[16] The criteria for a grant of DPB – CSI is distinctly different from the criteria relevant to a grant of Child Disability Allowance.

[17] There have been a number of changes in the legislation relating to the criteria for DPB – CSI in the past 20 years. In the 1980s and 1990s, there were also significant changes in the arrangements for the care of children with disabilities. Up until July 2002, s 27G(2) of the Social Security Act 1964 (the Act) provided that DPB – CSI could be paid only if the applicant was required to give full-time care and attention at home to some other person who would otherwise “be admitted to hospital within the meaning of s 88 of the Act”.

[18] An amendment to s 27G came into force on 1 October 2002.¹ The requirement of “to be admitted to hospital within the meaning of s 88 of the Act” was replaced with the words “would receive hospital care within the meaning of the Health and Disability Services (Safety) Act 2001”.

[19] The Health and Disability Services (Safety) Act 2001 defined “hospital care” in the following way:

hospital care means services that are children’s health services, geriatric services, maternity services, medical services, mental health services, or surgical services (or services of 2 or more of those kinds) provided—

- (a) in premises held out by the person providing or intending to provide the services as being capable of accommodating 2 or more of the people for whom the services are provided for continuous periods of 24 hours or longer; and
- (b) in consideration of payment (whether made or to be made, and whether by the Crown, the people for whom the services are provided, or any other person).

¹ Schedule 2 of the Health and Disability Services Safety Act 2001.

[20] The Health and Disability Services (Safety) Act 2001 provides separate definitions for “residential disability care” and “rest home care”. This suggests that these types of care were regarded as distinctly different from hospital care.

[21] A further amendment to s 27G occurred on 2 July 2007 when the categories of care that a person might require for their caregiver to receive DPB – CSI was expanded from simply “hospital care within the meaning of the Health and Disability Services (Safety) Act 2001” to:

- (a) Hospital care, rest home care or residential disability care within the meaning of the health and Disability Services (Safety) Act 2001; and
- (b) Care of the kind referred to in s 141 of the Children, Young Persons and Their Families Act 1989; and
- (c) Care of a kind equivalent to any of those kinds of care.

[22] In short, prior to 2 July 2007, a person seeking to establish eligibility for DPB – CSI needed to demonstrate that the person they were caring for would be in a hospital but for their care. In this case, there is no doctor who has certified that Lucas would have been cared for in a hospital but for his mother’s care in the period from his birth to 2 July 2007.

[23] The Authority has been provided with the first page of a report arising from a joint paediatric assessment dated 3 September 2009. This assessment records that the appellant first expressed concern about her son in May 2008. The report records that the appellant had been visiting pre-schools and had noted that her son’s skills were different from those of his peers. Her main concerns centred around XXXX’s decreased concentration and attention and the fact that his communication was at a single word level. As we are now considering the first 18 months of XXXX’s life, we note, from the summary, of the presenting concern under the heading “Early Developmental Milestones” it states:

“There were no concerns with smiling and eye contact was established in the first weeks of life. XXXX was said to walk at 12 months and to say ‘Mama and Dadda’ specifically around this stage also. XXXX commented that he was always quiet.”

[24] Two points must be made. The first is that none of the medical reports provided suggest that but for his mother’s care XXXX would have had to have been cared for in a hospital. That is not surprising given the report from the joint paediatric assessment. Moreover, the inference to be drawn from the information relating to his

early developmental milestones is that in his first year of life there were no concerns with XXXX meeting his early milestones.

[25] We further note the New Zealand Autism Spectrum Disorder Guidelines contained in the Section 12K Report state that:

“In the first year of life there are usually no clear discriminating features and delays/impairments in development may not necessarily be recognised by either parents or professionals.”

[26] There is a second reason why it is likely that no doctor has certified that XXXX would otherwise have been cared for in a hospital. This reason is that whilst for a period in New Zealand’s history, children with significant intellectual disabilities were cared for in places referred to as “hospitals”, a decision was taken to close those hospitals in 1985. By 2006 when XXXX was born, those hospitals had all been closed. There was no prospect of XXXX being admitted to such a hospital at the time of his birth, or in the following 18 months.

[27] In 2007, the legislation covering eligibility for DPB – CSI was changed again to include residential care. It is on that basis that the grant has been made from the date the legislation changed.

[28] While we appreciate that it is likely that XXXX was born with autism, the provisions of the Social Security Act 1964 and the practical arrangements for children with disabilities such as his in place in the period 3 February 2006 to 2 July 2007 meant that it was unlikely that DPB – CSI would be granted. We are satisfied that the Chief Executive’s decision not to backdate payment of DPB – CSI to the appellant prior to 2 July 2007 was correct.

Child Disability Allowance

[29] The appellant’s notice of appeal also refers to her appealing the commencement date of Child Disability Allowance.

[30] We agree with the submission made on behalf of the Chief Executive that the appellant’s original request for a review of decision on 7 August 2013 specifically referred to the commencement date of her DPB – CSI. There is no reference in that review of decision to Child Disability Allowance. For that reason, the decision of the Benefits Review Committee refers only to DPB – CSI and not to Child Disability Allowance.

[31] The jurisdiction of this Authority is limited by s 12K of the Social Security Act 1964. This Authority can only consider decisions of the Chief Executive which have been confirmed or varied by a Benefits Review Committee. As a Benefits Review Committee has not considered the issue of Child Disability Allowance we are not able to consider the issue of whether or not Child Disability Allowance should be backdated.

[32] It is open to the appellant to specifically request that an out of time backdated review of the Child Disability Allowance be carried out.

[33] The appeal as it relates to the backdating of DPB – CSI is dismissed.

DATED at WELLINGTON this 5th day of July 2016

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member