

[2016] NZSSAA 087

Reference No. SSA 150/15

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

Mr R Burnard - Chairperson
Mr K Williams - Member

HEARING at WELLINGTON on 14 April 2016

APPEARANCES

Mr XXXX for the appellant
Mr R Signal for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant's appeal relates to the following matters:

- (i) The date of commencement of Invalid's Benefit.
- (ii) Clarification of the payment of Disability Allowance to an organisation called Earthlink.
- (iii) Compensation for underpayment of benefit in the period 2001 – 2003.

[2] A request to reimburse the appellant's father for treatment costs of \$815 paid to the Phobic Trust was settled prior to the hearing.

Background

[3] The appellant is aged 41 years. He currently receives Supported Living Payment and associated supplementary benefits. He suffers from a mental health disability.

[4] The appellant had a probable diagnosis of intellectual disability in the 1990s. A letter from the appellant's father to the then Department of Social Welfare in May 1990 evidences the appellant's father indicating to the Ministry at that time that the appellant had an intellectual disability and a requirement for special schooling.

[5] The appellant left school when he was approximately 18 years of age. In the period immediately prior to March 1999 he was in receipt of an Unemployment Benefit. The appellant apparently suffered a psychotic episode in January 1999. On 15 March 1997 when he was aged 23 years he was transferred to a Sickness Benefit. Ministry records record his medical condition at the time as being "intellectual disability and other psychological conditions".

[6] There is a reference in the Ministry's computer records that in June 1999 he was referred to an appointment with a Work and Income designated doctor. By this time the appellant had been very unwell for at least six months. He was not however transferred to an Invalid's Benefit at this time.

[7] On 21 February 2000 the appellant began living in a XXXX mental health supported accommodation facility known as XXXX. He transferred to a mental health supported accommodation facility in XXXX in December 2000. The appellant was evicted from this accommodation on 8 December 2001. This began a very unsettled period in the appellant's life. Initially he went to live with his mother in XXXX but that arrangement was short-lived. The appellant's father records that in the period December 2001 to January 2003 the appellant had approximately 20 changes of location/address. These were primarily either in XXXX or XXXX.

[8] On 9 January 2003 the appellant's father lodged a review of decision on his behalf. Issues raised related to Accommodation Supplement and Disability Allowance. The Ministry belatedly followed up on this request for review on 5 March when a meeting took place between the appellant's father and Ministry staff. As a result of this meeting the appellant was, amongst other things referred to a designated doctor for consideration of his entitlement to Invalid's Benefit. A decision was made to grant Invalid's Benefit from 26 March 2003. No further action was taken by the Ministry in relation to the review of decision.

[9] The appellant's father says that a review of Accommodation Supplement entitlement was carried out in respect of the period 18 November 2002 to 5 March 2003 but not in respect of any earlier period. Disability Allowance was not reviewed at all.

[10] In 2009 the appellant's father made an effort to investigate what had happened to the appellant's 2003 request for review of decision but effectively the review of decision of 2003 was not reactivated until 2014. At that point the appellant's father also requested that the appellant's Invalid's Benefit be backdated to 21 December 2001. This request was considered by the Chief Executive. As a result on internal review the appellant was granted Invalid's Benefit from 21 December 2001 and arrears were paid.

Jurisdiction to consider further backdating

[11] The appellant's father, on behalf of the appellant now seeks further backdating of the appellant's entitlement to Invalid's Benefit. In the notice of appeal he sought backdating to 8 December 2001. At the hearing of this matter he left open the date to which backdating should be granted. In any event there can be no doubt that the issue of the backdating of the appellant's Invalid's Benefit was a matter which was decided on by the Chief Executive. It was considered by the Benefits Review Committee on 25 June 2015. The Benefits Review Committee in effect confirmed the Chief Executive's decision.

Application for Invalid's Benefit

[12] On behalf of the Chief Executive it is submitted that whilst the letter from the appellant of 21 December 2001 can be deemed to be an application for Invalid's Benefit, Invalid's Benefit could not be granted from 8 December 2001, as no application for Invalid's Benefit had been received on that date. It is submitted on behalf of the Chief Executive that s 80AA of the Social Security Act 1964 does not apply because the appellant has not indicated that he made an earlier attempt to apply for an Invalid's Benefit and was prevented from making that application as a result of some error or omission by Ministry staff.

[13] It is further noted on behalf of the Chief Executive that while the appellant was in receipt of Sickness Benefit from 15 March 1999 the medical certificates completed at the time would have had a section to be completed by a doctor. If a doctor had recommended that the appellant be assessed for entitlement to Invalid's Benefit at any time he would have been referred to a designated doctor for assessment.

[14] The decision of the Chief Executive which the Benefits Review Committee of 25 June was being asked to consider was the decision made in April 2003 to pay Invalid's Benefit from 26 March 2003. The law that applied in March 2003 was that a benefit could not be backdated in the absence of an application. However on 3 August 2001 the High Court, in *Chief Executive of the Department of Work and Income v Scoble*¹ stated that at that time there was nothing in the Act or Regulations which required a claimant to specify a particular monetary benefit when an application for benefit was made. The Court found:

I cannot believe that the legislature could ever have intended that because of a misdescription of a monetary benefit, or a failure to refer to all the possible monetary benefits which the circumstances support the Chief Executive has no power to ensure that the correct benefit or benefits are paid. Applicants for benefits come from those most in need in our community. They will often be persons lacking in requisite skills to identify or specify the benefits to which they might be entitled. I cannot contemplate that Parliament would have intended that the most disadvantaged members of a community should be further disadvantaged if their applications were misnamed or they failed to name the precise monetary benefits to which they are entitled under the Act.

[15] The Ministry rely on s 80AA to reject the appellant's claim for further backdating. However this provision did not come into force until 2 July 2007. It was not in force when the decision to determine the date of grant of Invalid's Benefit was made in 2003.

[16] When the appellant was transferred to a Sickness Benefit in March 1999 it was open to the Chief Executive to consider whether or not the appellant was entitled to an Invalid's Benefit. Contrary to the Ministry's submission it was not necessary that the appellant specify that he wished to apply for an Invalid's Benefit. It is apparent that the appellant was transferred from Unemployment Benefit to Sickness Benefit because he was unwell. It seems likely that the Ministry may already have been aware that the appellant had an intellectual disability.

[17] Two issues arise:

- (i) The first is whether or not the appellant qualified for Invalid's Benefit as at March 1999. Simply because the appellant was seriously unwell by March 1999 does not mean that he met the criteria for Invalid's Benefit. The decision maker needed to be satisfied as at March 1999 that the appellant was suffering from a condition which would affect his ability to work for at least two years.

¹ [2011] NZAR 1011 (HC).

- (ii) Was there sufficient information about the appellant's condition available to the Ministry which ought to have alerted it to the fact that Invalid's Benefit may have been a more appropriate benefit a Sickness Benefit either as at March 1999 or at any other point prior to December 2001.

[18] Unfortunately none of the medical certificates supporting the application for Sickness Benefit are now available. The Ministry does have a letter of 7 September 2011 from a psychiatrist employed by the XXXX DHB which notes that the appellant has been a patient of the XXXX continually for some 11 years. The letter records "he remains seriously mentally ill, is on high doses of medication and at present requires to be reviewed on a weekly basis by myself, and also needs additional support from the XXXX for his panic attacks, from a support worker in the community from a committed psychiatric nurse and a committed occupational therapist in order to be maintained in the community."

[19] A memorandum dated 2 April 2015 from the Ministry's Regional Health Advisor states:

I understand that in March 1999 when client's medical cert (as per SWIFT) indicated intellectual disability that W & I were reliant on the GP to recommend a designated doctor for IB. I would still have wondered why a case manager didn't note this as unusual at a time when (I assume) people with intellectual disability would have all been on IB. It doesn't seem to have been a diagnosis since then.

[20] The appellant's father refers to a letter written to the Ministry in 1990 which included the information that the appellant attends 'the Experience' Unit at XXXX.

[21] The material placed before the Authority at the hearing of this matter did not adequately demonstrate that the appellant was eligible for Invalid's Benefit. Since the hearing the appellant's father has obtained his son's records from XXXX and the XXXX District Health Board for the relevant period. However the decision of whether the appellant met the eligibility criteria for Invalid's Benefit is a medical decision. This Authority does not have jurisdiction to consider appeals on medical grounds.

[22] In the circumstances this matter is referred back to the Chief Executive to consider:

1. Whether the appellant's medical conditions were such that he qualified for Invalid's Benefit as at March 1999 or at any other point prior to 21 December 2001.

2. Whether the Ministry had information in March 1999, or at any other time prior to 21 December 2003, which ought to have resulted in the grant of an Invalid's Benefit rather than a Sickness Benefit.

[23] In the event that the Ministry is not satisfied on medical grounds of the appellant's eligibility for Invalid's Benefit in March 1999, the appellant's right of appeal in relation to this aspect of the matter is to the Medical Appeal Board rather than this Authority.

Compensation

[24] The appellant seeks compensation for the underpayment of benefit until 2003.

[25] This Authority does not have power to award compensation. It is unfortunate that the matter has not been pursued more assiduously by the appellant, however we recommend the Chief Executive consider whether or not an *ex gratia* payment should be made to the appellant for the payment of Sickness Benefit instead of Invalid's Benefit until 2003.

Disability payments to Earthlink

[26] A further matter raised by the appellant is that for a period in 2000/2001 the appellant was attending a course and being supported by and receiving training support from an organisation called Earthlink.

[27] It has come to light that at least for a period from 6 June 2001 the appellant's Disability Allowance was paid to Earthlink. But it does not necessarily follow that the payment to Earthlink was a mistake. Paperwork relating to this arrangement is no longer available.

[28] On behalf of the appellant it is submitted that the appellant was evicted from his Supported Living accommodation because the amount redirected from Work and Income to meet his board costs was insufficient. This was for two reasons:

- (i) The appellant was not receiving Invalid's Benefit.
- (ii) An amount of \$45 of his Disability Allowance was being directed to Earthlink and not to Step Ahead.

[29] There has been a significant delay on the part of the appellant pursuing this matter. Ministry records are no longer available. We understand the particular provider no longer exists. We accept that the Ministry is no longer able to be specific

about why the Disability Allowance was paid to Earthlink. The appellant has simply left the matter too long. We are unable to take this aspect of the matter any further.

[30] This appeal as it relates to compensation and disability payments to Earthlink is dismissed. The appeal as it relates the backdating of Invalid's Benefit is referred back to the Chief Executive for further consideration. The appellant is to be given notice of his rights of appeal in relation to the decisions made by the Chief Executive arising from this decision.

[31] Leave is reserved for either party to return to the Authority for further direction.

DATED at WELLINGTON this 6th day of September 2016

Mr R Burnard
Chairperson

Mr K Williams
Member