[2017] NZSSAA 014

Reference No. SSA 125/15

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr C Joe - Member

Hearing at **Wellington** on 5 April 2017

Appearances

For Chief Executive of the Ministry of Social Development: Ms R Shaw (agent)

For the Appellant: Mr G Howell (agent)

DECISION

Background

[1] On 15 December 2008, the Ministry granted the appellant an Unemployment Benefit from 2 December 2008. In March 2009, she was transferred to the Sickness Benefit.

[2] On 20 September 2013, the appellant was transferred to a Supported Living Payment, with effect from 2 August 2013.

[3] She seeks to have a Supported Living Payment/Invalids Benefit during the period between 30 March 2009 and 20 September 2013. It appears to be common ground that in 2013 when requesting the review leading to this appeal, that was the issue in dispute.

[4] In short, the point raised by the appellant is that the Ministry's assessment of her entitlement to a benefit should have been based on her being unable to return to work; whereas she received a lesser benefit on the basis that her inability to work was temporary and she could work for some of the time. The most favourable benefit for the Appellant was an Invalid Benefit to 15 July 2013, then the rules changed and the Invalid Benefit was replaced by a Supported Living Payment. The two forms of support were substantially similar, so the assessment of the pre-15 July 2013 period and the following period are not materially different in this case.

Procedure

[5] Unfortunately, this issue has had a lamentable procedural history. It includes consideration by the Medical Appeal Board, a decision purportedly made under Ministerial delegation regarding back-dating of entitlement, which was apparently not notified to the appellant, and a Benefits Review Committee that failed to complete its hearing process.

[6] The only sensible way in which this Authority can address what is in issue is to identify what was before the Benefits Review Committee which is the foundation for this appeal. The Benefits Review Committee heard the appeal on 1 July 2015. It identified the review as being "the decision to grant the appellant a Supported Living Payment from 2 August 2013 rather than an earlier date". It follows that the Benefits Review Committee considered the issue that the appellant wishes to have resolved. It is not necessary to review the earlier processes, as the scope of the appeal is the same as the scope of the Benefits Review Committee's decision.

[7] However, we observe that there has been significant delay in dealing with this matter. That includes the fact that this appeal was received by this Authority on 28 August 2015 but the report of the Ministry required under section 12K(4)(e) was not lodged until 16 March 2017, notwithstanding the Chief Executive's obligation to lodge the report "as soon as possible after the receipt of the copy of the notice of appeal". Notwithstanding that the issues go back as far as 2009, a large portion of that time has been wasted through the unfortunately convoluted and it seems ill-conceived

process through which the issue has been addressed unsatisfactorily since first raised. The complexity is not of the Appellant's making.

[8] It is appropriate also to record a particular concern expressed by Mr Howell regarding the Ministry's processes. He said the Ministry convened a Benefits Review Committee to hear the issues that we are now dealing with. This occurred in February 2014. The Committee apparently abandoned the hearing and failed to complete its process, without giving notice to the appellant and Mr Howell. Then the reference number for the review process was apparently deleted. The Ministry did not challenge this claim, it also relates to timeliness.

Discussion

Legislation governing entitlement

[9] There is no dispute as to the legal test regarding qualifying for an Invalids Benefit and a Supported Living Payment. The former was governed by section 40 of the Social Security Act 1964 (the Act), and the Supported Living Payment by the new section 40B. The parties agree the material terms are the same.

[10] In this case, the disputed element is whether the appellant was "incapable of regularly working 15 or more hours a week in open employment".

The facts

[11] The issue in contention in this case simply turns on the appellant's state of health during the relevant periods of time. The appellant has for a long period of time suffered from five illnesses, arthritis in the hands, arthritis in hip joints requiring prosthetic joints, an auto-immune disease affecting her endocrine system, anaemia, and depression. The appellant worked until late 2008, and wanted to continue to work.

[12] The appellant presents a compelling account of being unable to work after 2008; though she aspired to work again, if looked at objectively, her account indicates work was not a realistic prospect after she ceased work in 2008. Of the various factors affecting her, the only one that has

resolved to some extent is the pain in her hip joints; she underwent surgery to insert artificial joints and her pain improved greatly.

[13] Throughout the relevant time, the appellant had the benefit of continuing care from her general practitioner. The appellant reports that her general practitioner has been supportive, and attended the Benefits Review Committee hearing which its members failed to complete.

[14] The Ministry relied heavily on a telephone note recorded by one of the Ministry's officials. The note created on 14 May 2014 purportedly records the position of the Ministry's Designated Doctor, who was asked to report on the Appellant's capacity to work. Indeed, after all the time for review before the tardy filing of the 12K report, it seems to have remained the pivotal evidence the Ministry. In essence, the telephone note records that:

a. Between 2009 and 2011, the appellant could have found it difficult to work, but did not qualify for a Supported Living Payment. The inference being she could work at least 15 hours; and

b. From 2011 to 2013, she could have worked more than 15 hours, the inference being the hip operation had given her capacity to work longer hours.

[15] The official who wrote the note did not attend the hearing; neither did the Designated Doctor whose findings were purportedly being recorded in the note. However, at the hearing, the agent for the appellant produced a copy of the Designated Doctor's report. Contrary to the official's note, the Designated Doctor's report says that between the years 2009 and 2011 the appellant was not "able to work regularly in suitable and open employment for 15 or more hours a week or likely to be able to do so in the next two years". It expressed the view that in the years between 2011 and 2013 such work was possible.

[16] Accordingly, the file note relied on by the Ministry and the designated doctor's reports say two completely different things. The Designated Doctor apparently said that the appellant met the standards for a

Supported Living Payment/Invalids Benefit in the years from 2009 to 2011, and only ceased to qualify after that time.

[17] The fundamental error in the Ministry's stance was so clear that the agent for the Ministry very appropriately conceded that the Appellant did meet the Supported Living/Invalid standard during the period from 2009 to 2011. She undertook to ensure that the Ministry would make an adjustment to deal with that period. However, the Ministry's agent would not concede that the Appellant qualified in the period from 2011 to 2013. Accordingly, we will make the relevant factual findings.

[18] The primary evidence of the Appellant's capacity to work is the Appellant's evidence, being the only witness. The Ministry chose not to call the Designated Doctor, or anyone else. As noted, the Appellant's evidence was compelling, and plainly she was well placed to address the issues given it concerned her own health. We evaluated the evidence against the contemporaneous record. We do not find the notes of the Designated Doctor particularly compelling. The Appellant said there was no in-depth examination, the only record the Ministry produced about the Designated Doctor's view is completely wrong. The Designated Doctor's report the Appellant produced is brief. There is nothing in the nature of a proper clinical evaluation by the Designated Doctor on which we might rely to understand the Appellant's complex health conditions and the effect of the interventions over the years from 2009 to 2013. At best the Designated Doctor provided her written conclusions. She provided neither, a description of the evidence and clinical evaluation based on the evidence, nor did she provide reasoned conclusions. Given she did not give evidence we can give only slight weight to the Designated Doctor's report. Its value is further undermined as we do not know whether the official made a note of her conversation with the Designated Doctor that stated the opposite of what she was told, or whether the Designated Doctor told the official something different from what her report said.

[19] The Ministry also produced certificates from the Appellant's General Practitioner. We regard them as a far more reliable indicator of the Appellant's capacity to work in the period from 2011 to 2013 than the Designated Doctor's evaluation. It appears the general practitioner who

was originally advising the appellant, and came to the abandoned Benefits Review Committee hearing had retired. The evidence did not establish the precise timing of these events. However, it does seem likely that the beginning of 2011 was a time when the potential for improvement seemed at its best. The recovery from the hip replacements was a factor, and it seems a fresh general practitioner reviewing the case may have had some optimism in those circumstances. Certainly the Designated Doctor placed great weight on the effect of the hip replacements.

[20] The first certificate from the new general practitioner we have available was completed on 3 February 2011. It says that the appellant could not work for more than 30 hours a week, but could work for 15 hours per week. That would mean she did not meet the Supported Living/Invalid Benefit test.

[21] The next certificate is dated 5 May 2011 and this identifies that the appellant was prevented from working in open employment for 15 or more hours per week; so she did meet the test for Supported Living/Invalids Benefit. On 31 October 2011, the possibility of any work, and indeed any work planning, training, light selected duties, were all regarded as “unlikely in foreseeable future”. The same evaluation was repeated on 2 February 2012 and 3 May 2012.

[22] In short, only in one period in early 2011 did the general practitioner consider the appellant failed to meet the test.

[23] The Ministry concedes that the Designated Doctor found the Appellant met the test from 2009 until 2011. The general practitioner, aside from the 3 February 2011 certificate, found that from 2011 the Appellant continued to meet the Supported Living/Invalids Benefit test. The Appellant’s evidence is that she met the test because she could not work at all. We have no adequate grounds to doubt the Appellant’s evidence. We find that she was a frank and reliable witness, and we accept her evidence she was unable to work at all during the material periods. We regard the 3 February 2011 certificate as a minor departure from the consistent medical evaluation which coincides with the Appellant’s evidence. There were potential reasons for the general practitioner to be temporarily optimistic at that point in time. However, in our view the

optimism was unwarranted. We have regard both to the otherwise consistent view the Appellant had no capacity to work; and we also have the advantage of hindsight. We conclude the doctor's optimism was misplaced. Furthermore, the test is "incapable of *regularly* working 15 or more hours a week in open employment". In the context of chronic health problems extending over years, the one optimistic report may not meet the test of "regularity"; even if warranted in the short window of time.

[24] If necessary, we would also find the evidence establishes that from the 2009 to 2011 period, the appellant met the test for receiving Supported Living/Invalid Benefit entitlements. However, the Ministry has conceded that issue. Accordingly, we find on the evidence before us that throughout 2011 down to 2 August 2013 the appellant met the test to qualify for Supported Living/Invalids Benefit.

[25] The Appellant qualified for an Invalid's Benefit/Supported Living Payment entitlement throughout the period from 19 March 2009 to 1 August 2013.

Giving effect to our decision

[26] In the Ministry's view, having made this decision, the Authority cannot make an order to enforce it. As noted, the Ministry purported to make a decision under s 80AA of the Social Security Act 1964; it was made under delegated Ministerial discretion. At various points in the argument, it appeared that the Ministry was taking the position that to give effect to a favourable decision would require the exercise of that Ministerial discretion under s 80AA. We do not agree.

[27] Section 80AA of the Act allows a benefit to commence "at a time earlier than the time an application for it was made". The Ministry says:

> The Ministry submits that no application [for an Invalids Benefit] was received from the appellant in 2009.

[28] Therefore, the Ministry contends that section 80AA must govern the process of giving effect to our findings.

[29] However, neither the administration of benefit entitlement, nor the Authority, operates in that way. Potential beneficiaries will not necessarily

know what they may be entitled to have as support. Accordingly, section 11D(3) and (4) allow applications for one benefit as a gateway to the grant of a benefit of a different kind.

[30] In terms of the Authority's jurisdiction, it too demands enquiry rather than simply saying "yes" or "no" to potentially misconceived requests. It is inquisitorial[1], in *Margison v Chief Executive of the Department of Work and Income*[2] Justice Laurenson commented:

> On an appeal to an Authority I am satisfied that once the Authority is faced with an appeal it is empowered by the inquisitorial nature of its function, its original power of decision and its full range of remedies, to seek out the issues raised by the appellant's case and determine those afresh and establish whether the appellant can provide the justification for doing so or not.

[31] The Supreme Court also considered the nature of proceedings before the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income*[3]. It was resolute in requiring the Authority to reach the correct view on the facts, rather than being constrained by the earlier processes:[4]

> There is nothing in s 12M to prevent the Chief Executive from then asking the Authority to consider any matter which may support the decision which is under appeal. Indeed, the thrust of the section is quite the other way: that the Authority is to consider all relevant matters.
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> ..
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> In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.
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> The duty of the Authority was to reach the legally correct conclusion on the question before it, applying the law to the facts as it found them upon the rehearing without concerning itself about the conclusion reached by the BRC …

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1 See *Kerr v Department of Social Development (Northern Ireland)* [2004] 1 WLR 1372 (HL) at [61]; commented on the process of benefits adjudication requiring "a co-operative process of investigation in which both the claimant and the department play their role".

2 *Margison v Chief Executive of the Department of Work and Income* HC Auckland AP.141-SW00, 6 August 2001 at [27].

3 [2007] NZSC 55

4 Ibid at [20]–[26].

[32] In our view, this is a relatively straightforward situation where the issue on appeal from the Benefits Review Committee is which type of benefit the appellant qualified for, as from 2009, she first applied for a benefit in 2008. We have made a decision that the correct benefit is an Invalid's Benefit/Supported Living Payment.

[33] We do not consider that this is a case where s 80AA is material. The appellant applied for a benefit and, in accordance with the authorities cited, the issue is not backdating a benefit to the time before she applied for a benefit; the issue is which benefit the Ministry should have given her initially and from then on. That is a routine matter within the scope of this Authority's jurisdiction.

[34] Accordingly, we conclude that as from 19 March 2009 until 1 August 2013, when she began to receive a Supported Living Payment, the appellant was throughout the whole period entitled to hold either an Invalid's Benefit or Supported Living Payment.

[35] Accordingly, the appeal will be allowed on that basis, with leave reserved to determine the correct amount of the entitlement.

Decision

[36] The appeal is allowed; the Authority finds that the appellant was entitled to receive an Invalid's Benefit or Supported Living Payment, as is appropriate for the relevant period, for the period from 19 March 2009 to 1 August 2013.

[37] The Authority relies on its findings, and the concession given by the Ministry.

[38] Leave is reserved for the determination of the quantum of and necessary adjustments; and any outstanding contentious issues regarding entitlement.

Costs

[39] The appellant may submit a schedule claiming costs in accordance with the decision of the *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541.

Timetable

[1] The appellant may submit a schedule and supporting submissions relating to costs within 10 working days of this decision issuing.

[2] The Ministry may provide submissions in reply in a further five working days after receiving any schedule and submissions relating to the appellant's costs.

Dated at **Wellington** this 20th day of April 2017

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G Pearson
Chairperson

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C Joe JP
Member