[2017] NZSSAA 048

Reference No. SSA 053/17

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr C Joe - Member

Hearing by telephone on 16 August 2017

Appearances

The Appellant in person

For Chief Executive of the Ministry of Social Development: Mr R Signal

DECISION

Overview

[1] The appellant's infant daughter has a condition known as Chronic Suppurative Lung Disease. As the name implies, it is a long-term condition and the appellant as the mother of the child is entitled to a Child Disability Allowance (CDA). The Chief Executive accepts that the appellant was entitled to receive a CDA at least from 21 January 2016, the point in time when her daughter was diagnosed with the condition. It would seem likely that she was entitled to the allowance from an earlier point in time. She had pursued diagnosis and treatment for her daughter from a significantly earlier point in time.

[2] The appellant first applied for a CDA on 14 December 2016, this was in fact the first point when the appellant had any contact with the Ministry of Social Development regarding her daughter, and her entitlement to a CDA (or any other matter).

[3] The Ministry accepts there was no reason for the appellant to be aware she was entitled to a CDA at an earlier point in time, and that as soon she did became of her entitlement she took action.

[4] If the law permits the Chief Executive to do so, he is willing to commence payment of the CDA from the point of diagnosis, and potentially earlier if an earlier entitlement was established.

[5] There is only one issue in dispute. The appellant wants the CDA paid from the point in time when she qualified for the allowance; whereas, the Chief Executive considers that it is not possible to pay the CDA from a point in time earlier than when the appellant first made contact with the Ministry of Social Development.

[6] The reason identified by the Chief Executive is s 80(1) of the Social Security Act 1964, which states:

> **80 Commencement of benefits**
>
> (1) Except as otherwise provided in this section ... a benefit shall commence on the later of —
>
> (a) the date the applicant became entitled to receive it; or
>
> (b) the date the application for it was received.

[7] In the Chief Executive's view that is a clear prohibition against paying the CDA in relation to a period of time earlier than the date the application for it was received.

[8] The Chief Executive does accept that s 80AA of the Act provides that the Minister may consent to commencement prior to the date of application. However, the Chief Executive considers that s 80AA(2) contains a restriction that prevents that being done in this case. Section 80AA(2) provides:

(2) The Minister must not give consent unless satisfied that—

(a) in the case of a particular applicant, the particular applicant—

(i) could not reasonably have been expected to apply at the earlier time because of some erroneous action or inaction on the part of the department; or

(ii) at or before the earlier time, tried to apply or applied incompletely, and did not proceed because of some erroneous action or inaction on the part of the department; or

(b) in the case of applicants of a stated kind or description,—

(i) applicants of that kind or description could not reasonably have been expected to apply at earlier times because of some erroneous action or inaction on the part of the department in relation to applicants of that kind or description; or

(ii) at earlier times, some applicants of that kind or description tried to apply or applied incompletely, and did not proceed because of some erroneous action or inaction on the part of the department.

[9] The Chief Executive says, in short, that the decision to commence prior to an application lies with the Minister, and it must be founded on an erroneous action or inaction on the part of the Ministry of Social Development.

The appellant's position

[10] Understandably, the appellant did not engage specifically with the legal issues. She did explain why she had not applied for the CDA at an earlier point in time. In short, she neither knew nor had reason to know she could claim the allowance.

[11] The appellant is a registered nurse with more than a decade of clinical experience; she said that she had not been informed of the availability of the Child Disability Allowance in the course of her professional practice. She said that she had dealt with a range of medical

practitioners relating to her daughter's illness; they included general practitioners, registrars and consultant physicians. She had also engaged with nursing staff and paediatric social workers. She said none of them told her of the availability of the Child Disability Allowance.

[12] She also made the point that her daughter's illness has placed a great deal of stress on her family; it is very time consuming to get the care her daughter needs daily. Physical therapy twice daily is part of the necessary treatment. Furthermore, obtaining medical assistance and other support had also been very costly. The financial support from the CDA is something that was very important for the appellant and her family.

The Ministry's response

[13] The Ministry took no issue with the circumstances outlined by the appellant. The Ministry did however contend that notwithstanding the appellant's personal experience, the Ministry is very conscious of the need to ensure that information is made available regarding the CDA, particularly because the allowance is not income tested. Accordingly, the Ministry cannot assume that people who are entitled to the allowance will in the normal course of events be in contact with the Ministry. For that reason since 2004/2005 the Ministry has made concerted efforts to ensure that information about benefit entitlements has been publicly available. The Ministry contends that it has:

[13.1] Directed specialist Work and Income case managers at service centres to liaised with doctors in the local community;

[13.2] Allocated expert staff to provide services to hospitals and associated service providers, including liaison with their allied social workers;

[13.3] Use targeted mailouts to general practitioners;

[13.4] Given presentations to paediatric service departments at hospitals, which included the distribution of a booklet entitled "Child Disability Allowance; Guide for Medical Practitioners";

[13.5] Supplied information available in brochures at service centres.

[14] In relation to the appellant's particular circumstances the Ministry referred to a letter from the Associate Professor of Paediatrics and the paediatric social worker engaged in the care for the appellant's daughter. They wrote supporting the backdating of the CDA. In this letter they stated:

> [The child] has a chronic cough which is associated with Chronic Suppurative Lung Disease. She is under the care of myself and the Paediatric Respiratory Team at Christchurch Hospital. It recently came to our attention that [the child] did not have a Child Disability Allowance even though she is eligible for one. This was inadvertently missed on our end when [the child] was diagnosed in January 2016.

[15] The Chief Executive identifies this as evidence that the District Health Board personnel were aware of the availability of a CDA, and they failed to tell the appellant.

[16] The Ministry says that the DHB staff, including social workers employed by the DHB are not part of the Ministry, so erroneous action or inaction on their part cannot come within the scope of section 80AA.

Discussion

[17] In this case there is no dispute as to the point in time when the appellant first had contact with the Ministry of Social Development, or that her entitlement to the CDA started at an earlier time. The parties agree the appellant qualified for the CDA, at least from 21 January 2016. It is also agreed that the appellant could not reasonably have been expected to have applied for the CDA until 14 December 2016 when she made the application, because she neither knew nor had any reason to know of her entitlement.

[18] There can be no dispute that s 80 of the Act binds the Authority, it simply has no power to commence entitlement to the CDA before the appellant applied for the allowance. The Minister does have such a power, but the Minister can only do that if there is an erroneous action or inaction on the part of the Ministry. If we can identify that there has been an erroneous action or inaction, or potential grounds for thinking that is the case on the evidence before us then we would have no hesitation in requesting that this matter be referred to the Minister.

[19] We have full regard to the appellant's compelling explanation that she was not told of her potential entitlement to the CDA. That information considered on its own indicates there was potentially some fault on the part of the Ministry, as the appellant was not notified of the availability of the CDA. She had followed a conventional course for a parent of a child suffering from a condition that gives an entitlement to the CDA. She consulted with a range of medical personnel, and support persons, particularly social workers, employed by the DHB. Initially she had engaged with a general practitioner, and a medical specialist outside of the DHB's service structure.

[20] However, the Ministry asserts that it has devoted significant resources to publicising the availability of the CDA. This is not the first appeal where the adequacy of the Ministry's actions to publicise the CDA has been an issue. Another relatively recent example is SSA097/15 [2016] NZSSAA 069. The appellant's individual circumstances and personal experiences do give rise to some concern that the steps the Ministry has taken could have been inadequate. However, the appellant has in fact produced evidence as to what went wrong in this particular case. We have set out the admission in the letter from the medical specialist and paediatric social worker regarding the appellant's situation (above paragraph [14]. They admitted they inadvertently failed to notify the appellant she was entitled to, or at least, was potentially entitled to, a Child Disability Allowance.

[21] In these circumstances, there is nothing before us that is inconsistent with the Ministry's view claim it devoted substantial resources to a campaign to ensure that health workers are aware of the availability of the CDA. The direct evidence is that the DHB personnel knew that the CDA was available to the appellant at least from 21 January 2016, but failed to tell the appellant. That is the direct evidence in this case on that point. It confirms rather than challenges the Ministry's position.

[22] We cannot find that the appellant did not apply for the benefit because of some erroneous action or inaction on the part of the Ministry; any fault lies with the DHB personnel.

[23] The Authority regrets it cannot allow the CDA to commence from the point of eligibility, as does the Ministry. Unfortunately this is a case

where the Ministry, this Authority and the Minister are all bound by a clear restriction in the Act. The Authority must apply the law, and dismiss the appeal.

Decision

[24] The appeal is dismissed.

Dated at **Wellington** this 18th day of August 2017

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G Pearson
Chairperson

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C Joe JP
Member