

[2017] NZSSAA 058

Reference No. SSA 50/17

IN THE MATTER

of the Social Security Act
1964

AND

IN THE MATTER

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr K Williams - Member

Mr C Joe - Member

Hearing at WELLINGTON on 4 September 2017

Appearances

The Appellant: His mother Ms XXXX

For Chief Executive of the Ministry of Social Development: Ms J Hume

DECISION

Introduction

- [1] Before turning to the technical issues in this dispute, first it is appropriate to identify the reasons why it has been brought to this Authority.
- [2] The appellant is 33 years old. He was represented in this appeal by his mother. When he was 24 years of age, he was violently attacked. He was beaten over the head with an instrument, and had an object poked into his eye. The person who did those things to him was charged with criminal offending, but found not guilty by reason of insanity.

- [3] The consequences of the injuries are lifelong and profound. The appellant has very limited ability to speak, suffers from anxiety, walks with a cane and is significantly dependent on others for support in his day-to-day life. The appellant has no prospect of recovering from the injuries he has suffered.
- [4] The appellant, due to the circumstances in which he sustained his injuries, was entitled to an ACC lump sum payment. He received the maximum lump sum payment of \$130,622.25, based on his assessed impairment of 91 percent. Because the appellant did not happen to be in employment at the time he suffered his injury, he receives no further compensation for his loss of income. That is so, despite that in all probability had he not suffered the injury he would have been in employment for much or all of the following four decades of his life, if not more.
- [5] The appellant's mother is very conscious that the very modest compensation the appellant has received for the loss of function and future earning potential needs to last for the remainder of his life. The Ministry's position is that the money must be spent on day-to-day living, despite the fact he would receive benefit payments for those expenses if he did not have the compensation payment. As his mother correctly points out, the effect is to deprive the appellant of the small amount of compensation he has received, for the purpose of sustaining him over the remaining decades of his life. He will then be in the same position as if he got no compensation.
- [6] Because the appellant has not received any periodic payments from ACC for the loss of income, he has necessarily been dependent on a benefit. Most of the assistance available to the appellant is both income and asset tested. This appeal has arisen for the technical reason that the Ministry says that the remainder of the lump sum that the appellant received is regarded as a cash asset, and that makes him ineligible for the support that he would otherwise receive because he is unable to earn an income.
- [7] There are three categories of assistance that have been denied to the appellant because he has the remainder of the lump sum payment he received from ACC:
- [7.1] an accommodation supplement;

[7.2] temporary additional support; and

[7.3] special needs grants and a consideration of advances of benefit¹.

Discussion

The Facts

[8] The facts are not contentious. The Ministry does not dispute the circumstances faced by the appellant.

The Law – An Overview

[9] The legal question is whether or not the Social Security legislation does indeed impose asset tests, and include the appellant's lump sum as an asset that is taken into account. To make that evaluation, it is necessary to consider each of the categories; the accommodation supplement, temporary additional support, special needs grants and advances. Each has its own statutory regime and, accordingly, there is not only one question.

[10] The starting point is to identify the nature of the lump sum payment in issue. The evidence quite clearly establishes that the payment was made under the Accident Compensation Act 2001, and, in particular, was a lump sum compensation for permanent impairment made under Part 3, cl 54 of the Schedule to that Act.

[11] We now turn to consider each of the three categories of potential assistance and whether or not the lump sum payment can or should be taken into account as an asset when determining entitlement to receive the relevant assistance.

Accommodation Supplement

[12] The accommodation supplement is provided for in ss 61DH to 61EC of the Act (Part 1K). The supplement is both income and asset tested. While the appellant's lump sum payment has been invested in a bank account and earns interest, it is below the threshold for income testing which results in a reduction in the payment. Accordingly, it is only necessary to consider the asset testing aspect.

¹ In this case the advance payments of benefit arise under section 82(6).

- [13] Section 61EC(3) is the key provision relating to asset testing. It provides that an accommodation supplement is not paid to a person who has cash assets exceeding, in the case of the appellant, \$8,100.

- [14] Section 61E of the Act defines “cash assets” for the purpose of the provisions relating to the accommodation supplement. It means any “money saved with a bank” and extends to a wide range of other investments.

- [15] Accordingly, it is evident that because the ACC payment is now held as an investment in a bank account and it exceeds \$8,100 the appellant is barred from claiming an accommodation supplement.

- [16] The correctness of that view is confirmed by s 61EC(3A) of the Act which exempts a lump sum payment of the kind received by the appellant from being included as part of the asset test for a period of 12 months from receipt of the payment. In addition to the asset test, persons seeking an accommodation supplement are required to realise any assets available for their personal use. This specific treatment of the lump sum payment for a 12 month period does to some extent imply that the drafters of the legislation had in mind that the lump sum entitlement would affect the ability to claim an accommodation supplement, except for the prescribed exception.

Temporary Additional Support

- [17] The appellant also sought temporary additional support, which is provided for in s 61G (Part 1L) and in the Social Security (Temporary Additional Support) Regulations 2005, pursuant to s 132AB of the Act.

- [18] Temporary additional support is provided as last resort support, to alleviate financial hardship.

- [19] Temporary additional support also has a cash asset test. The test is provided in r 7 of the relevant regulations and refers to Schedule 31 of the Act. Cash assets have to be below \$1,050.92.

- [20] Regulation 8 defines a cash asset. The relevant regulation includes bank accounts and a range of other forms in which money may be invested.

[21] Regulation 15 of the Social Security (Income and Cash Assets Exemptions) Regulations 2011 does provide an element of exemption for payments received in settlement of a claim against the Crown. However, even if the ACC payment does come within that category it does not assist the appellant. Regulation 13 of those regulations provides that the exemption from inclusion in the asset test endures only for 12 month after the payment is made.

[22] In these circumstances, we must conclude that the ACC payment triggers the asset test and temporary additional support was not available to the appellant.

Special Needs Grant

[23] Special needs grants and advance payments of benefit are also income and asset tested. As noted the income test is not an issue because, for this category of relief, the interest earned on the lump sum was not sufficient to trigger the income test. Pursuant to s 124(1)(d) of the Act the minister established the special needs grant programme. The programme is subject to an asset test in clause 8. It is the same as that for temporary additional support; cash assets must not exceed \$1,050.92. The special needs grant programme contains a definition of “cash assets” in clause 3; it includes bank accounts and other similar types of investment. The regulations that have already been discussed in relation to temporary additional support apply equally to the special needs grant programme. The result is that the appellant’s ACC lump sum payment disentitled him to a special needs grant for dental treatment and an advance to purchase a refrigerator/freezer.

Advance payment of benefit under section 82(6)

[24] We recognise that advance payments of benefit can be made under section 82(6), but they are recoverable. In the present case they are not effective at all, as:

[24.1] First a decision must be made that the approach “would best meet the immediate needs of a beneficiary”; and

[24.2] The amount is a “debt due to the Crown under section 85A(c)”; which the Chief Executive is obliged to recover.

- [25] Accordingly while the appellant has the lump sum, an advance of benefit will be immediately recovered; so the advance cannot best meet his immediate needs.

Conclusion

- [26] We must conclude that the relevant provisions in the Act, regulations, and prescription for the programme include the appellant's ACC lump sum payment in the asset tests that are applied to the accommodation supplement, the temporary additional support, and special needs grant; and advance payments of benefit do not assist. There is no discretion that we can apply in relation to the operation of those provisions.
- [27] We do, however, record that, in our view, the appellant's circumstances demonstrate an unsatisfactory relationship between the ACC regime and the social security support available to the appellant. The unfairness arises from the circumstances in which the appellant found himself at the time of his accident. He happened not to be working at the time; and for that reason, does not receive income support from ACC. A lump sum of a very modest amount has been paid to compensate him for the permanent impairment to his body and cognitive functions; he receives no other compensation for the loss of his earning potential. The appellant has to use the limited means available to him to provide for the necessities of life that he would have provided from an income had he been able to work. The appellant is entitled to support from the social security regime, but his entitlements are not the same as other people, because he is required to draw on the limited, whole-of-life, compensation he received to fund costs that would ordinarily be provided for under the social security regime.
- [28] The regime operates to have the effect that in the medium term the compensation the appellant received will be entirely eroded to fund his day-to-day living. Accordingly, he will lose a significant portion of the benefit that the ACC regime provided for him with the lump sum payment. This regime creates the incentive to spend all of the entitlement within 12 months, which seems inconsistent with the purpose of the lump-sum compensation for the appellant.

Decision

[29] For the reasons discussed, this appeal must be dismissed; however, we recognise the reasons why the appellant brought the appeal and the unfairness that concerns him.

[30] We request that the Chief Executive ensures that the Ministry's policy division and the Minister are made aware of potential policy concerns raised by the appellant's circumstances.

Dated at Wellington this 10th day of October 2017

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member