

[2017] NZSSAA 072

Reference No. SSA 083/17

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 G Pearson - Chairperson
Mr K Williams - Member
Mr C Joe - Member

Hearing at WELLINGTON on 5 December 2017

Appearances

Mr G Howell as agent for the Appellant

Mr T Wild, lawyer for the respondent

INTERIM DECISION

Background

[1] This appeal concerns the issue of whether the appellant is entitled to further support for medical need and assistance in his home and related transportation costs.

[2] The issues arise due to the appellant's health conditions. He is approximately 40 years of age. He has insulin-dependent diabetes, an enlarged heart, heart failure, hypertension and peripheral neuropathy. He also suffers from chronic fatigue syndrome and anxiety.

- [3] In recent times, he has had part of his foot amputated, during a series of surgical procedures.
- [4] Unfortunately, there have been difficulties with the Ministry providing a file to the appellant's agent and it seems there have been difficulties with the Ministry providing a full account of the appellant's circumstances. There can be little doubt as to the appellant's general situation; however, we are not in a position to reach conclusions regarding details, or put it into a clear series of events referenced to dates.
- [5] The appellant gave evidence. Accordingly, it is appropriate, as a starting point, to set out the essence of what he said.
- [6] The appellant confirmed the health conditions already referred to. The surgical process of amputating part of his foot has been the subject of an ongoing and still unresolved medical saga. There have been approximately eight surgical procedures and the appellant requires more. The appellant has required that the surgical wounds be dressed. That has required regular hospital visits, and further bandaging at his home. He has been required to purchase some of the bandages for dressing between hospital visits. Aside from the obvious implications for his mobility, he has also at times had a device attached to drain fluid from his foot.
- [7] While the appellant has been dealing with these health-related difficulties, the Ministry has raised issues regarding the costs of the general practitioner who is assisting the appellant. However, savings produced by changing to a different doctor resulted in increased transport costs. For obvious reasons, the appellant had difficulty looking after his home and needed assistance to attend medical appointments.
- [8] The appellant approached the Ministry and sought assistance. The Ministry indicated that a home-help assistance grant would be available to help him with these difficulties. The appellant's mother provides similar services to elderly people on a commercial basis. Ministry officials indicated that it would be appropriate to have the appellant's mother provide services and the Ministry would pay for those services.

- [9] For a period, the appellant's mother provided the services and invoiced the Ministry; however, payments were not made. At various times, the appellant says that Ministry staff said he would receive financial assistance for his needs, including the bandages that he required.
- [10] The appellant says that notwithstanding having repeatedly provided records showing what his expenses were, the Ministry has lost them, there have been changes of personnel, his dealings with the Ministry have been most unsatisfactory and he has received no assistance.
- [11] The appellant said that he has been dealing with the hospital staff where the surgery took place, but has received no indication that the services he requires as a result of his health problems can be or will be funded through the health system. Hospital staff have not approached him regarding these issues, and given that the staff in the Ministry have indicated that the Ministry would provide funding, he relied on their assurances.
- [12] Essentially, the Ministry appears to accept the appellant's evidence. There was only minimal cross-examination regarding these issues.
- [13] While the Ministry's records we have seen do not appear to be comprehensive, they do generally support what the appellant says regarding his dealings with the Ministry. In an email dated 7 April 2017, the assistant Service Centre Manager wrote to the appellant saying that his home-help application had been approved and that his mother was registered in the Ministry's system and requested that her timesheets be provided. We also have a copy of an email headed "apology letter" from a Ministry official saying that the Ministry's response to the appellant involved "a human error made by an individual" and acknowledged that the appellant was "provided with incorrect information" and that "at times mistakes are made".
- [14] The apology letter itself dated 30 May 2017 contains a paragraph stating:
- You have explained that over the past year and a half since the medical problems with your foot began, you have been trying to access assistance with home-help and disability allowance to help with your recovery and the additional costs you have incurred through things such as additional visits to your GP and needing to take a taxi to these visits when your friends and family were unavailable.

You also advised me that you had trouble with getting responses to your questions and paperwork provided to the [local] community link go missing, in addition to the time taken to respond to your emails, phone calls and concerns made to a number of different people. There were also occasions when you were provided with incorrect information.

It is our expectation that our clients are able to access support and information in a timely manner, and that the information provided should be correct. I acknowledge that this was not your experience and apologise for this. I am confident that your future dealings with Work and Income and the team in the [local] community link will be of a higher standard.

- [15] Unfortunately, this correspondence was not included in the Section 12K Report. It seems the records have been misplaced.

The Ministry's current position

The scope of the appeal

- [16] The appellant's agent and the Ministry both agree that a home-help assistance grant was not the appropriate way of dealing with the appellant's needs. Accordingly, both have focused on providing assistance through the disability allowance paid to the appellant.

- [17] The first matter raised by the Ministry is the fact that there are two Benefit Review Committee decisions relating to the appellant's circumstances:

[17.1] One dated 29 August 2017 concerning a decision to change the rate of disability allowance from 18 January 2017.

[17.2] The other (being the one that led to this appeal) dated 27 June 2017 that relates to a decision to decline home-help.

- [18] It is not entirely clear what the Ministry's position was regarding there being two Benefit Review Committee decisions. However, in our view, nothing turns on this issue. In *Margison v Chief Executive of the Department of Work and Income*¹, 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

¹ *Margison v Chief Executive of the Department of Work and Income* HC Auckland AP.141-SW00, 6 August 2001 at [27].

decision and its full range of remedies, to seek out the issues raised by the appellant's case and determine these afresh and establish whether the appellant can provide the justification for doing so or not.

- [19] The Supreme Court also considered the nature of proceedings before the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income*². It was resolute in requiring the Authority to reach the correct view on the facts, rather than being constrained by the earlier processes:³

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.

...

In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.

...

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 ...

- [20] Accordingly, whether the correct assistance is under a disability allowance, the home-help scheme, or some other form of entitlement, our duty is to identify the proper response to the appellant's needs. The two Benefit Review Committee decisions concern different decisions. However, each of those decisions relate to the same needs and circumstances. Accordingly, there was an obligation on the part of the Chief Executive, and now this Authority, to determine how the Act contemplates those needs should be met.

Other assistance was available

- [21] The first substantive point raised by the Ministry is that s 69C(2A)(b) of the Social Security Act 1964 (the Act) provides that a disability allowance is not payable to any person except to the extent that the assistance towards meeting expenses is not available under another provision of the

² *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13.

³ *Ibid* at [20]–[26].

Act or any other enactment. The Ministry contends that the matters for which the appellant seeks support could have been provided by the District Health Board and the appellant had “not tested his eligibility for support” from the health system.

[22] The Ministry contended that, following the Benefits Review Committee decision, it had sought to assist the appellant by seeking support from the local District Health Board. The Ministry said:

[22.1] that the appellant was unwilling to consider support available to him through the health system;

[22.2] the appellant’s advocate has since, at the Ministry’s request, made enquiries with two local health boards but has not identified whether or not the appellant is eligible for any support; and

[22.3] a previous decision of this Authority (SSAA 084/2006) increased a disability allowance to allow for home-help type services which that appellant could not access under the health system; however, it was a mandatory consideration to first establish other support was not available.

Need not of an ongoing nature

[23] The next issue raised by the Ministry was that s 69C(2A) of the Act refers to costs being of an “ongoing nature”. The Ministry also referred to the relevant Ministerial Direction requiring verification of the need for an expense of how it related to the person’s disability, the expected duration of that need and the therapeutic value to the person receiving this service.

[24] The Ministry contended that the appellant “did not appear to need support to undertake the normal functions of life, nor on-going supervision for treatment”. The Ministry did concede that the appellant’s disability is long-term in nature; however, the Ministry said the need for home-help had not been shown to be long-term.

Need to verify expenses

[25] The final element of the Ministry’s opposition to allowing the appeal is the lack of verification of expenses.

Discussion

[26] It appears to us that there is a fundamental disconnect between the Ministry's position in relation to how this appeal should be determined and the facts established on the evidence.

No other assistance was available

[27] The first issue we must determine is the merits of the claim that the appellant failed to establish that he could not have accessed assistance through the health system. For some 18 months, the appellant has been continuously engaged with the health system. His health practitioners have a duty to ensure that services available through the health system are provided. The appellant's needs are acute and obvious. For some 18 months, he has had very grave issues relating to his foot against a background of serious medical conditions. The implications for mobility and the ability to deal with ordinary household matters is patently obvious.

[28] To the extent that the appellant did not explore his needs with the various health practitioners, it is because the Ministry admits that its own staff gave wrong information to the appellant saying that the Ministry would provide funding. There is a written record that funding would be provided and that the Ministry had undertaken the administrative processes to ensure the appellant's mother would be paid for providing services.

[29] On the balance of probabilities, we are satisfied this evidence establishes that the appellant was not eligible for any of the services in question to be provided by the health system. It was not offered to him by the health professionals who were in a position to know what entitlements he had, and his needs were obvious. The appellant indicated he would have taken the assistance if offered, and we accept that was the case. We find the assistance was not offered, and that was probably because it was not available under the health system.

[30] Given the prima facie evidence on this point, if the Ministry wish to challenge the point, at the very least it was necessary for the Ministry to call evidence or point to legislation that demonstrates support was available from the health system. Instead, the Ministry simply says it was up to the appellant to "test his eligibility". The evidential onus lies with the

Ministry, as the appellant has provided evidence that establishes he was probably not eligible for support.

- [31] Not for the first time, we observe that we expect the Ministry to engage with the health system and ensure that it is clear between the health system and the Ministry who is responsible for providing support⁴. It is not an appropriate or adequate response to suggest that persons with severely compromised mobility or other debilitating health conditions should be making their own enquiries. The health and social welfare systems need to have clear protocols so that responsibility is transparent. Even in this appeal, there has been no effort on the part of the Ministry to identify what, if any, responsibilities the health system may have had to provide more assistance than it did in fact provide.

The medical condition is ongoing

- [32] The next issue is to whether the costs for the purposes of s 69C(2A) were of an ongoing nature. We have referred to an extensive range of medical conditions afflicting the appellant. We have also referred to the fact the problems with the appellant's foot and the repeated surgical interventions relating to it have been ongoing for some 18 months, and continue. We are satisfied that the evidence overwhelmingly establishes that the appellant's acute and chronic medical problems are ongoing.

Verification of expenses

- [33] The final issue is the verification of expenses. We accept that there is an issue with the evidence. The evidence establishes that officers in the Ministry have, as the Ministry accepts, made serious errors in their handling of the appellant's affairs. We have no reason to doubt the appellant's evidence that he has on multiple occasions provided much or all of the evidence to verify the costs he claims.
- [34] We note that the information contained in the Section 12K Report is sparse, it did not include important information such as the letter of apology and related correspondence that illuminates the shortcomings in how the Ministry has dealt with the appellant's entitlements. We note the

⁴ *Chief Executive of the Ministry of Social Development v Scoble* [2001] NZAR 1011 at [9] to [11] and *Crequer v Chief Executive of the Ministry of Social Development* [2016] NZHC 943 discuss the Ministry's duty to be proactive in identifying benefit entitlements.

appellant's advocate has said that the Ministry has failed to provide a copy of its file so he can properly represent the appellant. Accordingly, we are satisfied on the balance of probabilities that the Ministry holds a significant body of information regarding the costs and has failed to provide much of the information to the Authority. It is now necessary to make an evaluation based on the best information available. If we have to do that on the basis of the appellant's oral evidence, without the support of documentary material, we will do so. However, we will provide the parties with the opportunity to provide the best information available.

Interim decision

- [35] We have reached final conclusions as to the scope of the appeal. We are satisfied, on the basis of the *Arbuthnot* decision, that we can and must make an evaluation of the entitlements the appellant has arising from the difficulties caused by his medical condition.
- [36] We also reach a final conclusion that the evidence establishes the appellant could not access support to deal with the costs in issue in this appeal through the health system, or any other funding available to him.
- [37] We also find that the costs in issue arose out of medical issues that were of an ongoing nature.
- [38] The only area where we allow the parties to provide further evidence is the verification and quantification of the appellant's costs.

Next steps

- [39] The Chief Executive is to review the information held by the Ministry and ensure that a supplementary 12K Report is filed containing any information held by the Ministry relevant to the appeal that is not contained within the existing Section 12K Report.
- [40] The Ministry may file a brief of evidence dealing with any information it holds relating to the costs claimed by the appellant. The supplementary Section 12K Report (or a report stating that there is no further information) is to be filed within five working days of this decision.

[41] In terms of providing information for the Authority to make a decision regarding the amount of the appellant's costs, the Authority requests that the appellant should consider the following:

[41.1] It appears likely that as the appellant's mother provided services of the kind in issue, commercially, it would seem likely that she would have records relating to the services she provided.

[41.2] It seems possible that the appellant has a copy of information he has already supplied to the Ministry.

[41.3] If there are gaps in the record, the appellant should be in a position to provide some evidence relating to the cost of particular services (for example, the hours required for home-help type services per week), and then provide an estimate of how frequently such services were in fact provided.

[41.4] If written records are not available, the Authority will make a decision on the balance of probabilities using the best information available.

Directions

[42] The Authority will convene a telephone conference to consider the information the Ministry has available, and in the light of that consider how the appellant will proceed to prove his claim. It seems that either the Ministry will provide sufficient information to allow a determination, or, alternatively, the appellant will need to undertake a process of the kind described to give an evidential foundation for the Authority to make a decision.

[43] The Authority's case manager will arrange for a telephone conference to be convened as soon as practicable after the Ministry files its supplementary Section 12K Report.

Additional time

[44] The Authority appreciates the timeframe for the Ministry to provide further information is short. If the Ministry needs further time, the Authority would be willing to consider that. However, it would expect the Ministry to

recognise the finding made in this decision and ensure that the appellant is receiving sufficient support to deal with his immediate circumstances.

Dated at Wellington this 18th day of December 2017

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member