

[2017] NZSSAA 074

Reference No. SSA 047/17
& 071/17

IN THE MATTER of the Social Security Act
1964

AND

IN THE MATTER of an appeal by **XXXX** of
New Plymouth 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 December 2017

Appearances

The Appellant in person

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

INTERIM DECISION

Background

- [1] The two appeals subject to this decision were both heard at the same time. The first appeal is against a decision to decline assistance for travel to, and the cost of, appointments with specialist dermatologists in Wanganui and New Plymouth, respectively.
- [2] The second appeal concerns the cost of an antihistamine medication, the cost of specialist appointments for the appellant relating to a dermatological condition, the costs and frequency of general

practitioner visits and the costs of laundry services. The Ministry also raised the costs of a mobile telephone.

- [3] The context for the various issues is the extent of funding allowed under a disability allowance.

The hearing

- [4] The appellant attended the hearing. He was in an agitated state. He travelled to Wellington for the hearing which required travel over some hours by road transport. It is usual for the Ministry to fund the cost of travel when appeals are heard away from the location where an appellant is living. In this case, it was not possible for the appellant to travel by air transport; due to a previous incident, he has been trespassed from the airport.
- [5] The appellant and the Ministry have different views as to the amount of notice provided to the appellant for the hearing and the arrangements made for his travel. Whatever occurred, the appellant was experiencing a high level of anxiety at the hearing. The appellant found it difficult to focus on the specific issues and gave a discursive review of his dealings with the Ministry.
- [6] There have been a number of matters where there has been tension between the appellant and the Ministry. The appellant has been trespassed from the Ministry's local offices, and must engage with the Ministry through its Remote Client Unit; he is not allowed face-to-face contact with Ministry staff.
- [7] It was clear that the appellant is very suspicious of people he engages with. He expressed his views as to a lack of integrity on the part of the Ministry, medical practitioners, a District Court Judge, this Authority and essentially anybody who has had a decision-making role in relation to his circumstances.
- [8] After providing his evidence and submitting a plethora of written documentation, the appellant indicated that he was not in an emotional state to be cross-examined by the agent appearing for the Ministry. In our view, that was indeed the position and the appellant was not cross-examined.

- [9] The other witness who attended the hearing was a Regional Disability Adviser employed by the Ministry of Social Development. This witness expressed various medical opinions regarding the appellant. Among the evidence she gave was an evaluation of the appellant's auto-immune disease. A medical specialist had recommended "a natural diet of fresh fruit, vegetables, meat and fish" given the appellant's medical condition. However, the Regional Disability Adviser concluded that because the appellant did not have coeliac disease, it was not necessary to fund any special dietary requirements. She also said that a specific antihistamine should be funded; however, she thought that it was not necessary for the appellant to regularly see a medical practitioner. As far as she was concerned, he could be given money to purchase the antihistamine as it was a pharmacy-only medicine which did not require a prescription and he could also purchase an EpiPen. An EpiPen is a device to give a self-administered intramuscular injection of adrenalin in the hope of preventing death in the case of anaphylaxis. She also gave evidence relating to laundry costs and telephone expenses.
- [10] When questioned by the Authority, it became evident that the Regional Disability Adviser had no medical qualifications or experience. She did have a Post-Graduate Certificate in Public Policy and was registered as a Career Counsellor. She had contacted a specialist medical practitioner who had examined the appellant; however, she said that this discussion "was on general information about allergic conditions only and did not refer specifically to [the appellant]".
- [11] The Regional Disability Adviser sought to qualify herself to give medical evidence regarding the appellant's condition by saying that her daughter also suffered from the same condition. With only that experience as a qualification, she sought to express opinions regarding the particular auto-immune disease affecting the appellant, the active ingredients in a range of antihistamine medications, and whether it was necessary to regularly consult with a general practitioner.
- [12] It appears to us that the evidential base on which these appeals are to be decided was utterly inadequate. The evidence from the Regional Disability Adviser was most concerning. The appellant had provided evidence that he had been prescribed an antihistamine which is typically used by persons suffering from hay fever; however, the dosage for his condition is different from treatment for hay fever. The

appellant's condition is a dermatological condition unrelated to hay fever. The evidence was that the dosage for the appellant's condition was much higher than for hay fever. When pharmacy-only medications are sold across the counter without a prescription, there is invariably a recommendation that higher dosages should only be taken in consultation with a medical practitioner. An EpiPen is an emergency device, intended, in the appellant's case, to inject himself in the case of a life-threatening episode of anaphylactic shock. The medical material indicates that the particular condition that the appellant suffers could well lead to such a situation. A prominent District Health Board in New Zealand contains this informational material on its website:¹

Anaphylaxis is the most severe form of allergic reaction, usually occurring within 20 minutes of exposure to the trigger, and is potentially life threatening.

It must be treated as a medical emergency, with the administration of intramuscular adrenaline as the first line treatment.

- [13] That is sufficient to give dimension and perspective to the Ministry providing evidence from the Regional Disability Adviser to the effect the appellant does not require medical supervision on a regular basis. That is not a decision which a person with no medical qualifications or experience can make properly, or justify.
- [14] The appellant cross-examined the Regional Disability Adviser to very good effect. She had deposed that since he did not suffer from coeliac disease he could meet his dietary requirements prescribed by a specialist medical practitioner without cost. The appellant asked the Regional Disability Adviser whether her daughter suffered from coeliac disease; she accepted that was the case.
- [15] We consider any principled decision dealing with the issues before us must be based on a medical assessment of the appellant. However, the reason why the Regional Disability Adviser only had a general discussion with the specialist physician and not a discussion related to the appellant, was that the appellant readily accepted that he had forbidden the disclosure of any medical information to the Ministry.

¹ New Zealand Child & Youth Clinical Network "Anaphylaxis" (July 2017) Starship <www.starship.org.nz>.

- [16] Overall, our evaluation of the material before us is as follows:
- a. We have seen various medical documents that show the appellant suffers from an autoimmune disease and has done so since some time prior to the year 2000.
 - b. The medical material indicates the condition is a serious one and that it affects the appellant's day-to-day function.
 - c. The medical practitioners have identified a specific antihistamine, which is available as a pharmacy-only medicine, it is not routinely available on a funded basis. There are other antihistamines that are funded under the health system. Potentially, it may be funded if a specialist practitioner were to prescribe it (the evidence in that regard was unclear). However, at least on one occasion, the prescription has been at a dosage that exceeds the maximum dosage if complying with the regime for using the medication without a prescription as a pharmacy-only medicine.
 - d. Medical practitioners have identified that an appropriate dietary regime is beneficial in controlling the appellant's condition. It is not limited to eliminating certain foods as is the case with coeliac disease, the material indicates a need to consume particular categories of food.
 - e. The appellant is at risk of suffering an anaphylactic shock. The appellant self-reports breathing difficulties which is consistent with that risk potential being more than remote in his case.
- [17] We can place very limited weight on the appellant's evidence beyond these elements which are corroborated by the medical information on the file. We can give no weight to the Regional Disability Adviser's evidence; she was unqualified to give evidence regarding the appellant's medical situation and needs arising from it. It was clear to us that she relied heavily on her experience as a parent looking after a particular child with a particular manifestation of autoimmune issues, one of which came within the same diagnostic category as the condition suffered by the appellant.

[18] At the end of the hearing, we explained to the appellant that if he was to get a proper evaluation of his medical situation he would need to undergo a proper examination from a qualified physician. He would also need to be willing to provide that information to the Ministry and to this Authority. We proposed to the Ministry's case officer that, given the inordinate expense of dealing with this appellant's appeal and the unsatisfactory state of the evidence before us, it would be money well spent. However, the Ministry's agent expressed the view that he considered that probably could not be done, as it would be necessary to comply with the Ministry's protocols and to first go through a general practitioner's consultation and then a referral.

[19] The appellant has already had the benefit of consulting multiple specialist physicians regarding his condition. There is only one of them who he seems to have some level of trust in; however, that is somewhat problematic as there are apparently unpaid consultation fees. The most recent specialist, on whom the Ministry has relied, now apparently has a problematic relationship with the appellant, at least that is the appellant's perspective.

[20] We frankly discussed with the appellant how his suspicion and resulting agitation did make it very difficult to deal with his circumstances.

Jurisdiction

[21] To receive a disability allowance, a person needs to receive a main benefit; however, a disability allowance is supplementary to, but separate from that benefit.

[22] Section 12J(17) governs what matters lie with the Medical Board rather than this Authority. It provides:

The Appeal Authority does not have the authority to hear and determine any appeal on medical grounds, grounds relating to incapacity, or grounds relating to capacity for work, against any decision or determination of the chief executive in respect of —

- (a) a supported living payment on the ground of sickness, injury, disability, or total blindness; or
- (b) a child disability allowance under section 39A; or
- (c) a veteran's pension under section 70 of the War Pensions Act 1954; or

- (d) jobseeker support on the ground of sickness, injury, or disability.

[23] Accordingly, the allocation of jurisdiction between the Medical Board, and this Authority is not only based on whether the issue concerns medical grounds. This Authority must hear matters involving medical grounds if they do not involve the specified forms of support. The provision does not refer to a disability allowance. To the extent a disability allowance is not included in the four types of assistance identified, issues arising are within this Authority's jurisdiction. Section 10B of the Act generally confers jurisdiction on the Medical Board in a matter that corresponds to the extent that jurisdiction is removed from this Authority.

[24] It appears that a disability allowance and a special needs grant are issues we must decide, whether or not there are medical considerations. If either party has a different view, they should raise the issue. Subject to that, we will proceed on the basis we will determine all issues relating to a disability allowance, and special needs grant.

Discussion

The facts

[25] For the reasons outlined, the evidence does not leave us in a position where we can confidently make factual findings. We can make an evaluation cautiously considering what the appellant has said and relying as far as possible on elements of the appellant's evidence that are confirmed by written material from qualified medical practitioners.

[26] However, much of what we are being asked to decide are medical issues. Any reliable answer will require medical assessment, by a medical practitioner directing the evaluation to the questions that determine the entitlements arising in the appeal. The difficulty is that the appellant's personal situation makes it very difficult for him to engage constructively with the Ministry and medical practitioners. The appellant has made a series of unfortunate choices over recent years, and spent time in prison as a consequence. Nonetheless, the appellant controls his own affairs and it must be up to him as to how he deals with the issues he has brought before us.

- [27] In these circumstances, we are going to issue this decision as an interim decision and provide a recommendation as to how matters might proceed. If either the Ministry or the appellant choose not to follow our recommendation, we will indicate what our final decision will be.
- [28] The first observation we make is that the appellant attended an oral hearing before us. While he was clearly suffering from anxiety, he was respectful and did listen to what we said to him. If the Ministry is going to engage with the appellant in a constructive manner, it can only likely do so by having an officer from the Ministry engage with the appellant on a face-to-face basis. We expect that the Ministry does have personnel who have the skills to undertake that task in an appropriate manner, and we strongly recommend that that occur. We would also suggest that suitable personnel are likely not to have previously engaged with the appellant's affairs. Certainly, the appellant did not identify anyone in the Ministry with whom he has a good relationship.
- [29] We also urge the Ministry to create an opportunity for the appellant to attend a consultation with a suitably qualified medical specialist, so a proper evaluation can be made of his needs. If that opportunity is presented, then the appellant will have the choice as to whether or not he engages with it. It seems necessary that the specialist should be somebody who has not previously engaged with the appellant, unless the appellant expresses confidence in an alternative approach.
- [30] We would anticipate that if a consultation successfully takes place and a report from the medical practitioner is prepared, it is likely that all of the issues in this appeal could be resolved by consent. If not, either this Tribunal or the Medical Board (if any issues go to a primary benefit) would have a foundation to make a sound decision.
- [31] The issues are essentially as simple as getting a proper medical evaluation of the appellant's circumstances; and the appellant agreeing that the information is provided to the Ministry and this Authority. The medical examination is not, as the Ministry's agent suggested, concerned with the right to a supported living payment, disability allowance, or special needs grant. The examination we propose is concerned with preparing proper evidence to present to this Authority.

Taking those steps is gathering evidence, not delivery of support. Accordingly, the funding of that process stands apart from the rules relating to benefit entitlement. It is also allowed under section 69C(3).

[32] If we receive no further evidence, the orders we will make will be as follows:

- a. We do not have sufficient evidence to make an evaluation on the question of assistance with travel to consult with a specialist dermatologist in Wanganui and New Plymouth. In the absence of further information that element would fail. However, we would refer the issue to the Medical Board to the extent it relates to a supported living payment.
- b. Funding of antihistamine medication will be a matter we decide to the extent it is accommodated by a disability allowance, or special needs grant; and referred to the Medical Board if it involves his supported living payment. The evidence includes a prescription, and the present evidence would satisfy us of a need to have funding for that prescription to continue. The funding would include medical consultations, given the dosage is not available without a prescription.
- c. We are satisfied that the appellant does need to regularly attend specialist and/or general practitioner appointments and have the cost of related transport funded. This would need to be backdated to the time when the appellant first sought assistance to cover that expense.
- d. The cost of any special dietary needs and medication which are not funded, unless they can be prescribed by the specialist physician or general practitioner and funded on that basis.

[33] It does seem that we could evaluate the antihistamine, medical consultations, and the costs of dietary needs to the extent they should be made as a disability allowance, or special needs grant, as that is not covered in section. However, before making orders under those heads we would give the parties an opportunity to address us in relation to the

amount of the costs, and the relationship between the role of the Medical Board and the Authority on those issues.

[34] Unless the Ministry makes provision for getting a proper medical evaluation and the appellant co-operates, it is likely that the appellant's issues will be ongoing and lead to further appeals. If:

a. there is a proper medical evaluation; and

b. the appellant decides to cooperate:

then, any further appeals will likely be easily resolved. This Authority and the Medical Board deal with facts, and the respective processes are efficient when objective facts are available.

[35] We would hope that this is an opportunity to address the appellant's needs. Appeals with partial evidence lead to expense for the Ministry, and are demanding on the appellant's already fragile circumstances. In our view, an attempt by appropriate personnel to engage face-to-face with the appellant will be essential if further money is not to be wasted on this matter.

Dated at Wellington this 19th day of December 2017

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member