

[2020] NZSSAA 22

Reference No. SSA 30/20

**IN THE MATTER** of the Social Security Act 2018

**AND**

**IN THE MATTER** of an appeal by **XXXX** of **Auckland** against a decision of the Ministry of Social Development that has been confirmed or varied by a Benefits Review Committee

## **BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

**S Pezaro** - Deputy Chair

**J Ryall** - Member

**Hearing** at Auckland on 10 November 2020

### **Appearances**

[The appellant's mother], agent for the appellant, by audio link

P Siueva, agent for the Ministry of Social Development

## **DECISION**

### **Background**

[1] XXXX (the appellant) appeals the decision not to pay her Supported Living Payment benefit when she was absent from New Zealand for the purpose of having medical treatment in Australia. This decision was upheld by a Benefits Review Committee.

[2] The appellant is 34 years old and has adrenocortical carcinoma. This type of cancer is rare, 1:1,000,000, and aggressive. In May 2017, after the appellant had surgery to remove a large tumour and chemotherapy,

further tumours were discovered. Her medical team in Auckland said that she had a 50% chance of surviving for 12 months and a 20% chance of living for five years. The appellant was granted Supported Living Payment on the ground of restricted work capacity. She also received Accommodation Supplement and Disability Allowance which were not suspended during her absence and are not in issue in this appeal.

- [3] Over the next 18 months, the appellant had further tumours removed and treatment, including radiation and chemotherapy. In November 2018, she was advised that none of the treatments were working and there was no further treatment option for her in New Zealand.
- [4] She undertook her own research and communicated with the Auckland DHB drug trial department. She applied to participate in a Sydney trial but was declined. In January 2019 she was advised that a place had become available in that trial and was given 72 hours to travel to Sydney and complete eligibility tests. She was accepted for the trial and required to live in Sydney for the treatment which occurred on a 21 day cycle.
- [5] The appellant notified Work and Income that she was required to move to Sydney for treatment and the Supported Living Payment continued. The Ministry of Social Development (the Ministry) now says that it continued to pay Supported Living Payment in error as it assumed that the treatment in Sydney was provided with the assistance of the Ministry of Health. The Ministry is not suggesting the appellant contributed to this situation, it accepts that it made no enquiries and did not explain the relevant regulations to the appellant.
- [6] In May and June 2019 the appellant returned to New Zealand for family visits, each time advising Work and Income of her travel movements. In October 2019 the medical team in Sydney agreed that she could move back to New Zealand and commute to Sydney for each treatment cycle. She continued to advise WINZ of her travel movements.
- [7] On 19 November 2019 the Ministry advised the appellant that she had nil dates of entitlement to Supported Living Payment during an absence from New Zealand and this benefit would stop on 20 November 2019. Supplementary Assistance in the form of Accommodation Supplement

and Disability Allowance would continue and Supported Living Payments reinstated when the appellant returned to New Zealand.

- [8] The appellant left New Zealand on 19 November 2019 and returned on 22 November 2019. She was not paid for the two days of absence and has not been paid for further absences on 3, 22 and 23 January 2020 and she now seeks payment of Supported Living Payment for these five days.

#### **Relevant law**

- [9] Section 114 of the Social Security Act 2018 (the Act) obliges a beneficiary to notify the Ministry of an intended absence from New Zealand. The Ministry accepts that the appellant did so and that there is no question of her failing to meet any other obligations during her absence.
- [10] Section 219 of the Act provides that as a general rule a benefit is not payable while a beneficiary is absent from New Zealand. This section is subject to exceptions contained in regulations made under s 436 of the Act. Regulation 140 of the Social Security Regulations 2018 (the Regulations) sets out the exceptions:

#### **140 General rule: benefit not payable while beneficiary absent from New Zealand**

(1) A benefit is not payable to a person (**P**) for any period during which P is absent from New Zealand (the **general rule**) unless 1 of the following exceptions applies:

- (a) the 4-week rule; or
- (b) the benefit subject to obligations rule; or
- (c) the medical exception; or
- (d) the vocational training exception; or
- (e) the Special Olympic or Paralympic Games exception; or
- (f) the other enactments exception.

- [11] Regulation 123 of the Social Security Regulations 2018 (the Regulations) requires the Ministry to apply the four-week rule if the benefit is a qualifying benefit for the purposes of that rule. However, reg 139(3) provides that Supported Living Payment on the ground of restricted work capacity is not a qualifying benefit for the purposes of regs 142, 143 and 144 which allow payment of benefit for absences of up to four weeks if certain criteria are met.
- [12] Exception to the general rule in respect of absences for medical treatment is provided by reg 150:

**150 Exception to general rule: medical treatment**

MSD may, in its discretion, pay a benefit to a person (**P**) who is absent from New Zealand for a period or periods not longer than 2 years in total if—

- (a) P would otherwise be entitled to be paid the benefit; and
- (b) P is absent because P or P's spouse or partner, dependent child, or sibling is receiving medical treatment overseas for which the Ministry of Health has granted assistance.

**Issues**

- [13] The issues for the Authority to decide are whether the reason that the appellant was absent from New Zealand, to obtain medical treatment that was unavailable to her in New Zealand, in the circumstances of her absence entitle her to payment of Supported Living Payment during that absence, either under the exception provided by reg 150, or any other provision for a discretionary payment.

**The case for the appellant**

- [14] The appellant was not well enough to present her own case at the hearing. Her mother appeared as her agent and said her daughter's condition was now critical. She said she understood the limits of the legislation but believes that her daughter's situation fell between the provisions. As she had exhausted all possibility for treatment in New Zealand, and her New Zealand specialist considered that the opportunity in Sydney was the only chance of extending her life, it was appropriate to pay her benefit entitlement during her absence.

- [15] The appellant's mother said that the situation was not logical or fair because the permitted reasons for entitlement to a benefit during absence include participating in special Olympics, training a guide dog or attending a job interview, among other situations, but not medical treatment necessary to extend life.

### **The case for the Ministry**

- [16] The Ministry submits that reg 150 allows a benefit to be paid during an absence from New Zealand for medical treatment only if the treatment is provided with the assistance of the Ministry of Health through the High Cost Treatment Pool, a fund set aside by the Ministry of Health for one-off treatments not otherwise funded by the New Zealand public health system. It was this provision that the Ministry assumed applied to the appellant when her overseas treatment started.
- [17] Ms Siueva could not explain why the Ministry interprets the granting of assistance under reg 150 as being limited to receiving funds from the High Cost Treatment Pool but submitted that 'assistance' means financial assistance. Unless the overseas treatment is funded by the Ministry of Health, the Ministry considers that the recipient is not eligible for payment of benefit during an absence from New Zealand and there is no discretion to be exercised.
- [18] In this case, as the appellant did not receive any financial assistance from the Ministry of Health, the Ministry's position is that she does not meet the requirement for payment of Supporting Living Payment during her absence. In addition, the Ministry says that as the appellant does not fall within any of the exceptions to the four-week rule in reg 143 of the Regulations, she is not entitled to receive Supported Living Payment for any absences over four weeks. As the days in question exceed this period, the Ministry says it has no discretion to pay Supported Living Payment.

### **Discussion and conclusion**

- [19] The Ministry's submission that Supported Living Payment on the grounds of restricted work capacity is a qualifying benefit for the purpose of the four-week rule is not correct. It has misinterpreted the legislation. The

four-week rule does not apply to the appellant. The only exception that potentially applies to her is the medical exception in reg 150. If this exception applied, she would be entitled to receive Supported Living Payment during an absence of up to two years.

[20] The question of whether or not reg 150 applies to the appellant turns on what is meant by overseas treatment *for which the Ministry of Health has granted assistance*. There is no definition of 'assistance' in the Regulations nor any indication that only financial assistance is intended.

[21] We do not accept that 'assistance' is intended to be restricted to financial assistance. The purpose of this exception appears to be to permit those beneficiaries who cannot get the treatment they require in New Zealand to travel overseas for treatment without being penalised by loss of benefit during treatment. We consider that 'assistance' as used in the reg 150 is not limited to financial assistance and includes a referral to an appropriate treatment provider and associated services such as provision of medical records, without any funding being provided.

[22] Therefore we have considered whether the appellant received assistance from the Ministry of Health for her treatment overseas. The appellant was referred to the Sydney treatment provider by her oncologist at Auckland Hospital. On 9 December 2019 Dr Lawrence, consultant medical oncologist at Auckland Hospital wrote to WINZ in support of her application for payment of her benefit while absent:

We have run out of treatment options; she is currently receiving treatment in Australia, as recommended by our service and after our direct referral. This is a critical part of her ongoing care and is effectively an extension of the service here as this is being given as a clinical trial.

[23] On the basis of this letter, we are satisfied that the appellant was referred to the Sydney treatment provider by her New Zealand medical team. The question is whether this referral amounts to assistance by the Ministry of Health.

[24] Assistance from the Ministry of Health is a phrase that is less than definite. It is not necessary or appropriate to try and identify the boundaries in this case. We are satisfied this case was one where the Ministry of Health provided assistance. The context was one where

treatment in Australia did not require funding, other than the cost to the appellant of travel and accommodation, due to the exceptional situation involving participation in a scientific study.

[25] In this context, where funding was not an issue, we have had regard to the fact the condition the appellant suffers from was being treated in the New Zealand health system which the Ministry of Health funds. The New Zealand health system could provide no further life-extending treatment; but did provide assistance to ensure continuity of care by way of treatment in Australia and provided essential information to secure the appellant's eligibility and participation in the Australian study. Accordingly, we are satisfied that the appellant's circumstances met the criteria for payment of benefit during the absences in question under the medical exception in reg 150 of the Regulations.

[26] We emphasise that the integration between treatment in the New Zealand health system and the Australian medical service provider, and the absence of the usual funding issues, determine that 'assistance' was provided in this case. Our decision is not intended to communicate a view of cases that have different facts.

### **Order**

[27] The appeal is upheld.

[28] The Ministry of Social Development is to pay the appellant her entitlement to Supported Living Payment for five days being 20 to 22 November 2019, 3 January 2020 and 22 January 2020 immediately.

**Dated at Wellington** this 19<sup>th</sup> day of November 2020

---

**S Pezaro**  
Deputy Chairperson

---

**J Ryall**  
Member