

[2018] NZSSAA 21

Reference No SSAA 001/18

**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 13 April 2018

Appearances

The appellant in person.

Mr T Wild, counsel, Auckland, for the Chief Executive of the Ministry of Social Development.

## **DECISION**

### **Introduction**

[1] The facts in this appeal are relatively straightforward and uncontentious. The appellant developed cataracts in both eyes and the condition progressed to the point where he was no longer able to drive. The appellant lives in a rural community, accordingly the condition had a severe impact on his life. Public transport was not readily available in the area. Notwithstanding the adverse consequences and a readily available surgical treatment for the cataracts, the public health regime would not provide funding for the treatment.

- [2] The appellant sought assistance from the social security system and has since had the cataract operation for one eye at his own expense. We will discuss the circumstances as they were when the appellant sought assistance, we understand he had not had the surgery at that time.
- [3] Ideally, the appellant required surgery for both eyes. Surgery for one eye costs \$3,880 and that was sufficient to improve the appellant's sight so he could drive, and generally function, much as he could have before the cataracts developed.
- [4] The appellant sought assistance from the social security system to allow him to get the surgery he needed. As the facts are not in dispute, the key issues are to:
- a) Identify the forms of assistance that are potentially available.
  - b) Evaluate the appellant's rights to access that assistance.
- [5] A key element in the evaluation is the extent to which the health system and the social security system, respectively, are responsible for addressing the appellant's needs.

### **The Appellant's Contentions**

- [6] The appellant appropriately emphasised the humanitarian consequences of him not receiving treatment for his condition, and the various effects on his life. None of those elements were contentious. The appellant took a wide-ranging approach to the evaluation of the issues. He agreed with the Ministry, however, that there were three key potential mechanisms to consider in relation to his entitlement, namely:
- a) The Special Needs Grant Programme, which provides for the ability to provide grants of money to provide assistance, either on a recoverable or non-recoverable basis.
  - b) Providing an advance payment of benefit (New Zealand Superannuation in the appellant's case).
  - c) Granting a Disability Allowance and making an advance payment of the Disability Allowance.

- [7] The appellant particularly emphasised the potential for an advance payment of a Disability Allowance. He considered that this was the most appropriate form of assistance.
- [8] The appellant also contended that the Ministry's policy relating to elder abuse provided funding and a mechanism for assisting the appellant with the cost of surgery. The appellant was, however, not able to identify any statutory mechanism that allowed the Chief Executive to grant such support, or for this Authority to allow an appeal on that basis.

### **The Respondent's Contentions**

- [9] The Ministry's position was that the appellant was not entitled to the assistance he sought because:
- a) He was not entitled to a Special Needs Grant as his "cash assets" exceeded the allowable limit. The Ministry said that was an absolute bar to using a Special Needs Grant to provide for the cost of surgery.
  - b) In relation to the advance payment of benefit, the Ministry's position was that to qualify for this entitlement the appellant would have to demonstrate "exceptional circumstances", and that was not a correct categorisation of his situation.
  - c) In relation to an advance payment of a Disability Allowance, the Ministry accepted that visual impairment due to cataracts can constitute a disability, and that would apply to the appellant (though the amount of any allowance was not clear). However, the advance payment of a Disability Allowance was in the same category as the advance payment of other benefits which meant that the "exceptional circumstances" requirement applied in the same way with the same result.
- [10] The Ministry took the position that the Chief Executive does not have discretionary powers to fund cataract surgery outside of the statutory entitlements and welfare programmes identified.

**Discussion – the Facts**

- [11] The facts were not contentious. The Ministry accepted that the cataracts had a severe effect on the appellant's ability to live a full life. He is engaged in an active life physically, mentally and socially, and contributes significantly to the community. A major factor is that the cataracts prevent the appellant from driving. The lack of public transport where he lives makes that issue more acute than would otherwise be the case for some people. Accordingly, the cataracts are significantly detrimental to his welfare.
- [12] There was no dispute that the appellant had sought assistance from the public health system to obtain cataract surgery. The public health system does provide cataract surgery, but the appellant did not qualify because his need was assessed as being too low to justify funding the procedure. The details of the assessment are not entirely clear, but it is evident that an evaluation considered clinical factors, the resources available, the effects on the appellant and the priority given to other patients. The appellant was told he could anticipate waiting several years before potentially qualifying for the surgery.
- [13] In relation to the quantification of assets, the details of which are discussed below, there was no dispute as to any determinative facts.

**Special Needs Grant**

- [14] The Special Needs Grant Programme is established pursuant to s 124(1)(d) of the Social Security Act 1964 ("the Act"). The Programme is promulgated with written instructions ([www.workandincome.govt.nz](http://www.workandincome.govt.nz)).
- [15] The definitive provision in the Special Needs Grants Programme is cl 8.1 which provides:
- An applicant is not entitled to a grant if his or her cash assets exceed the appropriate limit in clause 8.3.
- [16] The limit is provided in the Programme; in the present case, the limit was \$1,770.44.
- [17] The Programme also defines "cash assets" in cl 3. That definition says that the term "means ... assets of that person and his or her spouse or partner".

- [18] In this case, the appellant declared assets of \$6,150 and his wife declared assets of \$28,825, with them both having \$3,000 in joint assets. They also had a joint overdraft of \$11,000.
- [19] There are some complexities as to the precise assets which may be included as “cash assets”, and whether debts may be set-off against an asset. It is not necessary to discuss those issues in this case as the amount is clearly exceeded.
- [20] There is no relevant discretion under the Special Needs Grant Programme that allows either the Chief Executive or this Authority to do anything other than to apply cl 8.1 of the Programme. In this case, that provision is a complete bar to a Special Needs Grant. Significantly, that is the only provision that could allow a non-recoverable grant.

#### **Elder Abuse Funding**

- [21] For completeness, we note the appellant’s contention that initiatives to prevent elder abuse provided funding for that purpose cannot assist in this appeal. There is no statutory authority that lies within the jurisdiction of this Authority outside of the three specific grounds raised by the parties.

#### **Advance of Benefit**

- [22] There is no doubt the appellant is in receipt of a “benefit”, as New Zealand Superannuation is included within that definition. The same applies to a Disability Allowance. If he did not have the cataract operation, there is also little doubt that the appellant would be entitled to a Disability Allowance as there would be costs incurred resulting from his condition, and the cost would be ongoing. We note for completeness that there was some discussion regarding the decision *Chief Executive of the Ministry of Social Development v Port*.<sup>1</sup> In our view, that case is not relevant here; the ongoing nature of the disability and expenses arising from cataracts is clearly within the category of matters that may be covered by a Disability Allowance.
- [23] It follows that the contentious element is the ability to make an advance payment of either New Zealand Superannuation or a Disability

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<sup>1</sup> *Chief Executive of the Ministry of Social Development v Port* [2016] NZHC 1314 where the purchase of an item of gym equipment was held to be a one-off expense which was not covered by the Disability Allowance.

Allowance. Both of those actions are governed by s 82(6) of the Act which states:

**82 Payment of benefits**

...

- (6) If the chief executive is satisfied that an advance payment of a benefit would best meet the immediate needs of a beneficiary, the chief executive may, in the chief executive's discretion, on application by the beneficiary, make payment in advance of any number of instalments of the benefit, or part of it, not yet due, and the amount so paid in advance is a debt due to the Crown under section 85A(c), and subject to recovery under section 86(1) (chief executive's duty to recover debt referred to in section 85A), from the beneficiary.

[24] Before going on to consider some of the constraints relating to the exercise of that discretionary power, it is appropriate to return to the context of the appellant's request. The appellant's need is a medical one. The public health system is charged with providing surgical and medical services for health conditions. Access to the public health system is not subject to an income or asset test. It is, however, necessary to prioritise access in some cases. An evaluation is made of the patient's need, including the nature and effects of their adverse health condition, and the potential for providing relief through treatment. The Social Security regime is not intended to fill gaps in the public health system or second guess decisions made in the health system. If the appellant considers that the decision to deny him treatment was wrong and he was entitled to be given to a higher priority for surgery, that is an issue for the health regime, not the Social Security regime.

[25] We do note, however, that there are some medical costs the social security regime does meet. The public health regime does not meet all the costs associated with medical and surgical procedures. Persons that rely on the social security regime for support are entitled to have those unfunded costs considered. That is quite different from the present situation where the public health system will fund the cataract operation, but not for the appellant because he does not meet the needs based criteria.

[26] It is evident that the power to advance a benefit (set out in s 82(6) above) is a discretionary power where the Chief Executive is required to be

satisfied that an advance payment would best meet the immediate needs of a beneficiary.

- [27] Further guidance as to the exercise of that discretionary power is provided by the Ministerial Direction for Advance Payment of Benefit promulgated under s 5 of the Act (“the Direction”). Clause 2.1 of the Direction says that to be considered for an advance a beneficiary “must be able to identify a Particular Immediate Need”. Clause 2.2 of the Direction goes on to say that regard must be had to the beneficiary’s ability to meet the need from their own resources. Clause 2.3 then says that the beneficiary will generally be expected to meet a particular immediate need themselves if they have cash assets above a threshold. The relevant threshold is set out in cl 2 of Schedule 31 of the Act which is the same as the threshold for cash assets under the Special Needs Grant. In this case the threshold is \$1,770.44. It follows from our previous conclusion that this amount has been exceeded. However, unlike the absolute bar to a Special Needs Grant, there is a discretionary ability to make an advance of benefit notwithstanding the cash asset threshold “where there are exceptional circumstances” (cl 6.2).
- [28] The Ministry cited the decisions in *Stemson v Director of Social Welfare*,<sup>2</sup> *Hall v The Director General of Social Welfare*<sup>3</sup> and *Little v Chief Executive of the Ministry of Social Development*.<sup>4</sup> The Ministry said that those cases are authority for “exceptional circumstances” being exceptional or rare. That, however, adds little to the words themselves.
- [29] Accordingly, we turn to the question of exercising the discretion under s 82(6) of the Act. In our view, a very significant impediment to the appellant accessing an advance payment of benefit is the terms of s 82(6) itself. It requires a situation where the advance payment would “best meet the immediate needs of a beneficiary”. The circumstances of this case, and similar cases, is one where the public health system has determined its resources are not best used by providing the treatment sought. If the circumstances change, the treatment may be available. There can be no absolute rules in cases such as this one; however, the Chief Executive and this Authority must exercise a great deal of caution.

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<sup>2</sup> *Stemson v Director-General of Social Welfare* HC Auckland AP22-SW00, 28 June 2000.

<sup>3</sup> *Hall v The Director-General of Social Welfare* [1997] NZFLR 902.

<sup>4</sup> *Little v Chief Executive of the Ministry of Social Development* [2015] NZHC 1744.

It will not be a routine decision to conclude that the social security regime or a beneficiary, should fund a surgical or medical procedure the public health regime will not fund. In the case of an advance payment of benefit, initially it is funded by the social security regime and ultimately by the beneficiary.

- [30] Benefits are generally no more than adequate, though New Zealand Superannuation is generally the least restrictive benefit. In most instances, the conclusion will be that if a person is not able to fund treatment from their own resources, it is reasonable for them to rely on the public health system to best meet their immediate needs<sup>5</sup>. There would need to be some compelling circumstances to conclude that “advance payment of a benefit would best meet the immediate needs of a beneficiary” to go beyond what the public health system provides. We do not exclude the possibility that there could be cases where the test is met. However, when denying treatment to the appellant, the immediate needs of the appellant were considered by the public health system.
- [31] We acknowledge the appellant has provided a compelling case demonstrating the impact that the cataracts have had on his life, and his ability to contribute to the community. Nonetheless, those facts equally support a contention the public health system may have made an erroneous decision, which should be reconsidered. We emphasise that we are not saying the decision was wrong; we are in no position to evaluate the resources available in the public health system at the time of the decision, or any wider medical circumstances potentially material to the appellant’s situation.
- [32] In addition, we have regard to the Ministerial Direction directing that exceptional circumstances are required before making an advance where the beneficiary’s cash assets exceed the threshold. We consider that is also a barrier to exercising the discretion in the manner sought by the appellant. Our reasoning is very similar to that in relation to the discretion under s 82(6) of the Act. If a person has the resources to meet the cost of treatment rather than accept the priorities in the public health system, they are of course free to do that. If that is not the case, and denying or deferring treatment is simply the consequence of ordinary prioritisation in the public health system, requiring a person to accept that prioritisation is not likely to point to “exceptional circumstances”.

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<sup>5</sup> The test in s 86(2)



[33] The appellant contended there were no other similar cases to his and his case was exceptional on that basis. We do not accept that; the appellant suffered from a common medical condition which had the typical consequences for persons suffering from the condition. The treatment for that condition is well-settled and readily available. This is a case of an unexceptional medical circumstance with predictable results. Prioritisation of treatment for cataracts is determined for numerous patients in the public health system daily.

[34] Accordingly, we are not satisfied that an advance payment of a benefit would best meet the immediate needs of the appellant, or that the refusal of immediate treatment was an exceptional circumstance in this case. Accordingly, we are not entitled to exercise the discretion under s 82(6) of the Act to allow an advance payment of benefit.

#### **Decision**

[35] The appeal is dismissed.

**Dated at Wellington** this 7<sup>th</sup> day of May 2018

**G Pearson**

Chairperson

**K Williams**

Member

**C Joe JP**

Member