

[2018] NZSSAA 22

Reference No. SSAA 047/17  
& 071/17

**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 4 December 2017

### **Appearances**

Mr Ord, Barrister and Solicitor, Nelson for the appellant.

Mr R Moran, lawyer, for Chief Executive of the Ministry of Social Development.

## **SECOND INTERIM DECISION**

### **Background**

[1] The Authority issued its first interim decision in relation to this matter on 19 December 2017. That decision reference is [2017] NZSSAA 074, and the decision should be read with this present decision. The first interim decision makes it clear that, in our view, the Ministry's handling of the appellant's welfare entitlements has been most unsatisfactory. One of the features of that unsatisfactory conduct was when the Regional Disability Adviser gave evidence at the hearing that led to the interim decision. She was unqualified to give evidence in relation to the medical

issues which she purported to address. Her evidence included views as to how life-threatening health issues should be managed. At [16] of the first interim decision we set out our evaluation of the material before us. We also set out some issues relating to the jurisdiction between this Authority and the medical board.

- [2] After considering the material before us at the hearing, we reached the view that there was no satisfactory foundation for making the necessary factual findings. We made recommendations as to how the lack of information could be addressed.
- [3] We noted that the appellant had attended the hearing, had been respectful and listened to what we said to him. We observed that if the Ministry was going to engage with the appellant in a constructive manner, it could only likely do so by having an officer from the Ministry engage with the appellant on a face-to-face basis. We expressed the expectation that the Ministry would have personnel with the skills to undertake that task, in appropriate circumstances, and strongly recommended that face-to-face engagement should happen. We explained that we considered it was important for the appellant to attend a medical consultation with appropriately qualified medical specialist/s so a proper evaluation could be made of his needs. We expressed the view that if a constructive approach were taken by the Ministry to facilitate a proper medical evaluation, which the evidence indicated was essential, then the issues in this appeal could likely be resolved with minimum expense.
- [4] We went on to say that, unless there was constructive engagement and a proper medical evaluation, there would likely be adverse effects from further appeals due to the appellant's fragile circumstances and the fact that further money would be wasted by the Ministry on this matter.

### **The Appellant's Response**

- [5] Consistent with our expectation that the parties should engage constructively, the appellant instructed Mr Ord, a Barrister and Solicitor, to represent him. Mr Ord wrote a letter to the Authority, sending a copy of the letter to the Ministry. The key elements in Mr Ord's letter were that he sought:
- a) an interim award on the grounds of immediate need; and

- b) disclosure of some of the information the appellant had provided at the hearing.
- [6] The interim award that Mr Ord sought, preferably in the form of an emergency grant, was for:
- a) A telephone landline at \$89 per month, plus approximately \$1,200 to clear previous telecommunications debts.
  - b) A prescription for an antihistamine at \$86.
  - c) A prescription for divabit gel at \$5.
  - d) Funding to consult a particular medical specialist at \$320 per visit, including \$700 to clear a previous debt for further visits.
- [7] We note that there were appropriate reasons for the appellant to engage with the particular medical specialist.
- [8] The total interim award requested in the form of emergency assistance was \$2,400. Mr Ord expressed the need for an urgent response.

### **The Ministry's Response**

- [9] The Ministry responded through its counsel, Mr Ryan Moran. The key elements in Mr Moran's response were:
- a) The Ministry had considered the Authority's recommendations in its interim decision and concluded the Authority was wrong. A "face-to-face" meeting between a Ministry official and the appellant was unlikely to be helpful based on previous interactions with him.
  - b) Further, a "face-to-face" meeting could expose Ministry staff to unnecessary risk.
  - c) The Ministry would support the appellant's medical costs and assist with arranging a further medical assessment. However, that offer was conditional on the appellant first agreeing that the medical information be provided to the Ministry and the Authority.

### **The Consequences of the Ministry's Response**

- [10] Counsel for the Ministry sought to justify the Ministry's refusal to engage directly with the appellant because of the Ministry's Health, Safety and Security Unit's views. It had, apparently, made an assessment of the risk which was not consistent with this Authority's view.
- [11] We consider that the Ministry's response is unacceptable, given that it fails to take account of the fact there have been "face-to-face" meetings with Ministry officials, and there will be further meetings. The only optional element is the circumstances of future meetings.
- [12] Our interim decision followed a hearing. At that hearing:
- a) Each of the three members of this Authority hearing the appeal engaged with the appellant on a face-to-face basis.
  - b) The Ministry's agent who represented the Ministry at the hearing engaged with the appellant on a face-to-face basis.
  - c) The Ministry's witness also engaged with the appellant on a face-to-face basis.
- [13] Further hearings resulting from the Ministry's refusal to engage with the appellant outside of hearings will also be "face-to-face".
- [14] The appellant has engaged a legal process where the Ministry's decisions are subject to scrutiny. It is his legal right, and this Authority's duty, to ensure that the process is completed. We have no power to require the Ministry to make appropriate arrangements to meet with the appellant and/or his counsel outside of hearings. However, it is appropriate to point out to the Ministry the costs of its decision. If it is to use this Authority's hearings as its only mode of engaging with the appellant, the process will be very costly.
- [15] The High Court's decision in *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541 sets out the principles to be applied in cost decisions. It suffices to note that the norm, where costs are awarded, is to award them on a solicitor/client basis. We also refer to this Authority's decision in *X v Chief Executive* [2017] NZSSAA 063.

That decision deals with situations where the Authority recovers its own hearing costs.

- [16] If further hearings are required because of the Ministry's decision not to engage with the appellant and/or his counsel outside of hearings, the costs of those hearings are likely to be borne by the Ministry. The costs of each hearing are likely to be no less than \$7,500 each.
- [17] We further note, with concern, the emphasis counsel for the Ministry has placed on support for a medical evaluation being conditional on the appellant consenting to medical information being provided to the Ministry and the Authority.
- [18] For the reasons expressed in the first interim decision, the Ministry has dealt with the appellant's circumstances unsatisfactorily. That includes what we consider to be most inappropriate conclusions reached by medically unqualified persons concerning the appellant's medical needs. The appellant is a vulnerable person and there is no doubt that dictating conditions is likely to result in him being uncooperative. We would not find it surprising or unreasonable if the appellant sought to request that some conditions be placed on Ministry personnel allowed access to his medical records, given the unsatisfactory way his medical issues have been evaluated to date. We do of course recognise that the Ministry will need to access medical information; however, that does not preclude legitimate privacy expectations that may limit who sees the information.
- [19] We find the Ministry's response is not calculated to resolve issues in a satisfactory or cost-effective manner, and will likely lead to ongoing costly disputes.

#### **Next Steps**

- [20] We request that Mr Ord notify the Authority as to what progress has been made, particularly whether:
- a) the appellant's immediate circumstances have been satisfactorily resolved; and
  - b) whether there is now a satisfactory process in place to obtain the medical evidence the Authority needs to make a reasoned fact-based decision.
- [21] We request that the Ministry then report on its position.

[22] If we are not satisfied that the circumstances have been progressed adequately, we will arrange for a hearing. That hearing will be held either in Nelson or XXXX. The hearing will deal only with the application for interim relief, and the process to obtain adequate evidence in respect of the appellant's medical needs.

[23] We request that counsel for the appellant report within five working days, and the Ministry respond in a further five working days. Either party may apply to vary the time proposed.

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

**G Pearson**  
Chairperson

**K Williams**  
Member

**C Joe JP**  
Member