

[2020] NZSSAA 18

Reference No. SSA 094/19

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an appeal by **XXXX** of Whangarei against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee

AMENDED DECISION OF THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

C Joe - Member

Background

- [1] On 8 October 2020 we issued a memorandum giving our indicative view of the decision we would make with the information before us at that time. We indicated that if we had no further information we would dismiss this appeal. We set a timetable giving 10 working days for XXXX (the appellant) to request a hearing or provide any further information and the Ministry of Social Development to correct any error in the indicative decision. As the parties have not taken any further steps we now issue the final decision.
- [2] The appellant appeals the decision on 5 January 2018 by the Ministry of Social Development to grant Child Disability Allowance (CDA) for her daughter from 5 December 2017 and not from the date of her daughter's birth, 16 February 2011. The appellant claims CDA should be granted from her daughter's birth because she was born with health and disability issues.
- [3] The Ministry decided that the diagnosis required to establish entitlement to CDA was not made until 2017 and, as assistance cannot be granted until requested, CDA could not be backdated to the date of birth. The Ministry based this decision on a medical certificate dated 30 November 2017 confirming that the appellant's daughter had a brain tumour and was not mobile. Tragically the brain tumour was inoperable and her daughter died on 28 January 2018.

- [4] The Ministry's decision was upheld by a Benefits Review Committee. However, after the appeal was filed, the Ministry reviewed its decision and granted CDA from 10 April 2012 because it accepted that the appellant sought financial assistance at that time. The Ministry then paid the appellant arrears of \$13,616.25 for the period 10 April 2012 to 5 December 2017.
- [5] The appellant confirmed that she wanted to continue her appeal for the period from her daughter's birth to 9 April 2012. A hearing was scheduled on 26 March 2020 and directions issued requiring the Ministry to file certain documents sought by the appellant which were not in its reg 249 report. The appellant was directed to file any further documents she intended to refer to at the hearing by 11 March 2020.
- [6] The appellant filed a large number of documents by email. As some of the files could not be read, the hearing was adjourned and the Authority issued directions explaining the appropriate form for filing.
- [7] A further telephone conference was scheduled to set a new hearing date. The appellant did not attend that conference and attempts to contact her by telephone failed. Although she had refiled some documents on computer disks, the Authority did not have the facility to read these. Therefore the appellant was directed to file her documents either in hard copy or on a USB memory stick by 5 June 2020. The directions recorded that the Authority would review the material received from both parties and issue an indicative decision, giving the parties an opportunity to make further submissions before the decision was finalised.

The issue in this appeal

- [8] The question we must decide is whether the appellant is entitled to CDA before 10 April 2012, either from the date of her daughter's birth or at some point between the date of birth and 9 April 2012 (the relevant period). In order to be eligible for CDA, the appellant must show that her daughter had a diagnosed disability and to be entitled to a benefit, the appellant must have applied for assistance.
- [9] The Ministry states that in reviewing the decision it has taken the commencement date of the allowance as the date of first contact with the Ministry. We must examine the material on file to determine whether there is any earlier point at which the appellant approached the Ministry with what could or should have been

interpreted by the Ministry as a request for financial assistance and evidence of her daughter's disability.

Relevant law

[10] As this decision was made on 5 January 2018, the Social Security Act 1964 (the Act) applies and we must consider the law as it was at that time.

[11] Section 39A of the Act sets out the requirements for entitlement to CDA:

(1) For the purposes of this section and of sections 39B to 39E, **child with a serious disability** means a dependent child who—

(a) has a physical or mental disability;

(b) because of that disability needs constant care and attention; and

(c) is likely to need such care and attention permanently or for a period exceeding 12 months.

(2) In determining for the purposes of subsection (1)(b) whether a child with a serious disability needs constant care and attention the chief executive shall consider whether the child requires—

(a) from another person, frequent attention in connection with his bodily functions; or

(b) attention and supervision substantially in excess of that normally required by a child of the same age and sex; or

(c) regular supervision from another person in order to avoid substantial danger to himself or others.

[12] Section 11D of the Act set out the application process for benefits. Section 11D(1) states that a benefit must not be granted until an applicant has complied with s 11D(2) which requires an application form and any supporting evidence reasonably required by the Chief Executive.¹

[13] Section 11D(7) provides that, if the Ministry receives a written application and supporting evidence, it may treat the application as having been received on the date of first contact.

¹ The 1964 Act provided that the requirement for a form and information could only be waived if the Chief Executive was satisfied that the department already held the information required or a form relating to an application that had lapsed. The Social Security Act 2018, s 438(j) modified this requirement by permitting regulations to waive the requirements to complete an application form provide supporting evidence.

[14] Section 80(1) of the Act provides that a benefit commences on the later of the date the applicant became entitled to receive it or the date the application was received.

The case for the appellant

[15] In her Notice of Appeal, the appellant says she was concerned about her daughter from birth. She believes her daughter was born with the tumour but misdiagnosed and the tumour was growing from birth. She says an MRI should have been done in July 2015 when her daughter had her first long stay in hospital and claims the hospital was trying to cover up a misdiagnosis. The appellant wants the CDA backdated to birth as *“from then we did nothing but deal with hospitals, services, drs and told continually that there was nothing wrong when we knew there was”*.

[16] The appellant produced a number of medical records showing she consulted medical professionals from the time her daughter was a few months old. Unfortunately she has not produced these records in an ordered manner; they are not chronological and, in many cases, do not appear to be complete. The appellant has made handwritten notes on her daughter’s medical records expressing disagreement with the diagnoses and, at times, providing a different version of an attendance from that of the medical practitioner.

[17] After confirming she would pursue this appeal for the period prior to 10 April 2012, the appellant submitted further documentation. The documents included scans and medical records. Most of the documents produced by the appellant are no longer relevant because they relate to the period after 10 April 2012 and the Ministry has now granted CDA from this date.

The case for the Ministry

[18] The Ministry filed its report before it decided to grant CDA from 10 April 2012 and did not file further submissions.

[19] Its position is that the type of supporting evidence generally required for CDA is a medical certificate and that Section 80 of the Act provides a benefit cannot be granted before the date of application. However, where a benefit has not been granted due to an error, s 80AA allows the benefit to be backdated.

[20] The Ministry has now concluded that the appellant applied for assistance on 10 April 2012 and backdated CDA to that date. It does not appear to have considered whether there was evidence of disability at that time.

Discussion and conclusion

[21] For the purposes of this appeal, our inquiry focussed on the records from the appellant's daughter's birth to 10 April 2012 and we carefully examined those records to establish when disability was diagnosed. We also endeavoured to investigate the material before us to establish whether the appellant approached the Ministry with a need for assistance before this time, and if she did so, whether the request arose from her daughter's disability such that she was entitled to CDA under s 39A of the Act.

[22] Although the Ministry did not address the question of disability when it decided to backdate CDA to 10 April 2012, in determining this appeal we must apply the law. Therefore, only if we are satisfied that the appellant's daughter had a disability prior to 10 April 2012 can we grant CDA. The criteria in s 39A of the Act must be met and established by independent evidence from a person qualified to make the assessments necessary to satisfy these criteria. The Authority is not qualified to draw conclusions based on the medical examinations such as scans and tests that the appellant has produced; that is not within our powers. Our findings are based on the expert opinions of the appellant's daughter's health at the relevant time. Expert evidence of physical or mental disability that meant the appellant's daughter required care and attention, or regular supervision, in excess of the level of care normally required at that age, is required to demonstrate that the child had a level of disability that met the criteria for CDA.

[23] The earliest expert report we have on the appellant's daughter's health is 26 January 2012 from Dr Warwick Smith, a paediatrician. At this time, the appellant's daughter was 11 months old. Dr Smith recorded she appeared to develop normally until she was seven months when her motor development stopped progressing. At the time of the appointment, she was not crawling and was reluctant to weight bear. Dr Smith observed some characteristics of an autism spectrum disorder but stated that it was too early for a definitive diagnosis. He did not diagnose the child as having a disability at that time.

[24] On 17 April 2012 the paediatric outpatient clinic of Northland District Health Board assessed the appellant's daughter as having mild developmental delays which

seemed to be improving. Dr Rupert Scott recorded that the parents had no concerns until the child was six to seven months old. He recommended a follow up at eighteen months of age.² While this report is just outside of the relevant period, it indicates that, at the date from which CDA has now been granted, there was no diagnosis of disability.

[25] We conclude therefore, on the evidence before us that the appellant's daughter was not diagnosed with a disability prior to 10 April 2012 and therefore the appellant is not entitled to CDA prior to that date. For these reasons, we dismiss this appeal.

Observation

[26] We of course have the greatest sympathy for the appellant and the tragic circumstances that occurred so early in her daughter's life. We have no power beyond what the law gives us. The law does not always fully anticipate exceptional and tragic circumstances. We also appreciate that medical conditions can be difficult to diagnose in very young children, even when parents identify serious concerns very early, as occurred in this case.

[27] We are in a situation where we do not consider we, or the Ministry when it considered the matter, held the legal authority to grant support earlier than the Ministry did. That in no way diminishes our view that the appellant and her family did all they could and as early as they could to support their child.

Dated at Wellington this 30th day of October 2020

S Pezaro
Deputy Chair

C Joe
Member

² Report dated 17 April 2012, Paediatric Outpatient Clinic, Northland District Health Board at 55 of the Ministry's reg 249 report.