

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an Appeal to the Social Security Appeal Authority by XXXX of Auckland against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee.

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

R Palu (Deputy Chair)

P Singh (Member)

M Dodd (Member)

Representation: XXXX presenting her own appeal

Counsel: R. Stainthorpe, counsel, and N Jaura, appeals officer, for the Ministry of Social Development

DECISION

Introduction

- [1] XXXX's appeal concerns the Ministry's decision to grant her a disability allowance from 7 January 2022 and not the earlier date of 16 March 2020.
- [2] Subsequent to the appeal the Ministry reviewed XXXX's disability allowance and backdated it to 1 December 2021. In addition, the Ministry now accepts that XXXX had a disability from 24 March 2020. This decision is based on a diagnosis of post-traumatic stress disorder (PTSD) and stress and adjustment reaction arising from incidents in 2018. However, the Ministry is not satisfied that XXXX had personally incurred costs directly related to her disability during the period 24 March 2020 to 13 July 2021, when she was in New Zealand and receiving Jobseeker Support (JSS).

Background

- [3] XXXX is 37 years old. As she has various medical conditions, she receives a supported living payment.
- [4] She has been going through Trans-Tasman Family Court proceedings since 2018. She has long standing trauma and stress arising from this. XXXX came to New Zealand to be with her children who had relocated here from Australia with her ex-partner.
- [5] XXXX applied for and was granted JSS, from 24 March 2020 to 13 July 2021 with full time work obligations. XXXX did not apply for a disability allowance until 7 January 2022. According to XXXX this was because she was not aware that she was eligible for this. She considers that the Ministry should have informed her of her entitlement to a disability allowance when she first requested financial assistance in March 2020.

Issues

- [6] As stated, above XXXX claims a disability allowance from 16 March 2020. The Ministry does not dispute that between 24 March 2020 to 13 July 2021 XXXX was entitled to a disability allowance. What is in issue is whether XXXX actually had personal disability costs arising from her disability, PTSD and stress and adjustment reaction. The issues involved in this appeal are as follows:
- (a) At any time from 16 March 2020 to 30 November 2021 did XXXX have personal disability costs?
 - (b) Was XXXX entitled to a disability allowance between the period 16 to 24 March 2020?
 - (c) Was XXXX entitled to a disability allowance while she was out of New Zealand and subject to a standdown period, between 14 July to 30 November 2021?

Legal provisions

Disability Allowance

- [7] Under s 85 of the Social Security Act 2018 (the Act) a person who has additional expenses of an ongoing kind arising from their disability, which cannot be met from other available assistance, can be paid a disability allowance. A disability allowance is a discretionary supplementary payment.
- [8] A Ministerial Direction relating to Disability Allowance (the Ministerial Direction) provides for matters which the Ministry must consider when considering the grant

or review of a disability allowance.¹ Clause 2(1) of the Ministerial Direction provides:

2 Verification of additional expenses

- (1) Before determining whether a person has additional expenses of a kind required by section 85(2)(d) of the Act, you must require the applicant to provide written verification that-
- (a) He or she is incurring the expense claimed; and
 - (b) the expenses are of an ongoing kind; and
 - (c) the expenses arise from the person's disability-
- by way of-
- (d) a certificate from a health practitioner as to the need for the goods or services to which the expenses relate, how that need relates to the person's disability, the expected duration of that need, and the therapeutic value to the person in receiving the goods or services (the health practitioner's matters); and
 - (e) invoices or receipts for payment of the expenses; and
 - (f) any other verification considered necessary or satisfactory."

[9] Clause 4 of the Ministerial Direction further requires that when considering an additional expense, the Ministry must consider:

- (a) Whether the person is incurring ongoing expenses which result from the persons disability, having regard to—
 - (i) the relationship between the disability and the need to incur the expenses; and
 - (ii) the other matters referred to in clause 2(1)(d); and
 - (iii) Whether the person would be incurring the expense if he or she did not have the disability; and
 - (iv) Whether the expense or an expense of the kind was being incurred before the disability arose and the reasons for incurring that expense at the time; and
- (aa) The extent (if any) to which the person's life or health would be put at risk, or the person's disability aggravated, if the person could not receive the goods or services because the expense was not wholly or partly met from a disability allowance; and

¹ "Ministerial Direction Disability Allowance To: The Chief Executive of the Department of Work and Income"(1 April 1999) *The New Zealand Gazette* 1999-go2422 . The Ministerial Direction is saved by clause 2(1) of Schedule 1 of the Social Security Act 2018 as if it were a direction given to MSD under section 7 of the Act.

- (b) Whether there are less costly goods or services which might meet the need referred to in clause 2(1)(d); and
- (c) Any other matters considered relevant

[10] Clause 6 provides a general justification. It provides that where an applicant fulfils the requirements of s 85, a disability allowance must be granted only if such a grant is justified having regard to (as relevant to this appeal): assistance available to the applicant from other sources; the matters in clause 2(1)(d); any other matters considered to be relevant.

[11] An amendment in response to the global COVID-19 pandemic added Clause 2.2,² which allows the Ministry to not require verification of any particular expense if a state of local or national emergency is in force, an epidemic notice has been given or is in force,³ or where either may be imminent.

[12] In New Zealand, the Epidemic Preparedness (COVID-19) Notice (the Epidemic Notice) came into force on 25 March 2020. The Epidemic Notice expired on 20 October 2022.

Administration of social security

[13] Under s 311 of the Act, a benefit commences on the later of either: the date of entitlement, or the date the application for the benefit was received.

The Social Security Regulations 2018 (the Regulations)⁴ specify that applications for benefits must be in writing in the form provided by the Ministry.⁵

[14] It is well established that before the Ministry has an obligation to provide assistance a client must communicate his or her needs. The High Court in *Taylor v Chief Executive of Department of Work and Income* held that “persons who are in need are required to make their needs, in a broad sense, known to the [Ministry] by way of a claim.”⁶

Absence from New Zealand

[15] As a general rule a benefit is not payable while a beneficiary is absent from New Zealand.⁷ This rule is subject to exceptions contained in the Regulations. Regulation 140 sets out the exceptions:

² The **Ministerial Direction - Disability Allowance Amendment 2020**.

³ Issued under s 5(1) of the Epidemic Preparedness Act 2006.

⁴ The Social Security Regulations 2018 are made under s 436 of the Act.

⁵ Social Security Regulations 2018, regs 166, 172, and 174.

⁶ [2005] NZAR 371 at [15].

⁷ Section 311, Social Security Act 2018.

- (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.

[16] The 4-week rule allows payment of a qualifying benefit for absences up to 4 weeks and sometimes longer if certain criteria are met.⁸ However, reg 139(3) provides that JSS is not a qualifying benefit for the purpose of the 4-week rule.

[17] There is also discretion to pay a benefit that is not a qualifying benefit where, relevant to this appeal, an absence is for one of the permitted reasons in reg 146:⁹

- (a) to attend a job interview or follow up on a job prospect:
- (b) to attend a significant event relating to a family member:
- (c) to attend a court case as a party or a witness:
- (d) in the case of a beneficiary with a disability, to receive vocational training, disability assistance dog training;
- (e) compete in an overseas multinational or international Special Olympic or Paralympic Games competition: and
- (f) to provide assistance to a family member immediately following a natural disaster or adverse event.

[18] A beneficiary is also required to notify the Ministry of an intended absence from New Zealand.¹⁰ A person is not entitled to be paid a benefit while overseas under the exceptions, unless they have notified the Ministry of their intended absence before leaving New Zealand,¹¹ or there are humanitarian reasons for the absence and failure to notify, and notification is made as soon as reasonably practicable.¹²

⁸ Social Security Regulations 2018, regs 142, 143, 148 and 149.

⁹ Social Security Regulations 2018, reg 144 and 145.

¹⁰ Social Security Regulations 2018, reg 141.

¹¹ Social Security Regulations 2018, reg 141(1).

¹² Social Security Regulations 2018, reg 141(3).

If notification has been made after departing New Zealand, a benefit payment under the exceptions is payable from the date of notification.¹³

Case for the appellant

- [19] XXXX said that she has been forced to relocate to New Zealand to be close to her children, who were taken from her. She said she has long standing trauma and stress resulting from the situation concerning her children. Relocation has also taken her away from her family and support networks and XXXX says that she has suffered extensive isolation, humiliation and trauma.
- [20] XXXX seeks the cost of the nutrition supplements she took to assist her when she was suffering extreme depression and when she felt too sick to eat.
- [21] Information from XXXX's GP provides that health supplements, including adaptogens, pH stabilising supplements, and meal replacements, are necessary to improve her nutritional intake and mental and physical health.

Case for the Ministry

- [22] As stated above the Ministry accepts that XXXX had a disability between the period 24 March 2020 to 13 July 2021. The Ministry accepts that XXXX was entitled to a disability allowance. However, it is not satisfied, on the information it has received, that XXXX had personally incurred costs directly related to her disability during this period. The Ministry required sufficient information to assess this further.
- [23] The Ministry has also referred to the fact that XXXX did not make her disability needs known, when applying for JSS in March 2020, or when she applied for Temporary Additional Support later in 2020.
- [24] Mr Stainthorpe confirmed that XXXX's application for JSS can be treated as an application for a disability allowance, and that the period for providing information about her disability has been extended. In the Ministry's view the issue is narrow and concerns whether XXXX has any personal ongoing costs directly arising from her disability.
- [25] Mr Stainthorpe also confirmed that, although the Ministry has internal policy guidelines about what costs will be accepted, the Authority has all the powers of the Chief Executive and is not bound by the Ministry's internal guidelines. Ultimately, the Authority must be satisfied that the statutory test under s 85(2)(d) of Act, that the costs arise out of the disability, has been met.
- [26] The Ministry also considers that XXXX would not have been entitled to financial support, including a disability allowance, while she was away from New Zealand

¹³ Social Security Regulations 2018, reg 141(2).

between 13 July 2020 to 30 November 2021, which includes a stand down period from 26 November 2021.

Reasons

Personal disability costs

At any time from 16 March 2020 to 30 November 2021 did XXXX have personal disability costs?

- [27] There is no dispute that XXXX had a disability through the period March 2020 to 30 November 2021. This appeal primarily concerns whether XXXX incurred any disability costs, and if so, whether she was entitled to those costs during this period.
- [28] XXXX has provided five invoices totalling \$AUD2,691.93 for a variety of nutritional products and supplements. XXXX also provided information detailing other orders which were undated and contained no detail of the product ordered.
- [29] The main basis for the Ministry's position is that there is insufficient information to connect the costs claimed by XXXX to her disability as per s 85(2)(d).
- [30] For XXXX, standard pharmaceutical products, such as anti-depressants, are not beneficial to her. She said that she had an extremely negative experience when she tried anti-depressants in Australia. Instead, her approach is to provide supplements to assist her body to work through and process pain as an alternative or in addition to prescribed medication.
- [31] XXXX's evidence is that she has a background in health and nutrition and has been a qualified [role] since 2015/2016. Through her training she has expertise in how the body works, and the interconnected activity between mood, diet and training to achieve predictable outcomes. She has extensive experience with optimal nutrition and self-care and specialises in body sculpting, rehabilitation, and meal plan design.
- [32] XXXX said that she used the supplements included in her cost information to stay nourished, hydrated and active to mitigate against the vulnerabilities of her situation. She said that the products used were part of her daily routine and helped her get out of bed, ensure that she was consuming something regularly, and gave her the ability to function and cope. She described the supplements as her "daily routine to survive."
- [33] At the hearing XXXX provided detailed and in-depth information on the products and their benefits. Her evidence included the following:
- (a) The products used were ones that were familiar and helpful to her. They included:

- Al carnitine, to assist with metabolic processing and maintain a regular process;
- A bulking agent to maintain a certain level of strength;
- Zinc magnesium to relax muscles and help with sleep and repair;
- Branch Chain Amino Acid (BCAA) to assist with healing, mental capacity and regulate mood;
- Collagen for recovery and joints, skin, nail and hair health;
- Various products for muscle recovery, including Creatine Nitrate and various protein blends. Protein also has beneficial effects on mental health; and
- Biogreens a super green vegetable substitute.

(b) The supplements were not used for weight loss or for aesthetic purposes.

(c) She was not substituting food for supplements and instead was trying to nurture and nourish her body and stop it from wasting away.

[34] The evidence given by XXXX at the hearing was not challenged by the Ministry.

[35] We are satisfied that the nutritional products and supplements were used by XXXX as an alternative to standard pharmaceuticals, and were products that XXXX required and relied on to survive through this period to cope with the stress and effects of her disability.

[36] Clause 2 of the Ministerial Direction requires a health practitioner to verify or explain the therapeutic value to the person receiving the goods. From the Ministry's perspective XXXX's doctor's letters did not go far enough or go through the therapeutic value of XXXX's approach. This was exacerbated by the fact that the supplements used are also ones that are often provided in a gym context. However, at the hearing Mr Stainthorpe acknowledged that the evidence provided by XXXX at the hearing connected the supplements to her disability.

[37] The information from XXXX's GP confirms that she was taking supplements during the period and that her approach is supported by her GP. We are satisfied that the information provides the level of verification required for the period concerned.

[38] Clause 4 of the Ministerial Direction requires consideration as to whether a person would be incurring an expense if he or she did not have the disability and whether the expense was being incurred before the disability arose.

- [39] Given XXXX's background as a [role], her history of supplying clients supplements as part of that, and the bulk purchase of products covered in her invoices, the Ministry had concerns that her expenses covered products that she used prior to her disability or were for commercial supply.
- [40] XXXX's evidence is that the products sent to her in New Zealand, were not purchased for her Australian clients, who were based in Australia, and that she used these products personally. She explained that a reference that she was "keen to get selling" related to her desire to start selling the products that she was consuming and had benefitted her, to others.
- [41] After reviewing in detail with XXXX each item purchased, their quantity and frequency of use, we are satisfied that the purchases cover only XXXX's personal use during the period, and were not used for commercial supply. The products were used to manage the effects of PTSD and stress, which included loss of appetite, difficulty eating, and issues getting up in the morning. We accept that XXXX purchased the items in bulk because it was during the early stages of the global COVID-19 pandemic.
- [42] In addition, although XXXX had used some of the products previously, we are satisfied that previous use was not to the same degree or extent as use during the period considered in this appeal.
- [43] We also agree with Mr Stainthorpe that the supplements assisted in not aggravating XXXX's disability further.
- [44] We have had the benefit of hearing XXXX's evidence. It is clear from the evidence provided by XXXX that the supplements purchased allowed her to deal with the adverse side effects of her disability, including the effect on her sleep, her appetite, her diet and wellbeing. We are satisfied that the costs are additional expenses of an ongoing kind arising from XXXX's disability.

Cost

- [45] As stated above XXXX provided invoices totalling \$AUD2,691.93. This included an account dated 15 August 2019 for \$AUD184.50. We consider that due to the time period and product involved, the 2019 cost is unlikely to apply to the periods under consideration. The remaining invoices are dated 4 and 7 May 2020 and total \$AUD2,507.43.
- [46] XXXX considered that there were no cheaper alternatives at the time. She said that she has been in the health and fitness industry for a long time and has done a lot of research and had looked for cheaper alternatives.
- [47] XXXX confirmed that the cost of products ordered in bulk on 4 and 7 May 2020 were consumed through the period late May 2020 to early 2022. While, XXXX had

not calculated the cost she also considered that she would have spent at least a total of \$66 per week, the maximum disability allowance, during the period.

- [48] As the period of use goes beyond the period 30 November 2021, it is necessary to consider the timeframe in which the products were consumed to extract a weekly cost. XXXX said that by early 2022 she had some last packets of oats left. Information filed also provided information showing subsequent orders for adaptogen and nutrition supplements from the end of July 2021, another at the end of August 2021, two orders in September 2021, one in October 2021, three in November 2021 and one in mid December 2021. XXXX said that she transitioned from BCAA to adaptogens, a natural mood booster, from June or July 2021 and she also continued with other products such as protein powers and supplement powders.
- [49] On the evidence it appears that products progressively ran out from the end of July to December 2021, although it is not clear when exactly each product ordered in May 2020, was used up. While we cannot be exact, we consider that a midpoint of mid-October 2021 is reasonable timeframe to use. Rounded to whole weeks, the period of consumption would be 25 May 2020 to 18 October 2021, or 73 weeks. The weekly cost is therefore \$AUD34.35 (being \$AUD2,507.43 divided by 73 weeks).
- [50] The invoice information provided by XXXX also verifies that disability costs started on 4 May 2020. This is when XXXX ordered and paid for the products that she claims were related to her disability for the period under consideration.

Entitlement between 16 to 24 March 2020

Was XXXX entitled to a disability allowance between the period 16 to 24 March 2020?

- [51] XXXX flew from Australia to New Zealand on 15 March 2020. This is when she relocated permanently to New Zealand to be close to her children.
- [52] The Ministry's first recorded contact with XXXX is on 24 March 2020. This arose out of an online application. The Ministry considers that XXXX is only entitled to costs associated with her disability allowance from 24 March 2020, the date it considers that she first applied.
- [53] XXXX distinctly recalls calling the Ministry for assistance on 16 March 2020. She says that this was a time when she needed to provide a secure base for herself and her children and she borrowed a friend's phone to call the Ministry.
- [54] For XXXX, while the difference is only a week, there is a moral aspect to this issue which is important to her. From her perspective, the Ministry's dismissal of her recollection is harmful and illustrates a complete lack of respect, relentless

obstruction, concealment of facts, and has compounded a situation of hopelessness.

[55] Mr Stainthorpe acknowledged that the use of a friend's phone could explain why the Ministry has been unable to locate any record of contact from XXXX on 16 March 2020.

[56] On the evidence, we are satisfied that XXXX first called the Ministry on 16 March 2020 seeking assistance. However, this does not change the date from which XXXX's first incurred disability related costs, which we have found occurred on 4 May 2020.

Entitlement between 14 July to 30 November 2021

Was XXXX entitled to a disability allowance while she was out of New Zealand and subject to a standdown period, between 14 July to 30 November 2021?

[57] XXXX travelled to India and then Australia between the period 14 July to 26 November 2021. When she returned to New Zealand, her benefit resumed on 30 November 2021 after a standdown period.

[58] The Ministry considers that XXXX did not notify it that she had travelled overseas and it found this out when it connected with XXXX over the phone on 29 September 2021. However, email correspondence provided by XXXX shows that the Ministry became aware that she had travelled overseas through information from New Zealand Customs Service on 14 July 2021. XXXX also confirmed her departure to the Ministry by email on 15 July 2021.

[59] There is also a difference between the Ministry and XXXX as to why she travelled overseas during this period. The Ministry considers that XXXX travelled for a holiday. Ultimately, the Ministry considers that XXXX's reason did not come within any of the exceptions provided for.

[60] XXXX acknowledged that financial assistance is not generally allowed when a person is overseas. However, she considers that her circumstances qualify as an exception as she travelled overseas seeking refuge in a foreign country to escape inhumane, tortuous treatment and harassment in New Zealand. XXXX said that she left New Zealand in the interests of both her and her children's safety. She said she had legitimate concerns for her safety as her situation had involved her arrest by New Zealand Police on two occasions. XXXX said that she left New Zealand to let things settle down and in the hope of returning to New Zealand with her fiancée, who had visa issues and had been unable to enter New Zealand.

[61] We accept that XXXX left New Zealand for the reasons she has stated. However, the reasons do not come within the exceptions in regs 140 and 146 of the Regulations, which are restrictive. Consequently, XXXX was not entitled to a main

benefit or a disability allowance during the period that she was outside New Zealand or subject to a standdown period.

Conclusion

[62] We have found that XXXX is entitled to weekly disability costs at the rate of \$AUD34.35 for the period 4 May 2020 to 13 July 2021. This is a period of 62 weeks and one day. The disability cost across this period is therefore \$AUD2,134.61.

Other matters

[63] XXXX expressed her concerns around the Ministry's processes and approach when dealing with her, including its decision to decline backpay for her disability and its benefit review process. XXXX claims that the Ministry was well aware of the extreme distress and difficulties she faced since early 2018 and considers that assistance such as a disability allowance should have been identified as an option for her. She considers that the Ministry's conduct exacerbated her already tenuous situation and amounted to discrimination and a breach of her human rights under the Bill of Rights Act 1990 and also her privacy under the Privacy Act 1993.

[64] XXXX required the focus of this appeal to be on the Ministry's decision-making processes when dealing with a vulnerable adult like herself.

[65] The Authority's jurisdiction applies to decisions made by the Ministry that have been confirmed or varied by a Benefits Review Committee. As such the Authority's jurisdiction concerns decisions relating to the correctness of decisions relating to benefit entitlement. When dealing with an appeal the Authority's duty is to inquire into entitlement, it is not bound by earlier processes. The Authority cannot inquire into conduct issues or other matters, except to the extent they bear on the correctness of the Ministry's decision.

[66] The limits on the Authority's jurisdiction were expressed to the parties through the procedural process prior to the hearing.

Decision

[67] The appeal concerning the backdating of XXXX's disability allowance for the period 4 May 2021 to 13 July 2021 is allowed. XXXX is entitled to \$AUD2,134.61 for disability related costs (being \$34.35 per week for 62 weeks and 1 day).

Costs

- [68] Regulation 255 of the Regulations provides that when an appeal is allowed, either in whole or part, or if the matter is referred back to the Ministry, the Authority may allow the appellant the costs of bringing all or part of the appeal.
- [69] For the avoidance of doubt, costs incurred prior to bringing the appeal, including the process involving the prior review by a Benefits Review Committee, are not costs which have resulted from bringing the appeal.
- [70] As the appeal has largely been successful, costs associated with this appeal will be considered. XXXX is asked to provide information concerning the costs incurred in bringing this appeal. This is requested to be provided within three weeks of the date of this decision.
- [71] The Ministry is to provide any response within ten working days of receipt of XXXX's cost information.

DATED at Wellington 10 July 2023

R. Palu
Deputy Chair

P. Singh
Member

M. Dodd
Member