[2019] NZSSAA 05

Reference No. SSA 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

Hearings on 4 December 2017, and 9 November 2018.

Appearances

Mr Ord, Barrister and Solicitor, Nelson for the appellant

Mr Stainthorpe, lawyer, for Chief Executive of the Ministry of Social Development

FINAL DECISION

Background

[1] These appeals have been subject to two hearings, as the information at the first hearing was insufficient to resolve them. We have attached the relevant decisions and documents that identify how the Authority has reached the present point:

a) An interim decision dated 4 December 2017, following an oral hearing in Wellington on 4 December 2017 (the first interim decision).

b) A second interim decision dated 7 May 2018. It followed the Ministry's refusal to deal face to face with XXXX other than in a courtroom, where it had no choice but to do so (the second interim decision). The confidentiality order is now dissolved, and the standard anonymization will apply to all of the material before publication.

c) A minute dated 15 November 2018, it followed an oral hearing on 09 November 2018. It indicated the factual finding the Authority anticipated as a result of hearing evidence from a medical specialist, and explored the potential resolution of the appeals (the indicative minute).

[2] The indicative minute left the issues on the basis the parties would engage with each other. An examination of the two interim decisions and the minute make it plain that in the Authority's view the issues presented by XXXX were not unusual, and constructive engagement with him, and more recently his counsel, was appropriate and necessary.

[3] Following the indicative minute, on 20 December 2018 counsel for the appellant filed a memorandum requesting that the Authority issue a decision. It said the Ministry had taken no action in respect of the indicative minute intended to provide a path to a resolution. At the hearing, the parties had indicated an agreement should be possible, and the likely parameters. The Ministry has not responded to the Authority's minute, though it was invited to do so if it wished to challenge potential findings, it did not respond to XXXX's memorandum seeking a decision.

[4] On 17 January 2019, counsel for XXXX by email sought a decision including reimbursement for telephone expenses. On 25 January 2019, counsel for the Ministry indicated he was seeking instructions regarding the telephone costs, and he has now indicated there will be no response.

[5] We have reached the point where we have no alternative to issuing a decision to determine the appeals.

The issues

The matters raised by the parties

[6] We refer to the indicative minute where we set out a potential agreed resolution. However, the agreement discussed is potentially different from the matters falling within the jurisdiction of this Authority.

[7] The first interim decision identified the matters raised in the two appeals:

a) Travel costs for specialist appointments.

b) Medication costs.

c) General practitioner visits.

d) Laundry costs.

[8] The indicative minute recorded what the parties tentatively agreed were outstanding issues, and a potential resolution:

a) The Ministry will pay the unsubsidised component of prescriptions for Telfast and other pharmaceuticals prescribed by a general practitioner or medical specialist.

b) The Ministry will pay for travel to, and the unsubsidised component of, monthly consultations with a medical practitioner (general practitioner, and a specialist physician recommended by the general practitioner).

c) The Ministry will fund Pinetarsol (and any other medical needs such as an epi pen), in quantities recommended by a medical practitioner.

d) The Ministry will fund the purchase and use of a smart phone, including a pre-paid connection.

e) The Ministry will provide an advance payment for the purchase of cotton clothing.

[9] There were some issues regarding quantum that need to be considered:

a) It is likely that referrals to a specialist physician would be funded by the DHB if a referral is made by the general practitioner. Accordingly, the funding is likely to be required only for general practitioner visits.

b) The amount of funding for the smart phone purchase, and the connection need to be determined.

c) The amount for cotton clothing also needs to be determined.

[10] We are required to issue a decision dealing with the outstanding issues.

The scope of our jurisdiction — the duty to inquire into and determine the correct entitlement

[11] Ultimately, this Authority makes decisions exercising the duties, powers, functions and discretions of the Chief Executive (s 12I of the Social Security Act 1964 ("the Act")). It follows, the Authority often has different, and typically more accurate, information after hearing the appeal than the original decision-maker. Nonetheless, it must be mindful to consider the appellant's circumstances and truly and fairly exercise its responsibilities in the way the Chief Executive should have originally done so if he had the fullest and most accurate information.

[12] Section 11D(3) – (4) of the Act allows applications for any benefit as a gateway to the grant of a benefit of a different kind. The obligation to "get it right" when a person presents seeking assistance carries through each level, including the disposition of appeals before this Authority.

[13] The law is very clear regarding the Chief Executive's duties, and staff at all levels within the Ministry must understand that law to perform their duties. The nature of the Chief Executive's duties is concisely summarised by Dunningham J in *Crequer v Chief Executive of the Ministry of Social Development*:[1]

> [48] The role of the Chief Executive in performing his functions and powers under the Act has been considered in previous decisions. They have emphasised that, under s 12, it is for the Chief Executive and those acting with his authority, to determine what benefits should be granted to a claimant.[2] In doing that, there is a requirement for the Chief Executive, or his delegate, to ensure that the correct benefit or benefits are paid and in making that determination, to be "pro-active in seeing to welfare, and not defensive or bureaucratic".

[14] In *Scoble v Chief Executive of the Ministry of Social Development*, the High Court acknowledged that the Act "does not specifically place a duty on the Chief Executive to invite application where no enquiry for assistance has been made."[3] However, when a person does seek

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1 *Crequer v Chief Executive of the Ministry of Social Development* [2016] NZHC 943.

2 *Chief Executive of the Department of Work and Income v Scoble* [2001] NZAR 1011 (HC) at [29].

3 *Scoble v Chief Executive of the Ministry of Social Development* [2001] NZAR 1011 (HC) at [9].

assistance, then the Chief Executive is to consider what forms of assistance the person is or may be eligible to receive.[4]

[15] These duties were reiterated in *Koroua v Chief Executive of the Ministry of Social Development* where the Court observed:[5]

> In general as McGhechan J put it in *Hall v Director of Social Welfare* [1997] NZFLR 902 (HC) at 912, the Ministry should be "proactive in seeing to welfare, and not defensive or bureaucratic.

[16] The Court in *Koroua* also referred to *Taylor v Chief Executive of the Department of Work and Income*,[6] and noted that it was a question of fact whether an approach for assistance amounted to an application. The High Court said in *Taylor* that:[7]

> … Those who are in need are not to be deprived of the benefits to which the law entitles them, by an overly prescriptive and bureaucratic approach, and the Department should be proactive in ascertaining needs. But that must be viewed in the light of the statutory scheme, which involves persons who are in need being required to make their needs, in a broad sense, known to the Department by way of a claim... In light of that, there must in my view be a sufficiently clear identification of the need to enable the Department to give consideration to that need, and the way in which it can best be met, before a claim or an application can be said to have been made.

[17] Accordingly, we must determine what assistance the appellant should have had when he sought assistance.

The scope of our jurisdiction — our duty is not confined to a review of the decisions already made

[18] In *Margison v Chief Executive of the Department of Work and Income*, Justice Laurenson commented:[8]

> On an appeal to an Authority I am satisfied that once the Authority is faced with an appeal it is empowered by the inquisitorial nature of its function, its original power of decision and its full range of remedies, to seek out the issues raised by the appellant's case and determine these afresh and establish whether the appellant can provide the justification for doing so or not.

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4 At [9]–[11].

5 *Koroua v Chief Executive of the Ministry of Social Development* [2013] NZHC 3418 (HC) at [16].

6 *Taylor v Chief Executive of the Department of Work and Income* [2005] NZAR 371 (HC).

7 At [15].

8 *Margison v Chief Executive of the Department of Work and Income* HC Auckland AP.141-SW00, 6 August 2001 at [27].

[19] The Supreme Court also considered the nature of proceedings before the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income*.[9] It was resolute in requiring the Authority to reach the correct view on the facts, rather than being constrained by the earlier processes:[10]

> There is nothing in s 12M to prevent the Chief Executive from then asking the Authority to consider any matter which may support the decision which is under appeal. Indeed, the thrust of the section is quite the other way: that the Authority is to consider all relevant matters.
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> ..
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> In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.
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> …
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> The duty of the Authority was to reach the legally correct conclusion on the question before it, applying the law to the facts as it found them upon the rehearing without concerning itself about the conclusion reached by the BRC …

[20] Accordingly, our responsibility is to consider XXXX's entitlements broadly. We are satisfied that each of the issues the parties identified as live issues in the indicative minute are matters we should consider in terms of his entitlements under the Act. We approach the matter on the basis that as the parties are represented by counsel we should adopt their views of the extent to which matters have not been resolved at this point. Where parties are unrepresented, then our duty to undertake an inquisitorial process can require further exploration.

The scope of our jurisdiction — Medical Board

[21] In the first interim decision, we discussed what matters lie with the Medical Board and this Authority respectively. We stated why the issues in this appeal lie with the Authority. The parties have not challenged that position, and accordingly we deal with the issues on the basis they are with reference to entitlement to a disability allowance and special needs grant for each need. There is no dispute regarding entitlement to the primary benefit.

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9 *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55; [2008] 1 NZLR 13.

10 At [20], [25]–[26].

Facts

[22] The general circumstances are set out in the two interim decisions. We now reach factual conclusions, as foreshadowed in the indicative minute. The Ministry has not responded to the indicative minute, despite an invitation to do so if it opposed the indicative factual findings.[11] Accordingly, we now reach factual conclusions on the circumstances giving rise to XXXX's needs.

[23] We have heard from witnesses dealing with XXXX's health. We have found XXXX and Professor Ameratunga reliable witnesses, and we are satisfied we have a clear understanding of XXXX's situation as far as necessary to deal with the issues before us. We have found the Ministry's witness at the first hearing, its Regional Disability Adviser, unqualified to give medical evidence, and can place no weight on her opinions regarding XXXX's medical condition.

[24] This evidence satisfies us that:

a) XXXX was a young man in good health, employed in skilled work, for which he was qualified. At that time, there was no reason to suppose he would not continue to work and live a conventional life.

b) About 20 years ago, he developed urticaria, dematographia and angioedema (the condition). It is a skin condition, understood to be an autoimmune disease, giving rise to unpleasant symptoms. Itchiness associated with the condition often leads to scratching, with consequential skin damage. There are also elements of unsightliness that can result from the condition particularly when the face is affected. There have been social consequences for XXXX resulting from the symptoms, and they have affected his self-esteem and sense of self-worth.

c) Typically, a person with the condition is treated with antihistamines, and it will resolve relatively quickly. The person may suffer another outbreak during their life, but

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11 *Re SSAA 47/17* at [7].

generally the effect is transitory and does not greatly impact, when considering their life as a whole.

d) XXXX is highly atypical. Professor Ameratunga has and does see many people with the condition, and XXXX is in the extremely rare group where he has continuously suffered for some 20 years. We conclude he probably suffers known comorbidities, including goitre and anxiety. The Professor identified both as having a recognised association with the condition, and that psychological stress is known to aggravate the symptoms.

e) We are satisfied, based on the Professor's evidence, that the appropriate treatment is a specific antihistamine, Telfast, and another pharmaceutical to assist its efficacy (Ranitidine). The dosage of Telfast required for optimal effect for XXXX is higher than usual. It is not appropriate to substitute other antihistamines as they would have unpleasant side effects in high dosages.

f) XXXX should see a general practitioner monthly to manage the condition. That general practitioner should have the support of a specialist physician. One of the important things required is to monitor the dosage of Telfast and Ranitidine, and manage other aspects of XXXX's health (including possible goitre).

g) XXXX has used an EpiPen, which is a self-administered medication, typically used when a person suffers a severe allergic reaction that triggers anaphylaxis, which is a life-threatening condition. The professor considered there was no known association with XXXX's autoimmune condition and anaphylaxis (provided he does not use non-steroidal anti-inflammatory drugs, and he does not need to so so). If there is an un-associated risk, it is a matter for the general practitioner to determine and treat as appropriate.

h) Professor Ameratunga is not a medical specialist whose expertise is in mental health. He is, however, a medical practitioner, and qualified to identify that a person

probably suffers from a mental health condition. Indeed, the conditions, in which he is a specialist, can have effects on mental health, and that is the situation in the present case. We are satisfied that XXXX probably suffers from a significant mental health condition, and the severity is such that he would potentially benefit from inpatient treatment. In reaching that conclusion, we rely on the Professor's evidence, and XXXX's evidence regarding his own mental health.

i) We are satisfied XXXX may engage in various forms of anti-social behaviour as a result of his mental health, it is a risk that should be considered when determining XXXX's needs and how they should be met.

j) There is no immediate or foreseeable prospect of XXXX working unless and until his mental health improves. It is necessary and important that both XXXX's mental and physical health are treated, so he can potentially resume his role in the community as an independent person.

Limits on the Authority's ability to remediate

[25] For the reasons we have discussed, this Authority is required to go back to the point of the original decision regarding support. However, in a case such as the present one there must be an element of pragmatism. It is not always possible to fully remediate. In this case, we conclude there should have been more medical support between the time XXXX sought help and the present time. It is not possible to change what is now in the past, he did not receive the help he should have received. In some respects, his situation will have worsened due to the lack of support when he needed it. For example, he needed help with communications equipment as the Ministry refuses to deal with him face to face. He now has arrears relating to paying for phone and data communications.

[26] This Authority has no jurisdiction to award damages, and, in respect of the most concerning matters, the effects of lack of support cannot be remediated with compensation.

[27] In these circumstances, our approach to each of XXXX's needs will be to determine what decision should have been made, and then make orders that reflect the most appropriate order at the time of issuing this decision.

[28] We do not have jurisdiction to issue mandatory orders regarding the future conduct of the Ministry. However, the Ministry and XXXX should both be mindful that the factual findings in the present appeal will potentially be important in any further appeals. The Authority would likely approach further appeals using its inquisitorial powers and only expect to update evidence concerning XXXX's state of health. The Authority would expect there to be evidence of changed circumstances if it is expected to reach a different conclusion. In the absence of changed circumstances, parties should not assume the Authority will consider factual matters as though these appeals had not been determined. The ability to investigate in an informed manner is an important efficiency of the inquisitorial process open to this Authority.

The legal principles governing support applied in this case

Disability allowance

[29] Section 69C of the Act provides a discretion to grant a disability allowance at a rate not exceeding the amount in Schedule 19. The range of requirements that are a precondition to the availability of the discretion are not in dispute.

[30] The Ministry does, appropriately, say that support should be provided only if not otherwise available. In this case, to the extent support is available from the health system, it should not be provided under the Act.

[31] There is also a Ministerial Direction relating to the conditions for the exercise of the discretion.[12] It is, however, expressed as a direction to "have regard to" the matters in the direction. The direction is drafted with an awareness that the Act is the primary determinant of the Chief Executive's duty, and generally recognises the myriad of circumstances that may arise. For example, in cl 2 there are requirements regarding verification of expenses. However, in cl 2(f) the direction expressly states that the Chief Executive may accept any verification that he considers "necessary or satisfactory". The Chief Executive may be dealing with a person who severely lacks capacity, or has lost their belongings in a fire. The Ministerial Direction is neither expressed nor intended as a justification for departure from sensible decision-making.

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12 Ministerial Direction — Disability Allowance (28 March 1999).

[32] We have reached a factual conclusion that XXXX's ability to comply with verification processes is gravely compromised due to his mental health. Indeed, it affects his ability to get a medical examination and evaluation. The situation when he consulted Professor Ameratunga was highly problematic, XXXX began harassing the Professor's staff. We are satisfied XXXX has clear and present medical needs that flow from his disability, which involves both his physical and mental health.

[33] To the extent XXXX's medical needs have been established in the evidence we have heard and flow from his disability, we are satisfied they should be funded as a disability allowance up to the statutory maximum of $63.22/week.[13]

Special needs grant

[34] To the extent that XXXX's needs do not come within the scope of a disability allowance, it is necessary to consider whether he could receive a special needs grant, and, if so, the terms.

[35] Non-recoverable grants are available for essential needs under the Special Needs Grants Programme (SNG). They include specific provision for health travel costs,[14] but only where they are not otherwise funded and on referral.

[36] The more relevant provisions of the SNG in this case relate to emergency situations. Clause 12 of the SNG requires that the Chief Executive must be satisfied that "an emergency situation exists" before making a grant. Clause 12.2 provides that the Chief Executive, when deciding whether there is an emergency situation, must have regard to:

a) whether the situation was unforeseen;

b) whether the applicant could have made provision for the situation; and

c) whether not making a grant would worsen the situation, increase the risk to the life or welfare of the applicant (and related persons), or cause serious hardship.

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13 The rate has varied over time.

14 Ministerial Direction — Disability Allowance (28 March 1999), cl 11.4.6.

[37] In *Foster v Chief Executive of the Ministry of Social Development*[15] the appellant had been provided with money to buy shoes and a pullover. The Ministry paid the money as an advance of benefit, and the appellant wanted a non-recoverable grant under the SNG. The decision refused leave to bring an appeal, and, in doing so, reviewed the principles to use when applying the SNG. The Court emphasised that it was appropriate to use the ordinary meaning of "emergency".

[38] In our view, what amounts to an "emergency" depends on the facts in any given case. The guidance provided in cl 12.2 of the SNG largely reflects elements of the ordinary meaning of "emergency". However, the factors are ones that must be considered, single factors are not necessarily determinative in each case, and the list does not exclude other considerations in an appropriate case. For example, foresight is identified as a factor that may indicate there is no emergency. However, if someone's heart stopped beating due to a known medical condition making the stoppage foreseeable, the foresight would not make the situation less of an emergency. The seriousness of the potential harm and the importance of a timely response will usually be very relevant. These factors are relevant in the present case.

[39] In the present case, we are concerned with a man whose life has spiralled downward in a manner that has caused stress to him due to his feelings of loss of self-worth; it has caused stress to the community due to him acting out to the extent he has been imprisoned as a result. It has been extremely costly to the community as XXXX is a highly skilled man who cannot work. The cause of this human and economic cost is a physical illness, which is potentially able to be well managed. However, given 20 years of poor management, XXXX now needs a great deal of support. We are not able to say to what extent the predicament is the result of poor choices XXXX made when he was well enough to have made better choices, or other circumstances that may have been a barrier to him receiving optimal treatment. However, we are required to reach conclusions regarding the Ministry's duties.

[40] We must consider the response when XXXX sought help to fund medical attention, as he had no other means to obtain the treatment. We have already made the factual findings that he was in a parlous state where both him and the community were suffering from his predicament. We

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15 *Foster v Chief Executive of the Ministry of Social Development* [2009] NZCA 602.

have also made the factual finding that potentially XXXX could be in a far better situation if he did receive optimum medical attention. We consider the circumstances were an emergency, and to regard it as less would fail to engage with the humanitarian circumstances outlined.

[41] However, there is another dimension that makes characterisation of the situation as an emergency appropriate. That is the Ministry's response to XXXX's situation. The Ministry has failed to engage with his concerns over long period of time, and persisted with that course of action during the course of these appeals. The Ministry is not responsible for providing healthcare, or doing the things that could provide a path to wellness for XXXX. However, by withholding funding it has the capacity to create a barrier to XXXX accessing a path to wellness. The Ministry has adopted an intransigent strategy of not only withholding support, but electing not to provide the dignity of face-to-face communication with XXXX. The level of intransigence has been established by its refusal to engage face to face with XXXX when requested to do so by this Authority. Of course, the Ministry has had to engage with him face to face at hearings in a courtroom. XXXX is not the most problematic person the Ministry is required to deal with, people who have a history of violence, mental instability and other issues must be dealt with by personnel in a range of social agencies. It is necessary and appropriate to ensure the safety of all parties, but a refusal to engage is not an acceptable response for a person carrying out statutory responsibilities.

[42] Not only did the Ministry refuse to engage with XXXX face to face, it did not provide him with the means to engage through telephone and email communication. In our view, that added to the emergency that existed, the failure to engage added to the circumstances constituting an emergency.

[43] We are satisfied XXXX came within the scope of an emergency situation in respect of all of the time relevant to this appeal.

[44] There are a range of other restrictions in cl 9 of the SNG. To receive assistance, XXXX had to come within one of the specific parts of the SNG. The provisions of cl 14 of the SNG are the appropriate specific provisions.

[45] In our view, cl 14 of the SNG is intended to empower the Chief Executive to deal with a wide range of circumstances that are an emergency in the way we have already discussed. The relevant elements in this case are:

a) The general provision is cl 14.1 of the SNG which addresses the need for "special circumstances", and empowers the provision of recoverable and non-recoverable grants.

b) There is a monetary limit of $500, unless there are "exceptional circumstances" (cls 14.1A and 14.1B).

c) The decision on recoverability or non-recoverability must have regard to the purpose of the grant, the nature of the need, equity with other applicants, and the effect of a repayment obligation on the applicant.

[46] We now deal with these requirements of cl 14, and its sub-clauses. The facts, and our evaluation of the seriousness of the appellant's situation, are applicable to the first question of whether there were special circumstances. We are in no doubt there were special circumstances. The appellant faced unmet medical needs that have affected him for some two decades, they are probably able to be greatly alleviated, and he has been cut off from communication with the Ministry which has effectively imposed a barrier to him obtaining the treatment he needs. In our view, these are special circumstances, as they should never arise. The legislation the Ministry administers is intended to prevent such outcomes, and when they occur they cannot be normalised.

[47] The same reasoning leads us to conclude there were exceptional circumstances, and accordingly the monetary limit of $500 did not apply. While the phrases "emergency situation", "special circumstances", and "exceptional circumstances" have differing nuances and emphasis, the circumstances the appellant was, and is, in come within each of the phrases. A person whose life has spiralled out of control because of a treatable physical medical condition, that has over time gravely compromised his mental health, to the extent that there is no option for remediation other than a grant under the SNG, may be in an "emergency situation" or have "special circumstances", and "exceptional circumstances". We are satisfied that applies to XXXX.

Application to the claims

The unsubsidised component of prescriptions

[48] The appellant is entitled to be reimbursed for any prescriptions he has paid until the present time. For the reasons identified, the Authority expects the Ministry to ensure that in the future the unsubsidised component of prescriptions are funded.

[49] The medication is to include the non-prescription topical treatment pinetarsol, and EpiPens, as prescribed by a general practitioner in the future; and the costs of those items which XXXX has met in the past.

Travel to and cost of medical consultations

[50] The appellant is entitled to be refunded any travel costs of attending medical consultations. Whether the appellant should have paid for them or whether the health system should have provided funding is not material. If in fact the appellant has not received funding for the travel, it comes within the scope of the emergency assistance he required. For the reasons discussed, the appellant is neither an expert in what he is entitled to access in the health system, nor well enough to comply with requirements that may be imposed on him. The Ministry has not provided evidence of what assistance was available and not accessed. Accordingly, the best evidence is that has been paid by XXXX was not subsidised.

[51] In the future, the Authority expects Ministry staff to engage with the appellant in a way that will ensure it is not a barrier to him accessing care in the health system, within the scope of its responsibility.

Cost of a smart phone

[52] The appellant has provided a schedule of costs of $1,028.25 for phone and data services he has incurred. The Ministry has not taken issue with the quantum. There will be a payment of that amount. We treat the amount as a quantification of the funding that should have been provided, when XXXX first sought assistance.

[53] We also determine that XXXX should be provided with the price of a suitable smart phone, and the ongoing cost of data/voice services.

[54] If the amount that XXXX owes for his phone and data services has changed, he is entitled to that and may claim it. Historically the lack of

face to face communication with XXXX in itself made the telephone necessary; for the foreseeable future, even if that changes, accessing health care and legal services will make electronic communications necessary even if the Ministry does change its mode of engagement.

Cost of clothing

[55] XXXX is entitled to the cost of cotton clothing that lessens irritation from the condition. He may submit a claim for past costs, and an estimate of future periodic costs.

Mechanism

[56] The appellant will receive the disability allowance at the maximum rate from 25 November 2016, being the date XXXX sought assistance for travel to consult with a medical specialist. The balance of assistance will be provided as a non-recoverable special needs grant.

Costs

[57] During the process of hearing these appeals, the Authority has made clear that, in its view, having senior staff communicate with XXXX and his counsel outside of a courtroom was highly desirable, likely to resolve the appeals, and avoid unnecessary costs. The Authority pointed out the cost implications of refusing to engage with XXXX. That occurred before the most recent oral hearing.

[58] The indicative minute anticipated that constructive engagement could resolve the issues in the appeals in an enduring way, and there was an indication that would avert the costs issue. The appellant says the Ministry has failed to engage, and this decision has accordingly been necessary to deal with all outstanding issues.

[59] We refer to a decision relating to the principles arising for costs in the Authority's jurisdiction (Social Security Act 1964 Decision [2017] NZSSAA 063), including the situation where there has been a grant of legal aid. We have put the Ministry on clear notice that failure to engage with an appellant, and deal with them only in a courtroom, transfers costs to other agencies and parties. They include the legal aid regime, the Ministry of Justice and the appellant.

[60] The appellant may submit a memorandum claiming costs (including the cost of travel for XXXX to obtain a medical evaluation for the hearing).

Timetable

[61] If the parties have not agreed on the quantum of the amounts to be awarded, and/or costs:

a) The appellant may submit a memorandum, schedule and any supporting information within 15 working days of this decision.

b) The Ministry will have a further 10 working days to reply (it should in any case address the Authority's own costs of the most recent oral hearing and this decision).

c) If necessary, the Authority will hold a telephone conference before issuing orders.

[62] It appears that the Ministry has consistently refused to meet with the appellant outside of a courtroom, it may file an affidavit relating to that matter if it wishes to do so.

Dated at **Wellington** this 31 day of January 2019

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member

[2018] NZSSAA 22

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BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

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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 7th day of May 2018

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member

[2017] NZSSAA 074

Reference No. SSA 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

The Appellant in person

Mr R Signal for Chief Executive of the Ministry of Social Development

INTERIM DECISION

Background

[1] The two appeals subject to this decision were both heard at the same time. The first appeal is against a decision to decline assistance for travel to, and the cost of, appointments with specialist dermatologists in Wanganui and New Plymouth, respectively.

[2] The second appeal concerns the cost of an antihistamine medication, the cost of specialist appointments for the appellant relating to a

dermatological condition, the costs and frequency of general practitioner visits and the costs of laundry services. The Ministry also raised the costs of a mobile telephone.

[3] The context for the various issues is the extent of funding allowed under a disability allowance.

The hearing

[4] The appellant attended the hearing. He was in an agitated state. He travelled to Wellington for the hearing which required travel over some hours by road transport. It is usual for the Ministry to fund the cost of travel when appeals are heard away from the location where an appellant is living. In this case, it was not possible for the appellant to travel by air transport; due to a previous incident, he has been trespassed from the airport.

[5] The appellant and the Ministry have different views as to the amount of notice provided to the appellant for the hearing and the arrangements made for his travel. Whatever occurred, the appellant was experiencing a high level of anxiety at the hearing. The appellant found it difficult to focus on the specific issues and gave a discursive review of his dealings with the Ministry.

[6] There have been a number of matters where there has been tension between the appellant and the Ministry. The appellant has been trespassed from the Ministry's local offices, and must engage with the Ministry through its Remote Client Unit; he is not allowed face-to-face contact with Ministry staff.

[7] It was clear that the appellant is very suspicious of people he engages with. He expressed his views as to a lack of integrity on the part of the Ministry, medical practitioners, a District Court Judge, this Authority and essentially anybody who has had a decision-making role in relation to his circumstances.

[8] After providing his evidence and submitting a plethora of written documentation, the appellant indicated that he was not in an emotional state to be cross-examined by the agent appearing for the Ministry. In our view, that was indeed the position and the appellant was not cross-examined.

[9] The other witness who attended the hearing was a Regional Disability Adviser employed by the Ministry of Social Development. This witness expressed various medical opinions regarding the appellant. Among the evidence she gave was an evaluation of the appellant's auto-immune disease. A medical specialist had recommended "a natural diet of fresh fruit, vegetables, meat and fish" given the appellant's medical condition. However, the Regional Disability Adviser concluded that because the appellant did not have coeliac disease, it was not necessary to fund any special dietary requirements. She also said that a specific antihistamine should be funded; however, she thought that it was not necessary for the appellant to regularly see a medical practitioner. As far as she was concerned, he could be given money to purchase the antihistamine as it was a pharmacy-only medicine which did not require a prescription and he could also purchase an EpiPen. An EpiPen is a device to give a self-administered intramuscular injection of adrenalin in the hope of preventing death in the case of anaphylaxis. She also gave evidence relating to laundry costs and telephone expenses.

[10] When questioned by the Authority, it became evident that the Regional Disability Adviser had no medical qualifications or experience. She did have a Post-Graduate Certificate in Public Policy and was registered as a Career Counsellor. She had contacted a specialist medical practitioner who had examined the appellant; however, she said that this discussion "was on general information about allergic conditions only and did not refer specifically to [the appellant]".

[11] The Regional Disability Adviser sought to qualify herself to give medical evidence regarding the appellant's condition by saying that her daughter also suffered from the same condition. With only that experience as a qualification, she sought to express opinions regarding the particular auto-immune disease affecting the appellant, the active ingredients in a range of antihistamine medications, and whether it was necessary to regularly consult with a general practitioner.

[12] It appears to us that the evidential base on which these appeals are to be decided was utterly inadequate. The evidence from the Regional Disability Adviser was most concerning. The appellant had provided evidence that he had been prescribed an antihistamine which is typically used by persons suffering from hay fever; however, the dosage for his condition is different from treatment for hay fever. The appellant's condition is a dermatological condition unrelated to hay fever. The

evidence was that the dosage for the appellant's condition was much higher than for hay fever. When pharmacy-only medications are sold across the counter without a prescription, there is invariably a recommendation that higher dosages should only be taken in consultation with a medical practitioner. An EpiPen is an emergency device, intended, in the appellant's case, to inject himself in the case of a life-threatening episode of anaphylactic shock. The medical material indicates that the particular condition that the appellant suffers could well lead to such a situation. A prominent District Health Board in New Zealand contains this informational material on its website (New Zealand Child & Youth Clinical Network "Anaphylaxis" (July 2017) Starship www.starship.org.nz):

> **Anaphylaxis is the most severe form of allergic reaction, usually occurring within 20 minutes of exposure to the trigger, and is potentially life threatening.**
>
> It must be treated as a medical emergency, with the administration of intramuscular adrenaline as the first line treatment.

[13] That is sufficient to give dimension and perspective to the Ministry providing evidence from the Regional Disability Adviser to the effect the appellant does not require medical supervision on a regular basis. That is not a decision which a person with no medical qualifications or experience can make properly, or justify.

[14] The appellant cross-examined the Regional Disability Adviser to very good effect. She had deposed that since he did not suffer from coeliac disease he could meet his dietary requirements prescribed by a specialist medical practitioner without cost. The appellant asked the Regional Disability Adviser whether her daughter suffered from coeliac disease; she accepted that was the case.

[15] We consider any principled decision dealing with the issues before us must be based on a medical assessment of the appellant. However, the reason why the Regional Disability Adviser only had a general discussion with the specialist physician and not a discussion related to the appellant, was that the appellant readily accepted that he had forbidden the disclosure of any medical information to the Ministry.

[16] Overall, our evaluation of the material before us is as follows:

a. We have seen various medical documents that show the appellant suffers from an autoimmune disease and has done so since some time prior to the year 2000.

b. The medical material indicates the condition is a serious one and that it affects the appellant's day-to-day function.

c. The medical practitioners have identified a specific antihistamine, which is available as a pharmacy-only medicine, it is not routinely available on a funded basis. There are other antihistamines that are funded under the health system. Potentially, it may be funded if a specialist practitioner were to prescribe it (the evidence in that regard was unclear). However, at least on one occasion, the prescription has been at a dosage that exceeds the maximum dosage if complying with the regime for using the medication without a prescription as a pharmacy-only medicine.

d. Medical practitioners have identified that an appropriate dietary regime is beneficial in controlling the appellant's condition. It is not limited to eliminating certain foods as is the case with coeliac disease, the material indicates a need to consume particular categories of food.

e. The appellant is at risk of suffering an anaphylactic shock. The appellant self-reports breathing difficulties which is consistent with that risk potential being more than remote in his case.

[17] We can place very limited weight on the appellant's evidence beyond these elements which are corroborated by the medical information on the file. We can give no weight to the Regional Disability Adviser's evidence; she was unqualified to give evidence regarding the appellant's medical situation and needs arising from it. It was clear to us that she relied heavily on her experience as a parent looking after a particular child with a particular manifestation of autoimmune issues, one of which came within the same diagnostic category as the condition suffered by the appellant.

[18] At the end of the hearing, we explained to the appellant that if he was to get a proper evaluation of his medical situation he would need to undergo a proper examination from a qualified physician. He would also need to

be willing to provide that information to the Ministry and to this Authority. We proposed to the Ministry's case officer that, given the inordinate expense of dealing with this appellant's appeal and the unsatisfactory state of the evidence before us, it would be money well spent. However, the Ministry's agent expressed the view that he considered that probably could not be done, as it would be necessary to comply with the Ministry's protocols and to first go through a general practitioner's consultation and then a referral.

[19] The appellant has already had the benefit of consulting multiple specialist physicians regarding his condition. There is only one of them who he seems to have some level of trust in; however, that is somewhat problematic as there are apparently unpaid consultation fees. The most recent specialist, on whom the Ministry has relied, now apparently has a problematic relationship with the appellant, at least that is the appellant's perspective.

[20] We frankly discussed with the appellant how his suspicion and resulting agitation did make it very difficult to deal with his circumstances.

Jurisdiction

[21] To receive a disability allowance, a person needs to receive a main benefit; however, a disability allowance is supplementary to, but separate from that benefit.

[22] Section 12J(17) governs what matters lie with the Medical Board rather than this Authority. It provides:

> The Appeal Authority does not have the authority to hear and determine any appeal on medical grounds, grounds relating to incapacity, or grounds relating to capacity for work, against any decision or determination of the chief executive in respect of —
>
> (a) a supported living payment on the ground of sickness, injury, disability, or total blindness; or
>
> (b) a child disability allowance under section 39A; or
>
> (c) a veteran's pension under section 70 of the War Pensions Act 1954; or
>
> (d) jobseeker support on the ground of sickness, injury, or disability.

[23] Accordingly, the allocation of jurisdiction between the Medical Board, and this Authority is not only based on whether the issue concerns medical

grounds. This Authority must hear matters involving medical grounds if they do not involve the specified forms of support. The provision does not refer to a disability allowance. To the extent a disability allowance is not included in the four types of assistance identified, issues arising are within this Authority's jurisdiction. Section 10B of the Act generally confers jurisdiction on the Medical Board in a matter that corresponds to the extent that jurisdiction is removed from this Authority.

[24] It appears that a disability allowance and a special needs grant are issues we must decide, whether or not there are medical considerations. If either party has a different view, they should raise the issue. Subject to that, we will proceed on the basis we will determine all issues relating to a disability allowance, and special needs grant.

Discussion

The facts

[25] For the reasons outlined, the evidence does not leave us in a position where we can confidently make factual findings. We can make an evaluation cautiously considering what the appellant has said and relying as far as possible on elements of the appellant's evidence that are confirmed by written material from qualified medical practitioners.

[26] However, much of what we are being asked to decide are medical issues. Any reliable answer will require medical assessment, by a medical practitioner directing the evaluation to the questions that determine the entitlements arising in the appeal. The difficulty is that the appellant's personal situation makes it very difficult for him to engage constructively with the Ministry and medical practitioners. The appellant has made a series of unfortunate choices over recent years, and spent time in prison as a consequence. Nonetheless, the appellant controls his own affairs and it must be up to him as to how he deals with the issues he has brought before us.

[27] In these circumstances, we are going to issue this decision as an interim decision and provide a recommendation as to how matters might proceed. If either the Ministry or the appellant choose not to follow our recommendation, we will indicate what our final decision will be.

[28] The first observation we make is that the appellant attended an oral hearing before us. While he was clearly suffering from anxiety, he was respectful and did listen to what we said to him. If the Ministry is going to engage with the appellant in a constructive manner, it can only likely do so by having an officer from the Ministry engage with the appellant on a face-to-face basis. We expect that the Ministry does have personnel who have the skills to undertake that task in an appropriate manner, and we strongly recommend that that occur. We would also suggest that suitable personnel are likely not to have previously engaged with the appellant's affairs. Certainly, the appellant did not identify anyone in the Ministry with whom he has a good relationship.

[29] We also urge the Ministry to create an opportunity for the appellant to attend a consultation with a suitably qualified medical specialist, so a proper evaluation can be made of his needs. If that opportunity is presented, then the appellant will have the choice as to whether or not he engages with it. It seems necessary that the specialist should be somebody who has not previously engaged with the appellant, unless the appellant expresses confidence in an alternative approach.

[30] We would anticipate that if a consultation successfully takes place and a report from the medical practitioner is prepared, it is likely that all of the issues in this appeal could be resolved by consent. If not, either this Tribunal or the Medical Board (if any issues go to a primary benefit) would have a foundation to make a sound decision.

[31] The issues are essentially as simple as getting a proper medical evaluation of the appellant's circumstances; and the appellant agreeing that the information is provided to the Ministry and this Authority. The medical examination is not, as the Ministry's agent suggested, concerned with the right to a supported living payment, disability allowance, or special needs grant. The examination we propose is concerned with preparing proper evidence to present to this Authority.

Taking those steps is gathering evidence, not delivery of support. Accordingly, the funding of that process stands apart from the rules relating to benefit entitlement. It is also allowed under section 69C(3).

[32] If we receive no further evidence, the orders we will make will be as follows:

a. We do not have sufficient evidence to make an evaluation on the question of assistance with travel to consult with a specialist dermatologist in Wanganui and New Plymouth. In the absence of further information that element would fail. However, we would refer the issue to the Medical Board to the extent it relates to a supported living payment

b. Funding of antihistamine medication will be a matter we decide to the extent it is accommodated by a disability allowance, or special needs grant; and referred to the Medical Board if it involves his supported living payment. The evidence includes a prescription, and the present evidence would satisfy us of a need to have funding for that prescription to continue. The funding would include medical consultations, given the dosage is not available without a prescription.

c. We are satisfied that the appellant does need to regularly attend specialist and/or general practitioner appointments and have the cost of related transport funded. This would need to be backdated to the time when the appellant first sought assistance to cover that expense.

d. The cost of any special dietary needs and medication which are not funded, unless they can be prescribed by the specialist physician or general practitioner and funded on that basis.

[33] It does seem that we could evaluate the antihistamine, medical consultations, and the costs of dietary needs to the extent they should be made as a disability allowance, or special needs grant, as that is not covered in section. However, before making orders under those heads we would give the parties an opportunity to address us in relation to the amount of the costs, and the relationship between the role of the Medical Board and the Authority on those issues.

[34] Unless the Ministry makes provision for getting a proper medical evaluation and the appellant co-operates, it is likely that the appellant's issues will be ongoing and lead to further appeals. If:

a. there is a proper medical evaluation; and

b. the appellant decides to cooperate:

then, any further appeals will likely be easily resolved. This Authority and the Medical Board deal with facts, and the respective processes are efficient when objective facts are available.

[35] We would hope that this is an opportunity to address the appellant's needs. Appeals with partial evidence lead to expense for the Ministry, and are demanding on the appellant's already fragile circumstances. In our view, an attempt by appropriate personnel to engage face-to-face with the appellant will be essential if further money is not to be wasted on this matter.

Dated at **Wellington** this 19th day of December 2017

_____
G Pearson
Chairperson

_____
K Williams
Member

_____
C Joe JP
Member

[2018] NZSSAA

Ref No: 047/17
Ref No: 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 the Chief Executive that has been confirmed or varied by a Benefits Review Committee

NOT TO BE PUBLISHED

ORDER CONFINING DISTRIBUTION TO PARTIES, COUNSEL, ANY MEDICAL PRCTITIONER EXAMINING THE APPELLANT AND ANY COURT ENGAGED WITH THE PROCEEDING

DATE OF MINUTE **15 November 2018**

MINUTE
(FOLLOWING HEARING ON 9 NOVEMBER 2018)

The purpose of this minute

[1] This minute follows a hearing that took place in XXXX. Antecedents to that hearing were:

[1.1] A hearing at Wellington on 4 December 2017, resulting in an interim decision of 19 December 2017.[16]

[1.2] A second interim decision of 7 May 2018.[17]

[1.3] A judgment of the High Court in *T v The Chief Executive of the Ministry of Social Development*.[18] In that decision, the High Court issued a declaration that the appellant should be paid Jobseeker Support on an interim basis.

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[16] [2017] NZSSAA 74.

[17] [2018] NZSSAA 022.

[18] *T v The Chief Executive of the Ministry of Social Development* [2018] NZHC 2776.

[2] At the hearing, Professor Ameratunga, a specialist physician whose area of practice is immunology, gave evidence. An opportunity was provided for XXXX to give further evidence, and/or be cross-examined. The parties chose not to embark on having XXXX give further evidence

[3] The Authority's decision of 19 December 2017 describes the issues in the appeals. However, it is necessary to have regard to the nature of the Authority's jurisdiction. Put simply, the Authority is required to stand in the shoes of the Chief Executive at the point where an appellant sought assistance. The Authority must determine what assistance should have been provided, and is not confined to the support an appellant sought, or indeed what the Chief Executive or the Benefits Review Committee took into account. We refer to that principle, as there are a wider range of issues that have been canvassed. One of those issues is whether the appellant should have Jobseeker Support as a main benefit, or supported living payments. It is likely that it would be necessary to make that decision, as it has a bearing on some of the supplementary assistance available. However, it was not posed as a question in the appeal.

[4] After the evidence was given at this hearing, the Authority sought to get an understanding of the position of the parties, and pressed counsel for the Chief Executive to identify the orders he says the Authority should make. That led to the Chief Executive and XXXX's counsel identifying that there was in fact little difference between them.

[5] As an aid to resolving the remaining differences, the Authority agreed to give an indication of its likely factual findings on the evidence, record the elements of agreement, and identify the outstanding issues.

Factual finding

[6] We have heard from witnesses dealing with XXXX's health. We have found XXXX and Professor Ameratunga reliable witnesses, and we are satisfied we have a clear understanding of XXXX's situation as far as necessary to deal with the issues before us. We have found the Ministry's witness at the first hearing, its Regional Disability Adviser, unqualified to give medical evidence, and can place no weight on her opinions regarding XXXX's medical condition.

[7] In brief, we can convey that our findings on the evidence before us would be (subject to hearing submissions if the parties wish to present them):

[7.1] XXXX was a young man in good health, employed in skilled work, for which he was qualified. At that time, there was no reason to suppose he would not continue to work and live a conventional life.

[7.2] About 20 years ago he developed urticaria, dematographia and angioedema. For present purposes, it is sufficient to identify this as a skin condition, understood to be an autoimmune disease, giving rise to unpleasant symptoms. The itchiness associated with the condition often leads to scratching, with consequential skin damage. There are also elements of unsightliness that can result from the condition particularly when the face is affected. There may be obvious social consequences from the condition.

[7.3] Typically, a person with the condition is treated with antihistamines, and it will resolve relatively quickly. The person may suffer another outbreak during their life, but generally the effect is transitory and does not greatly impact when considering their life as a whole.

[7.4] The appellant is not like most people with the condition. Professor Ameratunga has and does see many people with the condition, and the appellant is in the extremely rare group where he has continuously suffered for some 20 years. It appears he potentially suffers comorbidities including goitre and anxiety. The Professor identified both as having a known association with the condition, and psychological stress as a known aggravation of the symptoms.

[7.5] The Professor considered that the appropriate treatment was a specific antihistamine, Telfast, and another pharmaceutical that assisted with the efficacy of Telfast (Ranitidine). The dosage of Telfast he prescribed was higher than usual; it was inappropriate to substitute other antihistamines as they would typically have unpleasant side effects in high dosages. After XXXX consulted with the Professor, he took the medication, and there was a significant improvement in his symptoms.

[7.6] Professor Ameratunga considers that to manage XXXX's autoimmune condition he should see a general practitioner monthly, and that general practitioner should have the support of a specialist physician. One of the important things required is to monitor the dosage of Telfast and Ranitidine, and manage other aspects of XXXX's health (including possible goitre).

[7.7] Telfast is an "over the counter" medicine, but not for administration in the dosage XXXX requires. It is not an expensive medication.

[7.8] XXXX has used an EpiPen, which is a self-administered medication, typically used when a person suffers a severe allergic reaction that triggers anaphylaxis, which is a life-threatening condition. The professor considered there was no known association with XXXX's autoimmune condition and anaphylaxis (as long as he did not use non-steroidal anti-inflammatory drugs). Whether there was an un-associated risk would be a matter that could be monitored by a general practitioner.

[7.9] Another important aspect of Professor Ameratunga's evidence is XXXX's mental health. After consulting Professor Ameratunga, XXXX engaged in harassment of the Professor and his female staff. He made as many as 15 telephone calls in one morning. Police intervention was required. The Professor said that while he did not specialise in psychiatry, his long clinical experience obviously included patients with mental health conditions. He considered XXXX probably suffered from a mental health condition. XXXX volunteered that he had in the past been subject to a compulsory treatment order for his mental health, which had been discharged on appeal without the treatment being completed. XXXX appeared insightful of this aspect of his health.

[7.10] We have seen sufficient indications in the evidence to be satisfied XXXX has a long history of behaviour of the kind Professor Ameratunga reported, he is subject to numerous trespass notices, and has been imprisoned as a result of his conduct. Indeed, a trespass order relating to the Court where the appeal was heard was an issue to be negotiated, as was a trespass order stopping air travel to attend the first hearing in Wellington.

[7.11] Based on the information we have before us we would, at this point, conclude on the balance of probabilities:

[7.11.1] XXXX has suffered from the autoimmune condition for about 20 years. It has not been managed well, and it has been severe enough to seriously disrupt his life, and led to him being unable to work.

[7.11.2] We are clear that for an extended period of time XXXX has engaged in inappropriate conduct that people regard as harassment; and his mental health is a factor or the cause of the behaviour. We are not in a position to determine the nature of the condition, but are satisfied it is a cause, or one of the causes, of the behavioural effects.

[7.11.3] We are satisfied XXXX's mental health has been a significant or principal cause of unsatisfactory treatment of his condition. It has led to issues in his communications with medical practitioners, and the Ministry. We accept Professor Ameratunga's opinion that XXXX's health, primarily his mental health, is sufficiently serious to evaluate potential care as an inpatient. It was a view he expressed in his evaluation, and one he supported in his oral evidence.

[7.11.4] In our view, there is no immediate or foreseeable prospect of XXXX working unless and until his mental health improves. It is necessary and important that both XXXX's mental and physical health are treated, so he can potentially resume his role in the community as an independent person.

The agreed orders

[8] Our understanding is that both parties would in principle, by consent, allow the Authority to make the following orders:

[8.1] The Ministry will pay the unsubsidised component of prescriptions for Telfast and other pharmaceuticals prescribed by a general practitioner or medical specialist.

[8.2] The Ministry will pay for travel to, and the unsubsidised component of, monthly consultations with a medical practitioner (general practitioner, and a specialist physician recommended by the general practitioner).

[8.3] The Ministry will fund Pinetarsol in quantities recommended by a medical practitioner.

[8.4] The Ministry will fund the purchase and use of a smart phone, including a pre-paid connection.

[8.5] The Ministry will provide an advance payment for the purchase of cotton clothing.

[9] There are some issues regarding quantum that need to be considered:

[9.1] It is likely that referrals to a specialist physician will be funded by the DHB if a referral is made by the general practitioner. Accordingly, the funding is likely to be required only for general practitioner visits.

[9.2] The amount of funding for the smart phone purchase, and the connection need to be determined.

[9.3] The amount for cotton clothing also needs to be determined.

[10] The parties suggested a longer list, but it appears it can be condensed in that way.

[11] The other aspect of the orders is the legal basis for the orders. To some extent that follows from the following discussion regarding the appropriate benefit. However, the Ministry has signalled that under a disability allowance the maximum payment is $63.22, and has identified that payment of some expenses as a special needs grant is appropriate.

[12] At this point we will not take a directive approach, but identify how we expect to deal with the matter if we need to make a determination. For the reasons we have identified, in our view XXXX is in a state of crisis, and has been for an extended time. Professor Ameratunga has provided a measure of how acute that state is, he considers that it is appropriate to evaluate him for inpatient treatment. It follows, that, in our view, despite the duration of this state of affairs, it is an emergency in the sense the legislation uses that word. It is an emergency both when considering the

humanitarian issues relating to XXXX, and from the point of view of the community. In that regard, we point to the harassment of Professor Ameritunaga and his staff, the inordinate costs of these proceedings and the proceedings in the High Court, and the other incidents of harassing behaviour, only some of which are known to us.

[13] Accordingly, our general approach would be to determine:

[13.1] XXXX qualifies for a Supported Living Payment.

[13.2] He has a severe disability, and there are a range of costs associated with managing it.

[13.3] Much of the cost of medical support is borne by the health system, it is entirely appropriate that is so, and the Ministry does not have a role in relieving the health system of those costs. However, to access appropriate care it is likely that the Ministry will have to bear the cost of unsubsidised primary care so that XXXX receives diagnosis, treatment, and referral as required. Unsubsidised costs of medication will also need to be funded.

[13.4] In relation to medical care, the Ministry has a limited role. It is not appropriate or necessary, generally, to engage in the doctor/patient relationship. A doctor will be subject to sanctions if prescribing or making referrals unnecessarily. The facts we have established show very clearly that XXXX is entitled to the dignity of a private medical consultation with a general practitioner who can evaluate XXXX's mental and physical health, and the ongoing support that follows from that.

[14] Having regard to those potential findings, we would encourage the Ministry to explore constructively the appropriate statutory mechanisms.

Outstanding matters

[15] XXXX's counsel has personally funded the cost of him seeing a medical practitioner and a taxi fare to do so. In our view, he should be reimbursed. We would consider doing so by way of ordering costs, or a non-refundable grant under the Act.

[16] There are costs of a failed attempt to obtain an affordable telephone connection. This is in significant part a product of difficulties communicating in respect of this appeal. We urge the Ministry to consider

the matter, and we will potentially evaluate it in a similar manner to the discussion in the immediately preceding paragraph.

[17] If these appeals are resolved by consent, on terms we are satisfied are consistent with the findings we would make, we understand there would be no application for costs. In that situation, there would be no award for the Authority's costs either. We refer to the second interim decision dated 7 May 2018 regarding costs, those observations would not apply if it is necessary to completed the contested hearing.

[18] We have taken the unusual step of giving an indication of our finding, in the expectations that doing so will assist the positive steps the parties have already taken to finding a solution. We observe that we have not reached any final conclusions, though we have heard all the evidence to determine the appeal. In our view, it has been appropriate to take this course as we consider that urgent intervention to fully explore the potential for XXXX to receive treatment is critical. That is both due to his welfare, and also the inordinate costs to the community and the revenue of him not achieving an optimum recovery.

Confidentiality

[19] Given the matters discussed, this minute is to be distributed only to the parties, counsel (and persons assisting them), any medical practitioner XXXX wishes to disclose it to in the course of treatment, and the High Court in any material proceedings.

[20] We note that the proceedings in the High Court are also subject to an order made in that Court, which should also be considered.

[21] Given some distinctive features of XXXX's circumstances we will consider any orders the parties may seek relating to permanent confidentiality orders.

Timetable

[22] We are conscious of the proceedings in the High Court, and the importance of dealing with XXXX's health. Accordingly, we propose to treat this appeal as an urgent matter.

[23] We request that the parties report on progress within 10 days. Either party may request a telephone conference at any point, and it will be dealt with urgently.

DATED at Wellington 01 March 2019

Grant Pearson
Chairperson