Handicapped child's allowance: constant care and attention

SERGI and SECRETARY TO DSS (No. S86/3)
Decided: 22 August 1986 by J.A. Kiosogious, D.B. Williams and J.T.B. Linn.

Meryl Sergi applied to the AAT for review of a decision by the DSS rejecting her claim for handicapped child's allowance in respect of her 10 year old son.

The legislation

Section 105J of the *Social Security Act* provides

> Subject to this Part, where a person who has a dependent child who is a severely handicapped child provides, in a private home that is the residence of that person and of that child, constant care and attention in respect of that child, that person is qualified to receive a handicapped child's allowance in respect of that child.

A 'severely handicapped child' is defined in section 105H(1) as a child who has a physical or mental disability, by reason of that disability needs constant care and attention and is likely to need that care and attention permanently or for an extended period. A 'handicapped child' is defined in the same sub-section as a child who by reason of a disability needs care and attention only marginally less than the care and attention of a severely handicapped child.

Section 105JA gives the Secretary power to grant an allowance to a person with a dependent handicapped child if the person is by reason of the provision of the care and attention 'subjected to severe financial hardship'.

The facts

The applicant's son was diagnosed as having diabetes mellitus when he was 6 years old. He attends an ordinary school. He is not disabled in any other way.

The applicant supplied details of the care and attention provided for her son. These included the testing of her son's blood sugar three times a day, the supervision of his twice daily insulin injections, the maintenance of a record book, the planning and provision of a special diet, regular visits to hospital, dealing with hyperglycaemic or hypoglycaemic reactions, being constantly available to advise the school he attends when queries arise in relation to her son's symptoms and constant vigilance over her son.

The AAT accepted this account and did not consider that the applicant was over-protective of her son or that she over-compensated for his disability.

Constant care and attention

It was accepted that the applicant had the custody, care and control of her son, that the care was provided in a private home, and that the care and attention was likely to be needed permanently or for an extended period. Thus the other terms of sections 105H and 105J were satisfied. The question remained as to whether the applicant provided constant care and attention.

The Tribunal referred to its decision in *Scrivener* (1986) 31 *SSR* 386, where the majority set out certain propositions with respect to the question of whether care and attention is constant in a given case. They were

(1) in determining the constancy of care and attention the appropriate approach is to look at a framework of weeks or even months and not hours or days to identify any frequently recurring pattern in the care and attention provided.

(2) Whilst 'constant' includes 'continuous', it has a separately applicable meaning of 'continually recurring'. Either standard is sufficient to satisfy the statutory requirement.

(3) It is inappropriate to increase the statutory standard of constancy required by the definition of a severely handicapped child by comparing it to the standard appropriate for a handicapped child, i.e. marginally less than constant care and attention. A handicapped child is defined in part as one who is not a severely handicapped child. Since the former is defined in terms of the latter, one must seek to define the latter first, before considering the former.

(4) More specifically, from the attendance of the child at an ordinary school it does not automatically follow that the care and attention provided to that child is no longer constant, nor that it ceases to be provided in a private home.

The Tribunal then discussed at some length the meaning of 'constant care and attention' and referred to earlier decisions of the Tribunal. It concluded the discussion by adding to the propositions in Scrivener above.

(5) Care and attention include an applicant's vigilance to avoid the onset of attack. (*Seager* (1984) 21 *SSR* 230, *Yousef* (1982) 5 *SSR* 55).

(6) Whether a child 'needs' constant care and attention will depend upon the circumstances of the case. Need is not restricted to ensuring the bare survival of the child, but includes care and attention given to minimise the child's disability to help him to lead as normal a life as possible (*Meloury* (1983) 13 *SSR* 126), and includes the prevention of damage to health over a longer period.

(7) The test for assessing need is objective, not subjective (*Sachs* (1984) 21 *SSR* 232), although a claimant's view of the situation will be influential evidence.

(8) The fact that a disability is well or poorly managed is, when considered in isolation, a neutral factor.

(Reasons, para. 21)

The conclusion of the Tribunal in Sergi's case was that the evidence pointed in one direction. The care and attention continued during most of the day and was thus sufficient to satisfy the statutory requirement. There was little doubt given the seriousness of the consequence of failing to maintain proper control of diabetes that the child needed constant care and attention. The vigilance of the applicant dominated her life.

Thus, the applicant had a severely handicapped child in respect of whom she provided constant care and attention and thus qualified to receive handicapped child's allowance.

No need for stringent tests?

The AAT also commented on the level of the allowance and its relationship with the test for qualification.

> In assessing constant care and attention, or marginally less than constant care and attention, the level of f allowance should be borne in mind. The allowance is, at most $85 per week. As was pointed out in *Seager*, very stringent tests could not have been intended by the legislature given the amount involved (viz $20 per week).

(Reasons, para. 27)

Formal decision

The AAT set aside the decision under review and substituted a finding that the applicant's son is a severely handicapped child who receives constant care and attention from the applicant.

AWAD AND SECRETARY TO DSS (No. S86/55)
Decided: 6 October 1986 by J.A. Kiosoglous, B.C. Lock and H.W. Garlick.

Jeanette Awad applied to the AAT for review of a decision by the DSS to refuse her application for handicapped child's allowance in respect of her 9 year old daughter.

The facts

The applicant's daughter suffered from eyesight problems (which included the enlargement of one eye), an ear

condition, skin rashes, infections, enuresis and anaemia. It was also claimed that the applicant's daughter had slight mental retardation but this was rejected by the Tribunal who found that she was of average or slightly less than average intelligence. None of her conditions was considered to have resulted in substantial impairments and the care provided as a result did not, in general terms, go beyond that of normal parental care.

The legislation

Section 105J of the *Social Security Act* provides that a person who provides 'constant care and attention' to a dependent severely handicapped child in their home is eligible for handicapped child's allowance.

Section 105JA gives the Secretary power to grant an allowance to a person who provides 'only marginally less than the care and attention' needed by a severely handicapped child to a dependent handicapped child in their home (para.(a)), if the person 'is, by reason of the provision of that care and attention, subjected to severe financial hardship' (para.(b)).

Section 105H(1) defines a 'severely handicapped child' as a child with a physical or mental disability needing constant care and attention; and a 'handicapped child' is defined as a child with a physical or mental disability needing only marginally less care and attention.

Was there a 'need' for constant care and attention?

The AAT observed that the care and attention provided to the daughter was clearly needed, but

> ... it is equally clear that this care and attention is neither constant nor marginally less than constant. The administration of medication or vitamin tablets would take only a few minutes a day. The enuresis is controlled, although the child is checked at night occasionally. The additional nursing provided because of infections, whilst adding to the care and attention, does not alter this conclusion...
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> However, additional care and attention is provided by the applicant. It consists of a whole range of tasks which are well within [the daughter's] capabilities, e.g. assisting her when she dresses, tying her laces, bathing her. It also comprises a large amount of protection and emotional support as [she] is often teased at school because of her appearance. To make matters worse, the ethnic community to which the applicant belongs stigmatizes physical disability. [The daughter] is thus sheltered within her own community by her mother. Indeeed, the applicant's grandmother is not even aware of her grand-daughter's problems. Whether the additional care and attention that is given to [her] by the applicant is in her best interests is a difficult question. If it is not, it cannot be 'needed'...

(Reasons, paras. 15-16)

The Tribunal referred to the decisions in *Sachs* (1984) 21 *SSR* 232 and *Sergi* (*this issue*). In those decisions the objective test of need was stressed.

The objective test

The Tribunal noted the difficulty of applying the objective test. The appropriate degree of objectivity is difficult to determine. However, 'care and attention can never be needed by a child when its provision is judged not to be in the best interests of the child's development' (Reasons, para. 18).

The Tribunal, while sympathising with the parent, concluded that this case involved a little girl whose disabilities, although not severe enough to substantially disrupt her daily life, distinguished her from her peers to the extent that her parent felt it necessary to provide care and attention beyond that which was necessary.

Formal decision

The AAT affirmed the decision under review.

Invalid pension: married person

BRADLEY and SECRETARY TO DSS
(No. N86/70)

Decided: 18 September 1986 by A.P. Renouf, J.H. McClintock and H.D. Browne.

In June 1984 Norma Bradley applied to the AAT for review of a DSS decision to reject her application for invalid pension on the basis that her husband's income deprived her of entitlement.

The facts

The applicant and her husband had been married for over thirty years. She had developed a mental condition about nine years ago. This required her to undergo hospitalisation. In 1981 the condition became worse and in 1983 she entered a hospital for an indefinite period. She moved to a nursing home in November 1985.

Medical evidence indicated that the applicant was unable to communicate with her husband or children 'in any sensible, rational or emotional way'. It was accepted by the AAT that her condition would require her to spend the rest of her life in institutional care. Her husband considered that the marriage was at an end although he did not want to divorce the applicant because of a moral obligation not to 'dump' her.

Two relevant periods

The relevant sections of the *Social Security Act* were amended on 21 September 1984. The AAT therefore had to consider the application in relation to two periods. The first period being from June 1984 to 20 September 1984 and the second from 21 September 1984 to the present.

The former section 29(2) which related to the first period provided:

> ...the income of a husband or wife shall -
> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court;
> or
> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines, be deemed to be half the total income of both.

Was there a special reason?

The AAT referred to *Reid* (1981) 3 *SSR* 31 which had said that the 'special reason' required in s.29(2) to make a case exempt from the normal methods for the computation of income must be such as to 'take it outside the common run of cases'.

The husband of the applicant argued that he suffered financial hardship as a result of his wife's condition and therefore his case was out of the ordinary as required by Reid.

The AAT did not accept this submission. There was no evidence that the husband was so committed to the payment of the applicant's hospital expenses that he had virtually no income left (see *Williams* (1981) 4 *SSR* 39). His income and expenses were balanced. The applicant's hospitalisation did not require expenditure beyond that for items such as toiletries and clothing which he would have incurred in any event. He also had savings of over $14,000.

Thus, in relation to the first period the Tribunal agreed with the decision of the DSS. It was also noted that s.28(1AAA), which gives the Secretary a discretion to allow payment of a pension at the single rate for a married person where the living expenses of the married couple are increased by reason of illness making them unable to live together, had been properly disregarded in this case. The AAT was not convinced that the applicant's husband had incurred increased expenses as a result of his wife's hospitalisation.

The second period

From 21 September 1984 the new s.6(1) defined 'married person' as including a de facto spouse but not including:

> (a) a legally married person (not being a de facto spouse) who is living separately and apart from the spouse of the person on a permanent basis; or