

Federal Court decisions

Claim for one benefit treated as claim for another benefit

SECRETARY TO DSS v COOPER
(Full Federal Court)

Decided: 20 November 1990 by
Morling, Burchett and Lee JJ.

This was an appeal from the decision of O'Loughlin J (*Cooper* (1990) 54 SSR 727), who had dismissed an appeal by the Secretary against a decision of the AAT brought under s.44 of the AAT Act.

The AAT had decided (*Cooper* (1989) 49 SSR 727) that a review form for continuation of handicapped child's allowance, lodged by Cooper's father in April 1987 (after Cooper's 16th birthday), should be treated as a claim for invalid pension, pursuant to s.159(5) of the *Social Security Act*, so that payment of invalid pension could be backdated from November 1987 (when Cooper had lodged a claim for invalid pension) to April 1987.

The legislation

Section 158(1) of the *Social Security Act* provides that the grant or payment of a pension, benefit or allowance under the Act 'shall not be made except upon the making of a claim for that pension, benefit or allowance'.

Section 159(5) gives the Secretary a discretion to treat a claim for one pension, allowance, benefit or payment under the Act or another Commonwealth Act as a claim for another pension, allowance or benefit 'that is similar in character' to the pension, allowance or benefit for which the claim was lodged, where the Secretary considers it reasonable to do so.

'Claim'

The Full Federal Court first decided that there had been no error of law, on the part of the AAT, in treating the submission of the review form by Cooper's father as the making of a claim within s.159(5). Several considerations supported this view:

- Section 159(5) 'should be construed generously', because it extended benefits conferred by beneficial legislation. It was intended to overcome technicality; and to construe its words

'in a narrow technical spirit would be quite perversely contrary to its evident purpose': Reasons, p.11.

- The words of s.159(5) contemplated a broad approach, using the general term 'payment' - 'plainly a broad and loose use of that word'; referring to claims lodged under any other Commonwealth Act or program, making a rigid definition of what amounted to a 'claim' unlikely; and contemplating that a claim could be made on behalf of a person, a likely situation where disabled persons were involved.
- The DSS itself had treated the submission of the review form as a claim for continuation of handicapped child's allowance, recording a 'grant' of that allowance to Cooper following lodgment of the review form by Cooper's father.

'Similar in character'

The Court noted that s.159(5) could only be applied where the pension, allowance or benefit to be substituted was 'similar in character' to that originally claimed. The Court observed that both invalid pension and handicapped child's allowance were paid in respect of a person's physical or mental disability, but that there were differences: invalid pension provided a higher level of support than handicapped child's allowance; and the allowance was paid to the parent, rather than to the disabled child. The AAT continued:

'While dissimilarities are relevant, it should not be overlooked that [s.159(5)] assumes the subventions in question are different. The most cursory glance at it demonstrates that it is talking about things which are unlikely to be the same. They may provide benefits of a different sort, and they may arise under different legislative schemes. In that context, there is greater significance to be attached to a similarity in some essential respect than to the presence with it of some dissimilarity. That may be quite consistent with the provisions being "similar in character" within the intention of the subsection.'

(Reasons, p.13)

The Court said it was clear that s.159(5) contemplated differences in the benefits: 'It assumes that the benefit to be substituted is in some respect superior - otherwise the question of substituting it would not arise': Reasons, pp.13-14. It said that the provision assumed that the officers of the DSS were -

'likely to know more than a handicapped or disadvantaged applicant about what benefits may be available to [the person], and that they

should consider whether there are more beneficial alternatives to what is sought in an application.'

(Reasons, p.14)

Factors to be considered, the Court said, were the similar suitability of the two benefits to meet the circumstances which gave rise to the application, and whether the two benefits were 'similarly grounded in those circumstances'. 'The logic of the subsection', the AAT said,

'directs attention to the nature of the need that gave rise to the claim and the extent to which each provision may be seen as a comparable response to that need. Viewed in this way, a handicapped child's allowance and an invalid pension are alike responses to physical or mental disability by the payment of a regularly recurring sum to provide for the requirements of the disabled person.'

(Reasons, p.14)

Understanding s.159(5) in this way, the Court said, there was no error in the AAT's findings and the DSS's appeal should be dismissed with costs.

A waste of money

The Federal Court noted that Cooper's father had consistently dealt promptly and efficiently with the DSS over the issue of his daughter's entitlements. There was not the slightest doubt that the difficulty in the present case arose from the DSS's failure to follow its normal practice of sending Cooper a claim form for invalid pension when she turned 16, or possibly a failure by the postal authorities to deliver the claim form - a failure for which the Commonwealth was responsible:

'In those circumstances, the technicality pursued through a series of appeals seems particularly sterile.'

(Reasons, p.15)

The Court pointed out that s.34A of the *Audit Act* 1901 (Cth) could have been used to make a payment to Cooper, if there had been doubt as to her technical eligibility. This payment would have ensured that the Commonwealth was not out of pocket beyond paying the invalid pension, which was intended to meet Cooper's need:

'In those circumstances, it is difficult to see the justification for the expenses which have been incurred in ascertaining the proper label to put upon the payment.'

(Reasons, p.16)

Formal decision

The Full Federal Court dismissed the appeal.

[P.H.]