

Casebase Number: G0020

Title of Payment: Disability Allowance



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Date of Final Decision: 05/01/2010

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Date of Final Decision: 15th January, 2010

Keywords: Disability allowance – medical - whether marriage tie broken – means - appeal - oral hearing

Organisation who assisted claimant: Northside Community Law and Mediation Centre (NCL&MC)

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Case Summary:

The Appellant's application for Disability Allowance (DA) was initially refused on two grounds; that is, failure to satisfy the medical criteria and the assertion by the Department of Social Protection that the applicant's marriage tie had not been broken and that her estranged husband's income should therefore be assessed against her claim. The decision was appealed. A revised decision was made in favour of the appellant with regard to the medical grounds but the matter of the marriage tie remained to be determined at oral hearing.

Summary of Benefit(s) Received:

Disability Allowance (DA) is a weekly allowance for people aged between 16 and 66 who have a "specified" disability that is expected to last for at least a year. The disability must substantially restrict a person from undertaking employment suitable to their age, experience and qualifications. The applicant must submit medical evidence at the time of application and a medical assessor in the Department of Social Protection will conduct their own medical assessment of the applicant's claim. Additionally, the applicant must pass a means test and be considered habitually resident in the State. In this case the Appellant applied for DA, but was denied the payment as she was not considered sufficiently "impaired" and therefore she was deemed capable of work. In addition to this the Social Welfare Inspector was not satisfied that the marriage tie had been broken and therefore determined that the spouse's earnings be means tested against the Appellant's claim. On notice of appeal, a second medical assessment by the Department of Social Protection determined that the Appellant did have a mental disability that prevented her from working. At oral hearing the Appellant also provided evidence that although she was not legally separated she had not been cohabitating with her estranged husband for many years. Appeal was allowed.

Background:

The Appellant had made an application for DA in late 2008. This application indicated that although the Appellant was separated from her husband they remained legally married. The application also indicated that her estranged husband was contributing maintenance payments to the Appellant for the benefit of their children. DA is means tested and the Social Welfare Inspector (SWI) sought to include estranged husband means in the assessment of the Appellant's means. The Department of Social Protection determined that the Appellant suffered from a mild/moderate mental health disability but that this did not preclude her from seeking employment. This was detailed in a medical assessment report.

Additionally, in a report completed by a Social Welfare Inspector it was suggested that the Appellant was not, in fact, separated from her husband and that he remained resident in the family home. This was substantially based on findings in an earlier report conducted by the Social Welfare Inspector in relation to a previous application by the Appellant for a different Social Welfare payment. The Social Welfare Inspector also submitted that a car owned by the estranged husband of the Appellant remained registered at the family home address and that this car had been seen by the Inspector on a number of occasions when passing the property.

Reference was also made by the Inspector to the marriage tie not being broken and that pursuant to the relevant legislation, the Appellant should not qualify for DA.

The Applicant appealed this decision in early 2009. In a second medical assessment, it was found that the Appellant did satisfy the medical requirements to qualify for DA due to the fact that she had depression and mental health difficulties. Internal communications between Social Welfare Inspectors noted that the Appellant had been deemed eligible for DA on medical grounds but questioned whether her estranged husband's means should also be taken into account. It was agreed by the Social Welfare Inspectors that the means of the Appellant's estranged husband should be taken into account. Consequently in mid 2009 the Social Welfare Inspector wrote to the Appellant and requested details regarding her estranged husband's income. The Appellant replied that she was separated from her husband and had no access to his financial information. The Appellants claim for DA was thus denied. Appellant subsequently appealed to the Social Welfare Appeals Office and an oral hearing was granted.

Date Appeal Taken:

10 June 2009

Date Appeal Heard:

19 November 2009

At Hearing:

The Appellant was represented by Northside Community Law and Mediation Centre which had prepared a written submission to the Appeals Officer. Reference was made to the meaning of sections 3(10) (a) and (b) and section.210 of the Social Welfare (Consolidation) Act 2005. It was submitted that the matter of the estranged husband's car being registered at the Appellant's address simply indicated that he had not changed the address following the separation and that this was beyond the control of the Appellant. It was thus argued that the contentions of the Social Welfare Inspector should be disregarded on that basis. It was also submitted by the Appellant that her estranged husband did visit the family home for the purposes of maintaining a relationship with his child and did not actually enter the family home itself but that he met his child for the purposes of a mutual hobby and confined his activities to outside the family home. In relation to the appearance of the Appellant's estranged husband's name on communications regarding the joint mortgage, it was contended that the relevant legislation was silent on such matters and joint ownership of a property is not proof that the marriage tie remains intact. More generally, it was suggested that this point was inconsequential in that the Appellant had initially taken out a joint mortgage with her husband a number of years ago and because no legal separation was yet in effect, his name remained on the mortgage. It was further argued that the Appellant's sole name appeared on a number of utility bills and where the estranged husband's name appeared, there had not been a request made to remove it. It was thus argued that the basis of the Department's assertions demonstrated undue reliance upon the fact that the

Appellant had not yet moved to sever her marriage legally. These grounds, it was submitted were arbitrary and insubstantial in view of the circumstances of the appellant. It was argued that the Appellant and her husband were, in reality, separated.

Decision:

Appeal ALLOWED

Relevant Evidence put Forth by Department of Social and Family Affairs:

The Social Welfare Inspector was present at the oral hearing. No new evidence was presented.

Relevant Evidence put Forth by Appellant:

Written submissions setting up the basis of the appellant's appeal and evidence given by the appellant at the oral hearing.

Appeal Officer's reasoning and Conclusion:

The Appeals Officer considered all of the evidence available, including the evidence produced at the oral hearing. The Appeals Officer found that the marriage tie was broken in this case and the Appellant was separated from her spouse and that she had fully disclosed her means.

On the above basis the appeal was allowed and DA was granted.

Our Observations:

This case demonstrates that where a person is *de facto* separated from an estranged spouse, but is not legally separated, particular difficulties can arise in conducting means assessments, often making it difficult for an Appellant to demonstrate and for Social Welfare Inspectors to clearly ascertain whether the Appellant is actually separated both physically and emotionally from their spouse.

It is notable that the social welfare code is not prescriptive in its terms when considering what constitutes the relationship characteristics of a „spouse“ or „couple“ – referring to a „spouse“ as:

(a) each person of a married couple who are living together, or

(b) a man and woman who are not married to each other but are cohabiting as husband and wife.

s. 3.(10) Social Welfare Consolidation Act 2005

Given the above, each case must be assessed carefully on its merits without undue weight being placed on any single factor such as the existence of a joint mortgage. It is the totality of the circumstances of the relationship that must be examined having due regard to the stated position of the applicant.

For *more information*, contact us at:

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