Casebase Number: G0055

Title of Payment: Disability Allowance

Community Law & Mediation
Northside Civic Centre
Bunratty Road
Coolock
Dublin 17

Date of Final Decision(s)**:**

Appeal: 11th January 2012
Suspension: 8th August 2013
Arrears: 27th August 2013

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Keywords: Disability Allowance- medical - appeal- oral hearing- inspection- suspension- arrears calculation- overpayment

Organisation who represented the Claimant: Community Law & Mediation (CLM)

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Case Summary:

This case relates to the Appellant's Disability Allowance (DA) claim. The Appellant encountered a number of difficulties at various stages in relation to this claim, and each one will be looked at in turn.

1. Appeal
2. Review and decision to suspend DA claim
3. Arrears and Overpayment Calculation

The Appellant represented himself at the Appeal, and CLM represented the claimant for the two latter issues. However, the Appellant's original application, subsequent refusal, review and appeal, informs the background to the two latter issues and so will be discussed first.

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 to support their claim at the time of application.

A medical assessor, employed by the Department of Social Protection [DSP], will conduct a medical assessment of the applicant's claim. This assessment may be "desk based" – on the papers or, in person. The medical assessor provides an opinion with regard to the extent the person's capacity to work is restricted by their disability. This opinion, together with the applicant's evidence and other relevant information, are then submitted to a Deciding Officer for decision. Additionally, the applicant must pass a means test and be considered habitually resident in the State.

Background:

1. Appeal.

On 13th May 2010, the Appellant, a married man at the time of the application and in his fifties, applied to the Department of Social Protection (DSP) for DA. He had been certified by his GP as suffering from Type 2 Diabetes and Hypertension. The Department's Medical Assessor conducted a desk-based assessment of the medical evidence submitted by the Appellant. The Medical Assessor's opinion was that the Appellant was "*unsuitable for Disability Allowance*". The Deciding Officer (DO) in a decision, dated 4th September 2010, refused the Appellant's application citing "*the claimant is not substantially restricted in undertaking suitable employment by reason of a specified disability, which has continued or may be expected to continue for at least 1year."*

The Appellant initially sought a review of the DO's decision, asserting that he was not satisfied with the Medical Assessor's opinion. The Appellant contended that due to his illness he was forced to carry an emergency kit as his blood sugar levels were changeable and extremely difficult to control, and that he tired easily. He further commented that he would be able to submit additional medical evidence and expand on his condition at an oral hearing. The DO referred the matter to a second medical assessor for the purpose of obtaining a second medical opinion.

On 19th October 2010, a second medical assessor carried out a "desk based" assessment and confirmed the opinion of the first Medical Assessor; that the Appellant was "*unsuitable"* for DA. The DO held that the Appellant's contentions did not rebut the findings of the two Medical Assessors and the matter was then referred to the Appeals Office on 13th November 2010.

> N.B. On receiving an unfavourable decision by a Deciding Officer, a person may seek a review of the decision before proceeding to appeal. s. 301 of the Act provides a DO with the authority to revise a decision of another DO if there has been a mistake in the law or the facts. In some cases a review may avoid the necessity of proceeding to appeal. Conversely, in the event that the DO is unlikely to revise their decision, this process will inevitably result in a delay in the appeal being adjudicated by an Appeals Officer.

The AO requested further medical evidence from the Appellant in order to ascertain the need for an oral hearing. The Appellant furnished the AO with evidence of regular appointments at an Ophthalmology clinic and at a Specialist Diabetes clinic. He also stated that he had requested reports from the medical professionals he attends at these clinics.

The AO granted the Appellant an oral hearing, which was held on the 10th of January 2012. At the oral hearing, the Appellant advised the AO that he was a skilled craftsman and had also worked as a heavy goods driver, but was unable to do either due to his medical condition. He explained that he had extreme difficulty in managing his diabetes and the affects were such that he could not leave the house by himself. He also referred to his deteriorating eyesight and its debilitating effect. He also advised that he was being referred to a Psychiatrist for depression and anxiety.

The AO in his report stated that he considered that the Appellant was "*substantially restricted from taking up suitable employment given his age, qualifications and experience."* The AO in his report made an observation with regard to the Appellant's presenting physical

symptoms and referred to the Appellant's "genuine distress" with respect to his medical conditions. The Appeal was allowed.

The Appellant was retrospectively awarded DA from 19th May 2010. He was awarded a reduced DA rate of €17 per week, as his wife's means were assessed against him at that time.

Date of Oral Hearing: 10th January 2012
Date of Final Decision: 11th January 2012, [Appeal Allowed]

Observations:
Any decision in relation to Disability Allowance will be influenced principally by medical opinion. However, it is important to note that the matter to be decided is the degree to which a person's disability restricts them from undertaking work that would otherwise be suitable to their age, experience and qualfications. The existence of the disablity is not at issue. Put plainly, the law does not require that a person prove that they are incapable of work; rather, they must prove that the affect of their condition is such that they are substantially restricted in undertaking suitable work. For this reason it is important that the limitations of evidence in the form of medical opinion must be considered by a DO and an Appeals Officer; that is, medical opinion will often only provide confirmation of the existence of a condition and its known medical affects. In order that a Doctor provide an informed opinion as to the extent of the effects on a person's life, that Doctor would need considerable knowledge of their patient. For this reason it is very important that a person submit detailed testimony with respect to how their condition effects them and provide witness testimony if possible.

Referring the role of the DSP's medical assessors, it is notable that in this case all the opinions were formed on the basis of "desk based" assessments; that is, the medical assessors did not meet the Appellant. In these circumstances the value of this evidence is by definition limited and should be weighed accordingly. Referring to evidence submitted by an Appellant's G.P., this may also be limited as the Appellant's Doctor may not have sufficient knowledge of the effects of the disability. In these circumstances it is important that a decision maker have the opportunity to rely on evidence that is based on "in person" medical assessments and credible witness testimony.

This case undoubtedly presents the limitations of medical opinion and paper based decisions. In order to ascertain the effect on the Appellant of his disability, the Appeals Officer needed to see and hear the Appellant's testimony.

2. Suspension of DA Claim.

On the 13th June 2012, the Appellant wrote to the DSP informing them of a change in his circumstances. He had separated from his wife, and sought the full rate of DA. A review is initiated when a claimant notifies the Department of any changes in his/her circumstances or those of his/her household.

The Appellant applied to the Community Welfare Officer for Supplementary Welfare Allowance (SWA) pending the review of his DA claim. The Community Welfare Officer wrote

to the Social Welfare Inspector (SWI), on the 25th July 2012, and on the 8th of August 2012 requesting that the review of the Appellant's DA claim be expedited.

During November and December 2012 a SWI called to the Appellant's home on six occasions for the purpose of conducting an interview to inform the review of the Appellant's claim. The Appellant was not home at the times when the SWI called. On the 10th December the SWI left a letter asking the Appellant to call to the office for interview later that day, and left a similar letter on the 11th December. The Appellant did not return home until the 12th December, at which point he contacted the DA section by phone to explain the reason for his absence; he had been visiting his son, who at the time was recovering from a car accident. The Appellant was assured that his DA payment would not be affected. On the 10th January 2013, the Appellant's DA was suspended.

Neither the DA suspension nor the reasons for it were communicated to the Appellant.

On the 21st January the Appellant wrote to the DA section accounting for his absence on the dates the SWI had called and referenced his phone conversation on the 12th December 2012. On the 16th March 2013, the Appellant wrote to the DA section *again* explaining his absence during the dates the SWI had called. He additionally sought clarity on why his payment had been stopped.

On the 24th April 2013 the Appellant sought the advices of CLM. On that date CLM wrote to the DA Section setting out the Appellant's position, advising that the Appellant had received no decision in writing setting out the reason for the suspension of his DA or notification of the outcome of the investigation carried out by the SWI into his claim.

As mentioned above, since 13th June 2012, the Appellant had been in receipt of a reduced DA with an 'SWA top up' to the basic social welfare rate of €186. As his DA was now suspended the Appellant had insufficient means to meet his needs. CLM wrote to the Designated Officer [formerly known as Community Welfare Officer] seeking an increase in his SWA payment until the matter of his DA claim could be resolved.

There was no response from the DA Section to the letter sent by CLM on the 24th April. On the 15th July CLM phoned the DA section regarding the suspension of the Appellant's DA. The DA section advised that the Appellant was registered on the DSP system as "*where abouts not known"* as he had failed to attend for interview. They further advised that the Appellant's DA would be re-instated upon receipt of evidence that he was resident at his stated address on the dates the SWI had called.

A copy of the Appellant's tenancy agreement, his rent book showing that he had paid rent during the relevant periods, and a UPC bill were forwarded to the DSP.

On 8th of August 2013, a Deciding Officer reinstated the Appellant's DA claim effective from 10th January 2013. The award was made at the full rate on the basis that the Appellant had been assessed as having nil means from 13th June 2012.

Date of Final Decision: **8th August 2013**

Observations:

The right to fair procedures is a fundamental constitutional right and a basic human right protected by the European Convention on Human Rights. In the context of Social Welfare claims the Department are obliged to follow fair procedures in respect of any decisions, in particular when those decisions result in the suspension of a payment.

A claimant must be provided with a written decision setting out the reasons for any proposed disallowance. On receipt of this decision a claimant must then be given the opportunity to rebut the findings of the Department. The DSP have produced comprehensive guidelines for SWI and DO which clearly set out how they must apply the principles of natural justice and fair procedures when making decisions. These guidelines are available at:

http://www.welfare.ie/en/Pages/Decision-Making-and-Natural-Justice.aspx

http://www.welfare.ie/en/pages/social-welfare-inspectors.aspx

In this case, the Appellant was not informed of the reason for the suspension of his claim until CLM phoned the DA Section on his behalf, several months after the suspension occurred.

In circumstances where a SWI investigating a claim cannot make contact with a claimant, an account of their efforts should be submitted to a Deciding Officer for consideration. A Deciding Officer may decide, based on this information, that the Appellant 's claim should be suspended for the reason that the claimant has not made himself available for review and therefore has failed to establish his continued eligibility to the claim. Any action by the Department must be communicated in writing to the claimant, and the claimant must be provided with the opportunity to comment and rebut any finding against them. The Department's own guidelines refer:

> *Every claimant is entitled to have their claim considered in accordance with the principles of natural and constitutional justice and in the context of determinations of entitlement under the social welfare legislation that includes:*
>
> 1. *The right to know the information, upon which a decision is being made,*
> 2. *The opportunity to comment upon any reports or documents being used in reaching the decision and to present his or her case,*
> 3. *The right to know the reasons for any adverse decision,*
> 4. *The right to have all relevant evidence considered and irrelevant evidence not taken into account,*
> 5. *To have the decision made by an impartial person whose discretion has not been fettered and*
> 6. *Where it is necessary for a fair determination of the issues, an oral hearing.*

3. Arrears Calculation and Overpayment

On the 4th of July 2012, the Appellant received a letter from the DSP stating that *"[y]ou are currently due Disability Allowance arrears of €7,266.40 … for the period of 19 May 2010 to 17 April 2012."* The letter also referred to an outstanding Jobseekers Allowance (JA) overpayment of €3,169.80 which was being recovered by weekly deductions from the Appellant's social welfare payment. The overpayment occurred during 2010 when the Appellant's DA claim was under appeal.

The letter proposed that the Department would recover the outstanding overpayment by withholding the amount from the arrears of Disability Allowance due.

The Appellant responded to this letter on the 9th of July 2012, requesting the arrears to be paid into his bank account and the overpayment to continue to be repaid by €30 deductions from his weekly allowance.

On the 16th March 2013, the Appellant in his letter to the DSP regarding the suspension of his DA claim (discussed above), sought clarity on when he would be paid the arrears owed to him as referred to in the DSP's letter of the 4th July 2012.

In the letters sent by CLM on the 24th April 2013, 18th July 2013 and 9th August 2013 on behalf of the Appellant, in relation to the suspension of his DA payment, enquires were also made regarding the arrears payment owed to the Appellant.

On the 27th August 2013, a letter from DSP was sent to the Appellant stating that the original letter of the 4th July 2012 had issued in error. DSP advised that no arrears were due to the Appellant as he was receiving a Jobseekers Allowance payment during the relevant period. Between 19th May 2010 and the 17th April 2012 the Appellant was in receipt of JA and SWA at different times. In the calculation of arrears due, the DSP did not correctly offset the amount of JA the Appellant received against the amount of DA he would have been entitled to for the same period.

On the 16th September 2013, CLM contacted the DSP seeking the exact amount of JA and SWA paid to the Appellant during the period 19th May 2010 -17th April 2012. The figures confirmed that the letter of the 4th July had issued in error and that no arrears were owed to the Appellant. The Appellant did not dispute the overpayment of JA nor the recovery of €30 per week.

Date of Final Decision: 27th August 2013

Observations:

While an appeal is pending adjudication by an AO, an Appellant may be eligible to receive another social welfare payment if they have no means, usually SWA. In the case of an Appellant who is refused DA there is no conflict if the Appellant claims a jobseekers payment while the DA appeal is pending. This is the case because it is the Department, not the Appellant, who is asserting that the claimant is capable of work.

In the event that an Appeal is allowed the DSP when implementing the Appeals Officer's decision must offset any payment the claimant actually received against the amount of arrears due for the same period. If, as in this case, the DSP do not check their systems to establish whether or not a person received another payment during the relevant period, there is a grave risk that an amount of arrears could be paid out in error. In view of the potential for administrative error, it is important that an Appellant understand what, if any, arrears might be due to them in the event that their appeal is allowed.

In circumstances where a person is overpaid, the DSP must in the first instance issue a revised decision by a DO setting out the cause of the overpayment; that is, the reason's why a person was not entitled to a payment, or entitled to a lesser rate of payment during a particular period. This decision may be appealed to the Social Welfare Appeals Office. It may be the case the facts of the overpayment are not in dispute, but on appeal an AO can consider the circumstances that gave rise to the overpayment and any relevant mitigation. The AO may allow the appeal and decide that the revised decision of the DO should not have been made with retrospective effect thereby cancelling the overpayment.

In the event that an appeal is disallowed, or a person decides not to appeal, an Authorised Officer of the DSP will seek to recover the debt. The Authorised Officer must recover the monies in a manner that is consistent with their statutory powers and the regulatory provisions governing the recovery of overpayments. Refer to Part 11 of the Social Welfare Consolidation Act 2005 [as amended] and Part 9 of the Social Welfare [Consolidated Claims Payment and Control] Regulations 2007 [as amended], S.I. 142 of 2007. The DSP have the authority to recover up to 15% of a person's personal rate of payment [not dependants] without the person's consent. However, before making a decision to recover this amount, the DSP must have due regard to a person's capacity to pay and any other relevant facts. It is also important to state that there is no minimum amount that must be recovered.

Any decision made by an authorised officer with respect to the recovery of a debt cannot be appealed to the Social Welfare Appeals Office. For this reason, when a Deciding Officer issues a revised decision, the consequence of which is the overpayment, a person should consider any relevant factors with a view to submitting potential grounds of appeal to the AO.

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