Casebase Number: G0045

Title of Payment: Guardians Payment (Contributory)

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

Date of Final Decision: 02/05/2012

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Date of Final Decision: 2nd May, 2012

Keywords: Guardians Payment (Contributory) entitlement—Social Welfare Inspector's report—whether child a qualified child—whether child an orphan—appeal allowed

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

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Case Summary:

The Appellant applied for Guardians Payment (Contributory) in respect of her grandson after his mother left the State. This was refused on the basis that the mother's absence was only temporary and therefore the child could not be considered an "orphan" for the purpose of the legislation. An Appeals Officer disallowed the appeal by way of summary decision. NCL&MC sought a review of the decision under Section 318 of the Social Welfare Consolidation Act 2005.

The Chief Appeals Officer decided to re-open the case by way of an oral hearing. The decision of the Appeals Officer was overturned by another Appeals Officer, the appeal was allowed.

Summary of Benefit(s) received:
Guardian's Payment (Contributory) is an insurance based payment which is made in respect of an orphan or orphans.
A child is regarded as an orphan if:

- They are under 18 (or 22 if in full-time education) and
- Both parents are dead, or
- One parent is either dead or unknown or has abandoned and failed to provide for the child, and
- The other parent is unknown or has abandoned and failed to provide for the child.

The main provisions relating to Guardian's Payment (Contributory) are contained in Chapter 19 (Part 2) of the Social Welfare (Consolidation) Act 2005 as amended. It is not necessary to be a legally appointed guardian. A guardian's payment may be paid to you if the orphan lives with you and you are responsible for his or her care. The payment must benefit the orphan. Guardian's Payment (Contributory) is an insurance based payment which is made in respect of an orphan or orphans. Note there is also a Guardian's Payment (Non-Contributory).

Date of Appeals Officer's decision: Summary decision to disallow appeal 8th September 2011
Date of oral hearing: 4th April 2012
Date of revised decision by an Appeals Officer: Appeal Allowed 2nd May 2012

Background:
On the 16th September 2010 the Appellant became the sole carer for her grandson when his mother (the appellant's daughter) left the State. Her address was unknown, contact was sporadic and no indication was given that she would return. However she did return on 14th January 2011. The Appellant did not seek Guardians Payment for the time her daughter was resident with her on return to the state, but only for the period her daughter had left the state i.e. September 2010 - January 2011. Prior to her daughter's return, the Appellant applied for Guardians Payment on the 21st September 2010 in respect of her grandson.
A Social Welfare Inspector (SWI) was sent to the Appellant's home on the 26th January 2011. The SWI in her report stated that she was satisfied that the Appellant was responsible for the welfare of her grandson while the child's mother was absent from the State. The application for Guardian's Payment was refused in a decision dated 14 March 2011. The Deciding Officer found:

"Having carefully considered all of the available evidence in this case, I am satisfied that the care arrangement for [the child] from end of September 2010 to January 2011 was as a result of a private, mutual agreement between his mother and yourself." Therefore the child was not considered an "orphan" for the purposes of the scheme.

This decision was appealed. In a decision dated the 26th September 2011 the appeal was disallowed. While the Appeals Officer (AO) accepted that the Appellant did have sole care and charge of the child, and was the financial provider for her grandson for those four months, the mother's absence was considered temporary in nature. The AO came to this conclusion on the basis that the mother and child had been residing with the Appellant before the mother left for Spain and continued upon her return. As the absence was temporary it could not be considered to constitute "abandonment" and the child could not therefore be regarded as an "orphan" for the purposes of the legislation.

On the 21st February 2012, NCL&MC sought a review of the Appeals Officer's decision under section 318 of the Social Welfare Consolidation Act 2005 which allows for the Chief Appeals Officer to revise a decision of an Appeals Officer on the basis that an error has occurred as to the facts of the case or an error as to the law.

The Chief Appeals Officer decided to re-open the case by way of an oral hearing. The oral hearing took place on the 4th April 2012.

At Hearing:
The AO outlined the background of the case as detailed in the Deciding Officers report of 29th June 2011 and as detailed in correspondence from NCL&MC and a submission from same, dated 21st February 2012. NCL&MC stated that the DO failed to properly consider the investigation of the SWI and her recommendations and also the supporting evidence that had been provided by the appellant.

NCL&MC stated that AO breached the Appellant's right to fair procedures and natural justice under both the Constitution and Article 6 of the European Convention on Human Rights. NCL&MC argued that the Department and the Appeals Office had decided on this issue after the return of the appellant's daughter and had therefore taken the view that the absence of the mother was only of a temporary nature**.** Had the claim been processed at the date of the application in October, the decision would or could have been very different. The delay in processing the claim meant that the Department having sent a SWI to verify the details was

looking at it from a very different perspective to which existed at the time of the application. NCL&MC also noted the SWI had taken the view that she considered the appellant was entitled to the payment for the duration of the absence from the State of the child's mother and had further suggested to the appellant that she contact Guardians Section to enquire if the payment could be reinstated for the period of the rehabilitation process in respect of her daughter.
NCL&MC noted that the Department had not been able to produce any evidence of an arrangement between the Appellant and her daughter regarding the care of her grandson as suggested by them in their decision letter.
The Appellant outlined her daughter (the mothers) situation; she noted that her daughter had gone missing previously but for two or three days. The Appellant said that she looked after her grandson on these occasions. On the day her daughter went missing, the Appellant assumed that this was another short disappearance. After a phone call from her daughter it was established that she had left the State. The Appellant said that she genuinely thought that her daughter would not return home. The Appellant said that she did not contact the Health Board of the situation or make any application to seek custody of her grandson. She stated that she was afraid that she and her spouse would not be able to keep their grandson due to their age.
The Appellant stated that she was receiving Child benefit for her grandson and also that her grandson was a child dependant on her spouse's pension.

Decision: In a letter dated the 1st June 2012, the appeal was allowed and the Appellant was deemed entitled to Guardian Payment (Contributory) from the 16th September 2012 – 13th January 2011.

Relevant Evidence put forth by Applicant:
It was submitted that while with the benefit of hindsight the absence of the mother could be seen as temporary, from the point of view of the Appellant, at the time of the absence, the Appellant believed that the mother would not return.
It was submitted that the actions of the Appellant's daughter from September 2010 until 14 January 2011 amounted to abandonment and a failure to provide for her son. It was the Appellant's belief that at that time her daughter had abandoned her child. It was submitted that there was no evidence to suggest that there was any sort of agreement in respect of the care of the child. Furthermore it was submitted that the Deciding Officer did not take into account other evidence namely a report from the Social Welfare Inspector dated 28th January 2011.

Appeals Officer's Reasoning and Conclusions:
The Appeal's Officer stated that the decision by the Deciding Officer and the decision in relation to the summary appeal by the Appeals Officer were flawed. It was stated that the decision of the Deciding Officer related to a time after the date of the application and with the benefit of hindsight. This applied to the summary appeal also. If the investigation had been carried out prior to the return of the Appellant's daughter, the AO believed a different outcome would have occurred.
The contention that an agreement had been entered into between the appellant her daughter was described as pure conjecture.
The AO stated that there was justifiable cause for the Appellant to believe that her daughter would not return home to care for her son based on the transient nature of her daughter's behaviour.

"It was perfectly reasonable for her to assume after a few weeks that something more serious was wrong and that she was quite literally left holding the baby."
The AO noted that this had already been recognised by the Department in the paying of Child Benefit and in approving the CD to the Appellant's spouse on his pension.
The AO stated that the situation of the appellant did meet the legal definition of abandonment. Furthermore it was noted that there is nothing in the Social Welfare legislation that suggests any time-frame upon which to rely in relation to any specific case of abandonment of a minor and the duration that must pass before abandonment may be deemed to have occurred. In the absence of a clear definition of the specific time-frame each case must be considered on its own merits, in this case based on the facts and evidence on file and presented at oral hearing it was accepted that the Appellant satisfied the conditions of the scheme.

Our observations:
In this case, both the Deciding Officer and the Appeal's Officer made a decision based on events that occurred much later than the original application. Both the DO and AO, with the benefit of hindsight, determined that the mother's absence had only been temporary. For the Appellant, who was charged with caring for her grandson during her daughter's absence, this was very uncertain. It is clear that the evidence presented by the Appellant at oral hearing contributed to the successful outcome. The AO noted that
"The Appellant was a pleasant and articulate lady who presented her case in a calm and dignified way and I have no reason to doubt what she told me."

For more information, useful links are;

- **Citizens Information (Guardians Payment):**
  http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/death_related_benefits/guardians_payments.html

- **Department of Social Protection (Guardians Payment Contributory):**
  http://www.welfare.ie/en/Pages/Guardians-Payment-Contributory.aspx

- **Social Welfare Consolidation Act (2005)**
  http://www.irishstatutebook.ie/pdf/2005/en.act.2005.0026.pdf

For ***more information***, contact us at:

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