 [2012] AATA 481

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2011/4992 |
| Re | Joshua McColl-Schembri |
|  | APPLICANT |
| And | Secretary, Department of Education, Employment and Workplace Relations |
|  | RESPONDENT |

# Decision

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| Tribunal | **Regina Perton, Member** |
| Date | **26 July 2012** |
| Place | **Melbourne** |

The Tribunal affirms the decision under review.

.........[sgd]...............................................................

**Regina Perton, Member**

Catchwords

SOCIAL SECURITY – youth disability supplement – review sought more than 13 weeks after reviewable decision – how far the allowance can be backdated – reason for failure to apply within 13 weeks irrelevant

Legislation

Social Security Act 1991 sections 16B, 556, 1067G-D1, Schedule 1

Social Security (Administration) Act 1999 sections 109,126, 180, 237

# REASONS FOR DECISION

**Regina Perton, Member**

 **26 July 2012**

1. Joshua McColl-Schembri is an eighteen-year old who receives the youth disability supplement (YDS) and youth allowance. The YDS provides additional financial support for people under 21 years old with a physical, intellectual or psychiatric disability who are on specified social security benefits. Mr McColl-Schembri is receiving the payment because his disability prevents him from working for 30 or more hours a week.
2. Mr McColl-Schembri lodged a claim for disability support pension (DSP) with Centrelink on 29 September 2009. Centrelink administers the provision of benefits for the respondent. A medical report dated 24 September 2009 indicated that Mr McColl-Schembri suffers from autism with the date of onset and diagnosis in 1999. The clinical features included attention deficit, lack of motivation, social phobia and anger and mood changes. On 13 October 2009 a Centrelink job capacity assessor assessed Mr McColl-Schembri and indicated in a job capacity assessment (JCA) report that Mr McColl-Schembri suffered from autism which had a medical impairment rating of 10 points under Table 8 of the Impairment Tables contained in Schedule 1 of the *Social Security Act 1991* (the Act). The JCA report also indicated that Mr McColl-Schembri did not require specialist disability employment interventions and had a current baseline capacity for work in excess of 30 hours per week.
3. On 19 October 2009 Centrelink sent Mr McColl-Schembri a notice stating that he was to receive youth allowance at the *at home rate* (a rate for a person living at home). On 16 November 2009 Centrelink advised Mr McColl-Schembri that his claim for DSP had been rejected as he did not receive sufficient points under the prescribed test for the impact of the disability on his day–to–day activities.
4. Between December 2009 and July 2011 Centrelink sent several notices to Mr McColl-Schembri advising him of the amount of youth allowance he was being paid. In each instance, a copy of the notice was sent to his mother, Ms Rita Schembri, who is his *correspondence nominee*.
5. On 1 August 2011 a different Centrelink job capacity assessor completed a fresh JCA report determining that Mr McColl-Schembri suffered from autism, had a current baseline capacity for work of 8 to 14 hours per week and had a future capacity for work with intervention of 15 to 22 hours per week. On 2 August 2011 Mr McColl-Schembri commenced a supported work program with an employment service provider catering for those with a disability. He also started receiving YDS payments of $110 a fortnight in addition to the youth allowance.
6. On 5 August 2011 Ms Schembri contacted Centrelink stating that she wished to review the starting date of her son’s YDS payments. She believed the starting date should have been in October 2009, when Mr McColl-Schembri had the first JCA. She pointed out that her son's condition had not changed and that he should receive back payment of the YDS.
7. On 8 August 2011 a Centrelink officer determined that the YDS payment should not be backdated to October 2009. On 16 August 2011 a Centrelink authorised review officer (ARO) affirmed the Centrelink officer’s decision. On 1 September 2011 Mr McColl-Schembri lodged an application for review with the Social Security Appeals Tribunal (SSAT). The SSAT confirmed the decision of the ARO on 5 October 2011.
8. On 23 November 2011 Mr McColl-Schembri lodged an application for review with this Tribunal to review the SSAT’s decision in relation to the starting date of the payment of the YDS. On 18 January 2012 Centrelink made a fresh decision backdating Mr McColl-Schembri's YDS to 26 April 2011.
9. Ms Schembri, representing her son, maintains that his YDS payments should be backdated to October 2009 to coincide with the commencement of his payments of youth allowance. Centrelink states that it is not legally able to do so because of the delay in seeking review of his payments.

# Relevant legislation

1. Section 556 of the Act sets out that a person’s rate of youth allowance is worked out in the *Youth Allowance Rate Calculator* in s 1067G of the Act. Section 1067G-D1 allows for an additional payment for a youth allowance recipient in certain circumstances:

1067G-D1 If a person:

(a) has a partial capacity to work; and

(b) has not turned 21:

an amount by way of youth disability supplement is to be added to the person’s rate. The rate of youth disability supplement is $92.40 per fortnight.

1. Section 16B of the Act sets out the meaning of the term *partial capacity to work*:

(1) A person has a **partial capacity to work** if:

(a) the person has a physical, intellectual or psychiatric impairment; and

(b) the Secretary is satisfied that:

 (i) the impairment of itself prevents the person from doing 30 hours per week of work independently of a program of support within the next 2 years; and

 (ii) no training activity is likely (because of the impairment) to enable the person to do 30 hours per week of work independently of a program of support within the next 2 years.

(2) A person is treated as doing work **independently of a program of support** if the Secretary is satisfied that to do the work the person

(a) is unlikely to need a program of support that:

(i) is designed to assist the person to prepare for, find or maintain work; and

(ii) is funded (wholly or partly) by the Commonwealth or is of a type that the Secretary considers is similar to a program of support that is funded (wholly or partly) by the Commonwealth; or

(b) is likely to need such a program of support provided occasionally; or

(c) is likely to need such a program of support that is not ongoing.

 (3) In deciding whether he or she is satisfied as mentioned in paragraph (1)(b) or subsection (2), the Secretary must comply with the guidelines (if any) determined and in force under subsection (4).

 (4) The Minister may, by legislative instrument, determine guidelines to be complied with by the Secretary in deciding whether he or she is satisfied as mentioned in paragraph (1)(b).

 (5) In this section:

**30 hours per week** of work means work:

 (a) that is for at least 30 hours per week on wages that are at or above the relevant minimum wage; and

(b) that exists in Australia, even if not within the person's locally accessible labour market.

**"training activity"** means one or more of the following activities, whether or not the activity is designed specifically for people with physical, intellectual or psychiatric impairments:

 (a) education;

 (b) pre-vocational training;

 (c) vocational training;

 (d) vocational rehabilitation;

 (e) work-related training (including on-the-job training).

1. Section 109 of the *Social Security Administration Act 1999* (the Administration Act) states:

**Date of effect of favourable determination resulting from review**

(1) If:

(a) a decision (the original decision ) is made in relation to a person's social security payment; and

(b) a notice is given to the person informing the person of the original decision; and

 (c) within 13 weeks after the notice is given, the person applies to the Secretary, under section 129, for review of the original decision; and

 (d) the favourable determination is made as a result of the application for review;

the favourable determination takes effect on the day on which the determination embodying the original decision took effect.

(2) If:

 (a) a decision (the original decision ) is made in relation to a person's social security payment; and

(b) a notice is given to the person informing the person of the original decision; and

(c) more than 13 weeks after the notice is given, the person applies to the Secretary, under section 129, for review of the original decision; and

 (d) the favourable determination is made as a result of the application for review;

the favourable determination takes effect on the day on which the application for review was made.

…

1. Section 126 of the Administration Act allows for a fresh decision to be made by Centrelink about a matter that is already under consideration by the SSAT or this Tribunal:

(1) The Secretary may review:

(a) subject to subsection (2), a decision of an officer under the social security law

…

if the Secretary is satisfied that there is sufficient reason to review the decision.

(2) The Secretary may review a decision:

 (a) whether or not any person has applied for review of the decision;

(b) even though an application has been made to the Social Security Appeals Tribunal or the Administrative Appeals Tribunal for review of the decision.

 (3) The Secretary may:

(a) affirm a decision; or

(b) vary a decision; or

(c) set a decision aside and substitute a new decision.

…

1. Section 180 of the Administration Act states that where a decision is varied or set aside after an application has been made to this Tribunal, the Tribunal is required to review the fresh decision.

 (1) If an officer varies a decision after an application has been made to the AAT for review of that decision but before the determination of the application, the application is to be treated as if:

(a) the decision as varied had been affirmed by the SSAT; and

(b) the application were an application for review of the decision as varied.

(2) If an officer sets a decision aside and substitutes a new decision after an application has been made to the AAT for review of the original decision but before the determination of the application, the application is to be treated as if:

(a) the SSAT had set aside the original decision and substituted the new decision; and

(b) the application were an application for review of the new decision.

1. Section 237 of the Administration Act deals with receipt of correspondence from Centrelink:

(1) If notice of a decision under the social security law is:

(a) delivered to a person personally; or

(b) left at the address of the place of residence or business of the person last known to the Secretary; or

(c) sent by prepaid post to the postal address of the person last known to the Secretary;

notice of the decision is taken, for the purposes of the social security law, to have been given to the person.

(2) Notice of a decision under the social security law may be given to a person by properly addressing, prepaying and posting the document as a letter.

(3) If notice of a decision is given in accordance with subsection (2), notice of the decision is taken to have been given to the person at the time at which the notice would be delivered in the ordinary course of the post unless the contrary is proved.

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# DOES mr mccoll-schembri qualify for further backpayment of his YDS PAYMENT?

1. After Mr McColl-Schembri made his application for DSP, a job-capacity assessor assessed him as not reaching the level of disability that would have led to the payment of DSP or YDS. Centrelink sent him (and his mother) a letter on 19 October 2009 informing him that he was eligible for youth allowance. At that time Mr McColl-Schembri was still a secondary school student. In his application form he indicated that he expected to remain at school until December 2012.
2. In a letter dated 19 October 2009 Centrelink advised Mr McColl-Schembri that he was to be paid youth allowance at the *at home rate*. On 26 November 2009 Centrelink wrote to him stating that his claim for DSP had been rejected because he did not receive a medical impairment rating of 20 points or more. Both letters contained the following text:

… If you do not agree with the decision, please contact us and we will explain it. We will reconsider your case and change the decision if appropriate. If you still do not agree with the decision, you can ask for an Authorised Review Officer to look at it… It is important to ask for the decision to be reviewed as soon as possible. This is because if you do not ask for the decision to be reviewed within 13 weeks of being told about it, any change to the decision, or any back payment, might only be able to take effect from the date you ask…

1. On 7 December 2009 Centrelink sent Mr McColl-Schembri a letter which detailed the amount of youth allowance he had received on a fortnightly basis since becoming eligible. On 1 March 2010 Centrelink sent another letter detailing the amount of youth allowance he had received on a fortnightly basis from 8 December 2009 to 1 March 2010. On 24 May 2010, 16 August 2010, 8 November 2010, 28 February 2011 and 18 July 2011, similar letters were sent detailing Mr McColl-Schembri’s payments. Copies of all letters were sent to Ms Schembri. Each letter contained the text cited above about the timing of any back payment if review was not sought within 13 weeks of the date of the letter.
2. On 1 August 2011 a different job-capacity assessor prepared another JCA report. Work Solutions Gippsland Pty Ltd referred Mr McColl-Schembri for the assessment. The assessor noted that Mr McColl-Schembri was undertaking a traineeship in *gardening/horticulture*. He was described as *a job seeker with a permanent disability and an assessed need for ongoing support in the workplace.* He was described as needing *specialist disability employment interventions.* Mr McColl-Schembri commenced a support program with the referring disability employment service provider on 2 August 2011.
3. On 2 August 2011 Centrelink sent a letter to Mr McColl-Schembri and his mother informing them that he would be paid a YDS of $110.00 per fortnight in addition to his youth allowance as from that date. On 5 August 2011 Ms Schembri contacted Centrelink to seek review of the date of commencement of Mr McColl-Schembri’s YDS payment. She believed that the YDS should have been backdated to October 2009. Ms Schembri stated that the first assessor in October 2009 should have taken into account that her son was suffering from a lifelong disability that had been diagnosed when he was approximately six years old.
4. At the hearing, Ms Schembri told the Tribunal that her son had been born 13 weeks premature. He proved to be poor at communicating and slow to learn the usual habits children learn quickly. He was eventually diagnosed at the age of six as autistic at a moderate to high level. He continues to have problems with communication. She said that when he had the first JCA assessment, the person undertaking it did not want her to be involved. She regrets that she did not insist at the time that she should be able to participate. Ms Schembri described problems her son experienced at school with bullying and issues in the workplace. She believes that her son is a victim of discrimination because of his condition. She also believes that she may have missed out on receiving some of Centrelink’s correspondence sent to her son. Ms Schembri also provided examples of other difficulties she faced in dealing with Centrelink.
5. On 8 August 2011 Centrelink determined that the payment should not be backdated:

…

I made this decision because the assessment in December 2009 confirmed you suffer from a permanent condition that impacts your ability to function. In assessing your medical circumstances it was reported that with assistance a minimal impact in work capability was probable. You are attending mainstream full-time secondary education with average results. Teachers aids were provided for science and english only. Due to the work capacity you were not eligible to receive the supplement.

If you disagreed with the initial medical assessment in December 2009 you would be required to appeal the decision within 13 weeks of assessment to have results change from the date previously assessed. An appeal outside of this timeframe can only be considered from the date you lodged an appeal. As you were already paid the supplement at this time any change of this decision would not change your payments.

1. On 16 August 2011 a Centrelink ARO affirmed the decision for similar reasons. On 5 October 2011 the SSAT determined that it could not backdate the YDS payment because Mr McColl-Schembri did not apply for review until August 2011, more than 13 weeks since the decisions made in October 2009.
2. The application to this Tribunal was made on 23 November 2011. On 18 January 2012 Centrelink advised Mr McColl-Schembri that a fresh decision had been made to backdate his YDS payment to *26 April 2012* [sic]. The Tribunal assumes that the date in the letter was a typographical error that should have been 26 April 2011 as Mr McColl-Schembri had already been in receipt of the YDS since August 2011. The letter notifying Mr McColl-Schembri of the backdating to that particular date did not explain why that date was chosen. At the hearing, the respondent’s advocate stated that the date was chosen because the application for review on 5 August 2011 was within 13 weeks of a letter sent to Mr McColl-Schembri on 18 July 2011. The letter dated 18 July 2011 referred to youth allowance payments made since 26 April 2012.
3. As a result of Centrelink’s decision, pursuant to section 126 of the Administration Act, changing the earlier decision after the lodgement of the application for review with this Tribunal, the reviewable decision for the Tribunal becomes whether the YDS can be paid from a date earlier than 26 April 2011.
4. The Tribunal is unable to ignore section 109 of the Administration Act. Regardless of the reason for delay in seeking review more than 13 weeks after notification of a Centrelink decision, the Tribunal cannot order back payment to a date earlier than the date on which the person sought Centrelink review. In this matter, review of the decision not to backdate the YDS payment to October 2009 was not sought until August 2011. Section 109 of the Administration Act does not differentiate between a situation where review was not sought in time because the applicant was unaware of his/her entitlement to a particular payment or believes that he/she did not receive the relevant correspondence from Centrelink or due to other reasons such as procrastination or forgetfulness.
5. The Tribunal has no option but to decide that Mr McColl-Schembri is unable to receive any back payment of youth allowance beyond 26 April 2011.

# DEcision

1. The Tribunal affirms the decision under review.

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| I certify that the preceding 28 (twenty -eight) paragraphs are a true copy of the reasons for the decision herein of Regina Perton, Member.  |

......[sgd]..................................................................

Associate

Dated 26 July 2012

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| Date of hearing | **25 May 2012** |
| Advocate for the Applicant | **Ms Schembri, the applicant's mother** |
| Advocate for the Respondent | **Mr M Hester** |
| Solicitors for the Respondent | **Department of Human Services Legal Division** |