Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

DIVISION:	**Social Services & Child Support Division**
REVIEW NUMBER:	**2016/S099196**
APPLICANT:	**Mrs S**
OTHER PARTIES:	**Secretary**
TRIBUNAL:	**Member F Staden**
DECISION DATE:	**15 February 2017**

DECISION:

The decision under review is set aside and the matter is sent back to the Chief Executive Centrelink for reconsideration in accordance with the direction that Mrs S has provided evidence which satisfies the requirements for a medical contraindication exemption under paragraph 6(3)(a) of the *A New Tax System (Family Assistance) Act 1999*.

Member F Staden

REASONS FOR DECISION

BACKGROUND

1. This review is about whether Mrs S s child care benefit was properly cancelled on the basis that her son, L did not meet the immunisation requirements associated with that payment.

2. On 16 February 2016 and 22 March 2016, the Department of Human Services – Centrelink (Centrelink) wrote to Mrs S informing her that immunisation requirements for child care fee assistance (child care benefit and/or child care rebate) now applied to all children aged under 20. The letters further informed Mrs S that, at the date of the letters, the Australian Childhood Immunisation Register (ACIR) showed that L did not meet the immunisation requirements. The letters included the following, "If there is a medical reason why your child has not been fully immunised, you will need to talk to your general practitioner".

3. On 29 March 2016, Mrs S submitted a 14 March 2016 letter from Dr D which read in part:

> I have seen L and his parents, and at my rooms today, Monday, March 14, 2016. particularly has suffered adverse vaccine reactions in the past, and now has autoimmune endocrine disease, as well as allergic sensitivities. L s father has allergic sensitivities.
>
> In my view, the risks of vaccination may outweigh the benefits for L at present. He has made it to nearly 2 years of age without vaccination, meaning he is already through the high risk period for vaccine-preventable diseases.
>
> I am assessing the genetic and other susceptibilities of L s parents and would suggest that he not be vaccinated until these results are back and his real risk can be more accurately determined. I will advise the family further when these results are at hand.

4. On 6 April 2016, Centrelink again wrote to Mrs S noting that the ACIR still showed L as not meeting the immunisation requirements and requesting that she make sure L was up to date with his immunisations by 30 April 2016.

5. On 2 May 2016, Centrelink wrote to Mrs S telling her that that her child care benefit for L was cancelled on the basis that he did not meet the immunisation requirements.

6. Following a request for review, Mrs S submitted additional information to Centrelink. This included a 24 June 2016 letter from Dr D , which read:

> I have seen and examined L S , and have obtained an extensive family history from his parents. Both parents carry a genotype associated with increased inflammatory processes and L will have inherited this same tendency towards poorly regulated inflammation.

> In my opinion, L is at increased risk of adverse reactions from vaccination compared to the general population, and this risk is significant based on the history I have obtained.
>
> It is my clinical opinion that L should not be vaccinated according to the vaccination schedule, as vaccines are likely to cause exacerbations of inflammation because of the vaccine adjuvants. The risk exceeds the potential benefits in L s case.

7. On 30 June 2016, an authorised review officer decided that the decision to cancel Mrs S 's child care benefit was correct. The officer noted that "from 1 January 2016, the only acceptable evidence for a medical contraindication exemption is an IMMU-11 medical exemption form signed by a general practitioner".

8. On 18 August 2016, Mrs S applied to the Social Services and Child Support Division of the Administrative Appeals Tribunal (the tribunal) for a review of the authorised review officer's decision.

9. A hearing was conducted on 16 November 2016. Mrs S gave sworn evidence in person. Her representative, Ms spoke to Mrs S s submission. The tribunal had before it documents provided by Centrelink (140 pages), a copy of which was given to Mrs S prior to the hearing. At hearing, Ms provided a one page summary (A1) of Mrs S s submission, a copy of which was given to Centrelink.

10. The tribunal deferred making its decision to allow time for Mrs S to provide additional material which she did on 18 November 2016 (A2 to A6). This material included a signed revised version of Dr D s 14 March 2016 letter. It read:

> I have seen and examined L S , and have obtained an extensive family history from his parents. Both parents carry a genotype associated with increased inflammatory processes, and L will have inherited this same tendency towards poorly regulated inflammation.
>
> In my opinion, L is therefore at increased risk of adverse reactions following vaccination compared to the general population, and this risk is significant based on the history I have obtained from the family.
>
> It is my clinical opinion that L should not be vaccinated according to the vaccination schedule, as vaccines are likely to cause excessive inflammation because of the vaccine adjuvants. The risk exceeds the potential benefits in L s case. I certify that the immunisation of L is contraindicated based on the specifications and advice set out in the Australian Immunisation Handbook 10th Edition (updated 1 August 2016, currently applicable)[.]

11. The tribunal requested a submission from Centrelink in relation to this matter (C1 to C7). Mrs S then provided a response to that submission (A6 to A9). Each party was given a copy of material provided by the other. In response to subsequent requests from the tribunal, Mrs S provided additional material (A10 to A22), a copy of which was given to Centrelink.

12. Relevant aspects of the evidence before the tribunal are referred to in the consideration below.

ISSUES

13. The statutory provisions relevant to this review are in the *A New Tax System (Family Assistance) Act 1999* (the Act) and the *Health Insurance Act 1973* (the Health Insurance Act).

14. The issues which arise in this case are:

    - Is a completed Immunisation medical exemption form the only acceptable evidence for a medical contraindication exemption; and if not

    - Has Mrs S provided evidence which satisfies the requirements for a medical contraindication exemption?

CONSIDERATION

Issue 1: Is a completed Immunisation medical exemption form the only acceptable evidence for a medical contraindication exemption?

15. The *Social Services Legislation Amendment (No Jab, No Pay) Act 2015* (No. 158, 2015) (the Amendment Act) changed the immunisation requirements which had to be met for an individual to be conditionally eligible for child care benefit by fee reduction for care provided by an approved child care service. Subparagraph 42(1)(c)(i) of the amended Act explains that the child receiving the care must meet the immunisation requirements in section 6 of that Act.

16. Relevantly here, under paragraph 6(3)(a) of the Act, a child meets the immunisation requirements "if a general practitioner has certified in writing that the immunisation of the child would be medically contraindicated under the specifications set out in the Australian Immunisation Handbook".

17. Prior to 1 January 2016, the certification of a medical contraindication could be provided by a "recognised immunisation provider". The Explanatory Memorandum to the Amendment Act explained that the change to general practitioner, from recognised immunisation provider, followed consultation with medical experts. It was observed that the assessment of medical contraindication can be complex and that it was therefore appropriate that the assessment be made by a general practitioner. It was noted that if a diagnosis of medical contraindication is made by a medical specialist, then "it is expected that the specialist would refer the matter back to the person's general practitioner who could then make the relevant certification for the purpose of new paragraph 6(3)(a)".

Immunisation medical exemption form

18. Centrelink accepts that the legislation does not specify the completion of a particular form as the only acceptable written evidence of a medical contraindication. However, Centrelink argued in its submission to the tribunal that "it is open to the Department to use appropriate administrative arrangements to collect relevant information from General Practitioners".

19. From 1 January 2016, the Immunisation Exemption Medical Contraindication form was changed to the Immunisation medical exemption form. Both forms reference the Australian Immunisation Handbook (the Handbook).

20. The current (10^{h} Edition as amended) version of the Handbook sets out clinical practice guidelines in relation to immunisation as approved by the Chief Executive Officer of the National Health and Medical Research Council (NHMRC). The NHMRC states in the Publication Approval section of the Handbook that the guidelines "are based on the systematic identification and synthesis of the best available scientific evidence and make clear recommendations for health professionals practising in an Australian health care setting".

21. The Disclaimer section of the Handbook states in part:

> This Handbook is a general guide to appropriate practice subject to clinician's judgement in each individual case. It is designed to provide information to assist decision making using the best information available at date of National Health and Medical Research Council approval (…). The Australian Government Department of Health does not accept any liability for any injury, loss or damage incurred by use of or reliance on the information.

22. The Immunisation medical exemption form, in addition to requiring general practitioner certification, makes more specific reference to the Handbook than the previous form. The most recent version of the Immunisation medical exemption form lists examples of possible false contraindications including "Family history of any adverse events following immunisation is not a valid vaccine exemption".

Policy requirement

23. The tribunal observed that the need for a completed Immunisation medical exemption form is not reflected in all relevant statements of Centrelink policy:

    - The Family Assistance Guide at 2.1.3.20 CCB Immunisation Requirements (last reviewed 7 November 2016) states:

      > A child meets the immunisation requirements for CCB if: …
      >
      > - a general practitioner has certified in writing that the immunisation of the child would be medically contraindicated under the specifications set out in the Australian Immunisation Handbook, …

    - The Family Assistance Guide at 2.1.3.40 Immunisation – Approved Exemptions (FTB, CCB) (last reviewed 8 February 2016) explains the approved exemptions for an

individual to meet the immunisation requirements for both family tax benefit Part A and child care benefit:

> Medical contraindication occurs when a general practitioner determines that it is not in the best interests of the child's health to have the child immunised.
>
> For an FTB child to meet the immunisation requirements by medical contraindication, a general practitioner must certify in writing that immunising the child would be medically contraindicated under the specifications set out in the Australian Immunisation Handbook.
>
> ***Example:*** *A child who suffers from anaphylaxis following a previous dose of the relevant vaccine. If so, a general practitioner may certify that immunisation is medically contraindicated on the approved form.*

This section of the Family Assistance Guide goes on to summarise the evidence required in relation to particular grounds for exemption. In relation to medical contraindication, the required evidence is listed as "An IMMU-11 Medical Exemption form signed by a general practitioner".

24. Thus the Family Assistance Guide does not appear to be consistent about the required evidence for a medical contraindication, in one place restating the requirement as set out in the legislation and in another requiring a completed Immunisation medical exemption form.

25. The authorised review officer noted this contradiction and sought advice from the Level 2 Policy Helpdesk about the requirement for an Immunisation medical exemption form. The response received read in part,

> The Australian Childhood Immunisation Register (ACIR) is responsible for assessment of a child's immunisation status. …
>
> Medical exemptions are recorded on the ACIR by the child's general practitioner. In this case the customer has provided us with further information for which we can direct to the ACIR for assessment (See OB [Operation Blueprint] ref below). It must be noted that the ACIR need to read the customer's accompanying information as there is notes about why the use of the IMMU11 form was not appropriate at this time. The ACIR team will assess the case accordingly. …
>
> Management of immunisation evidence 011 – 1017 0020 …
>
> A customer may lodge manual evidence where their child is not fully immunised for the following reasons: …
>
> Child has a vaccine exemption due to medical contraindication …
>
> Generally this evidence is transferred to the ACIR processing team to assess and process. …

> From 1 January 2016, notification of medical contraindications and natural immunity must be provided on the approved ACIR Immunisation Medical Exemption (IM011) form. This form can only be completed by general practitioners (GP).
>
> Other documentation including GP letters written on practice/GP letterhead and old versions of the form (IMMU11) will not be accepted as notification of a medical exemption. These are to be referred to the ACIR who will advise the customer that they will need to obtain an IM011. Exemptions due to natural immunity and medical contraindication are managed by the ACIR. Once a medical exemption has been assessed and recorded by the ACIR the child will meet the immunisation requirements.

26. The tribunal noted that even though Operation Blueprint states that anything other than an Immunisation medical exemption form is not acceptable evidence of a medical contraindication from 1 January 2016, the Helpdesk response previously refers to the review of alternative evidence by the ACIR (since 30 September 2016 the Australian Immunisation Register).

27. According to the principles established in *Drake and Minister for Immigration and Ethnic Affairs (No2)* (1979) 2 ALD 634, the tribunal is obliged to take account of ministerial policy unless it is inconsistent with legislation or would operate unjustly in a particular case. Subsequent cases have applied the same principle to departmental policy and guidelines. Operation Blueprint is an internal policy document. The Family Assistance Guide is a policy manual that assists Centrelink officers to apply family assistance law consistently.

28. Requiring certification by a general practitioner, rather than a recognised immunisation provider, is an acknowledgement of the medical complexity of the issues under consideration when finding immunisation is medically contraindicated for a particular child. The Handbook recognises the importance of a clinician's judgement in each individual case.

29. The tribunal recognises the administrative advantages of using the Immunisation medical exemption form. However, the tribunal found that making its use the only way in which a medical exemption can be notified constrains a GP's capacity to fully explain the detail of their reasons for finding such a medical contraindication and goes beyond the requirements of the legislation.

30. In the view of the tribunal, if a general practitioner certifies by letter that they have considered information in the Handbook and have found that immunisation is medically contraindicated for a particular child under the specifications in the Handbook, the requirement in paragraph 6(3)(a) of the Act is met.

Issue 2: Has Mrs S provided evidence which satisfies the requirements for a medical contraindication exemption?

31. Mrs S provided a revised 14 March 2016 letter from Dr D which certified that the immunisation of L was medically contraindicated under the specifications set out in the Handbook.

32. The tribunal has concluded above that it is not necessary for Dr D to complete an Immunisation medical exemption form in order to certify that immunisation is medically contraindicated for L The tribunal therefore finds that Dr D s letter meets the certification requirement of paragraph 6(3)(a) of the Act, subject to Dr D satisfying the definition of a general practitioner.

33. Section 3 of the Act states "general practitioner" has the same meaning as in the Health Insurance Act. Section 3 of the Health Insurance Act defines general practitioner as meaning:

    a. a medical practitioner in respect of whom a determination under section 3EA is in force; or

    b. a person registered under section 3F as a vocationally registered general practitioner; or

    c. a medical practitioner of a kind specified in the regulations.

34. The Family Assistance Guide at 1.1.G.12 explains that this in essence means:

    - a medical practitioner who the Chief Executive Medicare has determined is a recognised Fellow of the Royal Australian College of General Practitioners,
    - a person registered as a general practitioner under the Vocational Register of General Practitioners, or
    - a medical practitioner of a kind specified in the regulations of the Health Insurance Regulations 1975.

35. The relevant Health Insurance Regulations, sections 2A and 6DA, made under section 133 of the Health Insurance Act, relate to accreditation by the Australian College of Rural and Remote Medicine (ACRRM).

36. The tribunal noted that:

    - The Australian Health Practitioner Registration Authority (AHPRA) does not list Dr D as having a specialist general practice qualification;
    - Dr D s website states that he is not a vocationally registered general practitioner; and
    - There is no evidence to indicate that Dr D is participating in an ACRRM accreditation program.

37. The tribunal therefore found that Dr D does not meet the definition of a general practitioner in the Act. He cannot therefore certify that L s immunisation is medically contraindicated under the specifications set out in the Handbook for the purposes of paragraph 6(3)(a) of the Act.

38. The tribunal put this finding to Mrs S On 7 February 2017, she provided the tribunal with a copy of Dr D s revised 14 March 2016 letter on which Dr M had written “I endorse this finding”, signed his name and provided his address and qualification details.

39. AHPRA lists Dr M as having a specialist general practice qualification which the tribunal was satisfied met the requirements of the Act. The tribunal therefore accepted that Dr M met the definition of a general practitioner in the Act and so can certify that L s immunisation is medically contraindicated under the specifications set out in the Handbook. However, it was not clear from his endorsement of Dr D s letter whether Dr M himself examined L considered all relevant information, and formed a view that immunisation is medically contraindicated for L under the specifications set out in the Handbook.

40. The tribunal noted that more pertinent evidence would be for Dr M or another appropriately qualified general practitioner, to write and sign a report plus the necessary certification on their own letter head, based on their own consideration of all relevant factors and the guidelines in the Australian Immunisation Handbook. The tribunal put this view to Mrs S On 12 February 2017, she provided the tribunal by email with, relevantly here, copies of two letters, one from Dr C and one from Dr S .

41. The 9 January 2017 letter from Dr C stated,

> This is to certify that I have seen L and his parents in consultation today, and obtained an extensive family history and sighted immune investigations performed on his parents.
>
> I note that L has been recently assessed by a speech pathologist as being atypical in his speech development. I also not[e] on history that he has marked episodes of disordered behaviour and is delayed in toilet training with no apparent awareness of stool. On history and examination he is demonstrating some features consistent with ASD although not sufficient to place him on [the] spectrum.
>
> I note also that L s mother had an adverse reaction to the Hep B vaccine 23 years ago, with persistent excessively raised Hep B antibodies and that test results indicate that both parents carry genotype associated with increased inflammatory responses. L will therefore have inherited this same predisposition.
>
> It is therefore my clinical opinion that L should not be vaccinated according to the vaccination schedule, as vaccines induce an inflammatory response. In L s case, the potential risks outweigh the potential benefits. I certify that the immunisation of L is medically contraindicated based on specifications and advice in the Australian Immunisation Handbook.

42. AHPRA does not list Dr C as having a specialist general practice qualification. It may be that she meets the requirement of being a vocationally registered general practitioner but this information was not available to the tribunal. There is no evidence to indicate that Dr C is participating in an ACRRM accreditation program.

43. The tribunal did not have to reach a conclusion about whether Dr C met the definition of a general practitioner in the Act as Mrs S also provided a letter from Dr S AHPRA lists Dr S as having a specialist general practice qualification. The tribunal found that Dr S meets the definition of a general practitioner in the Act and so can certify that L s immunisation is medically contraindicated under the specifications set out in the Handbook.

44. The 10 February 2017 letter from Dr S stated,

> I have been asked to provide a medical exemption for vaccination. There is a strong family history of autoimmune disease and severe allergy. L may be at risk of allergic reactions to vaccinations, and so the parents have elected not to vaccinate L I support this decision.
>
> It is my clinical opinion that L should not be vaccinated according to the vaccination schedule due to the risks of allergy and inflammation due to the adjuvants. The risk exceeds the potential benefits in L s case. I certify that the immunisation of L is medically contraindicated based on the specifications and advice set out in the Australian Immunisation Handbook 10th Edition.

45. The tribunal confirmed with Mrs S that Dr S s letter was based on an examination of L After careful consideration, the tribunal found that Dr S s letter meets the certification requirement of paragraph 6(3)(a) of the Act.

46. The tribunal noted that Mrs S provided evidence in relation to her other child, S This cannot be considered here because the operative decision under review, the decision to cancel Mrs S s child care benefit, relates only to L

DECISION

The decision under review is set aside and the matter is sent back to the Chief Executive Centrelink for reconsideration in accordance with the direction that Mrs S has provided evidence which satisfies the requirements for a medical contraindication exemption under paragraph 6(3)(a) of the *A New Tax System (Family Assistance) Act 1999*.