

BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
MICHAEL & MICHELE BEGLAU
DENIAL OF CLAIM FOR REFUND

98-47

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 21, 1998, before Margaret B. Alcock, Hearing Officer. Michael Beglau represented himself. The Taxation and Revenue Department ("Department") was represented by Gail MacQuesten, Special Assistant Attorney General. Based on the evidence in the record and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 18, 1997, Michael and Michele Beglau filed their 1996 New Mexico personal income tax return showing a refund due of \$1,082.00.
2. A portion of the refund was attributable to a credit of \$707.00 claimed pursuant to NMSA 1978 Section 7-2-18.1, which allows a child day care credit to New Mexico residents who are either gainfully employed or disabled during any period for which the credit is claimed.
3. On April 7, 1997, the Department denied the portion of the refund attributable to the child day care credit based on the Department's determination that Mr. Beglau was neither gainfully employed nor disabled during the months for which the credit was claimed.
4. On May 26, 1997, the Beglaus filed a written protest to the denial of their claim for refund.

5. After graduating from high school, Mr. Beglau attended Dona Ana Community College in Las Cruces, New Mexico, and obtained a two-year degree in residential construction.
6. From 1983 to 1991, Mr. Beglau was in the army where he worked as a construction engineer doing plumbing, framing and concrete work, all of which required heavy physical labor.
7. In 1988, Mr. Beglau injured his back. Mr. Beglau also developed a condition that periodically caused a severe rash and blisters to break out on his hands and feet.
8. About the time of his 1988 injury, Mr. Beglau was promoted to staff sergeant and continued to perform duties as a construction supervisor until 1991, when he was discharged.
9. Periodically, Mr. Beglau's physical problems caused him to be taken off his regular work and assigned to light duty
11. After his discharge, Mr. Beglau returned to Las Cruces and enrolled in a two-year waste water treatment program at Dona Ana Community College.
12. For financial reasons, Mr. Beglau left school after one semester and moved to Las Vegas, Nevada, where he obtained work on a construction project.
13. Mr. Beglau was laid off the construction job after one month and subsequently took a job as a warehouseman for Henderson Cold Storage, where he worked from 1992 to 1995.
14. The job at Henderson required heavy physical labor, including lifting boxes of up to 100 pounds for several hours each day.
15. During the time he worked at Henderson, Mr. Beglau had recurring problems with his back. On at least four occasions, Mr. Beglau was out of work for one to two weeks and was put into a rehabilitation treatment program under Henderson's insurance.

16. Both the doctor who treated Mr. Beglau and the physical therapist who supervised Mr. Beglau's treatments told him that continuing to perform heavy labor would cause his back condition to become worse. Mr. Beglau also believed that his back condition was worsening.

17. Mr. Beglau consulted with the VA office to find out whether he would qualify for the VA's vocational rehabilitation program.

18. The VA determined that Mr. Beglau had a ten percent disability attributable to degenerative disc disease of the lumbar spine and a ten percent disability attributable to tinea pedis, manus and cruris.

19. Based on these disabilities, Mr. Beglau was eligible for a vocational rehabilitation subsistence allowance, provided he conformed to VA guidelines. The guidelines included full-time enrollment in an approved degree program and maintenance of certain academic standards.

20. In 1995, Mr. Beglau returned to Las Cruces and re-enrolled in the waste water treatment program at Dona Ana Community College.

21. Mr. Beglau chose the ultra pure water curriculum. After completing the program in May 1997, he obtained work as a facility technician at Intel in Rio Rancho, New Mexico.

22. Most of Mr. Beglau's work at Intel involves monitoring the company's pure water system, including reading gauges and adding chlorine to the water when needed.

23. During the 18 months he has worked at Intel, Mr. Beglau has had one incident where he hurt his back moving a heavy drum of chlorine tablets. Since then, Intel has switched to liquid chlorine and Mr. Beglau no longer has to move drums of tablets.

DISCUSSION

The issue presented is whether the Department was correct in determining that the Beglaus did not qualify for the New Mexico child day care credit because Mr. Beglau was neither gainfully

employed nor disabled during the months for which the credit was claimed. NMSA 1978 Section 7-2-18.1(B) provides, in pertinent part:

B. Any resident who files an individual New Mexico income tax return and who is not a dependent of another taxpayer may claim a credit for child daycare expenses incurred and paid to a caregiver in New Mexico during the taxable year by such resident if the resident:

...

(2) is gainfully employed for any period for which the credit is claimed or, if a joint return is filed, both spouses are gainfully employed or one is disabled for any period for which the credit is claimed.

Mr. Beglau argues that he was entitled to the credit because he was disabled and unable to perform the heavy physical labor required by the jobs he had previously held. Alternatively, Mr. Beglau argues that his enrollment in school under the VA vocational rehabilitation program should qualify as gainful employment. The Department argues that Mr. Beglau did not meet either of the requirements of disability or gainful employment.

Determination of Disability. NMSA 1978 Section 7-2-18.1(A)(4) defines a "disabled person" as:

a person who has a medically determinable physical or mental impairment, as certified by a licensed physician, that renders such person unable to engage in gainful employment.

NMSA 1978 Section 7-2-18.1(A)(5) defines the term "gainfully employed" as:

working for remuneration for others, either full time or part time, or self-employment in a business or partnership.

Regulation 3 NMAC 3.13.9.2 states:

As used in Section 7-2-18.1, a resident who is "gainfully employed" includes any resident who is working for wages, salary, commissions or any other form of employee remuneration or any resident who engages in any business activity as a proprietor or partner and who is required to report and pay taxes under the provisions of the Federal Self-Employment Contributions Act.

The Department interprets the definitions of "disabled person" and "gainfully employed" to mean that a taxpayer is not disabled for purposes of the child day care credit if he is able to perform any work for remuneration. This construction is far too narrow. I believe the Department errs in treating the term "gainfully employed" in Subsection (A)(5) of Section 7-2-18.1 as synonymous with the term "gainful employment" in Subsection (A)(4). The fact that someone is "gainfully employed" if that person is working for wages does not necessarily mean that someone who is able to perform *any* work for wages is not disabled. If this were the test of disability, a 50-year-old surgeon who suffers an injury that prevents him from continuing the practice of medicine, but does not prevent him from taking a job sweeping floors for minimum wage, would not be disabled for purposes of Section 7-2-18.1. Such a construction does not comport with accepted definitions of disability and gainful employment found in other sections of New Mexico's statutes.

In the context of disability determinations, the term "gainful employment" includes consideration of a disabled person's age, education, skills and experience. NMSA 1978 Section 10-11-10.1(O)(2) (1995 Repl. Pamp.) of the Public Employees Retirement Act states that for purposes of disability benefits, gainful employment "means remunerative employment or self-employment that is commensurate with the applicant's background, age, education, experience and any new skills or training the applicant may have acquired after terminating public employment or incurring the disability." NMSA 1978 Section 22-11-35 (1998 Repl. Pamp.) of the Education Retirement Act provides that a member is eligible for disability benefits if the member is unable to continue his employment "and unable to obtain and retain other gainful employment commensurate with his background, education and experience." NMSA 1978 Section 52-1-26 (1991 Repl. Pamp.) of the Workers' Compensation Act provides that permanent partial disability shall be determined "by calculating the worker's impairment as modified by his age, education and physical capacity...."

Statutes *in pari materia* should be read together to ascertain legislative intent. *Quintana v. New Mexico Dep't of Corrections*, 100 N.M. 224, 225, 668 P.2d 1101, 1102 (1983); *See also, Runyan v. Jaramillo*, 90 N.M. 629, 631, 567 P.2d 478, 480 (1977) (statutes on the same general subject should be construed by reference to each other). In this case, the Income Tax Act does not include a definition of "gainful employment" for purposes of determining the existence of a disability. A review of New Mexico law reveals, however, that none of the statutes dealing with the issue of disability support the Department's construction of the Act to limit a finding of disability to situations where a person is unable to perform *any* work, without regard for the person's background. Construing Section 7-2-18.1(A)(4) in accord with other New Mexico statutes on the same subject, I find that a person is "unable to engage in gainful employment" if he is unable to engage in remunerative employment or self-employment that is compatible with his age, education or training and previous work experience.

Application of Law to Facts. Mr. Beglau relies on the finding of disability by the VA to support his eligibility for the child day care credit provided in Section 7-2-18.1. As the Department correctly points out, compensation awards from the United States are irrelevant in determining eligibility for benefits under other unrelated provisions of law. *Snead v. Adams Construction*, 72 N.M. 94, 97, 380 P.2d 836, 838 (1963). Nonetheless, the VA documents submitted by Mr. Beglau do establish that he had "a medically determinable physical or mental impairment, as certified by a licensed physician", which is the first prong of the definition of disability set out in Section 7-2-18.1(A)(4). What remains to be determined is whether the disability rendered Mr. Beglau unable to engage in gainful employment.

Mr. Beglau graduated from high school and completed a two-year program in residential construction. He then entered the army where he served from 1983 to 1991. Mr. Beglau testified

that his entire time in the army was spent working construction, which required heavy physical labor.

It is true that he continued to perform construction work as a supervisor after his 1988 back injury, but even then his disabilities resulted in his periodically being taken off his regular assignment and given light duty. When Mr. Beglau looked for work after his discharge from the army, he took a construction job in Las Vegas, Nevada. He was laid off after one month and then found a job as a warehouseman for Henderson Cold Storage, another job requiring heavy physical labor.

During the three years he worked for Henderson, Mr. Beglau had recurring problems with his back. On at least four occasions, Mr. Beglau was out of work for one to two weeks and was put into a rehabilitation treatment program under Henderson's insurance. Both the doctor who treated Mr. Beglau and the physical therapist who supervised Mr. Beglau's treatments told him that continuing to perform heavy labor would cause his back condition to become worse. Mr. Beglau also believed that his back condition was worsening. It was at this point that Mr. Beglau returned to school to complete his training in the waste water treatment program. This program provided Mr. Beglau with skills that enabled him to find work in another field that does not require the kind of heavy labor that had caused his back injury and subsequent disability.

The evidence presented by Mr. Beglau supports his claim that he was disabled during the period for which he claimed the child day care credit. He clearly suffered from a medically determinable impairment as certified by the VA doctors. Mr. Beglau's education was in construction. His entire work experience consisted of performing physical labor as a construction worker and a warehouseman. His testimony establishes that because of the problem with his back, he was not able to continue the kind of work for which he was suited by education, training and experience. *See, Murphy v. Duke City Pizza, Inc.*, 118 N.M. 346, 350, 881 P.2d 706, 710 (Ct. App.), *cert. denied*, 118 N.M. 430, 882 P.2d 21 (1994) (a worker's own testimony can establish disability).

The Department did not call any witnesses or present any evidence to contradict Mr. Beglau's testimony. Accordingly, Mr. Beglau has met his burden of showing he was a disabled person within the definition set out in Section 7-2-18.1(A)(4) and was entitled to claim the child day care credit for tax year 1996.

My conclusion that Mr. Beglau was disabled for purposes of Section 7-2-18.1 makes it unnecessary to address his alternative argument that he was gainfully employed during the period he attended school under the VA allowance.

CONCLUSIONS OF LAW

1. Michael and Michele Beglau filed a timely, written protest to the Department's denial of their claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.

2. During tax year 1996, Mr. Beglau was a "disabled person" as defined in NMSA 1978 Section 7-2-18.1(A)(4) and was entitled to claim the child day care credit for that year.

For the foregoing reasons, the Taxpayer's protest IS GRANTED.

DONE, this 3rd day of September 1998.