The legislation

Section 102 of the *Social Security Act* provides that where a family allowance is payable to a person for a disabled child, and that person provides care and attention to the disabled child in the residence of that person and the child, disability allowance is payable for the child.

Section 101 defines a 'disabled child' as a child who -

> '(a) has a physical, intellectual or psychiatric disability;
>
> (b) because of that disability, needs care and attention provided by another person on a daily basis that is substantially more than the care and attention needed by a child of the same age who does not have such a disability, and
>
> (c) is likely to need that care and attention for an extended period'.

'Substantially' more care and attention

The major issue for decision was whether the physical disability, the diabetes, led to Ditton's daughter needing substantially more care and attention than a child without such a disability.

The AAT decided that she did. The Tribunal referred to the definition of 'substantially' in *Whiteford* (1987) 6 AAR 70 and to the more recent case of *Monaghan* (1990) 55 *SSR* 736, where the AAT said that 'substantially more' meant 'considerably more or significantly more'. Reference was also made to s.101(b) which indicated, according to the AAT, that the use of the word 'substantially' also imported a comparative notion and not just a 'qualitative or quantitative' sense as suggested in *Whiteford*.

The AAT concluded:

> 'Can it be said that when the quantity and quality of care and attention as provided by the Applicant and her husband is analysed, that it is, by comparison, more than the care and attention that would be otherwise provided to another 16 year old? . . .
>
> I am persuaded by the following passage of the evidence of Mrs Ditton when it was suggested to her that there was no need for her or her husband to administer the injections for Michelle –
>
> "There is no need because of her age, she is capable, but if we don't and observe her food etc. the consequences can be drastic. We are always keeping an eye on her and asking what she eats and takes with her and slipping jelly beans into her bag in case she becomes faint. She likes sport and it is encouraged but it has additional impact upon sugar levels and food consumption etc."
>
> In my view the care and attention, provided by the Applicant and her husband, amounts to that of vigilance and enquiry of Michelle as to her drug and food regime and I am satisfied from the evidence heard that Michelle is not sufficiently of an age or level of maturity to permit the parents to desist from their care and attention, which I have previously decided is substantially more than would be required by a child of her age without that disability.'

(Reasons, p. 7)

Care and attention for an 'extended period'

The Tribunal referred to the decision in *Bodney* (1986) 35 *SSR* 443, which determined that the Tribunal had to estimate the future period in deciding whether the child is likely to need care and attention for an extended period.

The AAT said that it was a virtual impossibility. It was expected that the maturity of the daughter would mean that less supervision would be required eventually. The Tribunal also noted that 'in or about a period of 12 months' the level of care and attention would diminish and that a review of entitlement at that point would reassess the level of care and attention. Nevertheless, the conclusion was that the care and attention was needed for an 'extended period', the duration of which could not be stated.

Formal decision

The decision under review was set aside and a decision was substituted that the applicant was entitled to child disability allowance.

[B.S.]

Invalid pension: inability to find work

STANDEN and SECRETARY TO DSS
(No. T89/163)
Decided: 19 July 1990 by R.C. Jennings.

The Tribunal *affirmed* an SSAT decision which had overturned a DSS decision not to grant invalid pension.

The facts

Following an injury to his back, Standen had a laminectomy for a disc prolapse in 1983 and a spinal fusion in 1984. He had a history of regular work and 'had never been a person prone to exploiting social services'. After receiving a lump sum payment he started his own business which failed because of factors related to his back injury.

The DSS claimed that Standen did not satisfy s.27(a) or (b) of the *Social Security Act*. It was not disputed that he had a permanent physical impairment which incapacitated him for certain types of work. The DSS relied on the evidence of an orthopaedic surgeon that Standen ought to be able to do some kind of light industrial or office work.

The decision

The Tribunal said that 'incapacity for work' involved both an evaluation in medical terms of physical (or mental) impairment and the ascertainment of the extent to which that impairment affects ability to engage in paid work. The Tribunal found that Standen's back injury made him a most unattractive prospect for an employer and said:

> 'The difficulty any man of limited experience and education must find in securing such work is greatly increased when it is known that he has had a major back injury and received a substantial workers' compensation settlement.'

Theoretically, Standen could do some light work if it could be found. His prospects of finding work were low because of his physical difficulties and compensation history. In deciding he had a permanent incapacity for work not less than 85%, the Tribunal found that the predominating factor preventing him obtaining work was his physical impairment.

[B.W.]

Invalid pension: permanent incapacity

MUNRO and SECRETARY TO DSS
(No. 6039)
Decided: 16 July 1990 by S.A. Forgie, W.A. De Maria and G.S. Urquhart.

Munro injured his back at work and later had manipulation which worsened

his symptoms. A myleogram showed no disc protrusion. Two surgeons suggested exploratory surgery which Munro declined. Munro said the pain affected his concentration – he could think of nothing but the pain. None of the doctors questioned that Munro suffered acute pain. The Commonwealth medical officers gave a combined impairment assessment of 15 to 20%.

The findings

The Tribunal was satisfied that Munro suffered chronic pain in his lower back, he had difficulty sitting for periods greater than 15 to 20 minutes and could not walk for any length of time. He suffered from lumbar-muscular ligamentous injuries.

The Tribunal followed *McDonald* (1984) *18 SSR* 188 in finding that, as there was no evidence of the likelihood of improvement in the foreseeable future, the incapacity was permanent. It accepted Munro's treating doctor's opinion that Munro would remain unfit for work indefinitely. The Tribunal noted that the Department's doctors did not suggest future improvement, merely that Munro should be reviewed in 12 months time.

Formal decision

The AAT decided that Munro was permanently incapacitated for work to the extent of 85%; at least 50% was directly caused by a permanent physical impairment; and he was entitled to receive an invalid pension.

[B.W.]

Special benefit: caring for incapacitated parent

SECRETARY TO DSS and MOORE (No. Q90/45)

Decided: 13 September 1990 by S.A. Forgie.

The Secretary applied for review of a decision by a Social Security Appeals Tribunal that Moore was not entitled to a carer's pension but was entitled to special benefit.

Moore cared for his father who suffered from Alzheimer's Disease and Parkinsonism. Moore had originally applied for carer's pension in August 1989 but this was rejected on the ground that Moore's father was not an age or invalid pensioner. His subsequent claim for special benefit in September 1989 was also rejected by the DSS.

The evidence

The AAT was satisfied, on the basis of evidence from Moore and his father's doctor, that Moore provided 'personal care, attention and supervision in all aspects of his father's life': Reasons, para. 5. He prepared his father's food, fed him, assisted him in showering, helped him dress and undress and the Tribunal accepted the doctor's evidence that Moore was engaged in a 'twenty-four hour a day job, with no breaks or holidays': Reasons, para. 5.

The AAT also accepted that, without this care, Moore's father would be admitted to a long term nursing unit: Moore's mother was unable to provide the appropriate care. Furthermore, given the work involved in his father's care, Moore was unable to engage in part-time work.

Both of Moore's parents were in receipt of a United Kingdom pension, and Moore's father was also receiving an RAF pension, giving a total annual income of some $25 000. Investments of $170 000 yielded Moore's parents a further $19 718 annually. Neither Moore nor his parents owned a house, and they paid $60 a week rent. Moore's only asset was an old car and he paid no rent or money for board and lodging to his parents: he had no income.

The Tribunal confirmed the SSAT decision that Moore was not eligible for a carer's pension as Moore's father was not receiving either an age or invalid pension, nor a rehabilitation allowance.

The legislation: special benefit

The relevant part of s.129 of the *Social Security Act* provides that:

> (1) . . . the Secretary may, in his discretion, grant a special benefit under this Division to a person –
> (a) who is not in receipt of a [relevant pension or benefit]
> (b) who is not a person to whom an unemployment benefit or a sickness benefit is payable; and
> (c) with respect to whom the Secretary is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).

The law applied

The DSS conceded that Moore met the requirements of s.129(1)(a), (b) and (c). The AAT accepted that concession in respect of paragraphs (a) and (b) and satisfied itself that paragraph (c) was also met, taking into account the decisions in such cases as *Guven* (1983) 17 *SSR* 173, *Conroy* (1983) 14 *SSR* 143 and *Te Velde* (1981) 3 *SSR* 23. However, the DSS argued that the SSAT had failed to consider the discretionary element which was essential to the consideration of eligibility for special benefit: that is, fulfilling the preconditions is 'but the gate into the field where the Secretary's discretion lies' (*Te Velde*).

The DSS argued that the AAT should consider a number of factors in deciding whether to exercise the discretion:

- that Moore's parents received an income greater than the age pension and were in a financial position to support him; and
- given that Moore was not eligible for carer's pension, to grant him special benefit in such circumstances would be to circumvent the specific requirements of the legislation.

Moore, in turn, argued that his parents could not be considered a 'suitable alternative source of support': Reasons, para. 11. He noted that they received no Australian pension, were not home owners and, on income from their pension alone, they would be entitled to an age pension as the income from the UK pension was less than the maximum allowable pension earnings amount. Moore described the $170 000 invested with the National Australia Bank as a benefit only to the Commissioner of Taxation.

The AAT was unable to accept Moore's argument. It noted that, if Moore's parents were in fact entitled to the age pension, that would be the end of the matter: Moore's father would be entitled to an age pension and Moore in turn would then be entitled to a carer's pension. However, their eligibility for age pension was not relevant to Moore's entitlement to special benefit.

The AAT then turned to the decision in *David* (1990) 54 *SSR* 716 and the