A Commonwealth Medical Officer examined Teagan and reported that she did not require substantially more care and attention on a daily basis than a child of the same age without a disability.

Disability

The AAT was satisfied that both children had a disability, namely asthma, which required care and attention on a daily basis.

Substantially more daily care and attention

The AAT referred to the AAT decision, *Monaghan and Secretary, Department of Social Security* (1990) 20 ALD 572 where it was stated that the phrase 'substantially more than' meant 'considerably or significantly more than'. In that case, the AAT held that the test for need was an objective test: Reasons, para.25.

The AAT noted that both Aamie and Teagan were very young children who were too young to administer their own medication or treatment. The AAT found that Aamie did require substantially more care and attention than a child of the same age without a disability as she required constant supervision of her activities and diet and had to be placed on a ventalair machine 3 times a day. Teagan, the AAT concluded did require care and attention because of her asthma but did not require substantially more care and attention than a child of her age without a disability.

Formal decision

The AAT set aside the decision of the SSAT and substituted its decision that Krznaric was entitled to CDA in respect of Aamie but was not entitled to CDA in respect of Teagan.

[H.B.]

Disability support pension: continuing inability to work

D'AMBROSIO and SECRETARY TO DSS
(No. 9553)
Decided: 17 June 1994 by D.J. Grimes, D.B. Travers and N.J. Attwood.

D'Ambrosio applied for a disability support pension (DSP) and his application was rejected by the DSS. This decision was affirmed by the SSAT and D'Ambrosio appealed to the AAT.

The legislation

Section 94(1) of the *Social Security Act 1991* provides that to qualify for a DSP, a person must have:

- a physical, intellectual or psychiatric impairment of 20% or more under the Impairment Tables (in sch.1B to the Act): s.94(1)(a) and (b); and
- a continuing inability to work: s.94(1)(c).

Section 94(2) provides that a continuing inability to work means that the impairment prevents a person from doing their usual work or work for which they are currently skilled: s.94(2)(a); and also prevents them undertaking educational or vocational training during the next 2 years which would be likely to equip the person within the next 2 years to do work for which they are currently unskilled: s.94(2)(b).

The facts

D'Ambrosio was born on 16 December 1976. From the age a 6 and a half, he was placed in a special education unit because of learning difficulties. He attended special education classes until 1993 when he completed Year 10. In 1994, he attended Copeland College and was currently undertaking Year 11. He was enrolled in mathematics, English, metalwork, woodwork and sport studies.

D'Ambrosio had had epilepsy since 1982. Since 1987, his seizures had been controlled with anti convulsants taken twice daily. He currently has fits on average once every 6 months during which he becomes unconscious and on the following day, he has headaches and feels weak and dizzy.

The applicant applied for DSP on 23 October 1992.

Medical evidence

Dr Boyopati examined D'Ambrosio at the request of the DSS on 24 November 1992. He took into account the report of Mr Petroni, clinical psychologist and concluded that D'Ambrosio was medically fit to enter the workforce on a full-time basis.

Dr Boyopati referred D'Ambrosio to Mr Petroni for a psychological assessment. He concluded D'Ambrosio had an IQ of 86 and noted that his responses revealed 'better potential ability than the standard scores'. Mr Petroni concluded that there was no reason why he could not work full time after completing his Year 10 studies. He believed that D'Ambrosio was fit for unskilled work.

Mrs Peters, a senior counsellor working in the ACT school system gave evidence that his full scale IQ was assessed at 63. She regarded Mr Petroni's findings as to D'Ambrosio's IQ to be inflated and concluded that his overall ability fell into the 'borderline-intellectually deficient' range.

Mrs Peters assessed D'Ambrosio's reading ability as at mid primary level of development and found that he had inadequate vocabulary, spelling and style as well as difficulty expressing his thoughts in writing. She recommended a training program based on pre-work and vocational skill development. Mrs Peters believed that he was not capable of working 30 hours a week under normal award conditions as he would require constant supervision in the workplace because of attention problems.

In a 'request for medical details' submitted with the claim for DSP, Dr Walters described D'Ambrosio's conditions as epilepsy, mild intellectual delay and behavioural problems. Dr Walker stated that D'Ambrosio's ability to work was affected by his limited understanding. He believed that whilst he was fit for his usual work, that is school, for at least 30 hours a week, he was not fit for other work for 30 hours a week.

Impairment

The AAT 4accepted that that D'Ambrosio had an impairment in that he had epilepsy and an intellectual impairment. The AAT found that, as the frequency and duration of attacks were not extended, the epilepsy condition was assessed under Table 26.4 as having an impairment rating of 0%.

The AAT assessed D'Ambrosio's intellectual impairment and behavioural problems, under Table 12. It found that his level of intelligence fell into 'the lower reaches of the 'borderline' classes', warranting a score of 3. In relation to his behavioural problems, the AAT concluded that he had a problem which attracted a score of 3 under Table 12. As he required minor help in his capacity for independent living, a score of 3 under Table 12 was found to be appropriate. D'Ambrosio was therefore assessed by the AAT as having a total score of 9 under Table 12 which gave him an impairment rating of 40%. Accordingly, the AAT concluded that he had an impairment well in excess of 20% as required by s.94(1)(b) of the *Social Security Act.*

Continuing inability to work

D'Ambrosio was attending school at the time of the hearing and it was clear that his impairment did not prevent him from attending schooling. However, the AAT declined to construe D'Ambrosio's 'usual work' as school work. The AAT stated that 'it would be an unjust construction of beneficial legislation to exclude those persons who have not worked and therefore do not have 'usual work' within the definition of the Act': Reasons, para.44.

Although D'Ambrosio had never been in the workforce, the AAT found that his impairment did not prevent him from being able to perform unskilled work. In addition, the AAT concluded that his impairment did not prevent him from undergoing vocational training which would equip him with new skills which may be of use in the workplace. Accordingly, D'Ambrosio was found not to have a continuing inability to work as defined by s.94(2)(b) of the *Social Security Act.*

Formal decision

The AAT affirmed the decision under review that D'Ambrosio was not eligible for DSP.

[H.B.]

Invalid pension: which law applies?

FAZZARI and SECRETARY TO DSS
(No. 9590)
Decided: 8 July 1994 by M.T.E. Shotter.

Background to appeal

Fazzari applied for invalid pension on the 8 April 1989. The DSS rejected the claim. In the rejection letter the DSS referred to Fazzari's claim as one for disability support pension (DSP) and not for invalid pension. Fazzari appealed to the SSAT who also rejected his claim. An appeal to the AAT was then lodged by Fazzari. By agreement, neither party was present at the hearing of this matter.

Fazzari lived in Australia from 1956 to 1970 and since 1970 had lived in Italy. During his time of residence in Australia he had worked as a welder.

The issues

The issues before the AAT were threefold. Firstly, what law should be applied in the claim. The DSS contended that the AAT should apply the law as it stood after the transitional arrangements of 1 July 1991. The SSAT had applied the law in this way in coming to the decision to reject the claim for DSP.

The second issue was whether, Fazzari was at least 85% incapacitated for work, as required by s.94(1) of the *Social Security Act 1947*, in force at the time of the claim.

Thirdly if Fazzari was incapacitated to this extent, was at least 50% of this capacity due to a permanent medical impairment, as required by s.94(1)(c)?

Which law should be applied

> '. . . On 1 July 1991, the 1947 Act was replaced by the Social Security Act 1991 ("the Act") and the relevant legislation relating to invalid pension became s.94 of that Act. On 12 November 1991, invalid pension by replaced by disability support pension. The qualification for the new pension stayed as s.94 of the Act.'

The AAT looked to s.8 of the *Acts Interpretation Act 1901* to determine whether or not Fazzari had an inchoate right to have the claim considered from the first date of claim. In contrast to the *Social Security Act 1991* which, by cl.5(1) of schedule 1A expresses an intention against preserving rights accrued under the repealed 1947 Act, no such contrary intention could be found in the *Social Security Disability and Sickness Support Act 1991.* Therefore s.8 of the *Acts Interpretation Act* operated to preserve his entitlements accrued before the commencement of the amending Act. Accordingly, the AAT decided that Fazzari had the 'right to have his claim dealt with on the basis of the law as it stood before 12 November 1991': Reasons, para.11.

This meant that Fazzari's claim must be considered under the eligibility criteria for invalid pension, that is under s.94 as it stood prior to 12 November 1991

The legislation

The section determining eligibility for invalid pension was s.94(1). The relevant part of this section stated:

> '"Qualification for invalid pension"
> Permanent incapacity for work
> 94.(1) A person is qualified for an invalid pension if:
> (a) the person is permanently incapacitated for work; and
> (b) the degree of incapacity for work is 8% or more; and
> (c) 50% or more of the incapacity for work is directly caused by a physical or mental impairment; and . . . '

Application of eligibility criteria

The AAT considered Fazzari's medical history from 1953 through to 1993. This included reports from medical practitioners in Italy and in Australia. The practitioners from Italy had personally examined Fazzari whilst the Australian medical practitioners had not.

On consideration of the evidence, the AAT stated that Fazzari 'is restricted in performing his designated trade of welder, and other occupations': Reasons, para.21. The AAT took particular note of Dr Young's comment that 'medical impairment is not based on diagnosis but on impairment of the applicant's function': Reasons, para. 21.

In assessing Fazzari's capacity to work the AAT considered the case of *Stenovic and Australian Telecommunications Commission* (1984) 6 ALD 359. The AAT looked in particular at the eventual market appeal for work placement that Fazzari would have and found that 'his ability to attract an employer who is prepared to engage him and remunerate him is almost non-existent': Reasons, para. 23.

The AAT stated that it 'preferred the opinions of the Italian medical practitioners as those who have treated Mr Fazzari personally and would know his condition in greater detail than Dr. McCartney or Dr. Young' : Reasons, para. 24. Further the AAT summarised the opinions of all the medical practitioners by stating that 'Each of those practitioners supports the contention that Mr Fazzari is "invalided" to a degree': Reasons, para. 24.

Formal decision

The AAT decided that Fazzari was permanently incapacitated for work. They found that his degree of incapacity for work was in excess of 85% and that at least 50% of that incapacity was caused by physical impairment. The AAT decided that Fazzari was eligible for invalid pension from the 8th of April 1989, which was his first claim.

[B.M.]