fit of those whom he has a responsibility to support': Reasons, p.12. The AAT continued:

> 'I do not accept that the applicant should be denied the opportunity of continuing his present plans. They are reasonable aspirations having regard to the handicap he suffers and the relatively modest assets he has acquired. They represent at least 20 years hard effort. He has a young family for whom he has obvious responsibilities. He should be permitted to discharge them in accordance with his ability.
>
> If he succeeds the extent to which he will need to rely on the State will progressively diminish. If he is denied this opportunity and forced to realise his assets he will eventually, but almost certainly, become a greater burden on the State.'

(Reasons, pp.12-3).

The AAT noted that the total value of the property (including plant and stock) was $134 700 and that, under the *Social Security Act*, Farrow and his wife were permitted to hold $108 000 worth of property before the assets test applied to them:

> 'The value of that excess is by no means substantial and it is not for want of effort on their part that it is presently producing only a very small income. The discretion to disregard assets must surely be more readily available in such cases.'

(Reasons, p.13).

Financial hardship

The AAT pointed out that, if the assets test applied to Farrow, his annual income from the pension would be $3292. It appeared that Farrow had little if any income from other sources. Accordingly, he would continue to suffer severe financial hardship if he could not take advantage of s.6AD.

Formal decision

The AAT set aside the decision under review and remitted the matter to the respondent to decide the rate of pension which should be paid to Farrow, taking account of the level of his income.

Handicapped child's allowance

PHILLIPS and SECRETARY TO DSS (No.W84/185)

Decided: 7 May 1986 by R.K. Todd, J.G. Billings and N. Marinevitch.

Gloria Phillips was granted a handicapped child's allowance for her daughter, N, in June 1982. This application to the AAT raised three matters in relation to that allowance: Phillips' eligibility for back-payment from August 1981 to May 1982, her daughter's classification as a handicapped child rather than a severely handicapped child, and a reduction in the allowance in July 1983 from $73 to $20 per month.

The evidence

N was born on 10 May 1975. Although Phillips had thought her daughter was 'slow', she had not noticed anything unusual, until 1980, when a baby health sister had referred her to the children's hospital in Perth. There Phillips was told that her daughter had 'a problem'. She was referred to a child development centre, where N was diagnosed in July 1981 as having a mild to moderate intellectual handicap. Phillips and C then attended a clinic for weekly check-ups over a period of 6 months. N then attended 2 special schools.

It appeared that the baby health sister had told Phillips that she might be eligible for handicapped child's allowance in 1980; but that none of the other medical agencies which she consulted over the next year had mentioned this possibility. Early in 1982 (within 6 months of the diagnosis of N), a welfare worker asked the children's hospital to prepare a claim for the allowance; but the hospital had delayed for several months, so that the claim was not lodged until 9 months after the diagnosis.

Phillips described N's behaviour and the type of care required. N broke toys given to her and was generally unable to get on with other children, but had recently begun playing with a younger child. N needed regular prompting to do everyday tasks but could dress and feed herself. N had communication problems: her younger siblings could not understand her and she needed to be given simpler explanations than her younger siblings. Phillips had also been involved in extra expenditure for N: she had bought some special educational toys (and would use any back-payment to buy more) and had to replace N's shoes frequently. She had spent approximately $20 a month while her daughter attended the clinic, but this had decreased once N started at special school. A welfare worker gave evidence that Phillips suffered considerable financial hardship from 1981 to 1984.

A State medical officer described N as having a 'mild to moderate intellectual handicap' without any other physical disabilities. He said that N would require constant care and attention from her mother for several years.

The legislation

Section 105J of the *Social Security Act* provides that a person who provides 'constant care and attention' to a dependent severely handicapped child in their home is eligible for handicapped child's allowance.

Section 105JA gives the Secretary power to grant an allowance to a person who provides 'only marginally less than the care and attention' needed by a severely handicapped child to a dependent handicapped child in their home (para.(a)), if the person 'is, by reason of the provision of that care and attention, subjected to severe financial hardship' (para.(b)).

According to s.105H(1), a 'severely handicapped child' is defined as a child with a physical or mental disability needing constant care and attention; and a 'handicapped child' is defined as a child with a physical or mental disability needing only marginally less care and attention.

Section 105L provides that the rate of handicapped child's allowance to be paid for a 'severely handicapped child' is $85 a month; and, for a 'handicapped child' - 'such rate as the Secretary, in his discretion, from time to time, determines, but not exceeding [$85 a month]'.

Section 102(1), read with s.105R, provides that a handicapped child's allowance is payable from the date of eligibility *if* the claim is lodged within 6 months or, where the claim is lodged later than that, *if* there are 'special circumstances'. Otherwise, the allowance is payable from the date when the claim is lodged.

Severely Handicapped Child?

The Tribunal relied on the decision in *Seager* (1984) 21 *SSR* 230, where the AAT had said that it was necessary for a parent to provide 'continually recurring' care and attention; but that periods of inattention within each 24-hour cycle did not prevent the care and attention being 'constant'. It concluded that -

> 'we are not satisfied that N, by reason of her disability, requires care and attention of the required constancy. . . . While N suffers no physical disability, her mental disability is such that, if her potential is to be realized and the effects of her disability minimized, she requires considerably more care and attention than would be required for a child without that disability. It follows that in our opinion N is a handicapped, but not a severely handicapped, child within the meaning of the Act.'

(Reasons, para.13)

Eligibility from August 1981?

Phillips argued that she was eligible

for a handicapped child's allowance from July/August 1981 when N was first diagnosed and Phillips began providing care and attention.

The AAT found that Phillips was suffering severe financial hardship from that time, but that this was largely caused by factors independent of the care and attention provided to N. The Tribunal decided that this was not a bar to eligibility:

> 'In our opinion where an applicant is subject to financial hardship independently of any extra expense imposed by the provision of care and attention specified in s.105 JA (a), if there is evidence that the meagre resources of the applicant are further depleted by reason of the provision of that care and attention it will be possible to conclude that such provision has subjected the applicant to severe financial hardship . . . The financial hardship imposed by the expenditure of a certain amount of money will tend to be greater the more limited are the resources of the person.'

(Reasons, para.20)

The AAT concluded that Phillips was therefore eligible for a handicapped child's allowance from August 1981 to May 1982.

Special Circumstances

The Tribunal noted the Federal Court decision in *Beadle* (1985) 26 *SSR* 321 and the later Tribunal decision in *Corbett* (see this issue of the *Reporter*). It decided that special circumstances did exist in the present case. It noted that, although the existence of the allowance was mentioned by the original referring sister, it had not been mentioned again by any of the other clinics or hospitals Phillips had attended, in 'circumstances in which one might have expected its availability to have been made known': Reasons, para.24. The AAT also emphasized that Phillips had requested that the children's hospital pursue her application for a handicapped child's allowance within the six months explicitly allowed by the legislation:

> 'The slowness of that organization, no doubt because of the pressures placed upon it, to see the matter through promptly constitutes, in our opinion, special circumstances.'

(Reasons, para.24)

The fact that Phillips was in receipt of a supporting parent's benefit did not mean that she should have known about her possible eligibility for a handicapped child's allowance, and the Tribunal noted that she did not have the widespread contact with welfare organizations which the applicant in *Corbett* (above) had .

Rate of Allowance

The DSS described its method of calculating the rate payable as a 2-step process. First it calculated the 'allowable weekly income', which is the sum of the maximum rate of handicapped child's allowance, $6 for each dependent child, plus the current adult minimum wage. Then it calculated and subtracted from that sum the cost specifically incurred because of the care and attention provided to the handicapped child ('special costs'), to produce the 'actual weekly income'. If the actual weekly income exceeded the allowable weekly income, generally no allowance would be payable. In the second stage, 'special costs' are multiplied by 52, and divided by 12 to produce a monthly figure and, if this is less than $20, then $20 is paid; if over $20, that amount is paid up to the maximum allowable.

The Tribunal commented that the first stage of this process imposed an extra test, beyond that provided in the Act, although the AAT felt that few applicants would fail to meet the test. The AAT observed that, although s.105L was obscure,

> 'the aim of the allowance would appear to be to enable a person to meet those costs associated with the provision of care and attention to a handicapped child rather than to ameliorate the general financial hardship of that person. We say this on the basis that s.105L(b) appears to contemplate that a person, meeting the eligibility criteria for a handicapped child's allowance, including that of severe financial hardship, may be entitled to less that the full rate of $85 per month. If the allowance was aimed at ameliorating general financial hardship, it is difficult to see the purpose of allowing for a lesser rate, as the maximum rate would itself rarely lift a person out of severe financial hardship.'

(Reasons, para.28)

The Tribunal concluded that the appropriate rate for the allowance was $73 a month (the then maximum) up to July 1983 - because of the severity of Phillips' financial hardship at that time; $20 a month from July 1983 to the date of the AAT hearing; and $40 a month from the date of that hearing - largely because of the increased demands for care made by N as she grew older.

Formal Decision

The Tribunal affirmed the decision that N was 'a handicapped child' and not 'a severely handicapped child'. The Tribunal set aside the DSS decision to refuse to backdate payment of the allowance from August 1981 and substituted a decision that Phillips should be paid during that period at the rate of $73 per month. The AAT affirmed the DSS decision that the allowance should be paid at the rate of $20 per month from July 1983 to the date of decision. It determined that the rate of allowance from the date of decision should be $40 per month.

BATES and SECRETARY TO DSS (No. W84/289)

Decided: 27 May 1986 by R.C. Jennings, J.G. Billings and N. Marinovich.

This was a rehearing of an application for backpayment of handicapped child's allowance, following a Federal Court decision directing that it be redecided 'according to law'.

The original Tribunal, (1985) 23 *SSR* 274, had found that 'special circumstances' existed, but had exercised a discretion not to allow backdating. The Federal Court in *Beadle* (1985) 26 *SSR* 321 decided that, once 'special circumstances' were established, there was no discretion to allow backdating, which should occur to the date of eligibility (see ss.102(1) and 105 of the *Social Security Act*).

The evidence

No new evidence was tendered and the AAT accepted the findings, though not necessarily the conclusion, of the original Tribunal. Specifically it acepted that 'the applicant suffered from all the disadvantages affecting Aboriginal people living in poverty and the additional disadvantage that she lived at Boddington, a small town which was not visited by members of social welfare services': Reasons, p.3.

Eligibility was claimed from 10 November 1977 and the claim was lodged in April 1983. The AAT referred to similarities between this case and *Johns (No 2)* (1986) 31 *SSR* 388. They noted that Mrs Bates was also in her 50s, that her husband was deceased, and that she was an Aboriginal woman with 12 children, only one of whom was handicapped. She also lived in a small, isolated country town in WA, and had little education.

The AAT suggested that the major difference between the two cases was that Johns' son was more severely handicapped than Bates'. This meant that welfare and medical authorites would have been more likely to tell Johns of the allowance than Bates, and that Bates was required to provide less care and attention to her son than Johns was to hers. Furthermore, Bates had little contact with medical authorities who could have been expected to tell her about the availability of the allowance.

The AAT also noted that the 'capital sum' in this case, that is the amount of backpayment, was considerably less than in *Johns* because Bates' son was a 'handicapped' rather than a 'severely handicapped' child (see s.105L(b)). The Tribunal concluded:

> 'We believe that by far the most

weighty circumstance, one that is common to both cases, is the isolation of the applicant which was both social and geographical. Her prospects of making a claim without assistance were virtually non-existent. The amount to which she will be entitled, if time is extended to the date of eligibility, need not be as substantial as it would have to be in the case of a severely handicapped child. As no evidence was directed to this question we consider it preferable to leave that discretion to be exercised by the respondent pursuant to s.105L(b).'

(Reasons, pp.8-9)

Formal decison

The AAT decided that there were special circumstances within s.102(1)(a) of the Act, and that the Secretary was to determine the rate at which the allowance was to be paid.

DIMER and SECRETARY TO DSS (No W85/89)

Decided: 6 March 1986 by H.E. Hallowes

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 28-year-old woman who suffered from a valvular heart disease and recurrent chest infections.

The AAT accepted that Dimer suffered from minor physical disabilities but that -

'her incapacity for work results not from those disabilities but rather from her acknowledged desire to take care of her children, together with her lack of skills and work experience with which to persuade an employer that she should be employed. She is also handicapped by living in a town where there are few opportunities for young women with her cultural background.'

(Reasons, para.13)

The AAT said that applicants for invalid pension who were otherwise qualified -

'should not be precluded from a pension because they lack work skills, having been out of the workforce for a number of years or because they have family responsibilities.'

(Reasons, para.14)

However, the AAT said, it was not Dimer's medical disabilities which made the difference between her working and not working; and, accordingly, she was not qualified for invalid pension.

MANIATIS and SECRETARY TO DSS (Nos V85/224, V85/300)

Decided: 17 April 1986 by H.E. Hallowes.

The AAT *affirmed* a DSS decision to cancel an invalid pension granted to an 87-year-old man, who had migrated to Australia in 1982 (when he was 83 years old).

Before coming to Australia, Maniatis had owned and worked on a farm in Greece and had been in good health. However, after arriving in Australia he had suffered a stroke and it was agreed that he was now incapable of working.

Although there was no medical evidence before the AAT as to the extent of Maniatis' medical condition when he arrived in Australia, the AAT agreed with the DSS' decision that Maniatis had not become permanently incapacitated for work while in Australia and that, therefore, s.25(1) of the *Social Security Act* prevented the grant of an invalid pension:

'I am satisfied that on arrival in Australia in 1982 the applicant was incapacitated for work within the provisions of s.24 of the Act as that section has been interpreted in *Panke* (1981) 2 *SSR* 9. His age and lack of work experience in farming under Australian conditions satisfies me that he would be unable to attract an employer to remunerate him. His ability to work at his own pace on his farm in Greece does not establish that he would have the physical strength and ability to compete for positions for which he was qualified in this country. The normal retiring age for men in Australia is 65 years . . .'

(Reasons, para.12)

The AAT also concluded that Maniatis would not have had the capacity to establish and operate his own business upon his arrival in Australia.

DONKERS and SECRETARY TO DSS (No.V85/501)

Decided: 2 July 1986 by J.R. Dwyer.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 26-year-old man who suffered from a significant back disability.

Donkers had been educated to year 11 standard and had worked for 3 years at heavy labouring jobs until the onset of his back disability had obliged him to stop working. He had then undergone a multiple laminectomy, as a result of which he had become permanently unfit for any heavy manual work. In 1981 he attempted to find light work but had been unsuccessful in this attempt.

The Commonwealth Rehabilitation Service had considered him for rehabilitation training but following a boating accident in 1983 and a severe whiplash injury in a car accident in July 1984, the Rehabilitation Service decided to reject him for rehabilitation 'in view of the enormous waiting list'.

The AAT noted that, because of his back disability, Donkers was unable to undertake manual work. The Tribunal said that it was unrealistic to expect an employer to offer Donkers clerical work of which he had had very little experience and where he would be competing with many people with higher educational qualifications. The AAT accepted Donkers' evidence that he had been advised by the Commonwealth Employment Service that he was unlikely to find employment because of his back disability and the Tribunal concluded as follows:

'26. I am satisfied that at present Mr Donkers could not attract an employer. In reaching this conclusion I have had regard to the decision in *McBay* (1985) 24 SSR 296 . . .'

The AAT also concluded that, despite Donkers' relative youth, his incapacity for work should be judged as permanent in the sense that it was 'more likely than not that the incapacity will persist in the foreseeable future': *McDonald* (1984) 18 SSR 188. There was no likelihood of spontaneous improvement in his condition nor that his condition could be corrected by surgery and the possibility of rehabilitation appeared to have been discounted by the Commonwealth Rehabilitation Service.

The AAT dated Donkers' permanent incapacity for work from August 1985, when the Commonwealth Rehabilitation Service rejected him for rehabilitation; and the AAT decided that Donkers qualified for an invalid pension from that date.

SEGON and SECRETARY TO DSS (No V85/277)

Decided: 13 March 1986 by J.R. Dwyer.

The AAT *set aside* a DSS decision to reject a claim for invalid pension lodged by a 57-year-old man who had worked for some 25 years as a draughtsman.

Segon had been unable to work as a draughtsman since 1980 because of serious deterioration of his eyesight and, after 3 years on other duties, he had been asked by his employer to resign. Since then, his attempts to find other employment had been unsuccessful.

Segon also suffered from a variety of other physical disabilities which indicated that he could not be expected to engage in any significant physical activity in employment. A CES officer told the Tribunal that, because of Segon's lack of experience in other employment, retraining would be necessary; but this was impossible because of his age: employers would not retrain a person over 50, let alone a person of 60.

The AAT expressed its conclusion as follows:

'28. I am satisfied that were it not for his deteriorating vision Mr Segon would have continued working as a draughtsman . . . until his

retirement. He would not have been placed in a position where it was necessary to seek new employment at the age of 57. Even at the age of 57 Mr Segon may well have been able to attract a new employment if he could still offer his skill as a draughtsman. It is solely due to his loss of vision in the left eye that Mr Segon is now in a position of having to seek employment in restricted fields for which he is not qualified and thus having to compete with much younger and fitter people who are more attractive to employers. In my opinion Mr Segon is in a similar position to the applicant in *Panke* (1981) 2 *SSR* 9.'

MERCURIO and SECRETARY TO DSS
(No.N85/625)
Decided: 28 April 1986 by J.O. Ballard, D.J. Howell, and J.P. Nicholls.

The AAT affirmed a DSS decision to refuse an invalid pension claimed by a 71-year-old former labourer under s.24A of the *Social Security Act*.

Mercurio had migrated to Australia in 1950 and worked here until 1959 when he returned to live in Italy. He lodged his claim for an Australian invalid pension in December 1982.

Mercurio suffered from a variety of disabilities, including a blood disease, a serious spinal problem and contact dermatitis.

Section 24A of the *Social Security Act* provides that a person who is permanently incapacitated for work and who has not resided in Australia since May 1973 will qualify for an invalid pension if the person became permanently incapacitated for work in Australia and is in 'special need of financial assistance'.

Mercurio claimed, and the DSS accepted, that he had developed contact dermatitis while working in Australia. (His other disabilities had developed since he left Australia.) However, it appeared that Mercurio had worked in Australia for 4 years after the time when he developed contact dermatitis. None of his employers in Australia nor a public hospital where he claimed to have been treated had kept records relating to his medical condition or capacity for work.

Mercurio did not attend the hearing of this matter; but it appeared that after his return to Italy in 1959, he had continued to work and it was possible that he was now receiving an Italian pension.

The AAT said that the evidence did not establish that Mercurio had become permanently incapacitated for work in Australia. The AAT was not prepared to adjourn the case to call for further information from the applicant, as had been done in Baldt (1984) 21 SSR 240:

> '[T]his procedure places excessive repsonsibilities upon the respondent in relation to applicants who have made their homes elsewhere and have little claim on the Australian taxpayer for their social security needs after the conclusion of their working lives. Plainly an applicant is entitled to be told the relevant requirements of the Australian law; but we doubt whether the respondent's officers can be expected to investigate claims made by overseas applicants in the same way as they would for a resident applicant.'

(Reasons, pp.6-7)

The AAT also noted that Mercurio may have held an Italian pension, which might have meant that he was not 'in special need of financial assistance within s.24A. However, the AAT made no finding on this issue.

JABALLAH and SECRETARY TO DSS
(No V85/366)
Decided: 6 May 1986 by R. Balmford, J. Brewer and L. Rodopoulos.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 55-year-old woman, who had migrated to Australia from Egypt in July 1982.

It was agreed that Jaballah now suffered from carpal tunnel syndrome which permanently incapacitated her from work. But the DSS argued that s.25(1) of the *Social Security Act* prevented the grant of an invalid pension to Jaballah because she had become permanently incapacitated for work before migrating to Australia.

A medical report prepared in Egypt for the Australian immigration authorities had noted only a diabetic condition but no other abnormality or defect in Jaballah. (This medical report had been prepared on a form which stressed the importance of ensuring that immigrants were 'not suffering from a medical disability likely to make them . . . a charge to public funds after their arrival in Australia'.)

Jaballah said that she had experienced pains in her hands while still in Egypt but that she had been able to work until her departure from that country. She said that the condition of her hands became worse after her arrival in Australia. A doctor consulted by Jaballah immediately after her arrival in Australia had recorded no indication of any disability in Jaballah's hands. However, she had returned to that doctor within a month complaining of pains in her hands. A specialist, who had operated on Jaballah a few months after her arrival in Australia, said that she must have had the condition for at least 5 years before 1982 although it was possible that she had got worse since coming to Australia.

On the basis of this evidence, the AAT found, on the balance of probabilities, that Jaballah's condition had not been incapacitating until some time after her arrival in Australia; and that, therefore, s.25 did not operate to disqualify her from an invalid pension.

Income test: 'annual rate of income'

TIMMINS and SECRETARY TO DSS
(No.V85/223)
Decided: 18 April 1986 by J.R. Dwyer, R.A. Sinclair and G.F. Brewer.

Eileen Timmins was granted an invalid pension in December 1977. The rate of that pension was calculated on the basis that her husband had an income from employment of $320 a fortnight. A letter from the DSS told Timmins to advise the DSS 'if over any consecutive 8 weeks the average income of you or your husband increases'.

In February 1978 the DSS learned from her husband's employer that he was being paid substantially more than $160 a week; the DSS re-calculated Timmins' pension entitlement as 'nil' and advised her that her pension was no longer payable. However, the DSS did not tell Timmins that she had failed to comply with her notification obligations.

In June 1978, Timmins' husband was retrenched and, when Timmins advised the DSS, payment of her invalid pension was resumed; and the DSS again informed her of her obligation to report increases in her or her husband's income.

In August 1978, Timmins notified the DSS that her husband had resumed working, and was receiving $300 a fortnight. The DSS reduced the level of her pension accordingly; and again told her of her obligation to report increases in income. Over the next 2 years, Timmins notified the DSS of a number of changes in her husband's income. Some of those notifications were found to be inaccurate when checked with her husband's employers; on each occasion, after checking with the employer, the DSS adjusted the level of Timmins' pension and reminded of her continuing obligation to report increases in income.

According to the DSS file, there was no contact between Timmins and the DSS from April 1980 to March 1982. Timmins claimed that she 'phoned the DSS to tell them of a change in her husband's employment; but the DSS had no record of her call.