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