In previous decisions where the AAT has ventured into the sensitive area of commenting upon act of grace payments it has tended to draw attention to something peculiar to that particular case, such as misinformation by the Department (*Weston* (1991) 61 *SSR* 845) or the creation of some expectation by DSS inaction or silence as in *Grillo*.

[B.W.]

Child disability allowance: arrears

HARRIS and SECRETARY TO DSS

(No. 8614)

Decided: 25 March 1993 by J.R. Dwyer.

The applicant asked the AAT to review a DSS decision not to backdate her payment of child disability allowance (CDA).

The facts

The applicant's son was born in March 1977. A claim for CDA was lodged in September 1990. Her son suffered from mild intellectual impairment which had been diagnosed in November 1981. He began school but did not advance beyond 'prep'. He later attended a special school for children with special needs.

The legislation

The applicable legislation was the *Social Security Act* 1947 as it was the legislation in force on the date of making the claim. Section 101 of that Act provided that a 'disabled child' was a child who had a physical, intellectual or psychiatric disability, because of that disability needed care and attention provided by another person on a daily basis that was substantially more than the care and attention needed by a child of the same age without such a disability, and was likely to need that care and attention permanently or for an extended period.

Section 102 provided that a person was qualified to receive CDA for a child if the person was eligible to receive family allowance in respect of the child, the child was a disabled child and the child received care and attention on a daily basis from the person or the person's spouse in a private home that is the residence of the person and the child.

Section 105(1) allowed CDA to be backdated up to 12 months prior to the lodging of the claim. This section was repealed on 29 December 1988. From that date s.158(1)(e) provided that payment of CDA shall not be made except upon the making of a claim for the allowance. A new s.159(4C) replaced it. Section 159(4C) purported to have the same effect as the repealed section in that it provided for the backdating of the payment for up to 12 months. But the new section did not express this purpose clearly according to the AAT. Section 105(1) had provided that CDA was payable, in the case of a person who was qualified before the lodging of the claim, 'from the commencement of the earliest family allowance period, being a family allowance period that commenced within 12 months of the day on which the claim was lodged'. But s.159(4C) provided that in those circumstances the claim was to 'be taken to have been lodged on . . . the day occurring 12 months before the day on which the claim was lodged'.

The AAT pointed out that the Act after its amendment in 1988 appeared to have a gap in that 'there was no section stating that CDA was not payable in respect of a period before the claim for CDA was lodged or was deemed to have been lodged under s.159(4C)'. The DSS did not disagree.

The question of arrears thus came down to the effect of ss.158(1)(e) and 159(4C). The AAT thought that s.158(1)(e) was ambiguous:

> 'In saying that payment of CDA should not be made except upon the making of a claim for that allowance, it could mean that there was no entitlement to payment of CDA in respect of any period of qualification for that allowance prior to the making of the claim. Alternatively, it could mean that although payment should not be made except upon the making of a claim for that allowance, upon the making of the claim, payment should be made in respect of any period of qualification for the allowance. Section 159(4C) provided that where a person became qualified to receive CDA more than twelve months before lodging the claim for CDA, the claim shall be taken to have been lodged on "the day occurring 12 months before the day on which the claim was lodged".'

(Reasons, paras 9-10; original emphasis)

The Tribunal concluded that due to the wording of s.159(4C) the first of the two alternative meanings of s.158(1)(e) should be adopted. To choose the second meaning would make s.159(4C) pointless:

> 'It is only if entitlement to payment in respect of periods of qualification for the allowance is limited by the date on which the claim was made, that there is any point in taking the claim to have been made twelve months earlier than it in fact was made. If, once the claim was lodged, payment could be made in respect of any period of qualification prior to that date, s.159(4C) would have no purpose.'

(Reasons, para.10)

As a result the Tribunal concluded that there was no entitlement to payment of CDA in respect of any period of qualification prior to the lodging of the claim for CDA.

Section 159(5) of the 1947 Act did provide a discretion to treat a claim for the payment of a pension, benefit or allowance as a claim for some other pension, benefit or allowance under the Act that was 'similar in character'. It was suggested that the claim for family allowance lodged in April 1977 could be so treated. This had been accepted by the SSAT. The AAT rejected this proposition.

The expression 'similar in character' had been discussed by the Federal Court in *Cooper* (1990) 54 *SSR* 727 and in *Calderaro* (1992) 65 *SSR* 924. In the latter case Gray J said that whether particular pensions, benefits or allowances were similar in character was essentially a question of fact. It was necessary to examine the features of each payment to assess whether there was a sufficient degree of similarity in character. Three matters were raised in that case: that greater significance should be attached to a similarity in an essential respect than to the presence with it of some dissimilarity; that it is relevant to consider whether the payments 'are similarly suitable to meet the circumstances which give rise to the application, and whether they are similarly grounded in those circumstances'; attention should be paid to practical realities rather than legal technicalities.

The AAT applied these considerations and concluded:

> 'The circumstance giving rise to an application for CDA is the existence of a child characterised under the Act as a disabled child, being a child needing care and attention 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. Family allowance does not meet that cir-

cumstance. It is an allowance paid in respect of children regardless of the existence of any disability. It is not similarly grounded to CDA, in that the basis for payment of family allowance is simply the support of a child, whereas the basis for payment of CDA is the provision of care and attention to a disabled child on a daily basis in the home of the person and the child. I am satisfied that the distinction between the two allowances is more significant than the fact that they both provide regular financial support to a person who has the care of a child.'

(Reasons, para.13; original emphasis)

But even if they were regarded as similar in character and the claim for family allowance could be treated as a claim for CDA, the applicant would not be qualified for CDA. This would occur because qualification for CDA requires that family allowance be payable to the person. The treatment of the claim for family allowance as a claim for CDA would mean that there would then be no claim for family allowance to enable the applicant to qualify for CDA.

The AAT also dismissed the possibility of treating a claim under a State Act for a mobility allowance as a relevant claim for the purposes of s.159(5).

The AAT expressed sympathy with the applicant who had not found out about the availability of CDA for 13 years. The AAT noted:

'The fact that it took thirteen years before she learnt, from another parent at a school John attended, that she should claim CDA shows that the system has somehow failed to make known to those whom it is designed to help, the availability of CDA. Whether further action could or should have been taken by the Department or by the Royal Children's Hospital, the medical profession or the other professionals and supporting services to whom Mrs Harris has taken J, is not for the Tribunal to determine.'

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Child disability allowance: review of cancellation

SECRETARY TO DSS and BRADY

(No. 8307)

Decided: 13 October 1992 by D.W. Muller.

In March 1991 the DSS decided that Brady was no longer entitled to receive child disability allowance in respect of her 19-year-old son. The SSAT set aside this decision and the DSS asked the AAT to review that decision.

The facts

Brady's son had been deaf from birth. The medical evidence was that her son had to attend university away from home in order to access the support services he required to reach his potential. He required extra care and attention in relation to his studies as he missed a significant proportion of what was said in lectures, tutorials, etc.

The evidence presented to the Tribunal also stressed the significant burden cast on the family by the disability. Because deafness was not a visible impairment, it was often regarded as a lesser disability than others.

The legislation

The AAT decided that the *Social Security Act* 1947 was the applicable legislation. Section 101 of that Act provided that a 'disabled child' was a child who had a physical, intellectual or psychiatric disability, as a result of that disability needed care and attention on a daily basis that is substantially more than that required by a child of the same age without such a disability, and is likely to need that care and attention permanently or for an extended period.

Section 102 provided that where a family allowance was payable to a person in respect of a child who was a disabled child, and the person provided in a private home that is the residence of the person and the child, care and attention on a daily basis, then the person was qualified to receive child disability allowance in respect of the child.

Section 103(1) provided that the allowance was still payable where the child was temporarily absent from home provided the absence was for a period not exceeding 28 days. But s.103(2) gave a discretion to the Secretary to determine that the allowance was still payable even though the child was temporarily absent from the home for more than this period. Section 103(3) also provided that the child's absence from home on normal school days for the purpose of receiving education, training or treatment, does not disqualify the person from receipt of the allowance in respect of the child.

The DSS argument

The DSS submitted that the purpose of the allowance was to enable children with not terribly severe handicaps to stay at home instead of being institutionalised. The payment offset some of the financial burdens imposed on parents as a result. In this case Brady's son was attending university and coping well. He did not require substantially more care and attention on a daily basis, and, in any event, that care and attention must be in a private home, not at the university. The discretion to allow for a temporary absence from home in excess of 28 days could not cover this situation as the son was absent from home for up to 32 weeks each year. This could not be considered temporary.

The DSS also submitted that as the Bradys were well off financially, the discretion should not be exercised in their case. Finally, it was submitted that a university is not a school within the meaning of the Act.

The Tribunal's findings

The AAT found that Brady's son was a dependent child and a disabled child because he suffered from profound sensory neural deafness. He needed care and attention on a daily basis as a result of that disability. This care and attention was substantially more than that needed by a child of the same age who did not have such a disability. This continued until the end of his first year at university. Since then he has been self-sufficient.

The Tribunal found that the son's absence from home to attend university was a temporary absence. The word temporary is not defined in the Act and the AAT referred to the Shorter Oxford English Dictionary which defined 'temporary' as 'lasting for a limited time; existing or valid for a time (only); made to supply a passing need'. The AAT noted that this definition did not necessarily suggest a short time or a brief moment.

The Tribunal also found that the university attended by the applicant's son was a 'school' for the purpose of