The legislation

Section 1223(1) of the *Social Security Act* 1991 provides that an amount paid to a person by way of allowance is, in specified circumstances, a debt due to the Commonwealth. Section 1223(2) excepted from the operation of sub-section (1) certain amounts paid to a person 'in advance' in circumstances that did not involve a breach of the Act.

Section 1223AA provided in substance that where a person has received a 'prepayment' of social security benefit for a period and the amount of the prepayment is more than the 'right amount' payable, the difference is a debt due to the Commonwealth.

'Prepayment' or payment 'in advance'?

The issue was whether the amount in question was a prepayment of social security benefit, or a 'payment in advance' within the meaning of s.1223(2). The SSAT had found that the payment was made in advance and that as the other conditions of s.1223(2) were met, s.1223(1) did not apply and the amount was not a debt.

While the Act did not define a payment 'in advance', a 'prepayment' was defined in s.1223AA(2) to include a payment under s.652. That provision empowers the Secretary to make payments earlier than usual to take account of a holiday period. While in common parlance the two terms may overlap, as used in the Act a distinction was intended. A payment made on the spot in an emergency situation would be a payment 'in advance' rather than a prepayment.

The AAT concluded that the amount in question was a prepayment for the purposes of s.1223AA and that s.1223 did not apply. As all the conditions in s.1223AA(1)(b) were satisfied, the amount was recoverable as a debt to the Commonwealth. The provision did not require any fault or falsity on the part of the recipient as a precondition to the creation of debt, and its language did not admit of any such interpretation.

Formal decision

The AAT set aside the decision under review and substituted a decision that the amount of $396.41 was a debt to the Commonwealth.

[P.O'C.]

Disability support pension: continuing inability to work

LOKNAR and SECRETARY TO DSS (No. 8399A)

Decided: 3 August 1993 by D.P. Breen, J.G. Billings and R.A. Joske.

Josip Loknar was granted an invalid pension in August 1990. When disability support pension (DSP) was introduced in November 1991, Loknar was reviewed and the DSS decided to cancel his pension.

On review, the SSAT affirmed that decision. Loknar appealed to the AAT.

Continuing inability to work

It was accepted that Loknar had at least a 20% impairment, as required by s. 94(1)(a) and (b) of the *Social Security Act* 1991.

The issue before the AAT was whether Loknar had a 'continuing inability to work' — that being one of the requirements to qualify for DSP: s.94(1)(c) of the Act.

According to s.94(2) of the Act, the concept of 'continuing inability to work' requires that:

- the person's impairment of itself prevent the person doing the person's usual work and work for which the person is currently skilled: s.94(2)(a); and
- either the impairment of itself prevent the person undertaking educational or vocational training during the next 2 years: s.94(2)(b)(i); or only permit the person to undertake such educational or vocational training as would not be likely to equip the person to do work for which he or she is currently unskilled: s.94(2)(b)(ii).

The AAT accepted the DSS's concession that Loknar satisfied s.94(2)(a), because his impairment prevented him undertaking work for which he was currently skilled.

The AAT then decided that Loknar's inability to undertake educational or vocational training was in part due to his illiteracy, age and lack of academic ability and not due solely to his impairment, so that he could not satisfy s.94(2)(b)(i).

The AAT then turned to consider whether, as an alternative, Loknar could satisfy s.94(2)(b)(ii).

The AAT said that the work referred to in that provision (that is, the work for which educational or vocational training could equip the person) must be skilled and not unskilled work.

The structure of the provisions, and the reference to work for which a person was 'currently skilled', demonstrated that the question posed by s.94(2)(b)(ii) was 'can he be retrained so as to undertake other *skilled* work?' The notion of *unskilled* jobs would seem to be impliedly excluded by the framework of the legislation: Reasons, para. 28.

Looking at Loknar's age, virtual illiteracy and limited academic ability, he was not a suitable candidate for rehabilitation. Educational and vocational training, the AAT said, would not equip Loknar to do work for which he was currently unskilled within the next 2 years.

It followed, the AAT said, that Loknar satisfied s.94(2)(b)(ii) and he had a continuing inability to work as required by s.94(1)(c).

Formal decision

The AAT set aside the decision and review and substituted a decision that Loknar was eligible for DSP from the date of its cancellation.

[P.H.]

Child disability allowance: meaning of 'disabled child'

BLADES and SECRETARY TO DSS (No. 8825)

Decided: 7 July 1993 by S.A. Forgie, A.M. Brennan and B.A. Smithurst.

The DSS had rejected Mrs Blades' application for child disability allowance. This decision was affirmed by a Social Security Appeals Tribunal and she then applied to the AAT for review of that decision.

The facts

The applicant's daughter was four years old. The child had suffered from colic until she was 12 months old and did not put on any weight between 13 months and 2 and a half years. She also suffered

from various gastric and ear infections. In addition the child was aggressive and irritable.

The medical evidence varied as to the nature and extent of the child's condition. One doctor acknowledged that the child had suffered more infections than the average child but doubted that she 'truly warrants a child disability allowance'. Another medical practitioner was of the view that there were problems between mother and child which lay at the base of the child's condition. This doctor did not consider the child to be hyperactive. A psychiatrist considered her to be developmentally delayed. This was not an organic problem but an emotional or behavioural one. A different medical practitioner considered her to be allergic to certain foods and recommended a special diet which took a lot of extra work.

In fact Mrs Blades had adopted a special diet for her child. This took considerable effort on her part and involved extra expense as her daughter could not eat cheap food but instead had to have specially prepared and fresh food. The child was also undergoing a physiotherapy program which included both clinic-based and home-based elements.

The legislation

The basic qualification for child disability allowance is set out in s.954 of the *Social Security Act*. A person may receive the allowance if the young person in respect of whom the allowance is paid is a 'CDA child of the person'. To be a CDA child the child must be a 'disabled child'. This term is explained in s.952 of the Act:

> 'Subject to section 953, a young person is a disabled child if:
>
> (a) the young person has a physical, intellectual or psychiatric disability; and
>
> (b) because of that disability, the young person:
>
> (i) needs care and attention from another person on a daily basis; and
>
> (ii) the care and attention needed by the young person is substantially more than that needed by a young person of the same age who does not have a physical, intellectual or psychiatric disability; and
>
> (c) the young person is likely to need that care and attention permanently or for an extended period.'

Did the child have a physical, intellectual or psychiatric disability?

The applicant submitted that the word 'disability' should be interpreted according to its dictionary definition. The decision in *Bryer* (1988) 41 *SSR* 516, where the AAT had adopted such an approach was referred to. In *Bryer* the applicant's child had a physical defect which, without treatment, would have led to impaired brain development. The AAT concluded in that case that the child had a disability even though there was no functional difficulty while the child was undergoing treatment. But it was noted by the AAT in the present case that in *Bryer* 'the Tribunal did not take a broader view that, in order to be a disability, an impairment had to lead to an incapacity or inability to function in everyday life': Reasons, p.18.

The question then was whether to have a 'disability' meant more than to have a physical, intellectual or psychiatric defect. The AAT referred to a number of different analyses of the meaning of disability. In some instances it was used to refer to the effect of an impairment on an individual's capacity to participate in personal, social and work activities; in the case of workers' compensation legislation its meaning was limited (by necessity) to loss of ability to work. Of course, in *Bryer* it was equated with the presence of an impairment.

The AAT then asked:

> 'In what sense is the word "disability" used in paragraph 952(a) of the Act? Paragraph 952(b) requires an assessment of the care and attention the child needs against the criteria in that paragraph. The opening words of the paragraph specifically link the care and attention needed to the disability by specifically stating that "because of that disability" the child needs the care and attention. A linkage of the disability with the care and attention required is possibly more compatible with a conclusion that the word "disability" is intended to mean an inability to perform normal activities leading to a requirement for additional care. That is because, as we have illustrated . . . it does not follow from a finding that there is an impairment that the child will need care and attention. This "linkage" however, is not determinative of the interpretation we should adopt for it could be equally argued that there is a link between a disability in the sense of an impairment and the care and attention the child needs. If the disability, in the sense of an impairment, is such that no care and attention is needed, sub-paragraph 952(b)(i) is not satisfied.'

(Reasons, paras 22-23)

The AAT then examined the history of the legislation. The handicapped child's allowance was first introduced in 1974 and was paid to carers of children who, in similar terms to the current legislation, had a physical or mental disability which caused the child to require care and attention. The concept 'handicapped' used at that time according to its dictionary definition referred to more than an impairment and looked to the loss of capacity or function arising from the impairment. This definition was also supported by the interconnection between the disability and need for care and attention which also existed in the legislation. The AAT concluded that the word 'disability' was then being used in its broader sense and was not limited to the presence of a defect or impairment.

Subsequent changes to the legislation did not indicate that this use of the term 'disability' altered. The AAT concluded:

> 'in order for a child to be regarded as having a disability, whether physical, intellectual or psychiatric, there must be a physical, intellectual or psychiatric impairment which, without treatment or care and attention, limits the child's capacity to engage in ordinary activities or ordinary life or in his or her ability to meet personal demands. What is regarded as "ordinary" would have to be addressed in the context of the activities, life and abilities of those children regarded as within the normal range and of an age similar to the child concerned.'

(Reasons, para. 28)

When applied to the present facts the conclusion was that the child did not have a disability. It was accepted that she was irritable, restless, demanding and less 'settled' than a normal child. But there was no evidence that she was outside the normal ranges of behaviour for a child of her age. While the various infections she suffered required care and attention the AAT concluded that, even though she may have had more than her share of such infections, these did not take her outside the normal range.

The Tribunal also commented on the commitment of the child's mother:

> 'Mrs Blades has cared for [her child] with dedication and concern for her needs. She has done so without thought for any extra work and time which has been involved and that is to her credit. We accept that [the child] has required more care and attention than the average child, if such a child exists. However, her work, time, care and concern does not mean that [the child] has a disability either in the sense of the Act or general language. Mrs Blades herself acknowledges that [her child] is not disabled as that term is generally understood. We would be concerned if [the child] were to grow up thinking that there is a possibility that she is disabled as that could have an adverse effect upon her development. In saying this, we acknowledge that Mrs Blades has also recognised that could be a problem and is taking care to ensure that [her child] grows up to lead an independent life without drawing [the child's] attention to an aspects of [the child's] behaviour which cause her concern.'

(Reasons, para. 31)

Formal decision

The AAT affirmed the decision under review.

[B.S.]