1992, McIver was contacted at six-monthly intervals by the DSS concerning the repayment. He stated that he had refused to pay, believing that the decision was unjust. He explained that at the time of the alleged overpayment he had been in a family business and that it was the business rather than him personally who received the funds at issue.

The DSS argued that McIver had had repeated contact with it and had done nothing to challenge the decision. Even after allegedly discovering his right to appeal in December 1992, he did not seek an appeal until December 1993.

The AAT decided that McIver had not provided an acceptable explanation for the delay in lodging his application for review. The AAT said that he had 'rested on his rights' by not acting sooner. The AAT also noted that he had regular contact with the DSS and that there was evidence that he had received the SSAT decision in 1990. And, even though his own evidence was that he was not aware of his appeal rights until 1992, he still waited another 12 months before he acted on that knowledge.

The AAT also found that there was some prejudice to the DSS in the re-opening of the matter considered closed, and which related to matters that occurred in the period 1986 to 1988. Moreover, while the AAT said that it was not its role to come to a conclusion as to the substantive application, it was noted that there was no fresh evidence that would materially contribute to McIver's case.

The AAT decided that in all the circumstances, fairness and justice between the parties would not be served by extending the time within which to allow McIver to lodge an application for review.

Formal decision

The AAT refused the application for an extension of time and, as a consequence, the substantive application was dismissed for lack of jurisdiction.

[R.G.]

Child disability allowance: arrears: qualification

SECRETARY TO DSS and FALK (No. 9407)

Decided: 7 April 1994 by G. Ettinger.

The facts

Falk gave birth to a daughter named Gretel on 24 November 1988. Gretel was kept in hospital for 11 weeks after her birth. Falk initially applied for a family allowance on 13 January 1989, while Gretel was still in hospital. Later, on 8 May 1992, she applied for a child disability allowance (CDA). (Falk claimed she had not previously been aware that she could apply for a CDA.) The DSS decided to pay CDA as from 12 months before her application, that is, from 8 May 1991.

On internal review the Authorised Review Officer decided that she was not entitled to receive arrears of payments for 12 months prior to her claim. On an appeal by Falk to the SSAT, it was decided that she should receive CDA payments as from 25 November 1988 when Gretel was born. The DSS appealed to the AAT.

The legislation

The AAT found that, since Falk had applied for CDA in 1992, the *Social Security Act 1991* applied. However, since Falk sought backpayments to 1989, her eligibility for CDA had to be determined under the *Social Security Act 1947*.

Section 102 of the 1947 Act provides that for a person to be qualified for CDA care and attention must be provided on a daily basis in the residence of the person and the child. This requirement was carried across to the 1991 Act (s.954(1)(b)).

Section 958(1) of the 1991 Act provides that the provisional commencement day (the day from which CDA is paid) is the date on which a person claims CDA. However, s.958(2)(a)(i) provides an alternative provisional commencement date where a person has made an 'initial claim' for family payment. On the facts, an initial claim for a family allowance was made on 13 January 1989.

Section 958 is subject to s.960 which provides that if the provisional commencement date is more than 12 months after the person becomes qualified for a CDA, then payments can be backdated for up to 12 months before the provisional commencement day.

Section 955(3) provides that where there is a temporary loss of qualification because the child is not receiving care and attention on a daily basis in the private home of the person, the DSS may nevertheless decide that the person continues to be qualified for CDA.

The main issue

It was not in dispute that Falk was entitled to receive CDA. The main issue before the AAT was whether CDA payments were payable either:

(i) from the date Gretel was born,

(ii) from the date of the initial claim for a family allowance (January 1989), or

(iii) from 8 May 1991, being 12 months prior to the application for CDA.

Daily care and attention

Falk submitted that she had provided care and attention while Gretel was in hospital, as required by s.102 of the 1947 Act and s.954 of the 1991 Act. She relied on evidence of telephone calls several times a day, her visits, her time with the baby walking her around the hospital grounds, changing nappies and attending to all her needs, including her feeding requirements.

On this basis, the AAT was satisfied that Falk had provided daily care and attention to Gretel, as from her birth, as required by both Acts.

Care and attention in the residence of the person and the young person

The DSS submitted that as Gretel was in hospital and not residing with Falk when she made the 'initial claim' for family allowance in January 1989, there was no eligibility for CDA at that date. Accordingly, the DSS argued that CDA payments could not be backdated to January 1989. Falk submitted that since Gretel's birth, the family home had been her residence.

The AAT found that Gretel had not taken up residence in the family home when she was in hospital. Accordingly, Falk did not qualify for CDA when she made the initial claim in January 1989.

Provisional commencement date

Falk submitted that pursuant to s.958(2)(a)(i), the provisional commencement date should not be 8 May 1992 when she made a claim for CDA, but 13 January 1989, when she made an initial claim for a family allowance.

The AAT rejected this argument and found that, as Gretel was in hospital in

January 1989 and was not residing with Falk, the provisional commencement day could not be 13 January 1989. The AAT found that Falk was not eligible for CDA in January 1989 (ss.954(1)(b) and 958(2)(a)(i)). As a result, the provisional commencement date was 8 May 1992 when Falk applied for CDA.

Falk made an alternative submission that, if the AAT found that she was not eligible for CDA in January 1989, s.955(3) applied. She submitted that there had been a temporary loss of qualification without the loss of the entitlement to a CDA.

However, the AAT found that s.955(3) was of no assistance to Falk as she did not qualify for CDA while Gretel was in hospital. As there was no qualification for CDA, there was no temporary loss of qualification.

Pursuant to s.960, Falk was found to be entitled to receive CDA as from 8 May 1991, being 12 months prior to the date Falk applied for a CDA.

Formal decision

The AAT set aside the decision of the SSAT and decided that Falk should receive CDA as from 8 May 1991, that is, 12 months before her claim in 1992.

[H.B.]

Child disability allowance: meaning of care and attention,

SECRETARY TO DSS and CARTER

(No. 9310)

Decided: 16 February 1994 by K.J. Lynch and K.P. Kennedy.

Carter's claim for child disability allowance (CDA) for her two sons was rejected by the DSS. On review the SSAT substituted a decision that she was eligible to receive CDA in respect of her two sons. The DSS appealed to the AAT for a review of this decision.

The facts

Carter has two sons, Justin and Brendan. Carter claimed that both sons required extra care and thus she should be eligible for CDA. Her son, Justin who was 9 years and 9 months old suffered from learning difficulties, visual memory problems, motor skills co-ordination problems, anxiety and demoralisation due to his impairments, enuresis (night wetting) and encopresis (soiling). Brendan who was 7 years and 9 months suffered from delayed development of visual skills, poor control over hand movement, poor gross motor skills, inability to organise body response, poor physical co-ordination, poor reading ability, difficulty with rote memory, scoliosis of the spine, enuresis and encopresis.

The medical and specialist commentary on each of these children's impairments was wide ranging and came from specialists in optometry, chiropractic, physiotherapy, naturopathy, speech therapy and psychology.

Reports were submitted to the AAT by some of these specialists, including a speech pathologist, chiropractor, physiotherapist, optometrist and child guidance therapist. Evidence was also submitted from a remedial teacher who assists Justin.

Much of the evidence related to exercises and programs to be carried out by each child in an attempt to minimise the disabilities. The DSS did not produce any contrary evidence.

Disabled

The AAT referred to the case of *Blades and Secretary of DSS* (1993) 76 *SSR* 1103 for a meaning of 'disability' under s.952. The reasoning in *Blades* was adopted by the AAT and applied to this situation to decide that each boy was disabled as required by the section.

Care and attention on a daily basis

The AAT considered the time Carter spent with each child on a daily basis and decided that she did provide care and attention to each child on a daily basis. In coming to this decision the AAT recognised that the only fair interpretation of s.952 is that the time spent with each child must be substantially more than with a child without a disability.

The AAT was unable to accept that a need for a special diet was established, notwithstanding the comments of Dr Troy (chiropractor). Carter's special diet shopping and preparation time could not be considered in terms of care and attention. There was no evidence before the AAT establishing that it was within the chiropractor's professional competence to advise that the children needed a special diet.

The AAT then turned to the question of whether or not the children actually needed the care and attention or was it merely the subjective belief of the mother. Many decisions were referred to and, in particular, *Kymantas and Secretary to DSS* (1990) 19 ALD N22. The AAT decided that the need of these children was a question of fact which could be established by

> 'comparison between the quantum of care and attention needed by the child in respect of whom the application is made and the care and attention needed by a child or young person of the same age without a disability.'

(Reasons, para.46)

The AAT made note of the need to separate the care and attention of an anxious mother from

> 'care and attention which is needed in the treatment of the disabilities as that which "refers to the minimisation of the child's disability so as to enable the child to develop as far as possible as if the disability did not exist and to lead as normal a life as possible"'.

(Reasons, para. 47)

In considering the multiplicity of programs that both children undertook in order to overcome their disabilities, the AAT decided that the same care was needed for each child and took up two or more hours a day for each child. It was recognised that this included Carter's observation of routines to see that they were carried out properly by the children, mastering programs herself so that she could supervise the children effectively, and attending the various classes and specialists that assist the children.

The AAT followed the reasoning expounded in *Dutton and Secretary of DSS* 21 ALD 434 that in deciding the amount of care and attention needed by a child, both quantitative and qualitative analysis must be considered. The AAT decided that each child needed care and attention beyond what would be needed by a child of similar age without disability. The AAT noted that even with some rationalisation of programs the extra care and attention would still amount to approximately two hours per day for each child. The AAT dismissed an argument put by the DSS that the mother's own literacy problems may lengthen the time needed to be spent with each child. The AAT commented that 'there is no authority for comparing the person providing the care and attention with some other standard carer': Reasons, para.49.

The AAT briefly turned its attention to the word 'substantially' and decided