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

that each child did require substantially more care and attention than a child of the same age without disability, and that this need for care and attention would continue for an extended period.

Formal decision

The AAT affirmed the SSAT decision that CDA was to be paid for both children.

[B.M.]

Child disability allowance: provisional commencement day

DOWD and SECRETARY TO DSS

(No. 9236)

Decided: 7 January 1994 by B.G. Gibbs, R.C. Gillham and E.A. Shanahan.

Dowd claimed that she was entitled to back payments of child disability allowance in respect of her son. Her claim was that she should have received the payment from 26 February 1986.

Previous claims rejected

Handicapped child's allowance had first been claimed by Dowd on 26 February 1987. This claim was rejected on the basis that her son was not a handicapped child. Subsequent claims for child disability allowance on 2 February 1989 and 23 May 1991 were also rejected on the ground that her son did not need substantially more care and attention because of his disability than that required by a young person of the same age who does not have a disability.

Dowd claimed the allowance once again on 6 October 1992. This claim was also rejected, so she appealed to the SSAT. On 15 April 1993 the SSAT decided that she was eligible for child disability allowance and had been qualified to receive the payment since 1986. The SSAT therefore backdated the payment 12 months prior to the most recent claim, viz. 6 October 1992. This meant that Dowd would receive the payment from 6 October 1991.

What was the correct commencement date?

As the SSAT had decided that she was qualified from 1986 Dowd asked the AAT to review the SSAT decision that she was only entitled to payment from October 1991. Her submission was that s.960 of the *Social Security Act 1991* provided that payment is to occur from the provisional commencement day. Section 958(1) states that the date on which the person made the claim for the allowance is their provisional commencement day. But where a previous claim has been made for a similar payment then the date is determined under s.958(2)(a)(ii) of the Act. This section states:

> 'If
>
> (a) a person makes a claim (in this subsection called the "initial claim") for:
>
> . . .
>
> (ii) a pension, allowance, benefit or other payment under another Act, or under a program administered by the Commonwealth, that is similar in character to child disability allowance;
>
> the person's provisional commencement day is the day on which the person made the initial claim.'

Section 960 of the Act further provides that where a person is qualified for child disability allowance and the provisional commencement day is more than 12 months after the person became qualified to receive the payment then the allowance can be backdated by 12 months.

Dowd claimed that the object of these provisions was to provide for arrears where the person had been unsuccessful in seeking to obtain the payment even though she was qualified.

But the Tribunal could not agree with her claim for back payment to 1986. The Tribunal said:

> 'While we agree that statutes should be construed in a manner to carry out the intention of the legislature, the paramount rule remains that every statute is to be interpreted according to its manifest and expressed intention . . .Accordingly, we find that while pursuant to subsection 958(1) a person's provisional commencement day will be the day on which the claim for CDA is made, the manifest and expressed intention of subsection 958(2) is to be of ameliorative effect. That is to say, where a person makes a claim of the type provided for in that subsection (called the initial claim) rather than for CDA then, subject to certain criteria being met, the person's provisional commencement day for CDA is the day on which the person made the initial claim.'

(Reasons, pp.5-6)

The criteria are: that the person was qualified for the allowance on the date of the initial claim; that a subsequent claim for CDA is made; and that the Secretary is satisfied that it is reasonable for s.958(2) to apply to the person.

The AAT pointed out that Dowd's claim on 26 February for handicapped child's allowance was rejected. As a result she could not satisfy the first of the above criteria which required her to be qualified for CDA on the date of the initial claim. Thus she could not claim the back payment under s.958(2).

The Tribunal also concluded that the later claims for CDA in February 1989 and 1991 were not claims of the type provided for under s.958(2). This was a further reason why she could not avail herself of the ameliorating provisions under that subsection.

Formal decision

The AAT affirmed the decision under review and affirmed the applicant's provisional commencement date as 6 October 1992 and that payment was to be backdated by 12 months to 6 October 1991.

[B.S.]

Overpayment: prepayment of benefit

SECRETARY TO DSS and AKHNOUKH

(No. 9319)

Decided: 23 February 1994 by J.R. Dwyer.

The DSS sought review of a decision of the SSAT made on 24 November 1992 that set aside a decision of the DSS to raise and recover an overpayment of job search allowance paid to Akhnoukh for the period 16 December 1991 to 26 December 1991. The SSAT had decided that there was no debt owing.

It was not disputed that Anhoukh was receiving job search allowance (JSA) when, on 16 December 1991, he commenced full-time temporary employment. He was due to complete his next fortnightly application for continuation of benefits on 26 December, but as that date was a public holiday, his next payment of JSA was prepaid under s.569 of the *Social Security Act 1991* on 23 December. On 7 January 1992 Anhoukh lodged his form, disclosing that he had commenced employment.