Taylor's treating doctor's report to the effect that it could not be said that it was necessary that Taylor separate from his wife to avoid the stress he was caused by his mother-in-law. The AAT found that Mr and Mrs Taylor lived apart because they were unable to continue in their relationship, and Taylor had chosen to remove himself from any stress caused by the marital relationship. The AAT was not satisfied that Taylor and his wife were unable to live together as a result of an illness or infirmity of either or both of them. Therefore, it decided that Taylor was not a member of an illness separated couple (as defined in s.4(7) of the *Social Security Act 1991*).

Formal decision

The AAT affirmed the decision under review.

[G.H.]

Splitting of family payment

McAULLEY (formerly O'DONNELL) and SECRETARY TO DSS (No. 11648)

Decided: 25 February 1997 by D.P. Breen.

The DSS had decided that McAulley had no entitlement to part of the family payment paid in respect of her son Michael because he was not her dependent child.

The facts

In October 1995 an order was made in the Family Court in which Michael's father, Neil O'Donnell was granted sole custody of Michael, with specified access being granted to McAulley.

In December 1995 McAulley claimed family payment for Michael on the basis that he was spending 7 days each fortnight with her. This request was refused and the decision was affirmed by an authorised review officer.

The SSAT varied the decision. It decided that McAulley should receive family payment during the December/ January school summer holiday period when she had continuous access to Michael.

Legislation and case law

The AAT referred to s.5(2) *Social Security Act 1991* which contains a definition of 'dependent child', and it also reviewed the case law. The cases considered included *Secretary, Department of Social Security v Field* (1989) 18 ALD 5 and *Elliot v Secretary, Department of Social Security* (1995) 40 ALD 594.

Reasons

The AAT accepted that the SSAT had made the correct decision in respect of the summer holidays. It referred to the fact that Michael's school also had three other school holiday periods each year in May, July and October in which he spent half the time with his mother. The AAT concluded that there should be a further splitting of the family payment on the basis that each parent qualified for 50% of family payment during all periods of school holidays.

Formal decision

The AAT varied the SSAT decision in accordance with the following findings:

- that McAulley and O'Donnell, not being members of the same couple, are each qualified for family payment for the dependent child Michael O'Donnell for the duration of the school holidays in the months of December/ January, May, July and October in each year and every year; and
- that they are equally so qualified.

[A.A.]

Practice and procedure: stay order

SHORT AND SHORT and SECRETARY TO THE DSS (No. 11575)

Decided: 29 January 1997 by G. Ettinger.

The Shorts applied to the AAT for an order staying the operation of the SSAT decision of 2 October 1996, which had affirmed the DSS decision to apply a preclusion period to 15 April 1997.

The facts

Mr Short received a compensation settlement on 15 December 1992, and was precluded from receiving a social security payment until 15 April 1997. The Shorts gave evidence that they 'had lost one house', and so their priority when they received the lump sum settlement, was to buy another family home. In spite of the fact that they knew they would have to repay some money to the DSS, the Shorts committed themselves to buying a new home. They had taken into account the preclusion period, but unexpected rises in building costs had resulted in a shortage of money.

The DSS argued that if the SSAT decision was stayed, and the Shorts were ultimately unsuccessful before the AAT, the DSS would not be able to recover the money paid to the Shorts because they would probably suffer financial hardship. It was also argued that the scale of expenditure of the Shorts had been unreasonable in the circumstances. The Shorts were still receiving some income. Mr Short was unable to work, but could assist with the care of their child. Mrs Short was an experienced waitress, but had not looked for work.

The merits

The AAT considered briefly the merits of the case and the meaning of 'special circumstances' in s.1184 of the *Social Security Act 1991*, and concluded that it was unlikely that special circumstances would be found in this case.

Formal decision

The AAT did not grant an Order staying the operation of the SSAT decision.

[C.H.]

DSP: meaning of 'treatment'

TLONAN and SECRETARY TO THE DSS (No. 11595)

Decided: 6 February 1997 by S.A. Forgie.

Tlonan sought a review of a decision of the SSAT which rejected her claim for the disability support pension (DSP). The claim had been rejected under s.94 of the *Social Security Act 1991* (the Act).

The issue

The issue before the AAT was whether Tlonan was qualified for a DSP, and in particular, whether Tlonan suffered from conditions which were diagnosed, investigated, treated and stabilised, and thus could be assigned an impairment rating under the Impairment Tables.

The evidence

The AAT heard evidence from both Tlonan and her husband. Tlonan gave evidence that she suffered from frequent migraine headaches, 5 times a day, and had done so for the past 7 years. Tlonan described the effects of the headaches to be pain at the back of her neck, top of her

head and behind her eyes. Tlonan said that she also suffered from shaking, fever and vomiting as a result of the headaches. Tlonan's evidence was that the only way to treat the headaches was to keep still, not talk and stay away from food and drink in a dark room. She also takes regular baths. Tlonan complained that she suffered from pains in her leg, and had done so for the past 17 years. She said that she is so very, very sick that she sometimes wonders if God should take her. In relation to ability to work, Tlonan gave evidence that she cannot work as she is very disabled.

Tlonan's husband gave evidence that his wife suffered very badly from headaches, and that the attacks were continuous. He did everything for his wife including cooking, washing and caring for her when she was ill. He said if the headaches could be controlled, Tlonan would not be able to work, but conceded that she could do a job which allowed her to sit down.

The medical evidence

The AAT heard evidence from a medical practitioner who had treated Tlonan. Dr Chong Wah had been Tlonan's treating doctor for 6 years. He said that his diagnosis of migraines had been based on the symptoms Tlonan described, and he had not been able to find a cause. Dr Chong Wah said that there was no formal diagnostic test for migraines. In the Doctor's opinion the migraines were a permanent condition, and he could not foresee Tlonan recovering within 2 years. Dr Chong Wah had prescribed a wide range of drugs to try to alleviate Tlonan's condition. Under cross-examination, Dr Chong Wah conceded that there had not been a reasonable trial of medication which had been prescribed by another medical practitioner, Dr Burrow. In relation to Tlonan's leg pains, Dr Chong Wah reported that they were a bit bizarre.

Dr Burrow wrote two reports which were tendered to the AAT. In these reports, he commented on Tlonan's visits to Royal Darwin Hospital outpatients clinic. Dr Burrow noted that Tlonan was suffering from migraine headaches and made several recommendations for treatment, including recommendations to Dr Chong Wah. In his most recent correspondence, Dr Burrow said that he was not aware if his most recent suggestions for treatment had been carried out.

Dr McLaren was the author of a report which was also tendered to the AAT. Dr McLaren, a Senior Psychiatrist with Mental Health Services in Darwin in 1994, advised that in his opinion, there was no psychiatric component to Tlonan's headaches.

Consideration of the evidence

The AAT found that Tlonan suffered from migraine headaches. It then considered the meaning of 'treatment' as it appeared in paragraphs 3 and 4 of the introduction to the Impairment Tables at Schedule 1B to the Act. The AAT referred to several dictionary meanings of 'treatment', including specialist medical dictionaries, and decided that the meaning given to the word 'treatment' should depend on the context, namely, within Schedule 1B of the Act. The AAT decided that this meant that it should not be given too restrictive a meaning and 'should not be limited to medical treatment in the sense of surgery or the prescription of medication': Reasons, para. 51.

According to the AAT:

> 'In its context, the word 'treatment' refers to a broad range of therapeutic measures which are reasonable to adopt in the particular case and may include passive measures such as rest as well as active measures including, but not limited to, such diverse measures as the prescription of medication, physiotherapy, exercise generally and counselling. What amounts to treatment in any particular case will depend on the individual circumstances of that case.'

(Reasons, para. 51)

The AAT discussed the modification of treatment to adapt to the needs and reactions of a patient to treatment, and decided that while modifications are being made to treatment, the condition is still being treated despite that modification. In applying this reasoning to Tlonan's case, the AAT decided that Tlonan had taken a wide range of medication over a long period of time, and had tried other things like massage and creams. The AAT also found that Tlonan had not taken the course of medication as recommended by Dr Burrow, nor had she undertaken physiotherapy as recommended by Dr Burrow. In light of this, the AAT found that Tlonan had not undergone the treatment for her migraines as recommended by Dr Burrow, and that there was nothing to suggest that Dr Burrow's suggestions were inappropriate or unreasonable. On this basis, the AAT found that there was no evidence on which to regard Tlonan's condition as treated and stabilised for the purpose of the Impairment Tables. Thus an impairment rating could not be assigned for her condition. The AAT found that Tlonan's leg pain could not be rated under the Tables either, as it had not been diagnosed, treated and stabilised.

Formal decision

The decision under review was affirmed. Tlonan was not eligible for the DSP.

[W.M.]

DSP: capable of working a 30-hour week

GARNER and SECRETARY TO DSS
(No. 11719)

Decided: 24 March 1997 by M.T. Lewis and J.R. Valentine.

Garner sought a review of a decision of the SSAT which cancelled his entitlement to a disability support pension (DSP).

The issue

The issue before the AAT was whether Garner was qualified for DSP, and in particular, whether Garner had a continuing inability to work under s.94(2) of the *Social Security Act 1991*.

The evidence

The AAT heard evidence from Garner that he had been in receipt of an invalid pension from October 1989 till September 1994, when the DSS had reviewed his entitlement and decided that he was no longer eligible. The primary medical condition for which the invalid pension had been granted was a back injury which Garner had sustained in 1981 whilst lifting heavy metal plates. Since the injury, Garner had worked as a clerical assistant and with the Royal Australian Air Force, but had been unable to continue with either employer because of his back injury.

Garner gave evidence to the AAT that he was working for 20 hours a week, and that this level of work had slowly been achieved over several months. Garner's work consisted of clerical work for the Australian Performing Arts Association, providing guitar lessons and guitar performances at hotels and clubs. Garner also gave evidence that he was seeking courier work, carrying small packages only, for approximately 8 hours a week. He had not been able to find such work. Garner said that he could play music in hotels and clubs, and teach guitar lessons for up to 3 hours with regular breaks of half an hour at least. He said that sitting down was easier than work which required standing and for this reason, the guitar performance and teaching work was easier to undertake than clerical work.

In relation to his back injury, Garner advised that he suffered constant pain, and took analgesic medication and used ointment. His back injury caused difficulty sleeping, and an inability to sit for prolonged periods. Garner stated that he