Act) that dealt with qualification for child disability allowance read as follows:

> Subject to section 953, a young person is a disabled child if:
>
> (a) the young person
>
> (i) has a physical, intellectual or psychiatric disability;
>
> (ii) and is likely to suffer from that disability permanently or for an extended period and
>
> (b) a determination of the Secretary under section 952A is in force and one of the following conditions applies:
>
> (i) under the determination, the disability is declared to be recognised disability for the purposes of this section;
>
> (ii) the young person has been assessed and rated under the Child Disability Assessment Tool and has been given a positive score of not less than 1.

Section 952(b) makes reference to a determination by the Secretary that a medical condition is 'a recognised disability' as one basis for establishing qualification. An alternative basis under s.952(b)(ii) is achieving a positive score under the Tool.

The basis for the SSAT's decision granting child disability allowance to Roe was that cystic fibrosis fitted within the Child Disability Assessment Determination 1998 which declared, amongst other things, at Number 9 of Schedule 3 of the Determination, a condition which met the description:

> severe multiple or physical disability (including uncontrolled seizures) requiring constant care and attention where the young person is less than six months of age

was a 'recognised disability' within the meaning of s.952(b)(i).

Constant care and attention

Roe gave evidence of the additional care entailed in managing the condition, and dietary and other precautions needed to avoid any infection. Evidence was given of a regime of medication repeated through the day and special food preparation in accordance with the high fat high protein diet required by cystic fibrotic children. Roe was able to offer evidence of the different level of care and attention accorded to her older child, without the condition, in the first six months of his life.

On the medical evidence, the child did not achieve a score of 1 on the Tool. The Tool is used to measure a child's functional ability, emotional state, behaviour and special care needs. The various abilities are assessed in relation to a number of age-related milestones and will attract a positive score if there is significant disability.

The AAT then looked at the question of a 'recognised disability', within the Determination by the Secretary made under s.952A. The Department accepted that the child had a 'severe physical disability', so the question for the AAT was whether cystic fibrosis was a condition that required 'constant care and attention'.

The AAT referred to *Mrs M and Director General of Social Security* (1983) 5 ALD N365 for the following:

> The expression 'constant care and attention' is not a technical expression and the word 'constant' is not a word having a medical or other relevant technical meaning. In the context in which that expression appears in Part VIB we think that 'constant care and attention' encompasses care and attention which is continually recurring. Nevertheless, 'constant' denotes more regularity or periodicity than 'spasmodic'.

On Roe's evidence and on the basis of medical reports the AAT found that constant care and attention was needed. Roe gave attention to her child on a regular basis that was 'significantly over and above the norm' (Reasons, para. 22). The AAT pointed out that the child suffered a life threatening illness and her life could be extended through proper care.

Formal decision

The decision of the SSAT was affirmed.

[M.C.]

Newstart allowance: unsuitable work

SECRETARY TO THE DFaCS and NOBLE (No. 20000010)

Decided: 14 January 2000 by J. Handley.

Background

Noble's claim for newstart allowance was rejected on the basis that he was not prepared to travel 90 minutes a day to and from work. He was living in Maffra and it was suggested that he was more likely to obtain employment in Yallourn or Traralgon. Noble refused to travel this distance.

The SSAT set aside this decision with directions that Noble satisfied the activity test and had done since claiming newstart allowance.

The issue and legislation

The issue in this case was whether Noble was actively seeking and willing to undertake paid work, other than paid work that is unsuitable.

Section 601(2A) of the *Social Security Act 1991* (the Act) states that particular paid work is unsuitable if:

> (g) commuting between the person's home and the place of work would be unreasonably difficult; or
>
> ...
>
> (j) for any other reason, the work is unsuitable for the person.

Section 601(2B) of the Act then states that commuting is not unreasonably difficult for the purposes of s.601(2A)(g) if:

> (a) the sole or principle reasons for the difficulty is that the commuting involves a journey, either from the person's home to the place of work or from the place of work to the person's home, that does not normally exceed 90 minutes in duration; or
>
> (b) in the Secretary's opinion, a substantial number of people living in the same area as the person regularly commute to their places of work in circumstances similar to those of the person.

The submissions

The submission of Noble was that there was not a substantial number of people commuting between Maffra and the La Trobe Valley. He had conducted a survey of 100 people within 5 kilometres of his home — three of these people worked outside Maffra and none worked in the La Trobe Valley.

He also stated that the costs of transport would be more than 10% of his gross pay and that given his general financial circumstances he could not afford to travel to work in Yallourn or Traralgon. The distance to Yallourn was 80 km (55 minutes travel) and to Traralgon was 70 km (45 minutes travel).

The Department argued that there was a 'substantial' number of people commuting between Maffra and the La Trobe Valley — an estimate of more than 20 people was provided.

Findings

The Tribunal spent some time stressing that the cost of the travel was not a relevant factor, despite the fact that the Policy Guide made reference to this and that that the SSAT had based its decision on this point.

The Tribunal also concluded that Yallourn and Traralgon are within 90 minutes travel of Maffra. There was some discussion that country driving

would mean that a greater distance is travelled in this time than for driving in the city and that this may have cost implications. However, the Tribunal concluded that the legislation did not allow financial issues associated with costs of travel to be considered for the purpose of s.601(2A)(j).

The Tribunal then considered the evidence given about the number of people commuting and concluded that even if the number of 20 was accepted then this could still not be 'substantial'.

On the basis of these conclusions, the Tribunal found that the paid work that may be available in the La Trobe Valley was 'unsuitable' as there was not a 'substantial' number of people living in the same area as Noble who regularly commuted to work. Consequently the Tribunal found that within the meaning of Act, Noble was actively seeking and willing to undertake paid work.

Formal decision

The AAT affirmed the decision of the SSAT, but for different reasons.

[R.P.]

[**Contributor's Note:** The contributor is troubled by this decision in that it is clear that s.601(2B)(b) has not been satisfied, but on this author's reading of this decision, it would appear that the Tribunal has not considered whether sub para (a) is satisfied or not. In other words, no finding has been made about what is the principal reason for the difficulty in commuting where the time of travel is usually less than 90 minutes.

On this author's reading of the legislation, it is necessary that both subsections (a) and (b) be answered in the negative to justify a conclusion that commuting would be unreasonably difficult for the purpose of s.601(2A). The decision appeared to be based on the conclusion that subparagraph (b) was not met, and that this was sufficient.]

Income maintenance period

RAAMS and SECRETARY TO THE DFaCS (No. 20000121)

Decided: 18 February 2000 by J.A. Kiosoglous.

Background

Raams was receiving parenting payment when her husband received a lump sum payment for unused leave entitlements on 29 October 1998.

On 18 February 1999 it was decided that an income maintenance period (IMP) should have been applied from 29 October 1998. A debt was raised for the period 5 November 1998 to 28 January 1999.

This decision was affirmed by an authorised review office and the SSAT.

The issue and legislation

The issue in this case was the method of the IMP calculation. Section 1068B-D10 of the *Social Security Act 1991* (the Act) provides:

1068B-D10. If:

(a) a person's employment has been terminated and

(b) the person receives a leave payment (whether as a lump sum payment, as a payment that is one of a series of regular payments or otherwise);

the person is taken to have received ordinary income for a period (the income maintenance period) equal to the leave period to which the payment relates.

The legal submissions

The submission of Raams was that the IMP should be calculated taking into account the fact that he was working part time (two days a week) prior to stopping work. To do otherwise was discriminatory against part-time workers.

The term 'ordinary income' should refer to the income he actually received prior to stopping work, not the deemed income calculated on the basis of a ten-day fortnight.

The Department argued that what was relevant was the money that was available to the person, not the hours worked before ceasing work. To do other wise would be unfair to full-time workers as part-time workers would have longer IMP but would be eligible for higher rates of parenting payment.

Findings

The Tribunal identified a number of difficulties with Raams' submission:

- it would be difficult to determine the hours worked, as for many employees, including Raams, these change over the years. It would be unreasonable to expect the Department to calculate the average fortnightly hours and income in each individual circumstance;
- the basis of the legislation was clear. It was intended that where a person receives an amount of money they are expected to live off that before claiming benefits;
- the term 'period' in the Act relates to the period of leave and not how the leave accrues; and
- if Raams' submission were accepted then although the deemed amount of income would be less, the length of period would be doubled and Raams' husband would have had to wait twice as long before receiving newstart allowance.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Family payment estimate of income: departmental error; 'special circumstances'

BRITTAIN and SECRETARY TO THE DFaCS (No. 20000161)

Decided: 3 March 2000 by J.A. Kiosoglous.

Background

Natalie Brittain and her partner receive family payment in respect of their two children. In her claim for that payment lodged on 16 September 1996 Brittain estimated the combined family income for 1996–97 at $56,916. She received a letter dated 11 June 1997 requesting an estimate of income for the 1997–98 tax year, and included her estimate of $25,462 (her husband having ceased work in February 1997) when she returned the form attached to that letter. This latter estimate was used by the Department to calculate her family payments with effect from 3 July 1997, and Brittain was advised of this by letter dated 15 December 1997. On 22 October 1998 Brittain advised the Department that the actual family income for 1997–98 was $28,237. The Department in November 1998 raised a debt totalling $1867 being family payment for the period 3 July 1997 to 22 October 1998. This decision was affirmed by an authorised review officer in December 1998 and by the SSAT in January 1999.

Legislation

Section 1069-H13 ff of the *Social Security Act 1991* (the Act) sets out the