

tion for which palliative care has replaced active treatment;

- (vii) the child:
- (A) requires personal care on 2 or more occasions between 10 pm and 6 am each day; and
- (B) if under 6 months of age, is expected to require care as described in sub-subparagraph (A) at the age of 6 months.'

Section 198(8) provides:

If the care receivers are the 2 or more disabled children mentioned in paragraph (2)(c), the Secretary must be of the opinion that the children require a level of care that is at least equivalent to the level of care required by a profoundly disabled child.

Departmental Policy Guidelines state that for the purposes of CP, two or more disabled children must require a level of care that is at least equivalent to the level of care required by a profoundly disabled child. That is —

- (a) each child has a severe disability or a severe medical condition; and
- (b) each child needs continuous personal care for at least 6 months unless one of the children has a terminal condition; and
- (c) between the children the test in s.197(2)(c) is met.

The facts

Borg unsuccessfully claimed CP on 22 March 2001. She has two disabled children and she receives carer allowance for both. The following facts were found by the AAT.

Shanae, aged 10, suffers from epilepsy, an intellectual disability and global delay. She has the developmental age of a 3 or 4 year old, although her language is that of about an 8 year old. She has suffered seizures since birth. The frequency varies but she has about two or three a month. There are indications that she also has nocturnal seizures. She is irritable two to three days before a seizure, and takes one to three days to recover. She is incontinent during a seizure, and suffers one-sided weakness afterwards.

Shanae needs all her food cut up and close supervision whilst eating. Sometimes she suffers faecal incontinence. She needs help wiping her bottom and needs underpants changed every day.

Shanae wakes between 5.30 and 6 am, and is very active all day. Her behaviour is such that the house is consistently in disarray, her brother is constantly harassed, and Borg is obliged to follow her around at all times to clean up the 'trail of disaster'. Her parents are trying to get assistance with developing

behavioural management strategies for her. It is difficult to implement them because of the nature of her conditions, and because she does not understand the concept of consequence for behaviour.

Shanae attends school where she gets additional help for five hours a week. The rest of the time she just wanders around at school. Borg has three meetings a week at school on average as needed to communicate a great deal with the school, and she finds herself there most days doing what she termed 'SOS work'.

The care she provides for Shanae prevents Borg from working. Borg and her husband are overwhelmed by the amount and extent of care Shanae needs every day, and this is affecting all the relationships within the family.

Nathan, aged 11, suffers from learning difficulties and gait difficulties requiring orthotic treatment. He requires extra tuition at home twice a week, and between half and one hour of assistance with his homework each night. He has to do a total of one hour of exercises daily and his parents supervise them. He is seeing a psychologist about the impact of Shanae's demands, her impact on his social relationships and the fact that she hits him.

The decision

The AAT noted that the disabilities of Shanae and Nathan combined do not include at least three of the circumstances set out in s.197(2)(c) of the Act, and that in affirming the decision to reject the CP claim the SSAT had adopted the Departmental Guidelines as correct in law.

The AAT considered it was clear on the evidence that each child has a severe disability, and needs continuous personal care. Shanae's level of mobility and destructiveness (as opposed to a lack of mobility and interaction with siblings contemplated by the circumstances set out in s.197(2)(c) of the Act) require, as a matter of fact, a level of care and intervention which is at least equivalent to the level of care required for a child who is a profoundly disabled child. It followed that combined the two disabled children also required at least that level of care.

Formal decision

The AAT set aside the decision under review and substituted a decision that Borg was qualified for payment of carer payment as at 22 March 2001.

[K.deH.]

Disability support pension: when condition to be regarded as fully treated and stabilised

HENWOOD and SECRETARY TO THE DFaCS
(No. 2002/0024)

Decided: 17 January 2001 by J. Cowdroy.

The criteria

Subsection 94(1) of the *Social Security Act 1991* (the Act) provides that to qualify for disability support pension (DSP) a person must have, among other things, an impairment which attracts a rating of 20 points under the Impairment Tables contained in Schedule 1B of the Act. A rating can only be given for a fully documented, diagnosed condition which has been investigated, treated and stabilised, and is considered to be permanent. The Tables state: 'it is accepted as being permanent if in the light of available evidence it is more likely than not that it will persist for the foreseeable future. This is taken as lasting for more than two years.'

[In addition, the effect of s.39(3) of the *Social Security (Administration) Act 1999* is that a claim for DSP may be granted if a person is not qualified when the claim is lodged but becomes qualified within 13 weeks of lodging the claim.]

The evidence

Henwood's claim for DSP lodged on 22 December 2000 was rejected. He suffers from disabilities of both feet. His toes are misshapen. The left foot is slightly better than the right. His working history is as a labourer, but he is unable to wear safety boots. He told the AAT that his skills are of the practical, 'hands-on' variety, he is not computer literate, and he believes he would get 'flustered' if asked to perform clerical work. He said he was keen to undergo any form of re-training if it would result in him obtaining employment.

On 24 May 2000 he underwent fusion of the tarso-metatarsal joints of the right foot to correct a collapsed arch. He also underwent surgery to the left foot with a pin inserted to try to correct a hammertoe. A further operation to the right foot was done in October 2000. It was thought that another might assist but it had since been decided that further surgical intervention would not be of benefit. The pin in the toe of his left foot

was subsequently removed, and he underwent further surgery on that foot in June 2001 which has made it 'a bit better'.

In a report of 7 November 2000, Dr Chu, general practitioner, referred to the operation of 24 May 2000 and added 'but has had complications'. He stated that the bilateral foot conditions were temporary, fluctuating and constant. In reply to the question 'could the patient benefit from vocational (work) training or rehabilitation?' he answered 'not until healed'.

An Ipswich Hospital outpatient record of 19 December 2000 set out a treatment plan including 'x-rays to both feet. ? further surgery'. Dr Chu stated on 20 December 2000 that the condition was long term and fluctuating, and that Mr Henwood was awaiting more operations.

A Commonwealth Medical Officer, Dr Leaming, stated on 25 January 2001 that the right foot condition was not yet fully treated or stabilised.

On 7 March 2001 Dr Chu described the condition as long term and fluctuating, and was of the view that further surgery was required. A Dr Gatehouse on 21 March 2001 described the condition as long term but was unsure if it was stable.

Dr Gatehouse later categorised the conditions as stable and improving, and that they were likely to persist for two years. On 1 May 2001 a Dr Dalton opined that both foot conditions were stable and likely to persist for at least two years, and on 4 June 2001 Dr Chu described the condition as 'long term stable' for both feet.

The AAT also had a report dated 10 September 2001 from Dr Reilly, the house surgeon at Ipswich Hospital who did not examine Mr Henman and relied on the notes of other practitioners, and a report of 23 November 2001 from Dr Walters, an orthopaedic surgeon consulted by Mr Henman more frequently than the other doctors. These reports indicated that the condition was then permanent.

The conclusion

In reaching its decision the AAT found that Mr Henman's feet conditions were now permanent. However, it considered it was bound to have regard to the state of the evidence at the relevant time period, that is from the date the claim was lodged (22 December 2000) to three months later (22 March 2001). It was not until Dr Chu's report of 4 June 2001 that there was evidence supporting the fact

that the condition had been fully treated and stabilised. Until such opinion [that the condition was fully treated and stabilised on or before 22 March 2001] was forthcoming the conditions could not be treated as permanent. Consequently Mr Henman did not meet one of the criteria for payment of DSP at the relevant time.

Formal decision

The AAT affirmed the decision to reject the claim for DSP.

[K.deH.]



Disability support pension: residential requirement; when first had inability to work

CHEN and SECRETARY TO THE DFaCS
(No. 2001/1033)

Decided: 20 December 2001 by M. Carstairs.

Background

Chen came to Australia from China in 1988 on a student visa. After the Tiananmen Square incident he had various visas and in August 1994 he was granted permanent residency. He travelled to China from September 1994 to May 1997 seeking medical treatment and family support. Chen's application for disability support pension made in July 1999 was rejected on the basis that he did not meet residency requirements.

Issue

The issue was whether Chen was an Australian resident at the time he first had a continuing inability to work.

Legislation

Section 94 provides for qualification for disability support pension in the following terms:

94.(1) A person is qualified for disability support pension if:

- (a) the person has a physical, intellectual or psychiatric impairment; and
- (b) the person's impairment is of 20 points or more under the Impairment Tables; and
- (c) one of the following applies:
 - (i) the person has a continuing inability to work;

... and

(e) the person either:

- (i) is an Australian resident at the time when the person first satisfies paragraph (c); or
- (ii) has 10 years qualifying Australian residence, or has a qualifying residence exemption for a disability support pension ... ;

The meaning of 'continuing inability to work' is set out in s.94(2) of the Act, and requires essentially that a person be unable to work for 30 hours per week or more (s.94(5)) by reason of impairment or be unable to undertake retraining, for at least two years.

'Australian resident' is defined in s.7(2) of the Act as a person who:

- (a) resides in Australia; and
- (b) is one of the following:
 - (i) an Australian citizen;
 - (ii) the holder of a permanent visa;
 - (iii) a special category visa holder who is a protected SCV holder.

When did 'continuing inability to work' begin?

The Tribunal had before it a range of medical reports and clinical notes dating from 1993. Chen conceded that he did not have 10 years residence in Australia (s.94(1)(e)(ii)) until 2004. But he submitted that he satisfied s.94(1)(e)(i) because his 'continuing inability to work' only arose after he had Australian residence in August 1994. He argued that the diagnoses of his conditions were made in 1998. Only at that time did doctors confirm he had conditions that would cause long-term disability. He relied on various medical reports and the fact that he received sickness allowance (a payment for temporary incapacity) in 1993 for 5-6 months.

The Department submitted that Chen's continuing inability to work arose in 1993, before Chen had Australian residence as defined in the Act. The Department queried Chen's interpretation of some medical reports and relied on others. The Department also said that Chen had on earlier occasions told Centrelink that illness prevented him from working since 1993 and Chen had at least 60 attendances at medical practices from late 1993 to early 1994. The Department submitted that on the basis of diagnoses made in 1999, as set out in the medical assessments for disability support pension, Chen had a psychiatric condition. On the medical evidence from 1993, it should be inferred that the psychiatric condition was present from 1993 and prevented Chen from working from then.