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.

The Tribunal found that the evidence indicated that doctors were seeking to identify the underlying conditions troubling Chen in 1993 and 1994. In the months from September to December 1993, Chen had more than 30 consultations in different medical practices and outpatient sections of hospitals. Additionally on a claim dated 4 October 1993 Chen said he had weight loss and 'a terrible illness.' This contradicted Chen's recent view that he merely had flu-like symptoms and minor anxiety in 1993.

The Tribunal was satisfied that Chen had significant psychiatric problems in 1993 that prevented him from working and continued to suffer from these when he first claimed disability support pension in 1998. Had he been assessed for social security purposes at the time, his level of disability would have meant that he had 'a continuing inability to work' in 1993, that is, prior to being an 'Australian resident' within the meaning of the Act.

The Tribunal considered whether s.94(1)(e)(ii), 'a qualifying residence exemption for disability support pension' might apply to Chen. It considered s.7(6) and the meaning of 'refugee' contained in s.7(6B). The Tribunal was satisfied that the visas held by Chen did not fall within the definition of 'refugee' which would have allowed for a residence exemption for a disability support pension.

The Tribunal found that Chen was not an Australian resident at the time when he first had a 'continuing inability to work' within the meaning of the Act and therefore was not qualified for disability support pension.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Family tax benefit: whether exemption from obtaining child support should be granted

SECRETARY TO THE DFaCS and VAD
(No. 2001/1045)

Decided: 21 December 2001 by M. Handley.

Background

VAD was the mother of two children and S the father. There was no dispute as to paternity. S was married to another person and employed. VAD was solely dependent on welfare benefits. S did not pay maintenance. His wife did not know that he was the father of the two children. S had indicated that if he was compelled to pay maintenance he would sever all current ties he had with the children. The rate of family tax benefit (FTB) payable to VAD was reduced because she was 'not pursuing reasonable action for child support ...' VAD also had a child, N, from a previous relationship, and she did not receive maintenance from the father of N.

Issues

The issue was whether it was reasonable for VAD to take action to obtain maintenance from S. The issue was not whether S could or would pay maintenance.

Legislation

Section 58 of the *A New Tax System (Family Assistance) Act 1999* (the Act) provides that the rate of family tax benefit is to be determined by a rate calculator found within Schedule 1 of the Act.

Clause 10 of Part 4 of Schedule 1 of the Act provides that the FTB rate is the 'base FTB child rate' if:

> (a) The individual or the individual's partner is entitled to claim or apply for maintenance for the child; and
>
> (b) The Secretary considers that it is reasonable for the individual or partner to take action to obtain maintenance; and
>
> (c) The individual or partner does not take action that the Secretary considers reasonable to obtain maintenance.

Reasonable to take action to obtain maintenance

VAD indicated that she was anxious to preserve the relationship between S and his children and did not wish to bring action which would precipitate him ceasing contact with the children. She believed if she brought maintenance proceedings he would carry out his threat to sever all contact. Having had that experience previously with the father of N she was content to allow the relationship between the children and S to continue at its present level and not bring proceedings against him for payment of maintenance. She also said she did not wish to precipitate the ending of S's marriage (which she believed would occur if he was obliged to pay maintenance).

The Tribunal noted s.3 of *Child Support (Assessment) Act 1989*, ss.3 and 4 of The Child Support (Registration and Collection) Act 1988 and Article 18 of The United Nations Convention on the Rights of the Child (to which Australia is a signatory).

The Department referred to its own Guidelines. The 'exemptions' from the 'maintenance action test' (that is the basis on which an officer of Centrelink might determine that it would be appropriate to grant an exemption from obtaining maintenance and thereby having a continuing entitlement to base FTB child rate) were set out in the Guidelines as follows:

- if they fear that if they take action for child support the non resident parent will react violently towards them or their family
- where it would be unreasonable to expect them to seek child support because of the harmful or disruptive effect it would have on them or the non resident parent
- if the identity of the father of the child or children is not known
- if they have had legal advice that paternity could not be proven through a court or have unsuccessfully tried to prove paternity
- where the child was conceived through artificial insemination procedures and the mother was neither married or in a marriage-like relationship at the time
- if there are cultural considerations that adversely impact on the customer's capacity to take reasonable action and;
- where there are other exceptional circumstances.

The Tribunal, referring to *Drake v Minister for Immigration and Ethnic Affairs* (No. 2) 1980 2 ALD 634, found the policy recorded in the guidelines to be 'sound and consistent with the Act. Adopting it as a guide will not delegate or fetter the responsibility of merits review nor will it be a predeterminant of outcome' (Reasons, para. 21).