with compassionate use of ribavirin' (Reasons, para. 40).

The Tribunal referred to paragraph 6 of the Introduction to the Impairment Tables set out at Schedule 1B of the Act.

> The Tribunal finds that the Applicant has undergone treatment of a character and duration accepted by experts in the treatment of Chronic Hepatitis C as sufficient to effect a positive response in his condition and, in the absence of a suitable positive response, ceased that treatment.

(Reasons, para. 42)

The Tribunal noted that there was little evidence to support the proposition that Soe's condition was improving or responding positively to the treatment. The Tribunal found that the further treatment program was an experimental study and that a substantial improvement could not reliably be expected and that the planned treatment was not of a type regularly undertaken or performed with a high success rate and a low risk to the patient. From 27 January 2001 significant functional improvement could not be expected to result from Soe's planned participation in an experimental study. The Tribunal noted the medical evidence and found that from this date it is reasonable to consider his condition stabilised. Soe's condition was not improving or responding positively to treatment during the relevant period and it was more likely than not that the condition would persist for more than two years without significant functional improvement. Soe's Chronic Hepatitis C condition was considered permanent at the cessation of treatment on 27 January 2001.

The Tribunal then referred to Table 11.1 under the Tables for the Assessment of Work-related Impairment for disability support pension at Schedule 1B of the Act. The Tribunal found an impairment rating of 20 points to be appropriate and that Soe satisfied the requirements of s.94(1)(b) of the Act.

The Tribunal considered Soe's continuing inability to work and noted that:

> The temporary character of [Soe]'s unfitness for work, and the likely period within which he may have been able to return to work, as recorded in the medical evidence, appears to reflect the expected duration of the treatment [Soe] was undergoing for his condition and the possibility that such treatment may have a positive effect upon his condition. The Tribunal has found that the treatment of [Soe]'s condition under the Treatment Protocol ceased on 27 January 2001 and, thereupon, [Soe]'s condition is considered permanent. The Tribunal has also found that it was more likely than not that [Soe]'s condition would persist for more than two years without significant functional improvement.

The Tribunal found that Soe's impairment was of itself sufficient to prevent him from doing any work or training for two years commencing on 27 January 2001 and he had a continuing inability to work pursuant to s.94(2) of the Act and, therefore, satisfied the requirements of s.94(1)(c) of the Act.

Formal decision

The Tribunal set aside the decision under review and in substitution therefore decided that the applicant qualified for and was entitled to a disability support pension from 27 January 2001.

[M.A.N.]

Disability support pension: whether medical condition fully treated and stabilised

NEWMAN and SECRETARY TO THE DFaCS (No. 2002/917)

Decided: 11 October 2002 by M.Carstairs.

Background

Newman, a 25 year old, was injured in a motor vehicle accident in 1996. On 5 December 2000 he lodged a claim for disability support pension. The claim was rejected on the basis that although Newman had an impairment rating of 20 points he was suitable for retraining. The SSAT obtained a report from an occupational physician. It decided that Newman did not have a *fully documented condition, which had been investigated, treated and stabilised* and therefore the condition could not be said to be permanent within the meaning of the legislation.

Issues

The issue was whether Newman met the requirements of s.94 of the *Social Security Act 1991* (the Act) to qualify for disability support pension.

Legislation

The legislation setting out the qualifications for disability support pension is contained in s.94(1), (2), (3), (5) and (6) of the Act. Details of start day of payment are contained in Clauses 3 and 4 of Part 2 of Schedule 2 to the *Social Security (Administration) Act 1999* (the SSA Act).

Was the condition treated and stabilised?

Newman submitted that he had seen 20 doctors who all agreed he should be granted disability support pension. The number of medical certificates that said he was unfit for work outweighed the single adverse report of the occupational physician. Newman submitted that he suffered from arthrosis, which he described as a condition in which enzymes collect around damaged nerve tissue and was diagnosed through magnetic resonance imaging (MRI) dated 28 February 2001.

Newman described his limited lifestyle, the consequences of his condition and his medications. He had numerous hospitalisations when his pain was unbearable. Newman indicated he had worked since the accident in 1996 but had not done so recently, after finding problems with insurance and the unpredictable onset of back pain. He was recently referred to a Pain Management Clinic and he acknowledged that his treating doctors had previously recommended attendance at a pain clinic.

Newman submitted that there was no further reasonable treatment available and he had learned those things that he could do to improve his back. He submitted that *treatment implies* some cure. However, his arthrosis was not going to go away and it was argued that pain management was not *treatment.*

The Department submitted that the question of qualification for disability support pension must be determined at the date of claim, December 2000, and that qualification for disability support pension requires that there be a permanent condition, which is not likely to change. The Department referred to the Introduction to the Tables for the Assessment of Work-Related Impairment for Disability Support Pension which states that the condition has to be a '... fully documented diagnosed condition which has been investigated, treated and stabilised and is likely to persist for at least two years'.

The Tribunal referred to the cases of *Tlonan and Secretary Department of Social Security* (1997) 24 AAR 467 and *Secretary, Department of Social Security and Dyer* (1998) 51 ALD 190) which considered the issue of whether a condition is temporary or permanent.

The Tribunal noted that qualification for disability support pension must be established within three months of a claim (clauses 3 and 4 of Schedule 2 of the SSA Act).

The Tribunal considered that numerous medical certificates stating

Newman to be incapacitated for work were of limited assistance in deciding the question of whether the condition is one which has been treated and stabilised. The information on the certificates was limited and essentially provided for medical practitioners ticking boxes without scope for explanation. The certificates told little about Newman's ability to work or retrain for the purposes of disability support pension.

The Tribunal noted that Newman had been to a number of medical practitioners and had a relatively limited time under the care of each. More than one of them had recommended a course of pain management.

> Applying the interpretation of the term in *Tlonan, treatment* is not to be read narrowly, and should encompass a broad range of therapeutic measures, reasonable to adopt in a particular case. Pain management has been recommended to the applicant by three medical practitioners, and is a common form of treatment for intractable back pain. The Tribunal does not accept the submission of the applicant that it does not fall within the concept of *treatment* under the Act. As the words in the Act set out, reasonable treatment is taken to be treatment *that is feasible and accessible and where a substantial improvement can reliably be expected and where the treatment or procedure is of a type regularly undertaken or performed, with a high success rate and low risk to the patient.*

(Reasons, para. 31)

The Tribunal was not satisfied, where treating doctors had recommended a course of pain management program and this had not occurred, that the requirements of the Act could be met. The condition was not *treated and stabilised.*

The Tribunal did not agree that no definitive diagnosis of a condition could be made. The Tribunal was satisfied that there was a lumbar disc condition, either a lesion or a prolapse: s.94(1)(a).

The Tribunal was satisfied that, at the time of the claim, in December 2000, or within three months of that time, it could not be said that Newman had a condition that was *treated or stabilised* within the meaning of the introductory words to the Tables for assessment under the Act. For those reasons the Tribunal was satisfied that the applicant could not satisfy s.94(1)(b) of the Act.

Formal decision

The decision under review was affirmed.

[M.A.N.]

Carer allowance: care provided on a daily basis in a private home

SECRETARY TO THE DFaCS and WALSH
(No. 2002/0881)

Decided: 4 October 2002 by R.G. Kenny.

Walsh's claim for carer allowance (CA) for his intellectually disabled son, Anthony, was rejected. The SSAT granted the claim and the Department appealed to the AAT.

The rules

The qualifications for carer allowance in relation to a disabled adult are set out in s.954(1) of the *Social Security Act 1991* (the Act):

> **954.** (1) A person is qualified for carer allowance for a disabled adult (the care receiver) if:
>
> (a) the care receiver is an Australian resident; and
>
> (b) the care receiver is a family member of the person or is a person approved in writing by the Secretary for the purposes of this paragraph; and
>
> (c) the care receiver has been assessed and rated, and been given a score of not less than 30, under the Adult Disability Assessment Tool; and
>
> (d) because of the disability from which the care receiver is suffering, the care receiver receives care and attention on a daily basis from the person, or the person together with another person, in a private home that is the residence of the person and the care receiver; and
>
> (f) the person is an Australian resident.

The definition of private home of the carer and care receiver in the department's Guide to the Social Security Law (the Guide) reads:

> **1.1.P.426 Private home of the carer and care receiver (CA)**
>
> **Definition**
>
> A private home can be any residence that a person regards as his or her home provided that:
>
> - the person actually lives in that residence, and
> - the person carries out his or her main domestic functions there, and
> - there are NO commercial arrangements in place for the provision of personal care, such as may be found in a nursing home.

The Tribunal noted that while it was not bound to apply policy guidelines (*Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409), it would usually do so unless there were cogent reasons in a particular case for not doing so: see *Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634 at 639-645; *Dainty and Minister for Immigration and Ethnic Affairs* (1987) 6 AAR 259 at 267; and *Minister for Immigration, Local Government and Ethnic Affairs v Roberts* (1993) 41 FCR 82 at 86. In this case there was no material before the Tribunal to indicate that the Guide should not be applied.

The facts

It was not disputed that Anthony suffered from Williams Syndrome, a significantly debilitating condition, and met the definition of disabled adult in s.952 of the Act. It was also agreed that ss.954(1)(a), (b), (c) and (f) of the Act were met. The issue was whether Walsh met the requirements of s.954(1)(d).

Mrs Mary Walsh, the respondent's wife, said she and Walsh cared for her 93-year-old mother and assisted in providing for the needs of Anthony. Walsh had ceased full-time employment so he could stay at home to look after the elderly mother and their son. Anthony needed support 24 hours a day that could not be provided in the family home, so a commercial arrangement had been made with the Endeavour Foundation for him to live at Stan Lohse House. However, he routinely returned to the family home on weekends and on other occasions when medical treatment was required and also when, from time to time, he was suspended from Stan Lohse House because of behavioural matters. He was currently living in the family home and had been there since 25 July 2002 because of surgical procedures he was required to undergo on 7 August 2002.

Mrs Walsh said Anthony had stayed at home, on a full-time basis, for 203 days out of the previous 423 days before the hearing. For the months of May, June, July and August 2002, he had been at home for 82 days of the total of 123 days. While at Stan Lohse House, he was involved in either a business service or an adult training support service from Monday to Friday. Although he received a disability support pension and a mobility allowance, these did not cover the full costs of maintaining him. During the periods when Anthony was not staying at Stan Lohse House, Mr and Mrs Walsh were still required to pay all associated costs as if he were there. In a typical fortnight, these would comprise $8 for bus contribution, $364.80 for board and $16.40 for activity levies.