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.

The reasons

The AAT noted that the CA provisions were enacted in 1999. With the accompanying Explanatory Memorandum they make it clear that the purpose was to ensure that those involved in providing care for a disabled adult were given financial assistance. The Act enabled a person to continue to receive CA during periods when care was not actually provided. Section 955 of the Act so provided in the case of a period of hospitalisation; s.956 so provided in circumstances where the carer and/or the care receiver were absent from Australia; s.957 so provided in relation to periods of temporary cessation for up to 63 days in any calendar year or where certain forms of training were undertaken.

For Walsh it was submitted that he was qualified not only during the periods when Anthony was resident in his private home but also for the periods when he had returned to Stan Lohse House. The AAT was satisfied that Anthony's return could not be described as a temporary cessation of the provision of care and attention by Walsh. Section 954(1) of the Act made provision for a person to qualify whilst the care receiver was in the private home, but when ss.954 to 957 were read together, they precluded the inference that a person may be qualified whilst not providing care and assistance outside of the home or outside of those specific circumstances of extension. It could not be said that Anthony was receiving care and attention from Walsh during the periods he was at Stan Lohse House. It followed that Walsh was not qualified for CA during those periods.

Stan Lohse House could not be paid the CA as it did not meet the Guide's definition of private home because a commercial arrangement was in place between Walsh and the Endeavour Foundation in that regard. However, that arrangement related only to the terms on which Anthony would stay at Stan Lohse House and not at his parent's home. On one reading of the definition, the mere existence of the arrangement would also impact on the status of Walsh's residence as being a private home because the definition required that there be no commercial arrangements in place for the provision of personal care, and it did not specifically provide that the arrangement had to be associated with any particular residence. Nevertheless, the tenor of the definition was that there be no commercial arrangement in relation to a place such as Walsh's home. On that basis the AAT was satisfied that Walsh's home was not excluded because of the commercial arrangement with the Endeavour Foundation.

For Walsh it was also submitted that he qualified for CA on the days when he provided care and attention to his son in his home. The issue was whether that situation was encompassed by paragraph 954(1)(d) of the Act. The Department argued that the care and attention provided by Walsh had not been provided on a daily basis because it was not provided *every day*. The AAT noted that the Guide at 1.1.D.10 states: '... for purposes of CA, daily basis means that the care receiver must be receiving care from the carer (either alone or with others in a shared care situation) on a continuing basis i.e. every day. This is subject to periods when the carer may take periods of temporary cessation of care.'

The AAT noted that in *Repatriation Commission v Gorton* (2001) 33 AAR 370, Stone J had stated:

> Prima facie the word 'daily' means 'every day', *London County Council v South Metropolitan Gas Company* [1903] 2 Ch 532 per Joyce J at 537–538. However, as Barry J commented in *Foster v Howard* [1949] VLR 311 at 311, it is an adjective 'the precise meaning of which is to be ascertained from the context in which it is used and particularly the substantive which it qualifies'. In my opinion, the precision which the term conveys will differ depending on whether it is used prescriptively or descriptively. A doctor's instructions that medicine is to be taken daily may easily be understood as meaning every day. However, we would not generally cavil at the description of a doctor's daily visits to a hospital if he did not generally go on Sundays. We would still regard it as accurate to describe an athlete as training daily even though it turned out that she missed a number of days a year. I do not accept that the phrase, 'daily consumption of alcohol' in Instrument 83 could only apply to a veteran who drank every day without exception.

(Reasons, para. 27)

The AAT was satisfied that it was the *prima facie* meaning, as noted by Stone J, of 'daily' that was applicable in this case. An element of continuity was required before care and attention can be described as being given on a daily basis, and the Guide's definition was in those terms. It referred to providing care on a continuing basis, used the term *every day* and the examples were consistent. The requirement would not be met where the care and attention is given on an intermittent basis, a regular basis or even a frequent basis. They would not be met when care was provided occasionally to deal with an illness or temporary medical crisis. The term occasional was not defined in the Guide but the Concise Oxford Dictionary gave the following meaning:

> arising out of, made or meant for, adapted for use on, acting on, special occasion(s); happening irregularly; as occasion presents itself; coming now and then, not regular or frequent.

In this case, the evidence revealed that periods in the family home were both regular and frequent, comprising periods of varying length and totalling some 48% of the time in the 14 months prior to the hearing. It was not to the effect that Anthony stayed only on an occasional basis with Walsh. However, some of those periods, including the one immediately preceding the day of the hearing, arose because of the need for Anthony to undergo medical treatment and would be embraced by the exclusionary reference in the Guide.

Walsh provided care and attention during each of the days when Anthony was with him. However, the intermittent rather than continuous nature of the periods of providing that care and attention removed the characteristic of it being on a daily basis as required by the Act.

Formal decision

The AAT set aside the decision under review and substituted its decision that Walsh was not qualified for CA.

[K.deH.]

Compensation: special circumstances; relationship between social security payments and the incapacity for which the compensation was awarded

ROBINSON and SECRETARY TO THE DFaCS (No. 2002/1011)

Decided: 24 October 2002 by P.J. Lindsay.

The facts

Robinson was 29 years old and worked in the building industry for some time. In February 1997, he was hit by a car as a pedestrian and suffered a fractured right forearm and abrasions. For a number of months prior to the accident he had been unemployed due to his unreliability. His unreliability had been attributable to a