

disability support pension (DSP). Fanous made a further claim in late August or early September 2004 which was granted.

#### Issues

Did Fanous, at the time of her claim in October 2003, or within 13 weeks, have an impairment of 20 points or more under the Impairment Tables and, if so did she have a continuing inability to work? Was her condition diagnosed, treated and stabilised and could it be regarded as permanent?

#### The legislation

Section 94 of the *Social Security Act 1991* ('the Act') sets out the qualification criteria for DSP. The Tribunal also referred to the introductory chapter to the Impairment Tables found at Schedule 1B of the Act (para. 5) which states that a condition 'must be considered to be permanent'. Permanence shall be found only when a condition 'has been diagnosed, treated and stabilised' and when 'it is more likely than not that it will persist for the foreseeable future. This will be taken as lasting for more than two years'.

Generally, a person claiming a social security entitlement must meet the qualification criteria for that payment at the time of claim or within 13 weeks (see Sch 2, Part 2, s.4 of the *Social Security (Administration) Act 1999*).

#### Entitlement at time of claim

Fanous told the Tribunal that she suffered from severe back and knee pain, depression, and anaemia and recently had nasal surgery and gall bladder surgery. She had suffered the back and knee pain for three or four years continuously. Fanous had an 'extra bone' at or about her right ankle which had been present for six or seven years and caused her severe discomfort when she stood or placed weight on her right foot. Fanous continued to be employed as a casual domestic attendant in a hospital one to two days per week. Fanous agreed that two doctors had suggested she be referred to a psychiatrist but she had refused.

When asked by the Tribunal to compare the extent of her injuries at October 2003 to the present time, Fanous said that there was no change except she felt that as she was older there may have been some deterioration with increased severity of pain.

The Department submitted that, at October 2003 and within 13 weeks of that date, Fanous did not qualify under s.94 of the Act.

The Tribunal noted a recent finding by the Department that Fanous had qualified for DSP on the basis of contemporary medical evidence indicating the conditions suffered by Fanous were permanent. The Tribunal found that Fanous did have a physical, intellectual or psychiatric impairment but the focus of this review was whether at October 2003 Fanous had an impairment of 20 points or more.

The Tribunal reviewed the medical evidence available from 1 July 2003 to November 2003. The Tribunal was satisfied that at October 2003 it was appropriate to assess Fanous' back injury under Table 5.2 at 10 impairment points. In relation to the relevant psychiatric impairment the Tribunal was not satisfied that the condition could be found to be permanent.

The Tribunal noted that refusal to receive medical treatment in some circumstances did not necessarily negate a finding that the relevant conditions still attract impairment points (*Tlonan and Secretary, Department of Social Security* (AAT 11595, 6 February 1997); *Dragojlovic v Director-General of Social Security* (1984) 52 ALR 157). The Tribunal accepted that Fanous did not attend the appointment to see a psychiatrist seemingly due to embarrassment and fear which may have been related to cultural reasons. But the problem remained that, at the date of claim and 13 weeks afterward, it could not be said her depression was permanent. Failing to see the psychiatrist may not preclude an attraction of impairment points but in this case points could not be assigned as it could not be found at the date of claim nor 13 weeks afterward that the condition was permanent.

The Tribunal concluded that Fanous would not have been able to demonstrate 20 impairment points at October 2003. She would not then or within 13 weeks of that date have been able to demonstrate qualification for DSP.

#### Formal decision

The decision of the SSAT was affirmed.

[M.A.N.]

## **Overpayment of family tax benefit: residence and contact arrangements; temporary absences from care**

**KEEN and SECRETARY TO THE DFaCS**  
(No 2004/312)

**Decided:** 18 March 2004 by  
R.P. Handley.

#### Background

Keen and Ross had had an informal mutual arrangement that their son, Elliott, resided with Keen. There had been no formal family law arrangements regarding residence or contact. On 9 October 2002, Elliott went with Ross and her partner to spend the remainder of the October school holidays with her. Keen was expecting Elliott to be returned on 13 October 2002 in time to resume school. Elliott did not return at the end of the school holidays and Keen was not able to contact Ross to find out when Elliott would be returning.

Keen was receiving parenting payment (single) (PPS) and family tax benefit (FTB) for Elliott, but he did not inform Centrelink that his son was no longer in his care. He continued to receive PPS during the period 9 October 2002 to 4 November 2002 and FTB during the period 9 October 2002 to 11 November 2002.

On 21 October 2002, Centrelink had sent a notice to Keen advising him of his PPS and FTB in respect of Elliott. The letter also advised of his responsibility to inform Centrelink of any change in circumstances, including if the child for whom he was being paid benefits stopped living with him or could no longer be considered his dependent.

On 30 October 2002, Ross informed Centrelink that Elliott had been living in her care since 9 October 2002 and requested that records be amended to reflect this. On 6 November 2002, Centrelink cancelled Keen's PPS, backdated to 9 October 2002. On the same day, Ross lodged an application for FTB for Elliott.

On 13 November 2002 Centrelink wrote to Keen requesting that he complete a questionnaire as to the children currently living with him, the full name and address of the person with whom Elliott was living and whether there was a registered parenting agreement or order in respect of Elliott. He did not return this to Centrelink.

On 20 November 2002, Keen telephoned Centrelink to inquire why his PPS had ceased. Keen was informed that because Elliott was no longer in his care, he was not eligible for PPS or FTB. On 29 November 2002, Centrelink approved Ross's claim for FTB backdated to 9 October 2002.

On 13 February 2003, Centrelink wrote to Keen informing him that as Elliott had left his care on 9 October 2002, he had been overpaid PPS from 9 October 2002 to 4 November 2002 of \$839.31 and FTB from 9 October 2002 to 11 November 2002 of \$776.38. Centrelink sought recovery of the total overpayment of \$1615.69 from him. Keen requested a review of this decision.

On 18 June 2003, an authorised review officer affirmed the decision and on 29 August 2003 the Social Security Appeals Tribunal (SSAT) also affirmed the decision in relation to the FTB but set aside the decision relating to the PPS debt. The SSAT decided that the PPS should be waived for the period 9 October 2002 to 23 October 2002 because of special circumstances. This left a debt for the period 24 October 2002 to 4 November 2002 of \$373.02, making the total debt owed by Keen \$1149.40.

### The law

The primary legislation is the *Social Security Act 1991* ('the Act'). Section 5 of the Act provides that a young person who has not turned 16 is a 'dependent child' of another person (an adult) if the adult is legally responsible for the day-to-day care, welfare and development of the young person (s.5(2)).

The qualifications for parenting payments are set out in s.500 and 'parenting payment' child is defined in s.500D of the Act.

The Tribunal also considered the debt and waiver provisions contained at ss.1223(1), 1236(1) 1236(1A)) and 1237AAD of the Act.

Sections 21, 22 and 23 of the *A New Tax System (Family Assistance) Act 1999* ('the FA Act') provides for the payment of FTB.

The Tribunal considered the debt and waiver provisions contained at ss.71(1), 95(1), 95(2) and 101 of the *A New Tax System (Family Assistance) (Administration) Act 1999* ('the FAA Act').

### Keen's evidence

Keen's relationship with Ross had started about 17 years ago. Their three

children had lived at various times with Ross's mother, with Ross and with Keen. It was not unusual that Ross arrived at Keen's place in October 2002 to take Elliott home with her for the last week of the school holidays. Keen assumed, as had happened before, that Ross would return Elliott before school resumed. Elliott took a few clothes and other things with him and went with his mother.

When Ross did not return Elliott, Keen assumed either that Ross's car had broken down or that she had decided to keep Elliott with her for a few days longer. Keen did not have a car and had a mobile phone on which he could receive incoming calls but not make outgoing calls. Keen did not have Ross's address and Ross did not have a phone so there was no easy way for Keen to contact her. He assumed that Ross would let him know what was happening.

When Ross did not contact Keen, he phoned her mother. She told Keen that Elliott had spent the first week of the school term staying with her. Ross had then collected Elliott and taken him home with her. Ross's mother said she did not know what was going on.

Keen then phoned Ross's boyfriend at work and asked him what was going on. He said he would speak to Ross, but she did not phone Keen. Keen said he phoned her boyfriend at work on two further occasions and asked that Ross should phone back but she did not do so.

Keen did not remember receiving a Centrelink letter dated 21 October 2002, which included a notice that he should notify Centrelink of any change of circumstances. Keen said he did not regard his circumstances as having changed at this stage. He still regarded Elliott as being in his care and control. Keen did recall receiving a questionnaire from Centrelink dated 13 November 2002. He said he put it aside, still regarding Elliott as being in his care and control.

Keen first realised his PPS and FTB had been cancelled on about 20 November 2002 when he found he had not been paid. He then contacted Centrelink.

Keen said on other occasions when the children had moved out of his care, he had always willingly provided a letter confirming this so that Ross could claim the appropriate entitlements. Neither she nor Centrelink asked for such a letter this time.

At the time of the hearing Keen was receiving newstart allowance and looking for work. He was about to do a Roads and Traffic Authority course and was receiving \$385 newstart allowance

gross per fortnight. Expenses for rent, child support and withholdings for utilities and other liabilities left Keen with \$180.80 net per fortnight.

### Change of care

The important issue for the Tribunal was at what time it was reasonable for a person in Keen's position to realise that Ross was intending to keep Elliott with her so that Elliott was no longer in Keen's care and control and the absence was no longer temporary. The Tribunal considered these issues important in determining at what date Keen's qualification for PPS and FTB ceased. The legislative regime for both payments permits temporary absences from the claimant's care.

The Tribunal accepted Keen's evidence that for the period immediately after 9 October 2002, he considered Elliott to be still in his care. Given previous arrangements, this was reasonable in the circumstances. However, when Ross did not respond to the messages Keen left for Ross to contact him, it would have been reasonable for Keen to assume that Ross was intending that Elliott remain with her. The Tribunal considered that Keen's call to the grandmother would have taken place about Monday, 21 October; Keen's phone call to the boyfriend a day or two later. By the end of Wednesday, 23 October, it would have been reasonable for him to assume that Ross would not be returning Elliott to him, and therefore Elliott was no longer in his care.

The Tribunal found from 24 October 2002, Keen was no longer responsible for Elliott's day to day care and he was therefore no longer Keen's dependent child for the purposes of s.5 of the Act. Keen ceased to be qualified for PPS for Elliott from that date.

Because Elliott ceased to be in Keen's day to day care, pursuant to s.22(2)(b) and (c) of the FA Act, Elliott ceased to be his FTB child and Keen ceased to be qualified for FTB from 24 October 2002.

As a result, Keen received an overpayment of both payments from 24 October 2002. Pursuant to s.1223(1) of the Act and s.71(1) of the FAA Act these overpayments constituted debts due to the Commonwealth.

### Waiver

The Tribunal next considered whether the debt could be waived pursuant to s.1237AAD of the Act and s.101 of the FAA Act.

The Tribunal accepted that Keen was living in straitened circumstances on newstart allowance, but was coping financially and had no major debts. In the Tribunal's view, there were no special circumstances which would make it appropriate to waive all or part of the debt and that it could continue to be recovered.

#### Formal decision

The AAT set aside the decision and remitted the matter to the DFaCS with a direction that Keen owed a debt to the Commonwealth in respect of an overpayment of PPS from 24 October 2002 to 4 November 2002 and of FTB from 24 October 2002 to 11 November 2002.

[S.P.]

### **Family tax benefit: lump sum claim not lodged within specified period; what is an effective claim?**

SECRETARY TO THE DFaCS and  
WILKIE  
(No. 2004/886)

Decided: 23 August 2004 by S. Webb.

#### Background

In September 2001 Wilkie's wife sought Centrelink's advice about how to claim family tax benefit (FTB). She was given a Family Assistance Office (FAO) claim form and was informed she could claim FTB using the claim form or through the tax system. She was not given a form to claim FTB through the tax system.

In October 2001, Wilkie telephoned the Australian Taxation Office (ATO) general help line and was advised that he could apply for FTB payment using his tax return.

In December 2001 Wilkie's accountant lodged a tax return for the 2000/2001 financial year electronically. On 30 May 2002 the ATO issued Notices of Assessment for Mr and Mrs Wilkie for that financial year showing that tax refunds were payable.

In December 2002 Wilkie engaged a new accountant who identified an error in his 2000/2001 tax return. An amended taxation return was lodged and Wilkie was issued with a Notice of Amended Assessment on 17 June 2003.

On 12 August 2003, Wilkie lodged a claim for lump sum payment of FTB for the 2000/2001 financial year. That claim was made using an FAO claim form. On the same day a delegate of Centrelink rejected the claim because it was lodged outside the specified period.

Wilkie sought review of that decision and pursued the matter to the SSAT. The SSAT telephoned the ATO Family Tax Office general help line and received similar advice as that given to Wilkie's wife.

The SSAT found in Wilkie's favour and set aside the original decision to reject his claim.

#### The law

Eligibility for FTB is determined under ss.3 and 21 of the *A New Tax System (Family Assistance) Act 1999* ('the FA Act'). Entitlement to FTB is subject to the *A New Tax System (Family Assistance) (Administration) Act 1999* ('the FAA Act').

A person can be entitled to FTB when they make a claim in accordance with s.5 of the *Administration Act* (s.5) but for a claim to be effective it must be in a form and manner as required by the Secretary (s.7).

A claim for payment of FTB for a past period must include a statement of the claimant's tax file number (s.8). Such a claim will be ineffective if it relates to one income year and is not lodged within the following year (s.10). If an effective claim is made the Secretary must make a determination in accordance with s.13 but can only do so if a tax assessment for the relevant year has been made (s.14). If the claimant is eligible for FTB during the period in question, Centrelink must determine that the person is entitled to payment of FTB (s.17). However, if the claim is not effective it is taken not to have been made (s.13).

#### Discussion and findings

The Tribunal considered the form and manner of a claim for FTB that is required for an effective claim.

Wilkie submitted that his tax return for the relevant period was sufficient. This was confirmed by advice received from the ATO that FTB could be claimed through the tax system or that he could claim using his tax return for the 2000/2001 financial year. The SSAT made enquiries of the ATO and was given similar advice.

The AAT did not agree with Wilkie's submission that lodgement of his tax return was sufficient but accepted that he relied on wrong advice. The Tribunal

said that merely lodging a tax return for the 2000/2001 financial year was not sufficient to establish an effective claim for payment of FTB during that period under the *Administration Act*. The Tribunal said that the Act invests a broad discretion in Centrelink concerning the requirements for an effective FTB claim. The form and manner of an effective FTB claim, and the information to be provided therefore, are not prescribed or established by determination, declaration, approval or other formal mechanisms under the *Administration Act*.

Wilkie also relied on *Formosa v Secretary, Department of Social Security* (1988) 46 FCR 117, submitting that his 2000/2001 tax return 'substantially complied' with the statutory requirements for an effective claim. In *Formosa* the requirements for an effective claim for the age pension under the *Social Security Act 1947* were considered. *Formosa* asserted that her oral claim was sufficient to be an effective claim. The majority (Davies and Gummow JJ) considered the given requirements for an effective claim 'may be mandatory as to some of the integers therein and directory as to others' and said:

34. ... In this way the claimant would not fail because the claim had been lodged at what it transpired was not an approved place or with a person not approved by the Secretary because these integers in s.159 (1) were directory rather than mandatory.

35. However, that is not to say that the requirement that the claim be in writing and on a form is not mandatory. The subject matter of the claim is the disbursement of public moneys consequent upon the satisfaction of various criteria laid down in the statute for the payment of particular pensions, benefits and allowances. It would be to attend the administration of the legislation with the greatest uncertainty both for alleged claimants and for those charged with administration of the legislation if oral applications were to be treated as sufficient for the making of a claim ...

37. ... The requirement that claims shall be made in writing is not to be characterised as a 'mere matter of machinery for carrying out the undoubted purposes of the Act': cf. *Grunwick Processing Laboratories Ltd. v Advisory, Conciliation and Arbitration Service* [1978] AC 655 at 690'.

The AAT also considered the form of Wilkie's tax return for the 2000/2001 financial year as he argued that the information in that form 'substantially complied' with the information required for an effective FTB claim. The Tribunal accepted that the 2000/2001 tax return contained information that may be relevant to establish eligibility for FTB and went on to examine the 'Family Tax benefit — tax claim form