

itated for work to the extent of not less than 85% or must be permanently blind.

(b) **Assessment of Permanence**

An incapacity is considered permanent if no fundamental or marked change for the better can be expected in a person's condition in the future.

(c) **Assessment of Incapacity**

Incapacity is defined by the degree of permanent incapacity of a person compared with the capacity for work which that person would have had, but for his incapacity.

The comparison is to be made with regard to all work that could reasonably be regarded by the assessor as being within the claimant's capacity.

Assessment of incapacity is made having regard to the degree of the claimant's impairment which, together with relevant facts about the applicant such as age, sex, education, lack of skills and personal disabilities, constitutes incapacity. It is important to recognise that it is permanent incapacity and not permanent impairment that is relevant for invalid pension purposes.

Permanent Impairment—This is a purely medical condition. Permanent impairment is an anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved, which abnormality or loss the Commonwealth Medical Officer considers stable or non-progressive at the time evaluation is made. It is always a basic consideration in the evaluation of permanent incapacity.

Permanent Incapacity—This is not a purely medical condition. A person is permanently incapacitated or under a permanent incapacity when his actual or presumed ability to engage in gainful employment is reduced or absent because of impairment which, in turn, may or may not be combined with other factors.

While fluctuations in the labour market are to be disregarded in the assessment of the applicant's capacity for work, that capacity must be assessed in the light of work of kinds that (subject to such fluctuations) are available in Australia, regardless of whether or not they are available at places reasonably accessible to the applicant at his current place of residence. However, age, sex, education, lack of relevant skills and personal disabilities are factors to be taken into account, together with impairment, in determining the capacity of an individual applicant for work that is not so reasonably accessible.

The fact that a severely handicapped applicant might be able to get work at a time of full or 'over-full' employment because of the scarcity of labour would not disentitle him if he was unlikely to get work at any reasonably foreseeable time given the general level of demand for labour in Australia.

Self-inflicted incapacity brought about for the purpose of obtaining a pension disqualifies a person from pension.

(d) **Employment Considerations**

While it is not generally possible for a person engaged in employment to be considered as being permanently incapacitated for work all relevant

factors should be considered where a person is engaging in some form of employment, including

- the nature of employment (part-time, sheltered, therapeutic, token);
 - whether employment is within the claimant's remaining capacity for work;
 - whether employment is compatible with the claimant's medical condition;
 - whether employment will continue.
- The Department of Social Security may request a review of medical entitlement if a pensioner commences work.

(e) **Other Considerations**

A person who has lost the use of both arms or legs may be considered to be permanently incapacitated, independent of their personal and employment circumstances, even when engaged in some limited employment. A similar assessment may be made if a person has suffered some other permanent impairment which is as broadly disruptive of his capacity for work as the loss of both arms or legs would be.

Comment

The new guidelines represent a victory for those groups which had pressured the Department of Social Security and the Government to abandon its restrictive view of 'permanent incapacity for work'. The guidelines now accept that this incapacity is to be measured by looking, not only at the claimant's medical condition, but also at a range of other factors.

However, on two important factors, the new guidelines are, at best, unclear: (these are, first, variations in the labour market and second, geographical or physical accessibility of work).

On the first of these, the section of the guidelines headed 'Permanent Incapacity' distinguishes between short-term (or seasonal) fluctuations in the labour market and long-term (or structural) changes: at least, we assume that this is the distinction which is drawn in the opening clause of the second paragraph and the third paragraph. So the fact that work which the claimant could do is temporarily available (because of some short-term drop in demand for labour) would not make the claimant 'permanently incapacitated for work'. But, on the other hand, an indefinite drop in demand for labour in the type of job or work which the claimant could do would contribute to making the claimant 'permanently incapacitated for work'.

On the second of these factors (accessibility) the new guidelines are both confused and contradictory. (Indeed, the *Reporter* will award one year's free subscription to the first person who can reduce this part of the guidelines to a simple and intelligible form.) The guidelines say (in the second paragraph of the section headed 'Permanent Incapacity' that the availability 'at places reasonably accessible to the applicant at his current place of residence' is irrelevant. But they go on to say that, where there is inaccessible and available work, the capacity of the claimant for that work is to be measured by reference to (amongst other things) the claimant's 'personal disabilities' and 'impairment'. What if the disabilities

or impairment are such that the claimant cannot travel? Surely then the inaccessibility of the work will be taken into account.

What, we might ask, are the poor Commonwealth Medical Officers to make of all this complexity and confusion?

Apart from that confusion it is absurd to say that accessibility of work is irrelevant when one is considering the capacity of a person (with an impairment) to engage in that work. How can the availability only in Darwin of work suited to a disabled claimant who lives in Hobart be relevant to deciding that the claimant is or is not incapacitated for work?

We can expect that the adequacy of these guidelines will soon be raised before the Administrative Appeals Tribunal: indeed, several invalid pension appeals were being heard by the AAT in Melbourne as this *Reporter* went to press. And the AAT can, of course, reject these new guidelines as intelligible or inappropriate.

File note: Legal aid for AAT appeals

Section 69 of the *Administrative Appeals Tribunal Act* provides that an applicant or other party before the AAT can apply to the Commonwealth Attorney-General for legal aid.

Until recently, the Australian Legal Aid Office (ALAO) treated this provision as preventing it from granting aid to people who had appealed to the AAT: these applications for aid were regarded as within the exclusive province of the Attorney-General.

However, the Attorney-General has now directed ALAO that it is to process all applications received by it for aid in AAT matters. If these applications fall within the standard ALAO guidelines (on means and merits), ALAO is to approve aid.

In those cases where the applicant cannot satisfy ALAO guidelines but where there is an element of 'public interest', ALAO has been directed to refer the application for aid to ALAO central office, which will submit the application to the Attorney-General for his decision under s.69 of the *AAT Act*. An element of 'public interest' will be involved where the AAT appeal relates to a matter of general public importance, or to a matter which could affect the rights of a significant section of the public, or where the appeal raises the validity of Commonwealth legislation.

Accordingly, any person seeking legal aid for an AAT appeal now has two options:

- (1) To apply direct to the Attorney-General under s.69 of the *AAT Act*.
- (2) To apply to the local ALAO.

(In Queensland, South Australia and Western Australia, where the ALAO has disappeared, applications for aid can be made to the Legal Aid (in SA Legal Services) Commission.)