who, having been temporarily or partially incapacitated, is unable to re-enter the workforce because of economic conditions, or that a person who, having been temporarily incapcitated, is unable to obtain remunerative employment because of his advanced years. The applicant is permanently incapacitated and it is because of his medical condition that he is unable to obtain employment.

Because of his medical condition, it is not feasible that the applicant leave Ballarat in search of employment. Therefore, it is not necessary that I discuss what might be the extent of the work market available to a reasonably mobile person.

(Reasons for Decision, p.6.)

Comment

This application for review was treated as a test-case by the DSS and the applicant: senior and junior counsel appeared for each side (the applicant's counsel was briefed with legal aid from the Australian Legal Aid Office: see *Social Security Reporter*, no. 1, p. 8).

However, the AAT was not able, in its reasons for decision, to resolve many of the difficult areas of disagreement in the assessment of eligibility for invalid pensions. This was largely because Panke's disability was found to be substantial; accordingly, two members of the Tribunal said that he was incapacitated for *any* type of work. They did not have to cope with the problem of a person whose disability left him capable of performing light work or clerical work but whose prospects of obtaining that work were very small, because of his age or educational qualifications or family commitments or because the work was located away from his place of residence.

However, there are strong suggestions in the reasons (and especially in those of Davies J) that the AAT will eventually adopt an approach to the assessment of 'incapacity for work' similar to that outlined in the DSS guidelines of 7 May 1981 (see *Social Security Reporter*, no. 1, pp. 7–8). All members of the AAT emphasized that incapacity involved *both* physical (or mental) impairment *and* the personal characteristics of the applicant, while Davies J stressed the relevance of this applicant's chances of actualy finding a job.

As there are many invalid pension appeals pending before the Tribunal, we can expect future decisions to explore the other controversial questions.

Jurisdiction: review of earlier decision

GEE and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N80/108)

Decided: 27 March 1981 by J. D. Davies J, M. J. Cusack and I. Prowse.

This was a decision on a preliminary challenge to the jurisdiction of the AAT. The challenge raised some technical questions about the sequence of events necessary to establish jurisdiction for the AAT: and some general questions about which decision the AAT is meant to review in its social security jurisdiction.

Background

Patricia Gee was receiving supporting parent's benefit.

(1) In February 1979 the DSS decided that she had failed to notify the Department of an increase in her private income; that she had been overpaid $1630; and that the overpayment should be recovered by deducting $53 per fortnight from future payments of her benefit. (The power to make these deductions is set out in s.140(2)—reproduced in *Thomson* in this issue of the *Reporter*.)

(2) In June 1979, Gee appealed against this decision to an SSAT.

(3) In July 1979, the DSS varied the February 1979 decision: the 'overpayment' was fixed at $1310 and the deductions from Gee's benefit were fixed at $16 per fortnight.

(4) In September 1979 Gee informed the DSS that she had commenced full-time employment and asked the Department to cancel her benefit, which the DSS did.

[Accordingly, the dispute between Gee and the DSS now had several components: (a) had there been an overpayment? (b) should deductions have been made under s.140(2) up to September 1979? (c) was the balance of the overpayment recoverable by court action under s.140(1) of the Act?]

(5) In the same month, September 1979, the SSAT recommended that Gee's appeal be upheld, because she 'had notified the Department of her increased earnings in January 1976'.

(6) On 24 March 1980, a delegate of the Director-General rejected that recommendation and affirmed the decision that there was an overpayment of $1310 and that the outstanding balance should be recovered by court action under s.140(1).

[**Note:** at this stage there was no right to appeal to the AAT, as the DSS decision was affirmed before 1 April 1980.]

(7) Later in 1980, following a request from a member of Parliament, the DSS reviewed the matter. On 1 September 1980 a delegate of the Director-General decided to reduce the overpayment 'to $1210 and to seek recovery of this amount from Mrs Gee pursuant to section 140(1)'.

(8) Gee then applied to the AAT for review of that decision.

The argument on jurisdiction

The jurisdiction of the AAT required the following sequence of events:

(1) Original decision of DSS.

(2) Review by an SSAT.

(3) Decisions of the Director-General (on or after 1 April 1980), affirming, varying or annulling original DSS decision.

The DSS argued that there could be no jurisdiction here because the decision of 24 March 1980, which followed an SSAT review and affirmed an original DSS decision, was made before 1 April 1980; and the decision of 1 September 1980 was a review of the decision of 24 March 1980, not of the original DSS decision (of February 1979) and had not followed an SSAT review of the decision of 24 March 1980.

The AAT's decision on jurisdiction

This ingenious argument was rejected by the AAT. The Tribunal said:

(a) that the decision which affected Gee's rights was the decision of February 1979 as varied in July 1979;

(b) that this decision 'remained operative', did not 'cease to have effect' and was not 'replaced by' the decision of 24 March 1980 affirming it;

(c) that the decision of 1 September 1980 'was a decision varying the operative decision' of February/July 1979; and

(d) that the decision of February/July 1979 had been reviewed by an SSAT.

(Reasons for Decision, pp.11–14.)

Accordingly, the sequence of events necessary to show AAT jurisdiction had been established.

The AAT went on to observe that the decision which the Tribunal reviewed in its social security jurisdiction was *not* the Director-General's decision affirming, varying or annulling an original DSS decision but the original DSS decision:

> The Administrative Appeals Tribunal is not involved in an exercise of reviewing on the merits the Director-General's affirmation or variation of that decision. The regulations may give that particular form to the review, but the essence of the review in relation to decisions made under the *Social Services Act* is the same as it is in other jurisdictions conferred upon the Administrative Appeals Tribunal, namely, whether the decision which has affected the rights of the applicant was the correct or preferable decision, not whether a decision which reconsidered such decision was the correct or preferable one.

(Reasons for Decision, p.18.)

One of the practical consequences of this approach was that the AAT could effectively exercise the power to suspend the operation of a decision appealed against (s.41, *AAT Act*)—the suspension would apply to the original, 'operative decision, not merely to the Director-General's review decision: Reasons for Decision, p.16.

Comment

If the DSS argument had been accepted by the AAT, its impact would have been confined to a fairly narrow group of cases—that is, where the Director-General's decision following the SSAT appeal was not, for some reason, appealable to the AAT: because, as in *Gee*, that decision was given before 1 April 1980 (see also the appeal described in (1980) 5 *LSB* 190–1); or because the time limit for appealing to the AAT against that decision had expired. In those cases, a subsequent review decision by the Director-General would not (if the DSS argument had been accepted) have provided the basis for an AAT appeal. But given this decision, a person *can* now use that subsequent review decision as the basis for an AAT appeal.

The argument put by the DSS was not only technical but also relatively narrow in its impact; it did *not* have the strange implications suggested for it in the *Administrative Law Service*, Bulletin No. 13 (June 1981), p.7.