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Administrative Appeals Tribunal decisions

Invalid pension: permanent incapacity

TIKNAZ and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/52)

Decided: 15 December 1981 by J.D. Davies, J.O. Ballard and H.W. Garlick.

In July 1978, Adnan Tiknaz, a man of 31 years, described by the AAT as 'of Turkish origin', was injured in a car accident. His physical injuries were minor but he became a chronic invalid and did not work from that date – he was suffering post-traumatic neurosis. In September 1980 he recovered $30 000 as the settlement of a common law action for damages arising out of the accident. But his neurosis did not improve.

In May 1980 Tiknaz lodged with the DSS a claim for invalid pension. The DSS rejected this claim and he applied to the AAT for review of that decision.

Incapacity for work

The AAT described Tiknaz's condition as one which is more common in the less assimilated ethnic communities. Amongst those communities, where the English language and the Australian way of life are not well understood and where confidence in the future depends on an ability to work, 'members tend to have a tragic reaction to any event which affects their working capacity', and this reaction is largely encouraged by a legal system which provides compensation rather than rehabilitation, and which leads to loss of employment prospects: Reasons for Decision, p. 2.

The various medical practitioners who had treated or examined Tiknaz confirmed that he was suffering from this condition. He had 'an acute reactive depressive illness', or 'a moderately severe depression with marked psychomotor retardation' and he complained of chronic headache, sleep disturbances, pains in the lower back and irritability.

The several doctors who had treated Tiknaz described him as a chronic invalid who was most unlikely to work again.

The AAT found this evidence convincing. It gave little weight to the evidence of an orthopaedic surgeon, who had examined Tiknaz for the DSS. ('It is not an orthopaedic or organic injury which precludes him from working. It is his neurotic condition', the AAT said.) And the Tribunal was not impressed by the opinion of a psychiatrist called by the DSS who said that Tiknaz was not 85% incapacitated. This was 'against the weight of the medical evidence before the Tribunal', the AAT said.

The AAT decided that since his accident, Tiknaz had not been fit for work. The real question was whether this condition was permanent.

A permanent incapacity

It was not necessary that Tiknaz' condition be incurable, rather it needed to be static or constant – one that would persist at least for an indefinite time in the future: Reasons for Decision, p. 11.

The AAT found that the weight of the evidence, produced on behalf of Tiknaz, established that he would not recover from his disability. Even on the evidence of the psychiatrist called by the DSS, the AAT concluded that Tiknaz's condition was permanent. The prospects of rehabilitation training were, the AAT believed, not high and, in any event, rehabilitation would be a long process:

In this issue:

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> His condition is not temporary or transitory and the fact that it may not be incurable, that there are still steps which may and probably should be taken to alleviate the condition, does not preclude the conclusion that, in the context of s.24, his condition is a permanent one.

Reasons for Decision, p.13.

Date of incapacity

The AAT went on to decide that Tiknaz was at least 85% permanently incapacitated for work in May 1980 and at the present time. The fact that the damages settlement, in September 1980, led to no improvement in his condition demonstrated that the neurosis had been firmly established before that date.

Consequently, the AAT did not need to consider whether Tiknaz could be paid an invalid pension if his permanent incapacity had only developed after he lodged his claim. Nevertheless, the AAT did discuss this question and said that the *Social Services Act* 'should be administered beneficially and with common sense'. Therefore, the Director-General could grant a pension to Tiknaz from the date of entitlement without requiring the lodgement of a further claim form (if his entitlement developed after the original claim). And it followed that the AAT, given all the powers and functions of the Director-General by s.43 of the *Administrative Appeals Tribunal Act* could do the same, if it thought that there was no entitlement at the date of application but that there was entitlement at a later date: Reasons for Decision, pp. 15-6.

Adequate compensation

The AAT then referred to s.25(1)(d) of the *Social Services Act* (set out in *Markovic* in this issue of the *Reporter*). Was Tiknaz precluded from being paid invalid pension in May 1980 because he then had 'an enforceable claim . . . for adequate compensation'? The AAT said that s.25(1)(d) was not a barrier. The $30 000 settlement (in September 1980) was not adequate compensation for Tiknaz's permanent incapacity.

The AAT concluded by recommending to the DSS that it take steps to attempt to rehabilitate Tiknaz into the workforce. While the prospects of success were not high, they were not hopeless and, if he were to overcome his neurosis, he would have to be given training which would give him the confidence to re-enter the workforce. But this should only be done in consultation with his doctors so that his health would not be damaged.

The AAT set aside the decision under review and decided that Tiknaz be granted an invalid pension from 27 May 1980.

BROWN and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/74)

Decided: 15 January 1982 by W. Prentice, E.L. Davis, M.S. McLelland.

Barbara Brown, a widow aged between 40 and 45 years, with a retarded child aged over 16 years, applied for an invalid pension in March 1980. The DSS rejected this claim in June 1980 and, after an unsuccessful SSAT appeal, she sought review by the AAT of the DSS decision.

The medical evidence before the AAT conflicted: two medical practitioners said she was not 85% permanently incapacitated for work, although unfit for heavy physical work due to hypertension and low back pain. A Commonwealth medical officer reported (in April 1980) that she was at least 85% permanently incapacitated.

But the AAT based its decision on evidence from the practitioner who had treated Brown for three years. He reported that she had a 'most alarming' blood pressure: it had been and now was 'at stroke level'; and she was being treated with heavy dosages of drugs which had not reduced or stabilized her severe hypertension. The AAT concluded:

> This Tribunal is of the clear opinion that the applicant's condition of very severe hypertension which has existed since at least 1978, is going to continue. We have not lost sight of the fact that her home conditions involve her in some responsibilities to her retarded son which not only would contribute to her stress situation, but also bear on her capacity to be employed. It is difficult to imagine any kind of work that her health would allow her to continue with.

Reasons for Decision, para. 8.

The AAT found that Brown 'was permanently incapacitated for work to a degree not less than 85% within the meaning of the Act' both in March 1980 and at the time of its decision (January 1982), set aside the decison under review and returned the matter to the Director-General with the direction that Brown be granted an invalid pension from 28 March 1980.

CAMILLERI and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/107)

Decided: 14 January 1982 by J.O. Ballard.

Nina Camilleri claimed an invalid pension in August 1979. This claim was rejected by the DSS in August 1980 and, after an unsuccessful appeal to an SSAT, she applied to the AAT for review of the DSS decision.

Before the Tribunal, evidence was given by three medical practitioners who said that Camilleri was asthmatic. Her general practitioner said she would be unable to hold down employment for any significant length of time.

A physician called by the DSS said that she had not been 85% incapacitated when examined in November 1979 and October 1980 but she had become permanently incapacitated to the extent of at least 85% by the date of the AAT hearing in December 1981.

Another physician, who had treated Camilleri, told the AAT that she was, and had been for some time 'more than 85 per cent permanently incapacitated for work all things considered': Reasons for Decision, para. 6. He explained that he took into account

> her command of the English language, her lack of training for any specific job other than process work or cleaning, work of that sort, so the type of work, and the fact that she has a family and house to run and the severity of her disease.

Camilleri was married and had four young children. When asked the extent to which caring for the children contributed to Camilleri's incapacity, the physician found it very difficult to apportion; and the AAT member remarked (during the hearing) that 'one does not get an invalid pension because one is bringing up four children.'

Later, in giving his reasons for decision, the AAT member said, after referring to *Panke*, 2 *SSR* 9:

> It seems to me that this test requires account to be taken of such matters which go to her employability as the applicant's lack of skills and of knowledge of the English language but not of extrinsic matters as her domestic obligations notwithstanding that they may affect her availability for work.

Reasons for Decision, para. 6.

Despite the problems about this physician's assessment of Camilleri's incapacity (based, according to the AAT, on 'some acceptable . . . and some unacceptable factors'), the AAT decided that Camilleri had become permanently incapacitated for work to the extent of at least 85% by 2 October 1981. The Tribunal rejected an argument that the critical date must be the date when invalid pension was claimed, adopting the reasons of the AAT in *Tiknaz*, noted in this issue of the *Reporter*.

The AAT set aside the decison under review and granted Camilleri an invalid pension as from 2 October 1981.

[*Note:* On the AAT's rejection Camilleri's family responsibilities, contrast *Brown*, noted in this issue of the *Reporter*, where the applicant's responsibility to her retarded son was treated as relevant.]

PARDO and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/57)

Decided: 14 December 1981 by J.B.K. Williams, E. Coates and M. Glick.

Francesco Pardo was born in Italy in 1923. He came to Australia in 1951. In 1970 he suffered a back injury while working and in 1975 his elbow was injured in a second industrial accident. He last worked in 1976 when he was dismissed because 'they said I was not producing enough'. All of his work experience had been as an unskilled labourer; he had a limited knowledge of the English language; and he had no particular skills.

In September 1980, Pardo claimed an invalid pension but this claim was rejected by the DSS on the ground that his degree of incapacity for work was less than 85%. Pardo applied to the AAT for review of this decision.

The medical evidence

An orthopaedic surgeon who examined Pardo for the DSS found that Pardo was suffering from spondylitis of his lumbar spine which rendered him unfit to work as a labourer but he was 'fit for any light work or a sedentary occupation' and not 85% incapacitated for work. In evidence to the AAT, this surgeon assessed Pardo's incapacity (based on his back and elbow injuries) at 70%.

A report from another surgeon, who

had treated Pardo, showed loss of movement and power in his elbow and back pain on bending and lifting; and this surgeon assessed the 'impairment of function' as 85%.

The AAT's assessment

The specialist who had examined Pardo for the DSS said that he had not taken account of anything other than medical factors. This specialist's assessment (of 70% incapacity for work) did not, the AAT pointed out, take into account the other factors canvassed in *Panke* (2 *SSR* 9) – in particular, whether the physical defect made his labour unsaleable in any market reasonably accessible to him. The AAT referred to Pardo's minimal education, his limited knowledge of English, his lack of any skills and continued:

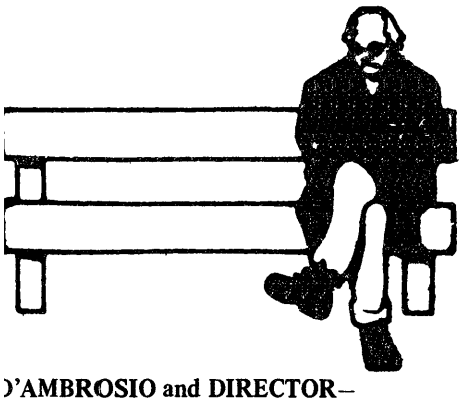
> The limitations upon his ability to engage in labouring work have already been discussed. We have not before us in this case evidence as has been called in other cases of this nature, by some person able to give more or less expert evidence of the employment opportunities available to a man in the situation of the applicant who resides in the Geelong area. However, we think that we can say from general knowledge that it would be very difficult indeed for a man in the applicant's position to find an employer who would be prepared to accommodate him with his disabilities, and that it is unlikely that he would find remunerative employment.

Reasons for Decision, para. 18.

And the AAT referred to evidence by Pardo that he had unsuccessfully approached five prospective employers in Geelong in a four week period in 1980: this lack of success supported the AAT's conclusions that he was unlikely to find a job.

The AAT then found that Pardo was permanently incapacitated for work, to the extent of at least 85%, and that he was qualified to receive an invalid pension under ss.23 and 24 of the *Social Services Act*.

The AAT set aside the decison under review and returned the matter to the Director-General with the direction that the invalid pension be granted.



D'AMBROSIO and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/116)

Decided: 27 November 1981 by A.N. Hall, M.Glick and M.S. McLelland.

Frances D'Ambrosio, a 49-year-old man born in Italy, was injured while working in Melbourne in May 1974. Up to that time, he had worked exclusively in labouring jobs; he had a very poor command of English and a very limited ability to read and write.

From the time of his injury (to his spine), D'Ambrosio had not worked, complaining of persistent pain and limitation of movement.

In May 1979, D'Ambrosio was granted an invalid pension. based on a medical report which indicated 'back injury – sciatica' and 'degenerative arthritis of the spine'. In March 1980, D'Ambrosio's invalid pension was cancelled following a futher medical examination.

D'Ambrosio sought review by the AAT of this cancellation.

The medical evidence

There was some conflict in the evidence given by the several doctors who had examined or treated D'Ambrosio. The general practitioner who had treated him for four years was satisfied that D'Ambrosio's incapacity was physical or organic. But other doctors said that there was little serious organic damage to the applicant. The major part of his disability, they said, was psychiatric or psychosomatic – he was suffering from a chronic anxiety depressive state. One psyhiatrist thought that this state might not be genuine: 'the need for a continuing invalid pension is the main aspect of his so-called psychiatric state.'

The AAT's assessment

But the AAT was satisfied, after observing D'Ambrosio during the hearing, and hearing his and his wife's evidence, that his psychiatric state was genuine: his only work skills were as a labourer; he could not resume that work; and 'now that his readily marketable skill as a labourer has gone, he has developed understandable anxiety and depression as to his future prospects': Reasons for Decision, para. 31.

Given that it was seven years since he had worked and that his poor education made the prospects of rehabilitation slight, the AAT found that 'his prospects of rejoining the workforce seem remote': Reasons for Decision, para. 32.

The AAT went on to find that the combined effects of the residual organic problems and consequential psychological problems incapacitated him for work to a significant degree. Taking into account his limited education and experience, his residual capacity for work was less than 15% and he was, therefore, 'permanently incapacitated for work within the meaning of s.23 of the *Social Services Act* 1947': Reasons for Decision, paras. 35-6.

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that D'Ambrosio's pension be restored from the date of its cancellation.

ROBERTSON and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/61)

Decided: 27 November 1981.

Mavis Robertson, aged 46 at the time of the AAT decision had applied for, and been refused, invalid pension.

She had worked in a number of unskilled and semi-skilled jobs until about 1977 when she developed back pains while lifting heavy cartons. She was also subjected to some sexual harassment; and, at about this time, menopause began.

She worked on and off for the next two years but back pains, depression and nervousness made it impossible for her to keep any of these jobs.

The medical evidence

Medical evidence was given by three practitioners – a surgeon and two psychiatrists. They said that the applicant did not have a severe back problem and that the problem was functional: without the 'psychological problem, her back would permit her to do light work but she would not be able to do any heavy lifting or bending': Reasons for Decision, para. 6.

The surgeon described her problem as one of severe depression. One psychiatrist said that the depression was transient rather than profound and protracted but that she had a marked difficulty with social relationships which interfered with her work capacity more than did her back problem. He thought a rehabilitation course might resolve her 'interpersonal difficulties' but he was doubtful that this would be successful.

The second psychiatrist (presumably examining for the DSS) found no evidence of anxiety or depression at the present time.

Incapacity not permanent

On the basis of this evidence, the AAT considered whether the applicant was permanently incapacitated for work to the extent of at least 85% within ss.23 and 24 of the *Social Services Act*. The Tribunal concluded that, at intervals since 1977, the applicant had been totally incapacitated for work. The incapacity was partly due to her back trouble but was substantially 'emotional'. But this incapacity was not permanent – it was not likely to last indefinitely because the applicant's moods changed from time to time.

The possibility that rehabilitation and work placement by the CES might succeed confirmed the AAT in the view that the incapacity should not be regarded as permanent. And the AAT concluded by recommending that this possibility be pursued by the DSS.

The AAT affirmed the decision under review.

WEBB and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. T81/11)

Decided: 27 November 1981 by R.K. Todd, H.W. Garlick and H.E. Hallowes.

Leonard Webb, aged 37 at the time of the AAT decision, had been granted an invalid pension in February 1975. He had, up to that time, worked for about 11 years, 'on and off' because he suffered from 'back troubles'. His jobs had all been unskilled labouring. He had left school at the age of 13.

At the time of the grant of the pension, he was suffering from painful restricted spinal movement caused by spondylolisthesis. The grant of pension was reviewed in 1976, 1978 and 1979 and he was found to be permanently incapacitated for work to the extent of 85% or more.

In July and August 1980 he was examined on behalf of the DSS and the examining doctors found that he was not qualified for invalid pension. The DSS then cancelled his invalid pension.

Webb then sought review by the AAT of the cancellation decision.

The law

Section 24 of the *Social Services Act* provides that a person who meets the age and residence requirements and 'is premanently incapacitated for work' is qualified to receive an invalid pension. Section 23 amplifies s.24:

> 23. For the purposes of this Division, a person shall be deemed to be permanently incapacitated for work if the degree of his permanent incapacity for work is not less than eighty-five per centum.

The AAT referred to *Panke*, 2 *SSR* 9 and adopted the analysis of Hall and Glick in that case: to determine incapacity for work, there must be, first, a medical evaluation of the person's physical or medical impairment and, second, an assessment of the extent to which the impairment affects the person's ability to engage in paid work; and any incapacity must be likely to last indefinitely (so that is can be described as 'permanent').

The evaluation and assessment of incapacity

On the medical evidence presented by Webb and the DSS, the AAT found that Webb's physical impairment was not much more than 10%, although it was permanent. But, because of his work history, his family background and socio-economic circumstances this impairment had severely affected his work motivation and, perhaps, made him at least 85% incapacitated for work:

> He is and has been surrounded by a variety of social, familial and attitudinal factors that have led to his being very pessimistic about obtaining a job and handling the work involved. He is a man who had a very limited education, who has never had other than a manual job, and who has never been able to find a job that has not at some stage had to be abandoned because of a back problem . . . He is of the view that no employer wants to hear about him if his back condition is revealed and that if he obtains a job by concealing that condition he gets into trouble.

Reasons for Decision, para. 18.

Permanent or temporary?

However, the AAT said, to the extent that his incapacity was due to problems of motivation it could not be regarded as permanent because there was a prospect that a rehabilitation and training scheme offered by the Commonwealth Employment Service could place Webb in employment with an employer willing to give him a chance. Until this scheme had been tried and failed, Webb's incapacity could not be said to be permanent.

If it did fail, 'the conclusion would almost inevitably follow not only that the incapacity had become permanent but also that, because of what would no doubt by then have become the decisive effect of the functional component of the incapacity, the degree of the incapacity had become more than 85 per cent':
Reasons for Decision, para. 22.

The AAT concluded by stressing that the onus was on the DSS and the CES to take positive steps to assist the applicant, especially because Webb had been paid an invalid pension for almost six years and had lost the pension at a time when his condition had not improved.

The AAT affirmed the decision under review.

MARKOVIC and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/84)

Decided: 24 December 1981 by J.O. Ballard.

Josep Markovic, described by the AAT as 'a Yugoslav, who speaks little English', was electrocuted in an industrial accident in July 1979. He was paid workers compensation for a time and received a lump sum payment of $16,000 early in 1981. A common law claim for damages was pending in the Supreme Court of Victoria at the time of the AAT hearing.

Markovic's application for an invalid pension was rejected by the DSS and after an unsuccessful appeal to an SSAT. he applied to the AAT for review of that decision.

Permanent incapacity

The AAT said that there was a clear conflict between Markovic's specialist medical advisers and the specialists who had examined him for the DSS. The AAT accepted the opinion of Markovic's psychiatrist who had been consulted 28 times by Markovic, apparently because of the opportunity this specialist had had to study Markovic's condition. This psychiatrist was supported by another specialist who had seen Markovic twice. On the basis of their opinions, the AAT found that Markovic's psychiatric disturbance (the result of his accident) rendered him at least 85% incapacitated for work. The AAT found that, 'on the balance of probabilities', Markovic's condition would not improve with the conclusion of the Supreme Court proceedings.

He was therefore qualified for invalid pension under ss.23 and 24 of the *Social Services Act*.

Enforceable claim for adequate compensation

The AAT then considered whether s.25(1) of the *Social Services Act* prevented the grant of an invalid pension to Markovic:

> 25.(1) An invalid pension shall not be granted to a person –
>
> . . .
>
> (d) if he has an enforceable claim against any person, under any law or contract, for adequate compensation in respect of his permanent incapacity or permanent blindness.

The AAT referred to *Buhagiar*, 4 *SSR* 34, where the AAT had suggested, in passing, that s.25(1)(d) was a barrier to payment of invalid pension while a claim to workers' compensation was pending; to *Bradley*, 4 *SSR* 35, where the AAT said that s.25(1)(d) was no barrier once a compensation claim had been settled; and to a High Court decision, *National Insurance Co. of N.Z. Ltd.* v *Espigne* (1960) 105 CLR 569.

In this last case Menzies J had said that s.25(1)(d) did not apply to a common law claim for damages (at pp. 568-9); Windeyer J said it had no application to 'rights of action in tort' – that is, common law damages claims (at p. 587). Those judges thought s.25(1)(d) referred to statutory (such as workers compensation) or contractual rights to compensation; and they doubted that a common law claim could be described as a claim to 'adequate compensation' because of the chance of any award being reduced by the plaintiff's contributory negligence.

In *Espagne*, Dixon CJ agreed with Menzies and Windeyer JJ and Fullagar J agreed with Windeyer J. The AAT decided that it should 'be regarded as binding authority'. Accordingly, Markovic's action for damages was no bar to the payment of invalid pension because –

- the section did not apply to common law claims;
- any damages awarded might be reduced because of contributory negligence and could not, therefore, be 'adequate'; or
- the defendant in the action might not be liable and the claim would not, therefore, be 'enforceable'.

The AAT set aside the decision under review and granted an invalid pension to Markovic.

Overpayment: discretion to deduct from pension

PFEIFFER and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. S81/17)

Decided: 4 December 1981 by J.O.Ballard.

In this matter the AAT reviewed a decision by the Director-General to recover an overpayment of invalid pension by deducting the overpayment from future payments of pension, as provided by s.140(2) of the *Social Services Act*.

Cynthia Pfeiffer was a married invalid pensioner. In March 1977 the DSS fixed her fortnightly rate of pension at $29.10, taking account of her husband's income of $297.26 a fortnight. The DSS did not review her husband's income until June 1980 when the husband's employer provided details of increased income from 31 March 1977 onwards.

The DSS then calculated that there had been an overpayment of $1234.20 and decided to withhold all of her invalid pension until this amount was recovered. This was done under s.140(2) which gives the Director-General a discretion to deduct from a current pension any amount paid by way of pension, 'which should not have been paid'.