SOCIAL SECURITY Reporter

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Invalid pension: permanent incapacity

LEONE and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/104)
Decided: 24 February 1982 by A. N. Hall.

Guiseppe Leone was born in Italy in 1930, educated to third grade in primary school and migrated to Australia in 1962. He worked in a range of relatively unskilled manual jobs until 1974 when his right knee was injured while he was working in a tyre factory.

Following a series of operations on his knee, Leone was granted an invalid pension on 7 December 1978. This grant was based on medical opinion that Leone had a gross disability in his right leg, that he was not fit for any form of manual work and that he could never hold down a sedentary job. After a review of Leone's pension, the DSS cancelled the pension on 21 November 1980. Leone appealed unsuccessfully to an SSAT and then sought review of the cancellation by the AAT.

The legislation

The qualifications for invalid pension are set out in ss.23 and 24 of the *Social Services Act*:

> **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 eight-five per centum.
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> **24.** (1) Subject to this Act, a person above the age of sixteen years who is not receiving an age pension and—
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> (a) is permanently incapacitated for work or is permanently blind; and
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> (b) is residing in, and is physically present in, Australia on the date on which he lodges his claim for a pension,
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> shall be qualified to receive an invalid pension.

The issues—a typical case?

Leone's case presented the Tribunal with a number of features which have been common to many of the applications for review in invalid pension cases: his work experience had been in heavy manual labour, he had suffered an industrial injury which incapacitated him from returning to that work,he had only rudimentary spoken English and could neither read nor write in that language, his physical impairment was complicated by a psychiatric condition and there was a sharp difference of medical opinion over the question whether his physical and psychiatric condition, in combination with his limited work skills, amounted to an 85% incapacity for work.

The medical evidence

There was general agreement between the medical witnesses that the injury to Leone's right knee (together with the results of radical surgery on the knee and with developing arthritis) amounted to a permanent disability which at least limited him to sedentary work.

But the medical practitioners who had treated Leone said that he had osteo-arthritis in both knees and hands and in his spine. Further, said the general practitioner who had treated him for 12 years (Dr Weinberg), Leone was suffering from a moderate anxiety state and had 'become withdrawn, depressed, cried on occasions, suffered from insomnia and was irritable and intolerant . . .'

A psychiatrist, who had examine Leone for the DSS, said that the psychiatric condi-

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tion was not, by itself, significantly disabling. Similarly, orthopaedic specialists, consulted by the DSS, concentrated on his injured knee which they said did not produce an 85% incapacity for work.

The need for a general overview

The AAT observed that this concentration on only one aspect of a person's impairments was a 'problem which appears to be a recurring one in cases of this nature': Reasons for Decision, para. 13. The AAT continued:

> 14. The consideration of the extent to which a person is incapacitated for work may be distorted when the physical and psychiatric impairments of the individual are seen in isolation. The total impact of those impairments on the individual's incapacity for work, may well be greater than the impact of each component viewed separately. It is for this reason, that in cases such as the present the overview given by the general practitioner who has treated the patient over a long period and who for the purposes of that treatment has had the benefit of specialist expert advice can be of considerable value. He looks at the impact of the impairments on the whole man as it were. In my view, Dr Weinberg's evidence provides that assistance in the present case.

(Reasons for Decision, para. 14)

Dr Weinberg thought that there could be no improvement in Leone's knee function and only a possible improvement in his nervous condition. His view of Leone's situation was spelt out in a report dated 18 January 1982:

> Honestly speaking, the knee injury would not prevent him to have certain easy jobs. For instance, jobs like an elevator operator doing his job partly standing up and partly sitting on a chair. But who will give him such a job? Especially when his education is very poor, his command of English is below the acceptable limits and his depression might increase his difficulties at performing a job. Also, who is prepared to give a job aged 53? A man without formal education, without understanding or speaking English acceptably and without any experience at doing a job except poor manual work?

The AAT's assessment

It was plain, the AAT said, that the knee injury and the degenerative changes would prevent Leone from ever again doing hard physical labour. So far as light work was concerned, the AAT said that pain in his right knee prevented him from standing or sitting for any length of time; and the osteoarthritic changes and his anxiety state would make it difficult for him to work over a full working day. His limited education and rudimentary English meant that he could not work in a job involving contact and communication with the public. The Tribunal said he could not, for example, work as a cleaner, gatekeeper, elevator driver, doorman or kitchen hand, even though he had said he wanted to work if suitable light work could be found.

The AAT concluded:

> 19. As was said in *Re Panke and Director-General of Social Services* (No. V81/30) the assessment of incapacity for work involves two elements. Firstly, the ascertainment of the physical and mental impairments from which the applicant suffers and secondly a consideration of the impact of those impairments on the person's capacity for work. In the present case, it is to the applicant's credit that he is prepared to continue with his efforts to find suitable employment. However, having regard to his age, to the physical and mental impairments and to all the other considerations to which I have referred, I believe that he may be nurturing false expectations of his own capacities. It is not inconceivable that the applicant may be able to find some casual employment or piece work to be done at home. If that were possible and the applicant were able to do the work, it may assist his own self-esteem and make a positive contribution to the alleviation of his depression. But in my view, such residual capacities for work as the applicant has should be assessed as less than 15%. Those capacities are not such as in my view to deny him entitlement to an invalid pension either now or at the date when his pension was cancelled.
>
> 20. I therefore find as a fact that at all material times the degree of the applicant's permanent incapacity for work was not less than 85% and that in accordance with s.23 of the Act, the applicant was deemed to be permanently incapacitated for work. It follows that the applicant has remained entitled, in my view, to an invalid pension and that the decision cancelling that pension should be set aside.
>
> 21. I order accordingly and remit the matter to the Director-General of Social Services with a direction to restore the applicant's invalid pension on and from the date of cancellation.

PATRINOS and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/53)

Decided: 17 February 1982 by J. B. K. Williams, M. Glick and H. E. Hallowes.

Spiros Patrinos was born in Greece in 1941 and migrated to Australia in 1966. He worked in a motor car factory until May 1968 when he was injured at work.

Apart from some brief periods of part-time work, he had not worked since his injury. He received a small workers' compensation award and the DSS granted him an invalid pension in 1976 on the basis of medical opinion that he was at least 85% permanently incapacitated for work due to an 'anxiety state' and 'lumbar disc lesion'.

In August 1979 Patrinos was imprisoned and, when the DSS learnt of this in October 1979, the Department cancelled his invalid pension.

In June 1980 Patrinos was released from prison and he lodged a claim for invalid pension. He was medically examined and found to be less than 50% incapacitated for work; and his claim was rejected.

Patrinos then appealed to an SSAT which recommended (in March 1981) that the appeal be dismissed. The Director-General's delegate accepted this recommendation and confirmed the 1980 rejection of Patrinos' claim.

On 20 July 1981, a delegate of the Director-General reviewed the October 1979 cancellation of Patrinos' pension. The cancellation had been made under s.46(1)(c) of the *Social Services Act*:

> **46.** (1) If—
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> (a) having regard to the income of a pensioner;
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> (b) by reason of the failure of a pensioner to comply with either of the last two preceding sections; or
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> (c) for any other reason,
>
> the Director-General considers that the pension which is being paid to a pensioner should be cancelled or suspended, or that the rate of the pension which is being paid to a pensioner is greater or less than it should be, the Director-General may cancel or suspend the pension, or reduce or increase the rate of the pension, accordingly.

The delegate took the view that this power of cancellation could not be used to stop payment of pension to a prisoner because another section, s.52(1), dealt with that situation:

> **52.** (1) If a pensioner is imprisoned, following upon his conviction for an offence, the Director-General may suspend his pension during the term of imprisonment or may forfeit any instalment of the pension falling due during the term of imprisonment.

Accordingly, the delegate varied the cancellation decision of October 1979 to a decision suspending the pension during the term of Patrinos' imprisonment. At the same time (20 July 1981), the delegate made a decision cancelling Patrinos' pension from 19 June 1980—two weeks after his release from prison. The delegate based this decision on his conclusion that, from the time of Patrinos' release from prison, his medical condition no longer permanently incapacitated him for work.

Patrinos then applied to the AAT for review of the decision made in March 1981 (confirming rejection of his 1980 claim for pension); and he also asked the AAT to review the decisions made in July 1981 (which had retrospectively suspended and cancelled his original, 1976, pension).

Which decision could the AAT review?

The AAT pointed out that its jurisdiction to review a decision under the *Social Services Act* only arose when the decision had been reviewed by an SSAT and affirmed, varied or annulled by the Director-General (or his delegate): see s.15A, *Social Services Act*, which replaced Part XXIVA of the Schedule to the *Administrative Appeals Tribunal Act*.

The decisions of 20 July 1981 had not been reviewed by an SSAT. Accordingly, they could not be reviewed by the AAT. The Tribunal observed:

> 19. It is evident that when making his decisions of 20 July 1981 Mr Conwell had in mind two considerations. The first was that the purported cancellation of the invalid persion because of the applicant's imprisonment may have been ineffective thus giving rise to a possible claim for payment by the applcant during the period of his imprisonment. The second was that following his decision to suspend the pension, a right to continue to receive it may have arisen following the applicant's release from prison and it was thought necessary to extinguish this possible right. But the correctness or otherwise of the decisions of 20 July 1981 and the effects that may flow from them are not, in our view, matters open to review by us. The jurisdiction of the Tribunal to review decisions of the respon-

dent is not at large: it is conferred within the limits laid down in Regulation (3) to which previous reference has been made. We propose to consider this matter on the basis of the decision referred to and considered by the SSAT which was subsequently affirmed by the respondent. In so doing, we are conscious of the fact that our decision may not necessarily resolve all the matters in contest between the parties.

Permanent incapacity—a conflict of opinion

The AAT then turned to the substantive issue in the case—whether Patrinos' 1980 claim for an invalid pension should have been rejected: was Patrinos permanently incapacitated for work to the extent of at least 85%, as required by ss.23 and 24 of the *Social Services Act*?

Patrinos gave evidence of pain in his left arm and shoulder, frequent headaches and difficulty in prolonged sitting, lifting, bending and sleeping.

As in many of these invalid pension cases, there was a sharp conflict of medical opinion. A general surgeon who had treated Patrinos for 13 years said that his spine was twisted and that he was unfit for labouring work. As the only commodity which he could sell on the labour market was his strength, he was 'well over 85% incapacitated'. This opinion was supported by two other medical practitioners.

On the other hand, an orthopaedic specialist who had seen Patrinos for the DSS said he could find no clinical deformity in his back: there were no clinical signs to suggest that he had a disability which would prevent him from doing manual work.

The AAT decided that it could not accept the evidence of Patrinos' doctors in disregard of the orthopaedic surgeon's views. [The medical assessment was not complicated, as a number of similar cases have been, by any evidence of psychiatric disability—the 'anxiety state' which had existed in 1976 was not raised before the AAT.]

The Tribunal was also influenced by its observation of Patrinos over 1½ days of the AAT hearing ('he sat throughout the hearing with no apparent inconvenience'), by the fact that he had travelled by air to Greece and back in 1975, that he drove a motor vehicle and that he had occasionally worked for short periods for his wife and another relative.

The AAT thought that while Patrinos suffered physical problems with his back which might prevent him undertaking physical work, his disability was not 'as great as he asserts it to be'.

While an officer from the Department of Employment and Youth Affairs thought that placing Patrinos with an employer would be difficult (because he had not worked for 13 years and had a criminal conviction), there was specialist help available from that Department. The AAT stated its attitude as follows:

> In his own best interests, it would seem eminently desirable that efforts be made to rehabilitate him by placement in employment rather than that he be condemned for life as an invalid at the age of 40.

(Reasons for Decision, para. 32)

The AAT affirmed the decision under review.

[Comment: It is difficult to see immediately how all of the factors mentioned by the AAT were relevant to Patrinos' incapacity in 1980 or 1982: the journey to Greece happened a year before the first grant of invalid pension; and the occasional periods of part-time work were apparently during the period from 1974 to 1978. It is also interesting to contrast this Tribunal's unwillingness to accept the opinion of the treating medical practitioner with the approach taken, for example, in *Tiknaz*, 5 *SSR* 45, *Brown*, 5 *SSR* 46, and *Leone*, in this issue of the *Reporter*.]

ARNIOTIS and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/88)

Decided: 17 February 1982 by R. K. Todd.

Antonios Arniotis was born in Greece in 1930 and migrated to Australia in 1965. He had jobs in a series of factories including a cotton-spinning factory, where he worked seven days a week between 1969 and 1978. While in this job, he developed coughing, allergic problems and symptoms of asthma. On medical advice, he stopped working and, in May 1978, he lodged a claim for invalid pension with the DSS.

The Reasons for Decision do not chart the course of this claim but it seems that it was rejected, that an appeal to an SSAT failed and that Arniotis then sought review from the AAT, whose decision was handed down almost four years after the claim had been lodged.

The medical evidence

Arniotis' general practitioner (Dr MacC) had treated him for cough problems since 1972. He said that Arniotis had developed asthma by February 1978 and that treatment for this condition was complicated by a stomach disorder—probably a duodenal ulcer. These physical problems were 'greatly compounded by his nervous functional problem'.

A psychiatrist who had treated Arniotis (Dr P) saw him as having 'asthma complicated by his neurotic tendencies' which was likely to continue indefinitely. Another psychiatrist (Dr R) said Arniotis had 'a quite total loss of confidence in himself in his physical ability to perform [and had] lost that confidence at all points of his life'. He was 'incapable of working because of the immense psychological defences he [had] built around himself'.

A specialist physician (Dr McK) confirmed that Arniotis had 'moderate obstructive airways disease . . . much compounded by psychogenic effect problems'.

A psychiatrist consulted by the DSS (Dr T) said that she did not believe Arniotis' anxiety would affect his ability to work. She thought he was over concerned about his symptoms—'this was common amongst obsessive, compulsive workers'. She thought that, apart from acute asthmatic attacks, his psychiatric incapacity was about 25-30%. The difficulty with this, the AAT said, was that it would be difficult to persuade an employer to hire him if the asthmatic attacks were frequent.

The AAT's decision

On that point, the Tribunal concluded that Arniotis did have 'persistent asthmatic problems which are likely to be continuously inhibitory of his ability to work and, at their most severe, would render him unable to obtain and hold any kind of employment at all': Reasons for Decision, para. 20.

And, on the basis of the psychiatric evidence, the AAT said that there was no prospect of significant improvement in his psychiatric condition: Reasons for Decision, para. 21.

So far as employment prospects were concerned, the Tribunal said:

> [F]rom the fact that the applicant has been out of work since early in 1978; that he lacks motivation to work; that he could really only work in a quiet, dust-free atmosphere with convenient hours, and so on, which he is not going to find in a factory environment; that employers say they want fit and active people for employment and from the fact of his age, his prospects of obtaining employment are very remote indeed.
>
> 23. On the evidence before me, I am in my opinion bound to find that the applicant has been incapacitated for work since his problems commenced in 1978. There may be some small room for saying that he has, for some part of that period, had the capacity to work in some clerical situation in dust-free surroundings and in which he could adopt a pace and a style of work suitable to his disability, but for such work he lacks training, experience, personality, language and motivation.
>
> 24. In truth, I think that he has, having regard to his own capacity to have undertaken paid work suitable to be undertaken by him, been incapacitated for work since March 1978. The degree of that incapacity has probably often been 100 per cent and certainly has never been less than 85 per cent.

This incapacity was 'permanent in the sense that it is likely to continue for the foreseeable future': Reasons for Decision, para.25.

The Tribunal concluded:

> 27. I propose to make a decision setting aside the decision under review and remitting the matter for reconsideration in accordance with the direction that the applicant be granted invalid pension in accordance with his application therefor dated 26 May 1978. In other words, there can be no further argument about his entitlement but the working out of it is a matter that should be left to the respondent. I will however grant liberty to apply in relation to the quantum of the applicant's entitlements should the same not be agreed upon.

DUSPARA and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/50)

Decided: 28 January 1982 by E. Smith, A. H. March and J. G. Billings.

Ivan Duspara, a 51-year-old man with little understanding of English, had been born in Yugoslavia and emigrated to Australia in 1967, where he worked as a labourer until October 1975. He suffered from a variety of

health problems and, in May 1978, he was granted an invalid pension by the DSS.

In October 1980 the DSS reviewed Duspara's invalid pension, decided that he was no longer 85% incapacitated for work and cancelled the pension in November 1980. Following an unsuccessful appeal to an SSAT, Duspara applied to the AAT for review of the decision to cancel his pension.

The medical evidence

Duspara had a hearing problem, headaches, breathing difficulties, persistent coughing and neck and throat pains; and he suffered from an anxiety state and depression.

According to the psychiatrist who had treated Duspara over 18 months, Duspara 'had become entrenched in the role of a sick person'. He thought that Duspara had a 'negligible' chance of rehabilitation and that he was not employable. Nor could Dr T see any evidence that Duspara would improve with time.

Another psychiatrist (Dr S) examined Duspara for the DSS and, at an AAT hearing in August 1981, said that Duspara was a hypochondriac but that this should not prevent him from working—from a 'physical and psychiatric point of view' he was fit to work. Dr S observed that 90% of the invalid pensioners whom he saw lost their symptoms once they had been granted a pension.

However, when the AAT hearing was resumed in November 1981, Dr S offered a completely different opinion: he now agreed with Dr T that Duspara was permanently unemployable and could not be rehabilitated. Explaining this change, Dr S said:

> I believe that I have not changed in my attitude but I have become aware that the whole picture is much more a complex of opportunity, age, motivation to work, willingness to work and personality. If you accept that all in one piece, well he is disabled.

(Reasons for Decision, para. 42)

The Tribunal's decision

The AAT found, on the basis of this evidence, that Duspara was

> for all practical purposes unemployable due to the complex of his physical and mental problems and that this situation was, and is, likely to continue indefinitely. The difficulties that were experienced earlier, due, we think, to the absence of one dominating ailment, disappear when the applicant's problems are seen in their totality.

And this incapacity for work was 'permanent' within the meaning of s.24 of the *Social Services Act* as interpreted in *Panke*, 2 *SSR* 9 (one that was likely to last indefinitely): Reasons for Decision, para. 44.

The AAT set aside the decision cancelling Duspara's invalid pension and remitted the matter to the Director-General with a direction to restore the pension from the date of its cancellation.

A case for review?

The DSS representative suggested to the AAT that it recommend a review of Duspara's case within 12 or 18 months as had been done by the Tribunal in *Bradley*, 4 *SSR* 35. This course was suggested because Duspara had said in evidence that he might wish to return to Yugoslavia. (An invalid pension is, of course, payable overseas to a person who has qualified in Australia: see s.83AB, *Social Services Act*.) However, the AAT refused to make such a recommendation:

> *Bradley's* case was, we note, different in that the applicant was a comparatively young man in respect of whom the medical evidence pointed to a real possibility of recovery once certain anxieties were removed. We do not think we should include a review recommendation merely as a deterrent to the applicant deciding in future to leave Australia. It is relevant to note that the evidence seems to us to establish clearly that the applicant is genuine in complaining of his various problems.

(Reasons for Decision, para.46)

RICCI and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/22)

Decided: 19 February 1982 by E. Smith, M. Glick and M. S. McLelland.

Ferdinando Ricci was born in Italy in 1924 and migrated to Australia in 1968. In the words of the AAT: 'He does not speak English, has had virtually no formal education and has been employed only in unskilled labouring type work'.

While working in a foundry in May 1977 he injured his back and was off work for ten months. He injured his back at work again in June 1979 and, after a month off work, he was dismissed by his employer because his back was prone to injury.

In July 1979, Ricci was granted an invalid pension by the DSS on the basis of a medical assessment that he was at least 85% permanently incapacitated for work 'due to chronic low back strain'.

The DSS began a review of Ricci's pension in July 1980 and, despite a favourable report from a Commonwealth Medical Officer cancelled his pension because he was not permanently incapacitated to the extent of 85%.

After an unsuccessful appeal to an SSAT, Ricci applied to the AAT for review of this decision.

Medical witnesses: who pays their expenses?

There was a sharp conflict in the medical opinions presented to the AAT. However, Ricci's case was at a disadvantage compared to the Department's case: he was not prepared to bear the expense of having any of his doctors attend the hearing and, accordingly, he relied on a written report from his orthopaedic surgeon, while the DSS was able to call three specialists before the Tribunal.

The AAT considered whether it might order payment of Ricci's doctors' fees and allowances by the Commonwealth (as it has a discretion to order under s.67(3) of the *Administrative Appeals Tribunal Act*). But the AAT refused to make this order because Ricci 'still had a substantial part of his lump sum compensation award of $17 500 [*sic*]' (awarded in December 1980); and the Tribunal thought it wrong to exercise the s.67(3) power 'in favour of an applicant who was unwilling, rather than unable, to pay his witnesses' fees and allowances': Reasons for Decision, para. 17.

The (conflicting) evidence

As in most invalid pension cases, the evidence given to the AAT showed a clear conflict between the applicant and the DSS. Ricci told the Tribunal of back pain (due to three spinal discs out of place) when he stood for any length of time; of inability to bend or to walk any distance; of wearing a back brace at all times, except in bed; and of his virtual inactivity—he did no housework, gardening or shopping and he did not drive a car. He also said that he had not applied for another job because he could not ask for a job 'and at the same time say "look, I am sick"'. But he had registered (without success) with the Commonwealth Employment Service.

Ricci's evidence, as to his inactivity and his complaints of pain, was supported by his daughter-in-law, who testified to his lack of education and his inability to speak English.

A medical report from an orthopaedic specialist (Mr B) who had treated Ricci said that there was no prospect of Ricci working again. He might theoretically be able to perform light duties but only if the language barrier were overcome and if he could work 'in a sheltered workshop situation':

> From the practical point of view, in modern Australia as our community is constituted today, there is no way in the World, short of his being given a minor post in some family business set up that he could be employed. I think that the Pension people have to accept that as regards his ever working again, from the point of view of his dysfunction, be this physical or functional, or an admixture of both, which I think it is, that he is unemployable and will remain so for the foreseeable future.

However, this opinion was contradicted by an orthopaedic surgeon (Mr S) called by the DSS who said that Ricci had no more than 20–25% physical disability in his back.

A general surgeon (Mr F) who had examined Ricci for his worker's compensation claim said he had 'some significant organic disability and some basic, genuine disability' complicated by functional overlay; but he should be able to do work involving light duties.

That opinion was confirmed by another general surgeon (Mr R) who said Ricci had a 30–40% loss of function in his back, but was fit for light duties such as 'a conveyor belt job . . . or sorting mail in an office'.

The Tribunal's decision

The AAT considered the significance of this evidence in the following paragraphs:

> 45. From a purely medical point of view, the preponderance of the evidence establishes, in the Tribunal's view, that the applicant was, and is, capable of performing some light work. We think it is also clear, based on the medical examinations over the period since 1977, that the applicant's disability is not likely to improve in the foreseeable future, if at all. So what physical disability he has can, we think, be regarded as permanent, if inclined to fluctuate a little.
>
> 46. It seems equally clear that the nature of the applicant's disability, when considered with his age, his total lack of skills, his virtual

total lack of education and his inability to speak or understand English, combine to make it questionable, in our view, whether he would be accepted back into the work force. Mr Huttner (who appeared for the respondent), put it strongly that '. . . you cannot become an invalid by virtue of the fact that you cannot speak the (English) language'. While that proposition, considered in isolation, is unquestionable, his lack of comprehension of the language, just as his lack of education, is, we think, a factor to be taken into account in assessing the effect of his physical or mental incapacity or his ability to obtain and perform work. We add, because it appeared to be challenged to some extent by the respondent, that we are satisfied that the applicant's lack of ability to speak or comprehend English is genuine and virtually total, despite the length of time he has been in Australia.

. . .

48. In all the circumstances, and taking due account of *Panke's* case, we find ourselves, on the evidence, unable to conclude that the applicant was at any relevant time, permanently incapacitated for work to the extent of 85 percent or more, and we would accordingly affirm the decision under review.

49. While coming to that conclusion, we think we should add that we have considerable doubt whether, in the situation of the 1980's, the applicant's chances of obtaining suitable employment will prove realistic. As the evidence before the Tribunal in *Re Bradley and the Director-General of Social Services* [4 *SSR*, 35] showed (see paragraph 34 of the Reasons for Decision), positions of gatekeeper and lift driver are not in practice available. And we think it is clear that many other types of 'light' employment are not likely to be available to the applicant because of his disability or his lack of education and English. We do not accept Mr Huttner's proposition that the applicant, with his history, and being on sickness benefit, should have been out looking for employment, even perhaps concealing the fact that he *was* on sickness benefit. We think that that asks far too much of such a person; and we certainly do not think that a person should be expected to mislead a prospective employer as to his medical fitness.

50. Not the least of the applicant's problems is that he has now been, for several years, treated as markedly disabled—by the grant of compensation, by his former employer, by his own doctors and by the grant of the invalid pension itself. He no doubt believes himself to be unable to work and has accepted the role of an invalid so that motivation to break back into the work force has been lost. The conflicting medical opinions that have now been expressed no doubt have served only to confuse him.

51. We would therefore recommend that the applicant's case be reconsidered in 12 months time. This would probably mean that the applicant would need to make a fresh application at that time, and submit up to date medical reports. If there is no improvement in his medical condition over that period, and experience has shown that no suitable light employment has been able to be found, we would think that the grant of an invald pension to him should then be favourably considered.

Invalid pension: separation under one roof

McQUILTY and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/116)

Decided: 13 January 1982 by W. Prentice, M. S. McLelland and I. Prowse.

Cecil McQuilty was granted an invalid pension on 11 April 1980 when he was 64. The DSS decided that his wife's earnings of $430 a fortnight would be taken into account in computing the level of McQuilty's pension. [The effect of this would have been to reduce his pension by about $43 a week.]

In making this decision, the DSS relied on s.29(2) of the *Social Services Act*:

> (2) For the purposes of this Part, unless the contrary intention appears, the income of a husband or wife shall—
> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines,
> be deemed to be half the total income of both.

McQuilty appealed against this decision to an SSAT, arguing that he had been living apart from his wife for many years, although they lived under the same roof. The SSAT recommended that the appeal be allowed but a delegate of the Director-General dismissed the appeal and affirmed the earlier decision to take the wife's earnings into account.

McQuilty then applied to the AAT for review of this decision.

The evidence

McQuilty, his wife and his daughter gave evidence to the AAT, and this evidence was not challenged by the DSS. They said that the McQuiltys had not lived as man and wife since 1970; they considered there was a complete breakdown of their marriage; they rarely saw each other; they did all their own household chores. They had remained in the one house (rented from the Housing Commission) because it provided cheap accommodation—it was 'vital economically that they not give up their own house'—and because they wanted to keep up appearances for their grandchildren.

Household expenses had been shared by the McQuiltys when he had a job; since his retirement his wife had paid most of these expenses on the understanding that he would resume his contribution when he received more income.

On 9 January 1981, the McQuiltys formalised their situation by entering into a written separation agreement.

The AAT's decision

The AAT decided that McQuilty and his wife had been living separate and apart since 1975. They had lived quite independent lives and it was clear that resumption of relations as husband and wife was impossible. The recent payment of rent by Mrs McQuilty did not compel the conclusion that they were living as husband and wife. As they had lived apart in pursuance of the written separation agreement since January 1981, the wife's income must be ignored from that date: s.29(2)(a).

Before that written agreement was made, that is between 11 April 1980 and 9 January 1981, was there 'any special reason' for disregarding the wife's income: s.29(2)(b)?

The AAT referred to *Reid*, 3 *SSR* 31, where the AAT had decided that a married pensioner should be treated as a single person (and his spouse's income ignored) because the marriage relationship had ended and the husand and wife were separated, although they were living undr the same roof and had made no formal separation agreement.

The AAT concluded that the conditions under which the McQuiltys share a house should be treated as a 'special reason' under s.29(2)(b) of the Act: 'By so finding "special reason" it considers it will be achieving rather than frustrating ends and objects of the Act': Reasons for Decision, para. 14.

The AAT determined 'that Mrs McQuilty's income should be disregarded in calculating the rate of the applicant's pension and directs that his pension should be recalculated and paid accordingly as from 11 April 1980': Reasons for Decision, para. 15.

Child endowment: jurisdiction

DOWLING and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/33)

Decided: 13 November 1981 by J. D. Davies J.

In June 1980 the Director-General decided that the child endowment payable for the children of Richard Dowling and Stephanie Claire (who had been divorced) should be apportioned—two-thirds to Dowling and one-third to Claire. (Section 99A gives the Director-General discretion to make such a decision.)

Dowling applied to the AAT for review of this decision and the Tribunal directed that Claire be joined as a party. Her counsel raised a preliminary objection that the allocation of child endowment was the subject of a matrimonial dispute which could only be dealt with by the Family Court, and that the AAT had no jurisdiction.

The AAT rejected this argument, saying that 'the Family Court of Australia has no