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# Administrative Appeals Tribunal decisions

## Invalid pension: incapacity and rehabilitation

**ALEKSIC and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/103)**

**Decided:** 19 April 1982 by A. N. Hall, J. G. Billings and E. L. Davis.

Mioljub Aleksic, described by the AAT as 'a relatively young man' with no 'competence in written English and . . . limited . . . spoken English', was struck on the head in January 1978 (in what appeared to be a street assault) and suffered moderately severe brain damage.

Aleksic had worked as a painter and decorator but it seems that, as a result of his injuries, he did not resume working. In May 1980 he claimed an invalid pension but the DSS rejected this claim. Following an unsuccessful appeal to an SSAT, he applied to the AAT for review of the DSS decision.

**The medical evidence**

The medical evidence established a series of disabilities: Aleksic suffered from deafness, vertigo, dimness of vision, loss of smell, epilepsy, loss of concentration and post-traumatic depression.

On the basis of this uncontradicted evidence the AAT found that Aleksic's physical impairments prevented him from resuming his former occupation, or working as a barman—the only other job for which he had any training.

Clerical work was out of the question because of Aleksic's poor command of English. Taking into account his physical and mental impairments and his limited capacities for work, the Tribunal found that Aleksic was permanently incapacitated for work within ss.23 and 24 of the *Social Services Act*.

**Rehabilitation**

The Tribunal was invited by the DSS to apply s.135M of the *Social Services Act*, which gives the Director-General power to refuse a pension to a person unless that person undergoes rehabilitation treatment.

However, the AAT thought that the prospects of rehabilitation could 'not be rated very highly', given Aleksic's physical and mental impairments. Therefore it did not consider it was appropriate to deny a pension unless Aleksic underwent rehabilitation. At the same time, the Tribunal implied that rehabilitation might be of *some* value for Aleksic ('at least to provide him with some occupational therapy that will add some purpose to his life') and it recommended that he undertake a rehabilitation programme.

**The formal decision**

The Tribunal set aside the decision under review and granted the applicant an invalid pension from the date of his application in May 1980.

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In December 1981, the Federal Court dismissed an appeal against the AAT's decision in *Thomson* (2 SSR 12): *Director General of Social Services v Thomson*

The Director-General has also lodged appeals against the decisions of the AAT in *Harris* (3 SSR 22), *Matteo* (5 SSR 50) and *Hangan* (in this issue). These appeals are yet to be heard.

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## BERMUDEZ and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/92)

**Decided:** 30 March 1982 by A. N. Hall, M. Glick and H. E. Hallowes.

Enrique Bermudez was born in 1946 in the Canary Islands where he worked as a plasterer before migrating to Australia in 1970. In Australia he worked as a carpenter until December 1978 when his back was injured at work. He tried to return to work in January 1979 but could not carry on because of pain in his back.

In November 1979, he claimed an invalid pension. This claim was rejected by the DSS and, in due course, he applied to the AAT for review of the decision.

**The medical evidence**

The Tribunal considered the medical assessments of two orthopaedic surgeons and three psychiatrists. The surgeons could find little organic impairment: at the most Bermudez had a chronic back strain. However, they believed that there was a 'large functional element' or a 'psychological element' which made it very doubtful that Bermudez would work again.

The psychiatrists agreed that there was a large functional element in Bermudez's condition, which was almost entirely hysterical. Bermudez saw himself as an incurable invalid, despite contrary medical advice. There was also a considerable element of 'compensation (or pension) neurosis' in the hysterical condition, evidenced by Bermudez's anger at being refused a pension and his overriding concern to be helped, not to recover, but to obtain financial security for his family. (He had refused to take medication suggested by one psychiatrist and was not prepared to try to learn a job within his physical capacity.)

An officer of the Commonwealth Employment Service told the AAT that it would be very difficult to find employment for Bermudez because of his back injury, the psychiatric condition, lack of English, poor motivation and risk of further compensation claims. But 'if the motivational problem could be remedied', his chances of getting a job would be 'medium to fair'.

The functional element was, the AAT said, quite serious and, 'looking at the applicant's physical and psychiatric condition in total, the evidence points strongly to the conclusion that, as at the date of his claim for a pension in November 1979, he was totally incapacitated for work of any kind': Reasons for Decision, para. 24.

**A 'permanent' incapacity?**

The large functional element raised the question whether Bermudez's total incapacity for work was permanent: was it 'a condition which is established and continuing, a condition which is not temporary or transitory'? (This phrase was taken from the AAT decision in *Tiknaz*, 4 *SSR* 45.)

In this context, there were two recent developments which could affect Bermudez's condition. First, his claim for worker's compensation (arising out of the December 1978 injury) had been settled at the end of October 1981, four weeks before the AAT hearing. It was too early to see whether this led to a change in his condition.

Second, Bermudez had decided to return as soon as possible to the Canary Islands. He had sold his Melbourne house and his wife and children had already travelled to the Canary Islands. The AAT thought that Bermudez's prospects of improvement were very real when he rejoined his family, was 'restored to a familiar environment with the financial security derived from the sale of his house and the proceeds of his compensation claim'.

The Tribunal was not prepared to accept the pessimistic predictions the psychiatrists made 'when facts now known were not available to them'; and it had considerable doubt that Bermudez's medical condition would last indefinitely or that his incapacity for work was 'permanent in the relevant sense': Reasons for Decision, paras 29-30.

**Rehabilitation**

Apart from those complications, the AAT believed that this was an appropriate case for rehabilitation. (Section 135M gives the Director-General power to refuse a pension to a person if that person will not undertake a rehabilitation programme.) Evidence had been given by a specialist in rehabilitation medicine that the DSS rehabilitation programme could overcome the lack of motivation which seemed to be a large part of Bermudez's problem. The AAT said:

> Given a change for the better in his own perception of himself as an invalid, we see no reason why the applicant should not have a reasonable prospect of reinstatement to the work force. Whilst the chances of such an improvement may not be great, we consider that those prospects should be fully explored before the applicant's evaluation of himself as an incurable invalid is confirmed by the grant of an invalid pension.

(Reasons for Decision, para. 35)

Bermudez's stated intention to leave Australia was a complicating factor. But, the AAT said, neither that intention nor his declared lack of interest in rehabilitation was a reason for disregarding the rehabilitation provisions of the *Social Services Act*:

> To do so would, in our view, treat claimants who wish to avail themselves immediately of the portability provisions of the Act differently from claimants who intend to remain in Australia. Portability, however, only comes into consideration once a pension has been properly granted (see s.83AB).

(Reasons for Decision, para. 34)

Workers compensation claim—does it prevent the grant of invalid pension? The Tribunal then considered the effect of s.25(1)(d) of the *Social Services Act*:

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

The DSS had drawn the Tribunal's attention to the question whether, in any event, Bermudez could not be granted a pension. The AAT said that, if Bermudez had qualified for an invalid pension, this section would not prevent the grant of that pension.

While Bermudez had, in November 1979, what later proved to be an enforceable claim to compensation against his employer, that claim was not for 'adequate compensation'—it was not a claim for 'compensation which would make sufficient financial provision for the claimant's permanent loss of his future capacity for work'. It was, said the Tribunal, highly improbable that a claim for worker's compensation would provide that adequate compensation: Reasons for Decision, para. 38.

The Tribunal pointed to the doubt whether s.25(1)(d) applied to a claim for damages at common law (see, for example, *Espagne's* case (1960) 105 CLR 569, *Markovic*, 4 *SSR* 48 and *Tiknaz*, 4 *SSR* 45.

The AAT noted that, in *Bradley*, 4 *SSR* 35, the Tribunal had said that s.25(1)(d) posed no barrier to the grant of an invalid pension once a claim to compensation had been enforced—once an award had been made. This, the AAT suggested, was not logically defensible just as the alleged distinction between common law claims and worker's compensation claims was illogical: Reasons for Decision, para. 40.

The Tribunal noted that the DSS had adopted the practice, no doubt prompted by the difficulties (especially of prediction) which s.25(1)(d) raised, of paying sickness benefits, rather than invalid pension, to a person who had a claim for damages or compensation pending. (Sickness benefit payments are recoverable by the DSS from a later award of compensation or damages—s.115, *Social Services Act*. Invalid pension payments are not recoverable from such an award.)

But the Tribunal suggested that this practice might not be supported by s.25(1)(d) of the *Social Services Act*. The AAT regarded worker's compensation awards as rarely providing 'adequate compensation' for a permanent incapacity: Reasons for Decision, para. 38. And the AAT found that Bermudez (whose claim for compensation was finally settled in October 1981) did not have an 'enforceable claim . . . for adequate compensation' in November 1979, when he applied for an invalid pension and accordingly, would not have been barred from receiving an invalid pension by s.25(1)(d).

The AAT suggested that, if s.25(1)(d) was 'intended to ensure that sickness benefit is paid rather than invalid pension pending settlement of a claim for compensation or damages so as to enable recovery of the sickness benefit pursuant to s.115, it may be preferable for the section to say so more clearly': Reasons for Decision, para. 44.

**The formal decision**

The Tribunal set aside the decision under review and substituted a decision that Bermudez be refused an invalid pension unless he received suitable rehabilitation treatment. It directed that arrangements for this treatment be made within 28 days by the Director-General and that Bermudez receive 'appropriate benefits' whilst undergoing the treatment.

**VELLA and DIRECTOR-GENERAL OF SOCIAL SERVICES (No N81/71)**

**Decided:** 19 March 1982 by A. N. Hall, M. Glick and M. McLelland.

Charles Vella was born in Malta in 1937 and, after five years of education, migrated to Australia in 1954. In Australia he worked as a labourer.

In 1956 he was seriously injured when he accidentally struck a stick of gelignite with a pick and it exploded. He did not work for three years and his return to work in 1959 was short-lived because he found the work too hard. In 1961 he was employed by BHP as a labourer and stayed in this job for nine years.

He then worked in a series of jobs as a labourer and cleaner until September 1978, when he stopped work, complaining of back pain and sore eyes. (These complaints had interfered with his work over the preceding four years: he had changed jobs several times; and had been unemployed for an extended period.)

On 15 April 1980, Vella (who was then living in Wagga) applied for an invalid pension. The DSS rejected this application and Vella applied to the AAT for review of the decision.

**The assessment of incapacity**

The AAT was presented with medical reports and evidence from six doctors, from Vella and his wife and from a CES officer. The medical evidence came from an opthalmic surgeon, a general practitioner, an orthopaedic surgeon, two psychiatrists, a psychologist and a specialist in rehabilitation medicine.

On the basis of the medical evidence, the AAT was satisfied that Vella suffered from heavy lumbar pain which prevented him from doing heavy manual work but he was still physically capable of undertaking light work which did not involve heavy lifting or bending. As a result of the 1956 accident, his eyes were affected by dust, smoke and glare and this incapacitated him for some types of work.

His psychiatric condition was more complex: one psychiatrist found an anxiety state, the psychologist said that his anxiety state was compounded by agoraphobia, which took the form of 'a fear of leaving the security of his home'. The AAT observed:

> Whether he be correctly diagnosed as suffering from an anxiety state or agoraphobia or both, the undeniable fact is that the applicant exhibits symptoms of a neurotic state of mind which all the experts agree to be genuine and which they all agree are contributing to a significant degree to the applicant's present incapacity for work. When the applicant's mental and physical impairments are viewed as a whole it is difficult to escape the conclusion that in his present frame of mind and with his physical disabilities, the applicant's capacity for work is very small indeed.

(Reasons for Decision, para. 33)

The Tribunal said that there was a significant hysterical element involved in his incapacity. If his back pain could be relieved and if he could undergo a rehabilitation programme, then his own view of himself, as a man whose life was finished, could be changed.

But left to his own resources, there was little prospect that his mental state would improve:

> While that mental state persists, we do not consider that the applicant has any residual capacity for work which he is capable of exploiting in the market place. He is limited to light work by his back condition; he is restricted in his avenues of light work by his propensity to eye irritation if he works in a poluted environment; his anxiety state and related conversion symptoms further diminish his ability to maintain a consistent work effort in any type of work. In his present state, the applicant is, in our view, unemployable whether one considers his opportunities for work in the Wagga district or in the wider employment market of one of the major coastal cities.

(Reasons for Decision, para. 35)

(The Wagga CES officer had said there was 'extreme competition for jobs in the Wagga Wagga area' and his office only referred people who were suitable or most qualified for a particular vacancy. Employers rarely hired a person suffering from any disability.)

**Rehabilitation**

But was this incapacity permanent? The prospects of rehabilitation were, according to the specialist evidence, poor. While Vella should, in theory, benefit from a programme 'aimed at relieving physical and psychological symptoms and embarking on a graduated programme of work conditioning', such a programme was not available in Wagga. Vella would need to spend several months in Sydney and his agoraphobia made him unwilling to leave his wife and home in Wagga. Further, his motivation was poor and the specialist in rehabilitation medicine concluded that he was not suitable for rehabilitation. The AAT said:

> In the circumstances, the question whether rehabilitation treatment at Commonwealth expense is warranted must remain a question for the Director-General having regard to the available resources and the prospects of success. As the matter stands we do not consider that we should defer the applicant's entitlement to an invalid pension until the outcome of any possible rehabilitation treatment is known. If such treatment is undertaken and is successful or if there is any other improvement in the applicant's condition in the future, his entitlement can be subject to review.

(Reasons for Decision, para. 36)

**The formal decision**

The AAT concluded that Vella was permanently incapacitated for work to the extent of not less than 85% and that he was, therefore, eligible for an invalid pension. It set aside the decision under review and returned the matter to the Director-General with a direction to grant invalid pension from the first pay day after 15 April 1980.

# Invalid pension: applicant must be 'present in Australia'

**HICKEY and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. A81/79)**

**Decided:** 18 March 1982 by E. Smith.

Section 24(1)(b) of the *Social Services Act* requires that a claimant for invalid pension must be 'residing in, and physically present in, Australia on the date when he lodges his claim for a pension'.

In this decision, the AAT found that this requirement is absolute, and that other provisions of the Act (particularly s.145) provide little chance of avoiding its impact.

**Background**

Garry Hickey had been classified as a handicapped child and his parents had been paid a handicapped child's allowance until his 16th birthday in 1976. In November 1976 he lodged a claim with the DSS for an invalid pension.

This claim was rejected because Hickey was then living with his parents in Malaysia, where his father had been posted by the Department of Foreign Affairs (his employer).

In December 1978, Hickey returned to Australia with his parents and in January 1979 he again claimed an invalid pension which the DSS granted from 18 January 1979.

Hickey sought payment of invalid pension for the period from 1976 to 1979. The DSS maintained that the *Social Services Act* did not allow payment for that period and Hickey applied to the AAT for review of that decision.

**1976 to 10 December 1978**

The AAT found that, while in Malaysia, Hickey was 'residing in . . Australia'. This term is given an extended meaning by s.20(1) and (2) of the *Social Services Act*: