SOCIAL SECURITY Reporter

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Administrative Appeals Tribunal decisions

Invalid pension: permanent incapacity

MANZ and DIRECTOR-GENERAL OF SOCIAL SERVICES
No. Q81/144
Decided: 30 June 1982 by A. N. Hall.

Aubrey Manz was born in 1937 and qualified as a boilermaker in 1958. He worked as a plant operator, builder's labourer, welder, process worker and tally clerk until 1972. He was on unemployment benefit until the end of 1975 and, following a series of illnesses and operations, on sickness benefit until the end of 1978.

In December 1978, Manz was granted an invalid pension. The DSS cancelled this pension in October 1981 and Manz applied to the AAT for review of the cancellation.

The question to be resolved

The AAT pointed out that it had to decide whether, on the evidence available to the AAT, the decision to cancel the pension in October 1981 was the right decision. The question was not whether the evidence available to the DSS in October 1981 was sufficient to support the cancellation. Accordingly, the Tribunal could take account of medical opinions expressed after the cancellation, where those opinions were relevant to Manz's condition at the date of cancellation.

'Permanent incapacity for work'

The AAT had to decide whether Manz was permanently incapacitated for work, to the extent of at least 85%, and so qualified for invalid pension under ss.23 and 24 of the *Social Services Act*. The AAT referred to the observations in *Panke*, (1981) 2 *SSR* 9, that qualification for invalid pension should be considered against the background of other parts of the Act, particularly those dealing with unemployment benefits. This called for a balancing of the applicant's residual capacity for work against the type of jobs usually or normally available but excluding the chance of obtaining special employment of an unusual kind.

The medical assessment

While Manz suffered from a series of physical problems—gout, hypertension, obesity and back pain—the Tribunal accepted the opinion of a specialist physician consulted by the DSS that he was capable of undertaking light work.

In accepting this opinion, the Tribunal discounted evidence given by Manz's treating doctor because that evidence was 'less than complete on matters of detail and was inconsistent in some respects with the evidence of the applicant'.

The hypertension meant that Manz should avoid any stressful occupation but it was not 'so severe and so uncontrolled as to expose him to a medically unacceptable risk of incapacity or worse if he were to undertake any work at all': Reasons for Decision, para. 38.

Employment prospects

There was no expert evidence before the AAT as to the availability of light work in Ipswich (where Manz lived), although Manz had suggested that there were few opportunities for this type of work. The AAT said:

> I do not consider, however, that the applicant's incapacity for work can be seen as any greater for the purposes of s.23 of the Act, because he lives in a location where the opportunities to exploit his work skills may be restricted.

(Reasons for Decision, para. 40)

(The AAT had earlier mentioned that Manz had demonstrated, in the past, that he could move around NSW and Queensland to find work; and that, because he had no dependants, he could 'do so again if he were so minded': Reasons for Decision, para. 34.)

Formal decision

The AAT affirmed the decision under review.

In this issue:

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KOLAKUSIC and DIRECTOR-GENERAL OF SOCIAL SERVICES No. V81/222

Decided: 11 June 1982 by E. Smith.

Mate Kolakusic was born in Yugoslavia in 1945, went to school for 3½ years and migrated to Australia in 1969. He worked in a series of labouring jobs and injured his neck and back in three separate work accidents between 1976 and 1979. After the last of these injuries (to his back), his employer laid him off and he had not worked since.

Kolakusic made several applications to the DSS for an invalid pension. Each of these claims was rejected by the DSS. Kolakusic applied to the AAT for review of the DSS decision rejecting his claim of 8 July 1980.

The medical evidence

The evidence presented to the AAT raised a familiar problem: the applicant and his medical advisers claimed that he was suffering from a combination of physical and psychiatric disabilities which incapacitated him; but medical specialists consulted by the DSS considered that Kolakusic was exaggerating his symptoms and that his physical and psychiatric problems did not prevent him from working.

The AAT was faced with a wide range of medical evidence: the statement of reasons (lodged by the DSS under s.37 of the *AAT Act*) listed 28 examinations and assessments by 15 medical practitioners; and sworn evidence was given to the Tribunal by seven doctors.

The Tribunal decided to discount the medical opinions of an orthopaedic surgeon and a psychiatrist consulted by the DSS: their opinions had been that Kolakusic had little or no disability and was malingering. The Tribunal discovered that the orthopaedic surgeon knew nothing of Kolakusic's earlier neck and back injuries—'his evidence needs to be considerably discounted in the light of this', the AAT said. And the Tribunal believed that the psychiatrist's opinion was probably coloured by her reading the orthopaedic surgeon's report.

Putting that evidence aside, there was clear medical evidence of a serious physical disability: several doctors said that Kolakusic's neck and back injuries had left him quite unable to perform work involving bending and lifting or process work. The most optimistic estimate was that he could work at a light job 'half a day at the most'.

Employment prospects

An employment officer with the CES told the AAT that Kolakusic was 'a very poor prospect; virtually unemployable'—because of his limited physical capacity, poor educational background and employer resistance to persons with a history of injury. These difficulties were not linked only to the current state of the economy.

The AAT's assessment

On the basis of this evidence, the AAT found that Kolakusic was unable to work as a labourer (the only type of work he had ever undertaken), as a process worker, in clerical employment, at any job involving continual sitting or standing, or at any job requiring sustained effort through a full day.

The AAT endorsed the approach to assessing 'permanent incapacity for work' established in *Panke*, (1981) 2 *SSR* 9—in particular, the emphasis on the employment prospects of the applicant in the light of his medical problems, his age, work experience and the types of suitable work available in the community: Reasons for Decision, paras 72-74.

The AAT concluded that Kolakusic had been at least 85% permanently incapacitated for work since July 1980.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that invalid pension be granted from 8 July 1980.

SHEELY and DIRECTOR-GENERAL OF SOCIAL SERVICES No. N81/118

Decided: 24 June 1982 by J. D. Davies J.

Anthony Sheely, who was born in 1947, had worked as a clerk for 18 years. His wife was partially blind and suffered from severe rheumatoid arthritis. They had two children.

In late 1978, Sheely resigned from his job, which had involved him in travelling at least three hours to and from work each day. According to a medical certificate, this resignation was 'for Medical Reasons—Recurrent Bronchial Asthma and Severe Anxiety State'.

Sheely's claim for an invalid pension was rejected by the DSS and he applied to the AAT for review of this decision.

The medical evidence

The Tribunal was presented with a range of medical evidence, from which it concluded that Sheely suffered from asthma but that this was a moderate permanent disability—it did not represent an 85% permanent incapacity for work. In addition, he suffered from periods of severe anxiety and depression which were caused by his concern for his wife (whose condition was deteriorating), but that depression was not enough to prevent him from working.

The need for a medical basis to the incapacity

The AAT observed that the 'permanent incapacity for work' (required by ss.23 and 24 of the *Social Security Act*)

> must result from a medical disability, whether that disability be physical or psychic. A disability, for the purposes of these sections, includes all recognised medical conditions, injury, disease, psychosis, neurosis and the like . . . The concept 'permanently incapacitated for work' therefore has a very wide application. Nevertheless, it is not unlimited and at its boundary there is a distinction between a person who is sick and a person who merely thinks that he is sick.

(Reasons for Decision, p.3)

The AAT then said that the medical disability 'must be of such significance that the incapacity can be said to arise or result from the medical condition' and concluded:

> I think that the principal reason he is not working is that he wishes to stay at home to look after his wife and children. I think that he has tended to put the blame for his unemployment upon his own physical condition whereas the main cause thereof has been his desire to tend his wife. Mrs Sheely's condition and his unemployment have understandably caused Mr Sheely much concern, and at times severe anxiety. But I think it has not been this worry and anxiety or his asthmatic condition which have stopped him from working. In my opinion, Mr Sheely ceased working when his wife became ill and the principal cause of his so doing was his realisation that he could not look after her as he wished to do if he continued in his then employment. I think that the need to care for his wife and children is still the predominant factor which inhibits Mr Sheely from obtaining any employment.
>
> In my opinion, Mr Sheely has the capacity to obtain remunerative employment in a wide spectrum of occupations.

Formal decision

The AAT affirmed the decision under review.

BALTAS and DIRECTOR-GENERAL OF SOCIAL SECURITY No. V81/167

Decided: 23 July 1982 by A. N. Hall, W. B. Tickle and H. W. Garlick.

Panagiotis Baltas, who had been born in Greece in 1939 and migrated to Australia in 1966, was granted an invalid pension in May 1980. In August 1980, a DSS officer observed Baltas serving customers in a fish and chip shop, of which his wife was the registered proprietor. The DSS then reviewed his elibigility, decided that he was not 85% permanently incapacitated for work and cancelled the invalid pension.

Baltas applied to the AAT for review of this decision.

The medical evidence

The AAT found that Baltas suffered from an inguinal hernia, a gastric ulcer and continuing back pain due to minor degenerative changes in his spine which had been aggravated by a work injury. These physical problems were not complicated by any serious psychiatric disorder; although, according to the AAT, Baltas had 'developed an image of himself as an invalid'.

Involvement in the family business

The Tribunal found, after considering evidence from Baltas, his wife and DSS field officers, that the fish and chip shop was being run as a family business for the benefit of Baltas and his wife and that Baltas regularly helped his wife in the shop, depending on the volume of business.

Baltas' medical advisers considered that these activities were consistent with his physical impairments and with his being 85% permanently incapacitated for work. They believed he could not hold down regular full-time employment and that his work in the shop had therapeutic value.

The Tribunal's view: 'the scheme of the Act'

The AAT took the view that Baltas' work in the shop had 'a very real monetary value to himself and his wife', not merely a therapeutic value. The Tribunal concluded:

4.42. Whilst engaged in the running of the business, Mr Baltas could not, we think, be regarded as unemployed for the purposes of s.s.107 of the *Social Security Act* 1947 so as to qualify for unemployment benefits. Whilst so employed, he is unavailable as a consequence too engage in any other remunerative employmment which may be suitable to be performed by him [cf. *Re Te Velde and Director-General opf Social Services* (1981) 3 ALN N75; cf. *Re BBrabenec and Director-General of Social Security* (1981) 3 ALN N39]. It would, we thhink, be a strange result, having regard to thhe scheme of the Act, if a person who was unnable to qualify for unemployment benefit boecause of the extent of his involvement in thhe running of a family business, could neverthheless qualify for an invalid pension on the baasis of being totally or substantially totally inncapacitated for work.

4.33. Having regard to the extent of his involvement in the actual running of the family business and having regard also to the fact thhat we do not consider that his physical and mnental impairments are such as to preclude hiim from doing light work we find that the appplicant is not and was not at the date of caancellation of his pension totally and permmanently incapacitated for work. We also fiind that he neither is nor was so substantially inncapacitated as to justify assessing the deegree of his incapacity for work as 85% or mmore. As a consequence he is not and was not att the date of cancellation of his pension quualified to receive an invalid pension.

Formmal decision

The AAT affirmed the decision under revieew.

CAMPAGNA and DIRECTOR-GENNERAL OF SOCIAL SERVICES No. V81/112

Decidded: 16 July 1982 by J. O. Ballard.

Luigiia Campagna was born in Italy in 1938 and mmigrated to Australia in 1958 where she marriied in 1964. In 1974, about two years after the birth of her second child, she founcd that she could no longer continue her work : as a machinist because 'she shook and could not concentrate' and 'felt dizzy'. Her healtth did not improve and she was able to do veery little housework.

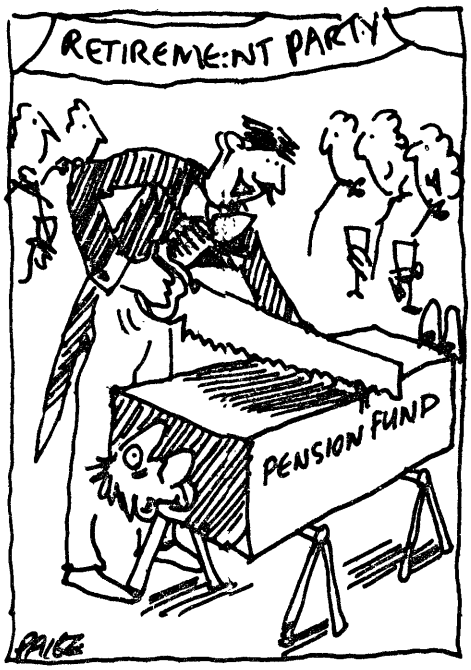
Earrly in 1981, the DSS rejected her applicattion for an invalid pension, and she applied to the AAT for review of this decision.

Thee applicant's medical advisers said she was ssuffering from a serious psychotic illness—she was 'an anxiety depressive person with paranoid features and hysterical featurres', her 'employment prospects were nil'. (One doctor explained that this was conneected with the stress of facing the standards of Australian life, working in a factory aand looking after a family at home, and obbsessed with meeting financial commitmeents.

Alttthough one psychiatrist consulted by the DSS thought Campagna was at most 50% iincapacitated for work, the Tribunal acceptted the evidence of the treating doctors aand found that she had no 'realistic capaciity to work because of her psychiatric illness'. (The AAT gave no weight to a reportt from another psychiatrist consulted by thee DSS because that psychiatrist was not available to give evidence and to be cross-examined.)

Formal decision

The AAT set asidle the decision under review and remitteed the matter to the Director-General with the direction that Campagna was emtitled to an invalid pension from 27 Jamuary 1981.



INVALID PENSSION SEMINAR

(to focus on ways off supporting disabled people, and their dlifficulties in the income security and rehabilitation areas.)

- 22 October 1982, 10.30 a.m. to 2.30 p.m.
- Room 100, Western grounds, University of NSW, Anzacc Pde., Kensington.
- Admission free.
- Access for disabled.

COROSSEZ and DIIRECTOR-GENERAL OF SOCCIAL SERVICES No. V81/105

Decided: 15 July 19822 by W. Prentice.

Ferruccio Corossez wwas born in Italy in 1923 and migrated to Australia in 1955. He worked until 1977 wheen he was granted an invalid pension. The DSS cancelled that pension in Septemberr 1980 and Corossez applied to the AATT for review of the cancellation.

The Tribunal was ppresented with conflicting medical evidence. Specialists consulted by the DSS found a lovw level of physical incapacity; and the DSSS said that it was significant that Corcossez had travelled overseas for a holidaay in May 1980. But Corossez's own medicaal advisers said that a combination of physsical and psychiatric problems made him at least 85% incapacitated for work. An officer from the Commonwealth Emmployment Service classified Corossez as 'extremely unlikely to obtain a position in thee current climate or at any time for that mattter' and would not 'send [Corossez] along for interview': Reasons for Decision, para. 9.

Setting aside the present situation of heavy unemployment (as it thought it was bound to do), the AAT saw Corossez as having a collection of problems:

> I come to the conclusion after some doubting that it has been established on the balance of probabilities that in combination at present and as likely to continue indefinitely, these disabilities render Mr Corossez with his work background, diffidence in English, and age of 59, virtually as a realistic matter, unemployable; and hence not less than 85% incapacitated permanently for work within the meaning of the Act.

(Reasons for Decision, para. 11)

Formal decision

The AAT set aside the decision under review and directed that Corossez be paid invalid pension from the date of its cancellation.

DOUNIAS and DIRECTOR-GENERAL OF SOCIAL SERVICES No. V81/176

Decided: 22 July 1982 by W. Prentice, M. Glick and W. Tickle.

George Dounias was born in Greece in 1932 and came to Australia in 1969. He worked at a series of factory jobs until retrenched in July 1978, and had not worked since then. From 1979 he began to feel sick 'with nerves' and began to receive treatment from several doctors. He applied for an invalid pension in February 1979 and, when this was refused by the DSS, he sought review by the AAT.

The Tribunal found that Dounias had been examined by at least 26 doctors and that he was receiving unco-ordinated treatment from two, or possibly three, of those. He had no physical disability; he suffered from anxiety and depression which were not sufficient to prevent his returning to work; and the unco-ordinated treatment and medication were contributing to his feelings of poor health and incapacity to work.

So Dounias was not 85% incapacitated for work; and, in any event, his condition could not be described as permanent because, with proper advice, he should be convinced 'that in the interests of his health he can and should go back to work': Reasons for Decision, para. 12.

Formal decision

The AAT decided 'to confirm the decision of the Director-General under review'.

GODFREY and DIRECTOR-GENERAL OF SOCIAL SERVICES No. Q81/75

Decided: 28 June 1982 by R. K. Todd.

Victor Godfrey was born in Australia in 1936. He worked at a series of manual jobs until 1973 when, because of a shoulder injury, he found he could no longer work.

Godfrey was granted invalid pension in 1979 but the DSS cancelled this pension in September 1981. Godfrey then applied to

the AAT for review of the cancellation.

While Godfrey complained of pain in the shoulder and weakness in his right arm, there was no medical evidence suggesting that he was incapacitated for work to the extent required by s.23 of the *Social Services Act* (at least 85%). Any incapacity which he did have was, to a considerable degree, remediable: so, even if he was 85% incapacitated, this would not be permanent.

The Tribunal concluded that Godfrey's subjective assertion of pain was not enough to fulfil the requirements of the *Social Services Act*.

Formal decision

The AAT affirmed the decision under review.

WARD and DIRECTOR-GENERAL OF SOCIAL SECURITY No. Q81/87

Decided: 28 July 1982 by R. K. Todd.

Edward Ward was born in Australia in 1936 and qualified as a carpenter. He worked until about 1978. He developed osteo-arthritis in one knee and he complained of difficulty in walking and climbing stairs. His application for invalid pension was rejected by the DSS.

On the review of this rejection, the AAT found a minor degree of osteo-arthritis and some muscle wasting which had led to a loss of confidence in the ability of the knee and leg to bear his weight. By themselves these disabilities did not incapacitate him for work.

However, 'social factors' (particularly the reluctance of an employer to hire a worker with Ward's disabilities) would probably lead to the conclusion that Ward was at least 85% incapacitated for work.

But that incapacity was not permanent. It could not be described as 'likely to continue' (see *Panke*, (1981) 2 *SSR* 9) because there was a real prospect that the muscle wasting would respond to physiotherapy. There were 'no guarantees that it will work, but on the medical evidence it is something that ought to be tried': Reasons for Decision, para. 9.

Formal decision

The AAT affirmed the decision under review.

Sickness benefit: recovery from compensation award

PRASIC and DIRECTOR-GENERAL OF SOCIAL SECURITY No. N81/218

Decided: 18 August 1982.

Zuhdija Prasic had been paid sickness benefits (totalling $9768) by the DSS following a work injury. In March 1981, Prasic's claim for worker's compensation was settled.

The DSS had earlier written to the workers' compensation insurer warning it that the Department would have a claim on any compensation payment. When the DSS learned of the settlement, it advised the insurer by telephone that the amount of its claim was $9768; and the insurer paid that amount direct to the DSS before paying the balance to Prasic.

The DSS was relying on s.115 of the *Social Security Act*. Under s.115(6), the DSS may recover, from any person liable to pay compensation to a sickness beneficiary, an amount equal to the sickness benefits paid to that beneficiary (if the compensation and the benefits cover the same period and the same incapacity).

Prasic asked the DSS to set aside its claim to repayment of sickness benefit until he had settled his common law claim for damages. The DSS refused and Prasic applied to the AAT for review of this decision.

A technical 'irregularity'

The AAT confirmed the earlier decision in *Saqqa*, (1981) 5 *SSR* 55, that once the Director-General had recovered sickness benefit payments from an insurer, there was no discretion to forego that recovery or to return the amount recovered.

But Prasic's counsel argued that the recovery of his sickness benefit from the insurer had been illegal because of technical irregularities: for instance, the amount of repayment had not been by a 'notice in writing' as specified in s.115(6) but by a telephone call. This irregularity, Prasic's counsel said, made the demand and the repayment illegal.

The AAT rejected that argument: if the insurers were prepared to dispense with formalities and accept an oral notice of the amount to be repaid, Prasic was in no position to complain of the inadequacy of the notice.

Accordingly, the recovery of sickness benefit payments from the insurer had been effected under s.115(6); and there was no power or discretion in the Director-General to 'undo' that recovery: see *Saqqa*.

Formal decision

The AAT decided that the decisions under review 'should be confirmed'.

Special benefit: migrant

TAKACS and DIRECTOR-GENERAL OF SOCIAL SECURITY No. V81/557

Decided: 27 August 1982 by R. K. Todd.

In March 1981, Dobra Takacs migrated to Australia from Rumania. Before her migration, her daughter had signed a 'maintenance guarantee' under Part IV of the *Migration Regulations*, in which the daughter undertook (to the Commonwealth government) to support Takacs.

Shortly after her arrival in Australia, Takacs applied to the DSS for a special benefit. When the DSS rejected this application, she sought review from the AAT.

The applicant's financial situation

When the daughter had signed this guarantee, she was working as a nursing aide. But, before her mother arrived in Australia, the daugher had given up this work (because of a back injury) and was being supported by her husband.

Takacs had no income of her own, lived with her daughter and son-in-law and was supported by the son-in-law. His net weekly income (from a superannuation pension) was about $185.

The AAT was told that the three adults managed to 'make ends meet' (with some difficulty) but that Takacs was unhappy to be entirely dependent on her son-in-law.

Qualifying for special benefit

Section 124(1) of the *Social Security Act* gives to the Director-General a discretion to pay special benefit to any person if the Director-General is satisfied that the person 'is unable to earn a sufficient livelihood' and if the person is not receiving a pension or qualified to receive a benefit.

The AAT found that Takacs was undoubtedly unable to earn a sufficient, or any, livelihood because of her age and other factors.

The Director-General's discretion

But, once Takacs had met the preconditions of s.124(1), the question arose whether the Director-General's discretion