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

should be exercised. On this question the AAT said:

> 11. I can only conclude that the purpose of the section was that no-one should be left alone without a sufficient livelihood, and that for those who do not qualify for receipt of some specific benefit, provision for such livelihood should be made. In other words, the question has to be: is the person in question in fact receiving a sufficient livelihood? When this question is posed in the present context, I do not see how it can be said that a person who is, in fact, being maintained by her family, as the applicant is, at an adequate if straitened level, can be said to be lacking a sufficient livelihood. What is really sought is a small subvention, in the nature of pocket money, for the purpose of affording the applicant a feeling of independence. I fully understand and respect the feelings of the applicant and her family, but I do not see how the discretion can be exercised in her favour on the basis that was suggested to me.
>
> 12. It should be added that in the event of changed circumstances another application may of course be made. At this point, however, I must affirm the decision under review.

Formal decision
The AAT affirmed the decision under review.

Income test: when is income 'derived'?

SMITH & SMITH and DIRECTOR-GENERAL OF SOCIAL SECURITY
No. W81/20
Decided: 26 July 1982 by G. D. Clarkson.

Albert Smith was granted an age pension shortly after he turned 65 (in May 1980); and his wife, then aged 56, was granted a wife's pension.

In fixing the rate of pension, the DSS took into account interest on the Smiths' investments in a retirement fund. The DSS treated this interest as 'income' for the purposes of the income test, and reduced the Smiths' pensions accordingly.

Mr and Mrs Smith applied to the AAT for review of this decision.

Jurisdiction
Section 15A(1) of the *Social Security Act* gives the AAT jurisdiction to review a limited range of DSS decisions: these are decisions made by an officer of the DSS, reviewed by a Social Security Appeals Tribunal (SSAT) and affirmed, varied, or cancelled by the Director-General.

In this case, an SSAT had considered the Smiths' appeal against the decision to treat interest on their investments as income, but could not reach agreement on its decision. A delegate of the Director-General had subsequently affirmed the original decision.

The AAT said that, ordinarily, a 'review' by a statutory tribunal would result in a 'decision' but that was not necessary where the tribunal was informal and only a recommending body (as the SSAT was).

Therefore, the AAT said, the requirements of s.15A of the *Social Security Act* were satisfied and the AAT had jurisdiction.

The investment fund
Mr and Mrs Smith had, at some time before 1973, invested in a retirement fund managed by the City Building Society. Under the terms of the fund's trust deed, the benefits of the investment, including interest on the investment, were to be retained in the fund until the investor reached the age of 60 years and had retired, when the investor could claim payment of the benefits.

Mr Smith had retired from his business in 1973 at the age of 58 years. He had chosen not to claim payment of his benefits from the fund when he turned 60 and these benefits were still unclaimed at the time when he claimed an age pension (and, it seems, at the time of the AAT hearing two years later).

Mrs Smith was, at the time when she was granted a wife's pension in 1980, not entitled to claim payment of her benefits from the retirement fund, because she was only 56.

Income 'derived', even if not 'received'
Before the case came on for hearing at the AAT, the DSS conceded that the interest on Mrs Smith's investment could not be treated as income; but it insisted that the interest on Mr Smith's investment was income, even though the interest had not been paid to Mr Smith but remained in the fund.

The DSS relied on the definition of income in s.18 of the *Social Security Act*.

> 'income', in relation to a person, means any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever, within or outside Australia, and includes any periodical payment or benefit by way of gift or allowance . . .

The DSS argued, and the AAT agreed, that the word 'derived' covered a wider field than 'received'—

> 'derived' covers a wider field than 'received' and that moneys may be derived before they are received. A person with a clear present legal entitlement to money has derived it even though it remains unpaid, but moneys accruing to an account before the account-holder is entitled to demand payment has not been 'derived'. The fact that an account-holder must make a claim for the money before he receives it does not affect the fact that he has already derived it.

(Reasons for Decision, p.10)

The AAT referred to a series of judicial decisions on the interpretation of income tax legislation which supported this view and concluded:

> I think it is appropriate to say that Mr Smith having retired and having attained 60 years of age, the interest in his account with the fund has come home to him in an immediately realizable form.
>
> On the other hand, Mrs Smith, being only 56 years of age when the age pension was granted to her husband, could not have required any payment to her by the Trustees, and the interest shown in her account with the fund has been correctly excluded from the assessment of the joint income under s.18 and 29(2) of the *Social Security Act*.

(Reasons for Decision, p.14)

Formal decision
The AAT affirmed the decision under review.

Invalid pension: residence and portability

VARGA and DIRECTOR-GENERAL OF SOCIAL SECURITY
No. V81/200
Decided: 23rd July 1982 by R. K. Todd.

Joseph Varga was born in Hungary in 1920. He migrated to Australia in 1951 with his wife and became an Australian citizen in 1960. In early 1978 his wife separated from him, 'without any trace of where she had gone'.

In March 1978, Varga travelled to West Germany where he believed he would find his wife. He left a flat, a car and some bank accounts in Australia.

Shortly after his arrival in Europe, Varga became seriously ill, was hospitalised and did not return to Australia until April 1980 (when he came back on a return ticket purchased in 1978). He then applied for an invalid pension which was granted by the DSS in May 1980.

In June 1980 he was told that his wife was living in a town in West Germany. He immediately left Australia, telling the DSS that he was going 'overseas for three months . . . to find his wife' (as the note on his DSS file put it).

Within a month of his arrival in West Germany, Varga again became ill and he stayed there, on medical advice that he was not well enough to travel, until he returned to Australia in November 1981 (on a return ticket purchased in June 1980).

Meanwhile, the DSS had paid his invalid pension until December 1980, when it suspended payment, claiming that it was not payable to Varga for any period during which he was outside Australia: *Social Security Act*, s.83AD(1).

Varga applied to the AAT for review of this decision.

Portability
Section 83AB declares that a person granted a pension is entitled to continue to be paid the pension even though he or she leaves Australia: this is the right of portability, introduced in 1973.