Invalid pension: permanent incapacity

VRANESIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/371)

Decided: 12 October 1982 by A. N. Hall.

Guido Vranesic was born in Yugoslavia in 1945 and migrated to Australia in 1969. In Australia he worked in factories until his neck was injured in an industrial accident in 1976. He was granted an invalid pension from December 1978.

In February 1981, the DSS cancelled Vranesic's pension following a medical review. After an unsuccessul appeal to an SSAT, he applied to the AAT for review of this decision.

The medical evidence

The medical evidence established that Vranesic suffered from spondylitis which caused pain in his back and neck and headaches, and a strain in his lower spine. He was incapacitated from any work which involved heavy lifting or prolonged bending or stooping but, according to an orthopaedic specialist, could perform a wide range of work.

Vranesic's general practitioner was more pessimistic, as was a physician (who had examined Vranesic on behalf of the DSS in 1978 and 1981). These doctors pointed to Vranesic's 'anxiety depressive state', his limited English and work skills and the restricted job opportunities in Ballarat, where he lived. On the other hand, a psychiatrist reported that Vranesic's 'fleeting symptoms of tension' were related to his unemployment and that he was not suffering any psychiatric illness.

The AAT's assessment

The Tribunal said that lack of skills in English could limit the range of jobs which a disabled person might undertake; but Vranesic's ability to communicate was quite adequate for the type of work which he would be likely to undertake.

On the medical evidence, Vranesic was fit for a wide range of work: his own belief that he could not hold down a job was a major barrier to his working. The AAT said:

> 28. Whilst there may be occasions when a person's perception of himself (rightly or wrongly) as an invalid incapable of work, may become so entrenched and so ineradicable as to itself constitute a psychological condition which destroys the person's capacity for work, it has not been suggested that the applicant has developed any such condition. Having regard to the physical impairments from which, on the medical evidence, I have found that the applicant suffers, I am unable to accept the applicant's assessment of himself and to conclude that he has lost his capacity to earn his living and that he is permanently incapacitated for work to the degree of not less than 85%. Whilst the applicant may have difficulty in finding suitable paid work due to the present recession in Ballarat, his efforts to find work in the past six years are in my view fairly minimal and do not point to the conclusion that the applicant is by reason of his physical and mental condition unable to attract an employer who is prepared to engage and remunerate him (cf. per Davies J in *Re Panke* (1981) 4 ALD 179, at 181). For these reasons I affirm the decision under review.

Formal Decision

The AAT affirmed the decision under review.

WARD and DIRECTOR-OF SOCIAL SECURITY (No. W81/8)

Decided: 22 September 1982 by G. D. Clarkson, J. G. Billings and J. B. Linn.

J. A. Ward was a man born in 1945, who suffered a series of injuries in industrial and road accidents between 1965 and 1974. In October 1975, Ward was granted an invalid pension. Following a medical review, the DSS cancelled Ward's pension in December 1980. He applied to the AAT for review of the cancellation.

The medical evidence

Ward had not been employed for any substantial period since 1973. He complained of pains in his right shoulder and arm, both elbows, neck and head, dizzy spells and problems with his right eye.

Although he had not been employed for nine years, Ward had worked part-time at home—repairing and spray painting motor vehicles, restoring furniture and household items. (Ward's employment experience and qualifications were as a panelbeater, mechanic and spray painter.)

A general practitioner consulted by the DSS said that Ward was not 85% incapacitated for work: he was capable of any work except heavy work. A psychiatrist reported that he was 'psychiatrically . . . fit for work'.

However, an orthopaedic surgeon who was the senior medical officer of the DSS in Western Australia, gave a different assessment. He had been involved in the assessment and treatment of Ward for eight years, and had concluded that Ward could not be trained to work in a different area of employment.

There was no doubt, the surgeon said, that Ward could do some work. But he could not 'hold on to a full-time position in the workforce because he cannot work against the award wage and work fast enough to satisfy an employer'. And there was significant prejudice amongst employers against job-seekers with back disabilities.

Although Ward's orthopaedic complaints were 'mild to moderate', he was below the standard of competitive employment and was 85% incapacitated for work. The best that one could expect was 'his current situation, in that he has a part-time job at home'. The prospects for rehabilitation were extremely low, given Ward's 'very limited . . . intellectual capacity for undertaking an alternative'.

The AAT's assessment—part-time work shows capacity to work

The AAT decided that (apart from the problems raised by the surgeon's evidence) Ward was not 85% permanently incapacitated for work as required by ss.23 and 24 of the *Social Security Act*. The question was to what extent that view should be modified in the light of the surgeon's view that Ward was 'unemployable'. The Tribunal said:

> [W]e think one could only describe the present applicant as unemployable by comparing his present capacity with his former capacity as a full-time employee in the motor repair business, rather than by examining what tasks the applicant could now do in the motor repair business and in other occupations.
>
> In our view, Mr Ward has already shown he is not unemployable, by developing the business which he has.
>
> In the present case, where the applicant has shown a capacity to develop a business in which he can use his skills and experience on a part-time basis, the extent to which his physical impairment affects his ability to obtain and to engage in paid work is not to be measured by his ability to obtain employment as a full-time employee, but by his ability to engage in remunerative work, i.e. in employment in its widest sense.
>
> It seems to us that the applicant is now required to look at at least three possible courses—to seek further rehabilitation, to seek employment, perhaps in a field in which he has not been employed before, or to attempt to develop his part time business into one which can provide a reasonable return.

(Reasons for Decision, pp.13–14)

Formal decision

The AAT decided to confirm the decision under review.

[**Comment:** This Tribunal's claim that capacity to work was not to be measured against full-time work, that his part-time work showed that he was capable of working, should be contrasted with the decision in *Mann*, (1982) 8 *SSR* 75. In that case, a three-member Tribunal said that 'it would . . . be quite unrealistic and quite wrong to contemplate that because a man can do two, three or four hours work a day that he is to be regarded as being adequately capacitated "for work"'. In that Tribunal's opinion, the *Social Security Act* meant 'full-time' when it referred to incapacity for work in ss.23 and 24.]

PAVLIDIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/491)

Decided: 29 October 1982 by E. Smith.

Kyriakos Pavlidis was born in Greece in 1938, received a minimal education and migrated to Australia in 1970. He worked at a series of factory jobs, injuring one of his eyes in 1973 and his back in 1977.

He found himself unable to work following the back injury and, when his claim for workers' compensation was settled, he claimed invalid pension (in June 1980). The DSS rejected this claim and Pavlidis applied

to the AAT for review of the rejection.

The AAT described the medical evidence for Pavlidis as 'strong indeed'. A general surgeon, who had treated Pavlidis for five years, said he had degenerative changes in his back and a minor disc rupture; and that he was 'not able to perform any form of work either industrial or domestic which involves any movement or straining of the back'. The surgeon conceded that there was a 'moderate exaggeration' due to Pavlidis' anxiety reaction.

A physician, who was also treating Pavlidis, said he had a chronic spinal pain disability which impaired his movements and a severe psychological disability—he was '100% disabled' and this was 'likely to be permanent'. A psychiatrist reported severe psychological effects resulting from Pavlidis' back injury: he had a neurotic obsession with his disability but he was not deliberately exaggerating his problems.

An employment officer with the CES told the Tribunal that Pavlidis was 'virtually unemployable' because of his medical condition.

On the other hand, an orthopaedic surgeon consulted by the DSS told the Tribunal that Pavlidis had a wide range of movement in his spine and legs and was capable of doing any job that did not involve heavy lifting or repeated bending.

The Tribunal accepted the evidence given on behalf of Pavlidis and said it was satisfied on the balance of probabilities that the applicant was at least 85% incapacitated for work.

The Tribunal discounted the medical evidence given on behalf of the DSS because the doctor had 'approached the applicant's case with perhaps too much suspicion' and because 'perhaps there was not full communication between the applicant and [the doctor]': Reasons for Decision, para. 45.

Formal decision

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

PAPADOPOULOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/443)

Decided: 14 October 1982 by A. N. Hall.

Vasilios Papadopoulos was born in Greece in 1939 and migrated to Australia in 1970. He worked as a heavy labourer until he injured his right elbow in 1976. He was then given a lighter cleaning job until he injured his hand in 1978.

Papadopoulos' applications for invalid pension were rejected by the DSS in 1980 and February 1981. He applied to the AAT for review of the second rejection.

The medical evidence

Papadopoulos complained of severe headaches, pain in his neck, shoulder, back and groin, a duodenal ulcer, and severely limited movement and strength in his right elbow and left hand.

Papadopoulos' general surgeon, who had seen him on about 30 occasions, said he had significant organic disabilities which, in combination with depression, rendered him totally unemployable.

On the other hand, doctors consulted by the DSS said that Papadopoulos had 'minimal organic disease', no signs of depression or functional overlay, and that he was 'consciously trying to manipulate his situation in order to gain an invalid pension'.

However, a psychiatrist called by Papadopoulos said that, given his background of steady employment, it was most likely that his physical disabilities had 'led to a progressive neurotic anxiety-depressive illness which is now chronic'. Papadopoulos was not, therefore, employable on the open labour market.

The AAT's assessment

The Tribunal accepted the evidence of Papadopoulos' treating doctor and his psychiatrist and found

> that on the balance of probabilities the applicant, by reason of his physical and mental impairments, is incapacitated for work to the degree of not less than 85% as required by ss.23 and 24 of the *Social Security Act* 1947 . . . On [that medical evidence] I also find that the applicant's incapacity is likely to continue for an indefinite period.

(Reasons for Decision, para. 18)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Papadopoulos be granted an invalid pension from February 1981.

DAVY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/96)

Decided: 27 October 1982 by J. B. K. Williams.

Ivor Davy had been granted an invalid pension in February 1980 (when he was 37 years of age), on the basis of degeneration of his spine. His pension was reviewed in March 1981; and the DSS eventually cancelled the pension from November 1981.

Davy applied to the AAT for review of this cancellation.

The medical evidence

An orthopaedic surgeon consulted by the DSS told the Tribunal that Davy had a 'chronic degeneration of the intervertebral disc', which incapacitated him from heavy work. But he should be capable, this specialist said, of light to moderate work.

A report from Davy's general practitioner said that it was highly unlikely that Davy would 'ever be capable of sustained heavy work'.

[Another orthopaedic surgeon consulted by the DSS had reported that Davy had 'an incapacity of more than 85% for all types of physical work' and that his condition was static. This specialist did not give evidence to the AAT, which appears to have ignored his opinion.]

The Tribunal found that Davy was capable of light to moderate work, that his incapacity had not been established as permanent—'There are avenues which may be explored which may result in an improvement in his medical condition and in his

rehabilitation, particularly bearing in mind his age': Reasons for Decision, p.7. (The AAT believed that Davy should undergo rehabilitation at a DSS centre.)

Formal decision

The AAT affirmed the decision under review.

[**Comment:** At the end of its Reasons for Decision, the AAT observed that Davy would not 'suffer any financial hardship' because he was receiving sickness benefit. The Tribunal accepted Davy's opinion that sickness benefit 'amounts to the same monetary payment to him as would the invalid pension'. It is disturbing that the Tribunal, which is intended to stand in the shoes of the Director-General when making its decisions, should be so ignorant of the basic features of the Australian social security system: such a comparison ignores the discrimination in fringe benefits (local rates and transport concessions, for example), and the more stringent income test, the restrictions on supplementary rent allowances and the lack of 'incentive allowances' for sickness benefits]

BUHMANN and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q81/179)

Decided: 8 September 1982 by J. B. K. Williams.

John Buhmann injured his back while working as a labourer in 1974 (when he was aged about 27 years). In December 1979, following settlement of his workers' compensation claim, he was granted an invalid pension.

In August 1981 the DSS cancelled Buhmann's invalid pension. Buhmann applied to the AAT for review of this decision.

The medical evidence before the Tribunal showed degeneration of Buhmann's spine. But, while Buhmann's general practitioner said this condition made him at least 85% incapacitated for work, a report from his orthopaedic surgeon placed his incapacity below this level. And an orthopaedic surgeon, consulted by the DSS, gave evidence that he was about 50% incapacitated and that his condition could improve if he reduced his excess weight. This specialist observed that Buhmann could perform manual work which did not involve heavy digging or lifting.

The AAT said:

> The applicant is a man who normally would have before him a working life of around 25 or 30 years. He last worked in 1974. To conclude that, in effect, his working life is now over would require, to my mind, compelling evidence of physical incapacity to work likely to last for an indefinite period of time in the future. A finding of this nature is, in my view, clearly not open when regard is had to the evidence of [the surgeon consulted by the DSS] which I accept.

(Reasons for Decision, p.8)

Formal decision

The AAT affirmed the decision under review.

SULLIVAN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/172)

Decided: 28 September 1982, by J. B. K. Williams.

Leo Sullivan, aged about 41, applied for an invalid pension in May 1981 but was rejected by the DSS. He applied to the AAT for review of this rejection.

Sullivan told the Tribunal that, following a fall from a horse, he had constant pain in his shoulders and upper back. His general practitioner stated that he had treated Sullivan for pain in the upper back, but his cervical spine appeared normal. Another treating doctor confirmed that Sullivan's cervical spine was normal, but said that he suffered from spondylolisthesis in his lumbar spine which gave him a 'moderate' disability.

The Tribunal found that the medical evidence did 'not support or explain the disabilities claimed by the applicant'. The AAT had 'little doubt that he thinks that he suffers from disabilities that numerous members of the medical profession have failed to diagnose or alleviate'. The AAT observed that Sullivan was obviously very intense and suffered a great deal of mental anguish following what he saw as incorrect medical treatment given to his young daughter.

But the AAT saw its function as determining 'the application on the evidence placed before it by the parties to the application'. On that evidence, it could not determine the nature or the extent of Sullivan's disability.

Formal decision

The AAT affirmed the decision under review.

JACKSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/144)

Decided: 21 September 1982 by W. Prentice.

Michael Jackson was born (in about 1943) in Lebanon where he received minimal schooling. After migrating to Australia, he worked at panel-beating and labouring. He spoke, but could not read, English.

Jackson suffered a series of injuries to his right eye and his back over about five years. In 1976, the DSS granted him an invalid pension. In 1981, the DSS cancelled his pension and he applied to the AAT for review.

Jackson claimed that he had practically no sight in his right eye, and constant pain in his back and legs which prevented him from undertaking any activity. These complaints were supported by his own doctors.

However, an opthalmic surgeon consulted by the DSS said there was no reason why Jackson could not see with his right eye. The AAT accepted this view, and the opinion of an orthopaedic surgeon that there was little disability in his back or legs. This surgeon had noted that Jackson's hands were calloused (in early 1982) indicating that he had recently undertaken heavy manual work.

The AAT decided that his evidence damaged Jackson's credibility, that he had exaggerated his complaints and that, given 'his present age of 39, he should not be found to be permanently (in the sense of indefinitely continuing) incapacitated for work . . .' Moreover, his 'disabilities [did not] amount to anything like the figure of 85%, even if one were to weigh them with his lack of formal education, inability to read and write English language, and a degree of limitation of kinds of actual work experience': Reasons for Decision, para. 14.

Formal decision

The AAT confirmed the decision to cancel Jackson's invalid pension.

KACUROV and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/103)

Decided: 8 September 1982 by J. B. K. Williams.

Atanas Kacurov was born in Yugoslavia in 1944 and migrated to Australia in 1970. In March 1980 he was granted an invalid pension because of a 'back problem'.

Kacurov's pension was reviewed in May 1981 when he told the DSS he was about to move to the United States. After this review, the DSS cancelled his invalid pension. Kacurov then applied to the AAT for review of the cancellation.

Kacurov did not appear at the AAT hearing, nor did he submit any evidence about his medical condition or his activities in the United States (where he had lived since May 1981).

A surgeon consulted by the DSS reported that Kacurov was 'unfit for heavy physical work but this would exclude only 20% of the civil employment pool'. (Kacurov had worked as an estate agent in Australia.)

The Tribunal said that its 'function [was] to determine the matter on the material placed before it by the parties' and, upon the evidence, it was not satisfied that Kacurov was qualified to receive an invalid pension.

Formal decision

The AAT affirmed the decision under review.

TSAOUCIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/145)

Decided: 21 September 1982 by J. B. K. Williams.

Peter Tsaoucis was born in Greece and migrated to Australia in 1965. He had little formal education, spoke little English, and worked in labouring jobs. He had hernia operations in 1974, 1978 and 1981.

In June 1981 he applied to the DSS for an invalid pension; this application was rejected. He applied to the AAT for review of this decision.

Tsaoucis' surgeon gave evidence that he had made a good recovery from the 1981 operation. There was a 90% chance of full recovery, so that he could do heavy labouring work within about three years. In the meantime, he could undertake light manual work. A surgeon consulted by the DSS confirmed this view.

The AAT found, on the basis of this evidence, 'that, whatever the applicant's present incapacity, expressed in the percentage terms may be, it is [not] an incapacity which is likely to last indefinitely': Reasons for Decision, para. 8. Accordingly, Tsaoucis was not at least 85% permanently incapacitated for work.

Formal decision

The AAT affirmed the decision under review.

Child endowment: late application

FLYNN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/575)

Decided: 12 October 1982 by A. N. Hall.

Mrs V. J. Flynn was granted child endowment for her twin children in May 1964. Shortly after their 16th birthday (in April 1980), the DSS mailed to Flynn a claim form for 'student family allowance' (that is, child endowment for a full-time student aged 16 or more). But, according to the DSS, Flynn did not return this form; and the DSS cancelled the twins' endowment.

In August 1981, Flynn realised that she was receiving endowment only for her three younger children and not for the twins, who were full-time students. She applied for and was granted student family allowance (from September 1981); but the DSS refused to back-date this allowance.

Flynn applied to the AAT for review of this refusal.

'Special circumstances' for back-dating payment?

Where a person claims child endowment more than six months after becoming eligible, the endowment is payable from the date of the claim: *Social Security Act*, s.102(1)(b). However the Director-General may back-date payment (to the date of eligibility) 'in special circumstances': s.102(1)(a).

During the AAT hearing (conducted by conference telephone), Flynn had said that she was sure that she had returned the claim forms to the DSS in May 1980. However, Flynn subsequently wrote to the AAT saying that she was not certain of this and that she could not sign a statutory declaration in support of her statement during the hearing.

The Tribunal observed:

> [A]s the evidence does not enable me to find that the claims were posted to the Department, no question arises of there being 'special circumstances' for extending the date for lodgment of the claims until . . . August 1981 . . . The Applicant's case depended upon my finding as a fact that the claims were completed promptly and returned by post and that they must have gone astray in the post or within the Department. No other basis for a finding of 'special circumstances' was suggested.

(Reasons for Decision, para. 12)

Formal decision

The AAT affirmed the decision under review.

MICHAEL and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/481)

Decided: 21 October 1982 by R. K. Todd.

Leonidas Michael asked the AAT to review the Director-General's refusal to back-date payment of child endowment for his 'student child'.

Michael and his wife had received endowment for their son from July 1962 until shortly after his 16th birthday, when the endowment was cancelled because Mrs Michael had not done anything to satisfy the DSS that her son was a 'student child' or to claim student endowment for the son.

Early in 1981, Michael noticed that endowment was no longer being paid into his bank account. Mrs Michael lodged a claim for student endowment which the DSS granted. But the DSS refused to back-date payment.

'Special circumstances' for back-dating payment?

Michael claimed that there were 'special circumstances' to justify retrospective payment of the endowment. (Section 102(1)(a) gives the Director-General a discretion to back-date payment in 'special circumstances': see *Flynn*, in this issue of the *Reporter*.)

Michael said that endowment had been paid into his current account which was also used as the trading account for the shop which he operated. Because of the mixing of family and business money and because the reconciliation of bank statements was left to his accountat, the cancellation of the endowment had not been noticed for two-and-a-half years.

After referring the earlier decision in *Faa* (1981) 4 *SSR* 41, the Tribunal said that none of the 'circumstances disclosed in the present matter are "special" within the meaning of the Act': Reasons for Decision, para. 9.

Formal decision

The AAT affirmed the decision under review.

Handicapped child's allowance: 'constant care'

SCHRAMM and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/95)

Decided: 1 October 1982 by R. K. Todd.

Janet Schramm had been granted a handicapped child's allowance in respect of her daughter Melanie, who suffered from cystic fibrosis. This had been granted under s.105 of the *Social Security Act*, that is, on the basis of 'severe handicap', in May 1977. In April 1979 this was cancelled. In September 1979, Schramm was granted a handicapped child's allowance under s.105JA, that is, on the basis that her child was 'handicapped'—one needing care and attention 'only marginally less than he would need if he were a severely handicapped child' (s.105H(1)); but, because of the income test which applied to an allowance under s.105JA, the rate payable to Schramm was 'nil'.

In September 1980 Schramm re-applied claiming that her child was severely handicapped. The DSS rejected this claim and Schramm applied to the AAT for review.

The evidence

The tribunal described the care and attention given to Melanie by Schramm or her husband. This included physiotherapy sessions three to five times a day, supervision of drug taking and diet, special swimming sessions and other physical exercise recommended by doctors. Medical evidence was given to the AAT on the need for constant physiotherapy and the Tribunal said that treatment could occupy three hours a day. A number of expenses had been incurred in relation to the child, including medication, physiotherapy equipment and medical insurance. Melanie had commenced preschool in 1981 for two-and-a-half hours a day and joined an ordinary primary school in 1982, a decision strongly supported by her doctor, who gave evidence. Schramm had recently begun part-time work, although she or her husband need to be within close reach of the school in order to