Overpayment: deduction from current pension

HOLT & HOLT and DIRECTOR-GENERAL OF SOCIAL SECURITY (Nos Q82/73 and Q82/74)

Decided: 23 February 1983 by J. B. K. Williams, M. Glick and M. McLelland.

Ellen Holt and her husband were granted Australian age pensions in April and July 1981, having notified the DSS that they were also applying for United Kingdom retirement pensions.

Late in July 1981 the Holts were advised that they had been granted UK pensions from 2 July 1981. On 4 August 1981, Mr Holt told the DSS that he and his wife had been granted UK pensions and asked that their age pensions be adjusted.

The DSS adjusted the Holt's pensions on 28 August 1981 and then claimed that they had been overpaid (a total of $651) between 2 July and 22 August. The Holts applied to the AAT for review of this decision.

The Tribunal assumed that recovery of the overpayments was based on s.140(2) of the *Social Security Act*, which gives to the Director-General a discretion to deduct, from a current pension, an amount of pension, paid for any reason, which should not have been paid.

The Holts argued that the discretion in s.140(2) should be exercised in their favour because the overpayments were not their fault and because they would suffer severe hardship if the overpayments were recovered.

The AAT dismissed the first of these arguments: even though the Holts 'were not at fault nevertheless, they have received monies [*sic*] to which they were not entitled under the *Social Security Act*'. Therefore, they 'should be called upon to re-pay the amounts of the overpayments from future entitlements': Reasons for Decision, p.5.

[Earlier, the AAT had contrasted s.140(2) recovery with s.140(1), where recovery was only possible if the overpayment was a consequence of the individual's failure to comply with the Act. The AAT did not mention the argument adopted by an earlier Tribunal in *Buhagiar* (1981) 4 *SSR* 34, to the effect that the s.140(2) discretion should be exercised so as to ensure that it had the same practical operation as s.140(1).]

After looking at the financial circumstances of the Holts, the AAT recommended that recovery of the overpayments should not exceed $5 a week.

Formal decision

The AAT affirmed the decision under review and recommended that the rate of deductions under s.140(2) should not exceed $5 per week from the combined pension.

Invalid pension: permanent incapacity

BORG and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/447)

Decided: 27 January 1983 by E. Smith.

Joseph Borg was born in Malta in 1931 and migrated to Australia in 1973 where he worked as a labourer. He suffered a hernia in 1977 and, following three operations, he was dismissed on medical grounds in 1978.

In February 1981 he applied for an invalid pension but the DSS rejected his application.

Permanent incapacity: non-medical factors

On review, the AAT found that Borg was still suffering from a medical disability—a recurrent incisional hernia, which would not improve and could deteriorate.

He was still physically capable of light work: the extent of his 'medical incapacity' was estimated (by various doctors) at between 30% and 60%. But the Tribunal accepted the opinion of Borg's surgeon that he was '85% incapacitated, taking into account factors other than purely medical factors in arriving at this conclusion': Reasons for Decision, para. 44.

In one of his reports, this surgeon had said that the hernia rendered Borg 50% incapacitated but, 'as he is an unskilled labourer and is unfit for heavy work, his English being very limited and with the current recession, I would consider him unemployable'.

The AAT observed that Borg had 'little or no marketable capacity to engage in remunerative employment, when viewed as a realistic and not merely a theoretical manner' and continued:

> He has, to adopt the words used by Mr A. N. Hall in *Re McGeary* [(1982) 11 *SSR* 113], 'effectively lost his ability to undertake suitable paid employment by reason of his physical and mental impairments'. Any doubts there may have been on this aspect were, in my view dispelled by [the Department of Employment counsellor's] evidence, which was positive and to the point. He did not think the applicant was employable. He did not think the Rehabilitation service was suitable for the applicant or that he would be accepted for rehabilitation.

(Reasons for Decision, para. 47)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Borg be granted an invalid pension from the date of his application.

TRIANDAFYLLAKOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/365)

Decided: 14 February 1983 by E. Smith.

The Tribunal *affirmed* a DSS refusal of invalid pension to a 45-year-old former factory worker who had injured his back in 1977.

Faced with conflicting medical opinion, and with claims by Triandafyllakos of pains all over his body, the Tribunal accepted the evidence called by the DSS and found that Triandafyllakos was only 20% permanently incapacitated for work.

Given the degree of his incapacity, his grasp of English and good education, he could not be regarded as having virtually no residual capacity for work that could be exploited in the market place'. Nor had Triandafyllakos 'tested his ability to find work sufficiently over the years to justify a finding that he [had] lost that ability'.

His basic problem, said the Tribunal, was 'unwillingness to make the necessary efforts to get himself back into useful employment, compounded, to some extent, by too ready acceptance by his medical advisers of his complaints'.

CARFANTAN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/35)

Decided: 14 January 1983 by J. B. K. Williams.

The Tribunal *set aside* a DSS refusal to grant invalid pension to a 52-year-old former plumber with very poor command of English, whose spine had been injured and now severely restricted his range of movement.

Given Carfantan's age and background, the Tribunal dismissed the prospect of rehabilitation and observed that his limited English 'would preclude him from engaging in sedentary occupations, e.g. clerical work'. The Tribunal found that 'his prospects of again being enlisted in the work force are remote'.

ARMANASCO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/147)

Decided: 14 January 1983 by J. B. K. Williams.

The Tribunal *affirmed* a DSS cancellation of an invalid pension held by 55-year-old woman who had worked as a clerk and a shop assistant, after accepting medical evidence that she had only 'minimal work restrictions' because of spinal degeneration.

Given her work experience, the Tribunal said, there was 'a range of employment for which she has the necessary skills and which are within her physical capacity to perform'.