QUTAMI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/112)

Decided: 1 February 1983 by A. N. Hall.

Ruda Qutami was born in Jordan in 1941 and migrated to Australia in 1971. He then worked in a series of factory jobs until he injured his right wrist in 1974. After attempting to return to work, Qutami was dismissed at the end of 1974. He had not worked since then. He was paid worker's compensation and, in late 1979, settled a claim for damages against his former employer.

In March 1980, he applied for an invalid pension, which was refused by the DSS. He then sought review of that refusal by the AAT.

The medical evidence

The AAT found that Qutami had permanent restriction of movement in his right wrist, and that he suffered constant pain in this wrist. He also suffered pains in his back and neck, probably caused by 'postural imbalance', although there was probably a functional element in that pain.

Given that Qutami was 'extremely right-handed', the Tribunal found that he could not work in any heavy manual occupation, or in an occupation which required two-handed manual skills. His grasp of written English was inadequate for clerical work; but he did have 'the physical and mental capacity to undertake light work such as a car park attendant . . .'

Capacity to obtain employment

If the evidence had rested there, the Tribunal said, Qutami would not have qualified for an invalid pension. However the evidence went 'much further insofar as it indicates an inability on the part of the applicant to obtain work due to his medical condition': Reasons for Decision, para. 35.

The Tribunal had been told of applications for at least ten jobs, and of fruitless attendance at the local CES office over two years. In addition, he had not been able, during a rehabilitation course, to adjust to the demands of full-time employment.

The AAT accepted the opinion of Davies J in *Panke* (1981) 2 *SSR* 9, that incapacity could not be considered 'in a meaningful way without having regard to his employment prospects'. So the question was whether Qutami had 'lost his ability to attract an employer who is prepared to engage and remunerate him': Reasons for Decision, para. 37. In answer to this question, the AAT said:

> Having regard to the obvious impairment to his right wrist and hand, to his history of a worker's compensation and damages claim against his former employer, to the fact that he has been out of the workforce for over eight years and that his performance during the recent rehabilitation program indicates an inability on his part to cope with the realities of what a regular job would entail, I have concluded that the applicant has lost the ability to attract an employer who would be prepared to engage and remunerate him.

(Reasons for Decision, para. 39)

Formal decision

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

BLASNIK and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/104)

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

The Tribunal *affirmed* a DSS cancellation of invalid pension held by a 59-year-old tradesman, after concluding that his back disability (a result of a work injury and degeneration) did not prevent him from doing light work, and that he had no psychiatric illness.

The Tribunal observed that Blasnik's unwillingness to work was 'influenced by a desire not to leave his [sick] wife at home unattended'; but that was 'not a factor that can be taken into account when assessing the applicant's physical capacity for work'.

Widow's pension: misleading advice

VALLANCE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/38)

Decided 18 January 1983 by G. D. Clarkson.

Margaret Vallance had been granted a class A widow's pension in 1975 (she then had three dependent children).

By November 1981, her two older children had ceased to be in her 'custody, care and control' and her youngest child was about to leave school. She called at the Perth office of the DSS and asked if her pension would continue if that child took employment from 1 December.

An officer of the DSS advised her that her entitlement would continue. Her youngest child then entered into full-time employment on 1 December.

On 3 December 1981, Vallance again went to the Perth office of the DSS and told the office that her youngest child had commenced work. She was again told that her entitlement to a pension would continue.

This advice was wrong: Vallance was due to turn 45 on 14 December 1981 and her entitlement to a widow's pension could only have continued if her youngest child had delayed taking up employment until then—a matter of two weeks. And, in fact, the DSS quickly became aware of this and cancelled her pension within a few days of 3 December 1981.

Vallance then applied to the AAT, claiming that she should be paid a class B widow's pension.

(For the purpose of establishing jurisdiction, the AAT treated the DSS cancellation as a refusal to grant a class B widow's pension to Vallance.)

The legislation

The AAT pointed out that a class A widow's pension was payable to 'a widow who has the custody, care and control of one or more children': s.60(1)(a).

A class B widow's pension was payable to a widow, without the custody etc. of any child, who was 50 years of age and to a widow who had ceased to have the custody etc. of any child after reaching the age of 45 years: s.60(1)(b). The Tribunal said that the effect of Vallance's youngest child taking employment two weeks before Vallance turned 45 was that she ceased to be qualified for a class A widow's pension and could not qualify for a class B widow's pension until she turned 50.

No 'estoppel'

Vallance had argued 'that because of the bad advice given by the departmental officer on 18 November 1981, on which the applicant acted to her prejudice, the Director-General [was] estopped from saying that her entitlement to a pension under s.60(1)(a) or (b) ceased before she attained 45 years of age on 14 December 1981'. The Tribunal rejected this argument in the following passage:

> In general terms, the powers of the Director-General are those given to him by statute, and although he ostensibly has a wide discretion to determine a rate of pension which is reasonable and sufficient (e.g. s.63) I am unable to find any power vested in him to grant a pension to a person who is not qualified to receive one. Such a grant may occur by mistake or error and certain decisions of the Director-General are subject to appeal or to judicial review, but in my view if the Director-General rightly concludes that a person does not qualify for a pension, he has no power then to grant one.

(Reasons for Decision, p.10)

Formal decision

The AAT affirmed the decision under review.