FOSKETT and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/270)

Decided: 16 March 1984 by B.J. McMahon, J. McClintock and I. Prowse.

The Tribunal *set aside* a DSS decision to reject a claim for invalid pension lodged by a 57-year-old former bus driver who suffered from degenerative disease of the spine and a disabling psychological condition.

The Tribunal said that his mental and physical 'impairments would impinge upon his capacity to sustain his work in any normal avenue of employment [and that he was] permanently incapacitated for full time work of any kind': Reasons, p. 9.

Accordingly, the Tribunal did not find it necessary to consider the effect of current economic conditions on Foskett's capacity to work. However, the Tribunal indicated (Reasons, p. 7) that it was not prepared to accept the DSS' argument that a person's incapacity for work should always be assessed in isolation from current economic conditions.

CHIARAVALOTTI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/85)

Decided: 26 January 1984 by I.R. Thompson

The AAT *set aside* a DSS decision to cancel the invalid pension of a 43-year-old former wall builder who suffered from back, heart and peptic ulcer conditions. The applicant also had an entrenched perception of himself as an invalid.

The Tribunal accepted medical evidence that rehabilitiation was unlikely to be successful. Though there was a suggestion by the AAT that the likely success of rehabilitation did not necessarily disqualify an applicant for invalid pension.

> I have given careful consideration to the question whether or not there is a settled expectation that his incapacity will continue indefinitely. In that regard the provisions of section 135M of the Act are of some significance. Implicit in them is a recognition that a person may be permanently incapacitated for work notwithstanding that suitable treatment is available for his physical rehabilitation.

(Reasons, para. 24).

ARNOLD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/475)

Decided: 21 February 1984 by W.A.G. Enright, J. McClintock and A. Renouf.

The AAT *set aside* a DSS refusal to grant invalid pension to a 43-year-old former moulder who suffered from back problems.

In relation to the permanence of the incapacity, the Tribunal said:

> Retraining is really out of the question. The applicant is a poorly educated man whose formal education ended many years ago. He has been a long time out of the work force and even, given retraining, would present as a poor prospect to an employer.

(Reasons, para. 28)

The AAT also decided, and handed down Reasons for Decision, in the following invalid pension cases. On our reading, none of these raised any issue of principle but depended solely on the assessment of medical evidence and evidence on the applicant's work experience and skills.

DSS decision set aside

Beladakis (N82/502) 8.2.84
Brinkley (Q81/101) 14.2.84
Bussell (N82/348) 21.2.84
Damaggio (V82/458) 29.11.83
Hayek (N83/367) 16.3.84
Lazarou (N82/174) 6.3.84
Morante (N82/465) 2.2.84
Ponce (N82/526) 6.3.84
Saqqa (N83/216) 29.3.84
Schembri (N83/394) 23.3.84
Shennag (N83/401) 29.3.84

DSS decisions affirmed

Biyikli (N82/167) 8.2.84
Finnimore (N82/489) 8.2.84
Khoury (N83/49) 27.3.84
Mouhammed (N81/247) 16.2.84
Roberts (Q82/163) 25.1.84
Stone (V82/478) 20.1.84

Federal Court decisions

Invalid pension: medical treatment

DRAGOJLOVIC v DIRECTOR-GENERAL OF SOCIAL SECURITY

Federal Court of Australia

Decided: 6 February 1984 by Smithers J.

This was an appeal from the decision of the AAT in *Dragojlovic* (1983) 16 *SSR* 162, where the Tribunal had decided that the applicant was not qualified for an invalid pension because his 'incapacity for work' was not 'permanent' within s.24 of the *Social Security Act.*

Dragojlovic suffered from a back condition which, according to medical opinion, could respond to surgery. Dragojlovic had refused to undergo the operation and the Tribunal had taken the view that this refusal was unreasonable and that, therefore, Dragojlovic's incapacity could not be regarded as permanent. In coming to this conclusion, the Tribunal had relied on rules developed in worker's compensation and tort law, to the effect that an accident victim was obliged to take reasonable steps to reduce his incapacity before claiming compensation or damages.

Refusal to undergo surgery: is incapacity 'permanent'?

The Federal Court decided that the Tribunal had 'erred in law in a critical way' and allowed the appeal. The Court quoted extensively from another Tribunal decision, *Korovesis* (1983) 17 *SSR* 175, where R.K. Todd had said that a person's refusal to undergo medical treatment had to be accepted, no matter how unreasonable, for the purposes of eligibility for invalid pension.

The Court accepted that the purposes of compensation law and of social security law were quite different: the former aimed to distribute the cost of injury between the victim and the wrongdoer; but social security law aimed to provide a 'safety net' under a person in crisis. The right to claim invalid pension depended

> on the existence of a single state of fact, namely whether or not, within the meaning of the words used in the statute, the applicant is permanently incapacitated for work. It is for social purposes that is done that way. The Act is concerned with the fact, and not with the performance by the claimand of some notional duty to mitigate the severity of the disability causing his incapacity.

(Judgment, p. 6)

The Court conceded that a disability which could be relieved by available treatment was not permanent. But if a person could not, for fear or religious belief or for some other reason of a genuinely compulsive nature, accept that treatment, the disability should be treated as permanent. Here, the applicant had a real fear of undergoing surgery (a laminectomy).

> Whether this fear be reasonable or unreasonable or even baseless, in the light of the applicant's knowledge of the cogent factors favouring his undergoing of the operation, the applicant will remain incapacitated so long as it lasts. If the fear actually is compelling and permanent then the incapacity is permanent. In that case the fact upon which entitlement under the Act depends is established.

(Judgment, p. 7)

The Court cautioned that this principle could not be extended to a person who refused medical treatment as 'a tactical exercise designed to obtain a pension which lacks bona fides':

> In any case in which treatment is refused the question for the [DSS] or the Tribunal is not whether the refusal is reasonable or

otherwise, but whether, on the probabilities, the refusal is genuinely based on grounds which, in fact, compel the person concerned, acting honestly, so to refuse ... Dealing with the plain question of fact, with respect to a man who can be cured only by treatment objectively reasonable, but actually not available to him because of fear or other genuine reason, a Tribunal would, in my opinion, find that that man was permanently incapacitated for work within the meaning of s.23 of the Act.

(Judgment, pp. 9-10)

Rehabilitation and medical treatment

The Court considered whether s.135M justified the Tribunal's refusal to grant an invalid pension to Dragojlovic.

> 135M. (1) The Director-General may, having regard to the age and to the mental and physical capacity of a person who is a claimant for a pension or is a pensioner, and to the facilities available to that person for suitable treatment for physical rehabilitation and suitable training for a vocation, refuse to grant a pension to that person or cancel or suspend that person's pension, unless that person receives such treatment or training.

The Court said that this provision was concerned with rehabilitation and training for a vocation:

> The undergoing of suitable rehabilitation for a vocation is something which is in harmony with the Act and might reasonably be made a condition of the continuance or even the grant of a pension. But rehabilitation for its own sake to some unspecified degree for no purpose but an improvement in health could not rationally be made such a condition.

(Judgment, p. 14)

There was no limit to the kind of treatment which the Director-General

might require under s.135M – but the treatment must be likely to achieve or contribute towards the person's capacity to work in a particular type of work. Moreover, the treatment must be

> limited to facilities and treatment which that person can make use of in the circumstances in which he is placed. Those circumstances would include constraints upon him of genuine fears for his safety, even if unfounded, or his genuine religious beliefs. If those beliefs or those fears exclude use of those facilities for particular treatment so far as he is concerned, the failure to undergo that treatment would not support the exercise of the respondent's discretion to refuse or cancel a pension.

(Judgment, p. 20)

In the present case, the Court said, the Tribunal had applied s.135M on the assumption that the discretion should be exercised against the applicant if the Tribunal thought that the applicant had unreasonably refused medical treatment designed to remedy his physical difficulties. The Tribunal had failed to consider those matters which were relevant to a proper exercise of the discretion in s.135M.

Formal decision

The Federal Court allowed the appeal and remitted the matter to the AAT for further consideration in accordance with the principles set out in the Court's reasons for judgment.

Invalid pension: proof of 'permanent incapacity'

McDONALD v DIRECTOR-GENERAL OF SOCIAL SECURITY

Federal Court of Australia

Decided: 27 March 1984 by Woodward, Northrop and Jenkinson JJ.

This was an appeal from the decision of the AAT in *McDonald* (1982) 11 *SSR* 114, where the Tribunal had decided that the applicant was not 'permanently incapacitated for work' within s.24 of the *Social Security Act* and that, therefore, the DSS had been correct in cancelling her invalid pension.

Two questions of law were raised in the appeal (s.44(1) of the *AAT Act* provides that an appeal can only be taken to the Federal Court on a question of law):

(a) does either party in a case such as this before the Tribunal bear any onus of proof and, if so, what is the extent of that onus?

(b) what is the meaning of the word 'permanent' in the phrase 'permanent incapacity'?

Onus of proof

It was argued, on behalf of the appellant McDonald, that the Tribunal should have placed the onus of proof on the Director-General because the Tribunal had been reviewing a decision to *cancel* an invalid pension.

Woodward J. said that the onus of proof was a common law concept which provided answers to practical problems in litigation in the courts. It was not directly applicable in administrative proceedings.

In particular, no legal onus of proof arose from the status of the AAT as an 'appeals' tribunal : the Tribunal was required, by s.43 of the *AAT Act*, to put itself in the position of the administrator and to make its own decision; in particular, there could be no presumption that the administrator's decision was correct.

However, the legislation being administered by the decision-maker (or the AAT) could place the onus on an applicant to establish some state of facts. Qualification for sickness benefit is expressed in those terms : the applicant must satisfy the Director-General that he or she is temporarily incapacitated for work etc : s.108(1). But that was not the situation under s.24 of the *Social Security Act*, which provided that a person would qualify for invalid pension if the person was permanently incapacitated for work:

> Obviously someone must set in motion the process which establishes the entitlement, and that will normally be done by or on behalf of theperson concerned, but the Act does not create a legal onus to prove all relevant aspects of a claim of permanent incapacity such, for example, as the state of the labour market for disabled persons. Certainly if no material is available to the decision-maker, or if available material leaves the decision-maker quite uncertain whether the person is permanently incapacitated, the claim must fail. But I think it would be artificial to describe this situation in the terms of the legal onus of proof.

(Judgment, p. 7)

When the Director-General was considering whether an invalid pension should be cancelled because of changed circumstances (exercising the powers to cancel given by s.14 or s.46(1) of the *Social Security Act*), the Director-General should act in good faith on the available information – 'but no question of onus arises': Judgment, p. 9. The answer was the same when the AAT was reviewing the decision of the Director-General –