Background

'INCAPACITATED FOR WORK': WHAT HAPPENS WHEN THE WORK DRIES UP?

The decisions of the AAT in *Fliedner* (1983) 17 *SSR* 117 and *Fraser* (1983) 17 *SSR* 176 offer an interesting contrast in their assessment of 'incapacity for work' for the purposes of qualifying for invalid pension.

Both cases dealt with persons who, because of a combination of medical and non-medical factors, could be termed 'unemployable'. In both cases the applicant had applied for and been refused invalid pension. Each sought review by the AAT.

FLIEDNER

Mr Fliedner was 51 years old. He suffered from a multiplicity of physical symptoms (including stomach problems and arthritis) and also from a psychiatric condition, namely a chronic anxiety state. He had left school at 12 and had worked as a farm labourer and shearer. He could not read or write. He had not worked since 1977.

Incapacity: arising from medical condition

It was clear from earlier decisions that the 'incapacity for work' referred to in s.24 of the *Social Security Act* must 'result from' a medical condition. The Tribunal quoted from *Sheeley* (1982) 9 *SSR* 86:

> . . . the 'permanent incapacity' must result from a medical disability using the term in the sense I have already described. In my view, it is not sufficient that the medical disability be a material factor in the incapacity, it must be of such significance that the incapacity can be said to arise or result from the medical condition. If it were not so, the term 'invalid pension' would not be appropriate.

Thus, the medical condition must result in an incapacity for work or, in other words, an inability to attract an employer (see *Panke* 1981) 2 *SSR* 9). The difficulty, said the AAT, was that expressed in *McGeary* (1983) 11 *SSR* 113, where the Tribunal had said:

> The problem in having regard to a persons's inability to attract an employer, however, is in differentiating between, on the one hand, difficulties which truly reflect an *incapacity* for work . . . and, on the other, difficulties which merely reflect an inability to exploit a capacity for work due to depressed job opportunities . . . or the lack of any genuine interest in obtaining paid employment.

The labour market: how relevant?

How far can this differentiation be taken? It was this point which the AAT pursued in *Fliedner*. The Tribunal examined unemployment statistics over the past 92 years. These demonstrated that 'normal' economic conditions involved an unemployment rate of between 4.5% and 11%: see Reasons, para. 31.

Further considerations applied to older people. In a report by the Bureau of Labour Market Research of the Department of Employment and Industrial Relations entitled 'Retired, Unemployed or at Risk : Changes in the Australian Labour Market for Older Workers', it was shown that the workforce participation rate of older people was significantly lower than those for younger people. Further, the duration of unemployment for older workers had increased more than for younger workers over the period studied, 1961 to 1981.

The Report suggested two sets of reasons for 'the trend to early retirement'. One set involved voluntary factors : superannuation, possibility of income from other sources, etc. The other set related to involuntary factors attributable to the effects of the economic recession. In particular there has been a rise in the number of 'discouraged workers'. This is explained in the Report:

> The argument is that older workers have been hit particularly hard by the economic recession both in terms of the rate of job loss and difficulties in regaining employment. Older workers who lose jobs have difficulty in competing with younger job seekers. Rather than search for jobs which they feel do not exist, many leave the workforce relying on pensions, superannuation benefits or private non-labour sources of income for financial support. Jobless older workers who continue to look for employment have very long periods of unemployment.

(Quoted in Reasons, para. 33)

The Tribunal then commented:

> Thus, it can be seen that the inability of an unskilled man of fifty to obtain employment, whatever the reason for that inability, should be considered as a manifestation of the continuing and normal state of the labour market, rather than as a merely temporary and abnormal phenomenon.

(Reasons, para. 25)

There was no question that Mr Fliedner needed to be supported under the *Social Security Act*. The question was under which head this would occur:

> An applicant for invalid pension must, in order to show that his incapacity for work results from his medical condition . . . Once such a result is established, the effect of other factors on his ability to obtain employment should not be overemphasised.

(Reasons, para. 37)

The indication is that older persons will, because of their age, be at a disadvantage in attracting an employer. This should not of itself result in the incapacity being described as not arising from a medical condition, but rather be the background against which the claim is assessed.

The Tribunal concluded that Mr Fliedner was entitled to an invalid pension.

FRASER

Mr Fraser was 53 years old. He had been unemployed since 1979. He was described as suffering from slight mental retardation, asthma and arthritis. He had work as a messenger for a chemist and in the despatch department of a department store. He had also worked as an assistant in a canteen and in maintenance sections of a factory and hotel.

Qualifying for invalid pension: four steps

The Tribunal identified the four necessary steps in deciding whether a person is qualified to receive invalid pension.

The first was to evaluate his physical and mental impairment in purely medical terms to measure the extent that the impairment affected his ability to engage in paid work. Secondly, to ascertain the type of work suitable for him it was necessary to look to his age, previous work experience and the types of paid work availale to such a person with his attributes. Thirdly, one had to consider whether he is capable of attracting an employer to employ him. Finally, the incapacity must be permanent.

The AAT referred to the different reasons why a person may not be capable of attracting an employer. It might be due to an incapacity for work, an inability to exploit depressed job opportunities or a lack of genuine interest in obtaining paid employment. (See the passage from *McGeary*, cited in *Fliedner*, above.)

Incapacity must result from medical condition

Of Mr Fraser, the AAT said:

> . . . there can be little doubt that he is practically unemployable because of his age, his physical and mental condition (including his relatively low IQ) and the fact that he has been unemployed for the past four and a half years.

(Reasons, para. 21)

However, his physical or mental condition were not of such significance that his incapacity for work could be said to result from it. His physical or mental condition (alone?) did not disable him from doing the types of jobs which he did during the course of his working life: see Reasons, para. 23. Therefore, Fraser did not qualify for invalid pension.

In this regard the Tribunal in *Fraser* relied heavily on the requirement set out in *Sheely* (above) that the medical condition be of 'such significance' that the incapacity can be said to arise from it.

For the AAT in *Fraser*, the age of the applicant (and his resulting difficulty in obtaining employment) was not so much a basis for assessing incapacity as a basis for changing the Act to creat new benefits applicable to these 'unemployable' but not 'invalid' persons: see Reasons, para. 24.

STAMBERG

Since the decisions in *Fliedner* and *Fraser* the AAT has decided *Stamberg* (see this issue of the *Reporter*). In that case the decision to refuse the invalid pension of a 57-year-old former clerk who suffered from arthritis was set aside.

The AAT referred to those principles discussed above applicable to the assessment of claims for invalid pension. The Tribunal referred to *Fliedner* and adopted much of its langage. In particular, the following comment is taken directly from that case:

> An applicant for invalid pension must, in order to succeed in that application, be able to show that his incapacity for work results from his medical condition . . . once such a result is established, the effect of other factors on his ability to obtain employment should not be overemphasised.

(Reasons, para. 20)

In the result, the Tribunal was able to conclude that Mr Stamberg did satisfy the criteria for invalid pension, even though his medical condition did not acquire the significance perhaps thought necessary in *Fraser*. The Tribunal said:

> 21 . . .Neither of the medical witnesses considered him to be 85% incapacitated for work in purely medical terms; but . . . medical considerations form only part of the evidence to be taken into account in determining eligibility for invalid pension . . . 22 . . . Thus, Mr. Stamberg's unemployability derives *initially* from his medical condition, reinforced though it may be by the difficulties of a man of his age in the labour market . . . [our emphasis]

Observations

The problem presented by interaction between medical impairment and structural changes in our industrial economy is obviously creating some difficulties for the AAT, which has only recently begun to address the question whether those changes can be used to 'qualify' a person for invalid pension. Whereas the Tribunal in *Fraser* treated those changes as irrelevant, the Tribunals which decided *Fliedner* and *Stamberg* took them into account. However, it was only in the second of those cases that the Tribunal overtly based its decison on labour market changes. One senses, from the rather equivocal approach in the earlier decision of *Fliedner*, that the Tribunal was feeling its way with the economic evidence – offering substantial arguments for taking account of structural changes but then deciding the case on quite different, medical, grounds.

In some ways, it is difficult to see why there should be any controversy over the relevance of these broad, non-medical factors: a person's incapacity for work must be measured against the work which is available to that person. If structural changes have severely contracted the range of work available to people over 50 years of age, a relatively minor medical condition will often be sufficient to render those people unemployable and so incapacitated for work. If those changes are not likely to be reversed in the foreseeable future, then the incapacity will be permanent.

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Administration

FREEDOM OF INFORMATION IN SOCIAL SECURITY*

Access to personal documents under the *Freedom of Information Act* (*FOI Act*) is a means by which Social Security clients or their advisers can find the facts upon which Departmental decisions are based.

The use of the material obtained in this way, in conjunction with Departmental manuals, instructions and procedures (which are required by s.9 of the *FOI Act* to be available for inspection and purchase), may help with critical examination of these decisions.

Requests for personal documents

The following procedures are suggested as a means of gaining the maximum benefits from the *FOI Act* with a minimum of delay.

(1) When making an FOI request on behalf of another person, the applicant must have either the express or implied authority of the client to see documents relating to the client's personal affairs.

It should be noted that a solicitor who states in writing that he or she is acting on behalf of a client is regarded as having the implied authority of that client.

Other persons making an FOI request in a representative capacity should obtain an express authority in writing from the client. The Department of Social Security FOI form 'I Want to See My File' has a provision for such an authority.

(2) Where a client is married it is advisable also to take instructions or secure an authority from the client's spouse. Pension and Benefit files often contain information relating to the spouse's personal affairs. In the absence of the spouse's authority the information will thus be subject to the exemption in s.41(1) of the FOI ACT (documents that, if disclosed, would involve the unreasonable disclosure of information relating to the personal affairs of any person) or s.38 of the FOI Act which prohibits from disclosure documents to which secrecy provisions of other legislation apply (sees s.17 of the *Social Security Act*).

(3) Section 41(3) of the FOI Act provides that, where disclosure of medical or psychiatric information regarding a person might be prejudicial to the health or well-being of that person, the information may be disclosed to a medical practitioner nominated by that person, instead of releasing it to that person directly.

When considering access to documents containing medical or psychiatric information under s.41(3), Departmental practice is to obtain the opinion of a medical practitioner, preferably the client's treating doctor. In all cases where the documents requested are likely to include medical or psychiatric information (for example, where the client is an invalid pensioner), the name and address of the client's treating doctor should be included in the request.

(Medical certificates tendered by sickness beneficiaries are not usually considered subject to s.41(3).)

(4) Occasionally the Department has difficulty in locating requested documents insufficiently identifying the client. While in no way mandatory, the inclusion of relevant additional information concerning the client may help to avoid delays in the processing of an FOI request.