GARRETY and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/732)

Decided: 27 June 1984 by B.J. McMahon.

Judith Garrety's daughter, G, was born in September 1970. In October 1978, she was seriously injured when hit by a truck. Over the next 4 years, she spent substantial periods in hospital.

In August 1982, Garrety claimed a handicapped child's allowance in respect of her daughter but the DSS rejected that claim. She then applied to the AAT for review of the DSS refusal.

'Constant care and attention'

The Tribunal decided that, during the period between November 1979 and August 1982, Garrety had qualified for a handicapped child's allowance under s.105J of the *Social Security Act*, on the basis that her daughter was a severely handicapped child.

During that period, the AAT said, Garrety had provided 'constant care and attention' to her daughter in their private home. Her daughter's frequent absences in hospital for treatment did not affect the constancy of that care and attention for, as the Tribunal had said in *Yousef* (1981) 5 *SSR* 55, 'if the need for care an attention is continually recurring the statutory requirement is satisfied.'

The AAT suggested, without finally adopting, another approach to this question. After noting that Garrety had cared for and attended to her child even while the child was in hospital, the AAT said:

> [I]n the light of the purpose of the Act to relieve the burden of health care on institutions and to move it to private homes, it may well be that in the context of this section, *in* includes *from*. Thus while the applicant continued to be based at home and continued to assist the hospital staff and relieve them of burdens they might otherwise have, it might be said that she was providing care and attention *from* (and therefore, in this case *in*) a private home.

(Reasons, p. 9)

'Special circumstances' for back payment.

Garrety's claim for handicapped child's allowance had not been lodged until the end of the period for which she was qualified. Accordingly, the AAT considered whether there were 'special circumstances' to justify back payment of the allowance within s.102(1)(a) of the Act: see *Corbett* in this issue of the *Reporter* for the terms of that section.

Garrety told the AAT that, in December 1978, she had visited an office of the DSS and asked whether she was eligible for financial assistance for her daughter. A DSS officer had told her that, as her child did not 'go to a school for cripple children', Garrety was not eligible for handicapped child's allowance. She said that, as a result of that advice, she had not thought to make any further inquiries until, in August 1982, she had been told by a social worker that she would be eligible for the allowance.

The AAT accepted that Garrety had been given this advice by a DSS officer. (Indeed, the DSS did not deny that the conversation had taken place.) Accordingly, there were sufficient 'special circumstances' to justify back payment of the allowance in this case, even though Garrety's other circumstances (the fact that she was not geographically or culturally isolated, her access to professional advice and her general level of intelligence and literacy) would not have supported a finding of special circumstances:

> If one enquires at a regional office of the DSS and is told that one is not eligible to make application for an allowance, it seems to me to be a special circumstance that outweighs all other circumstances reviewed above.

(Reasons, p. 21)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Garrety be paid handicapped child's allowance for the period from November 1979 to August 1982.

Invalid pension: back-dated payment

DIXON and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/245)

Decided: 20 June 1984 by R. Balmford.

Beverly Dixon had two sons, S born on 9 September 1965 and D born on 9 September 1966. Both children suffered physical and intellectual handicaps and Dixon had been granted a handicapped child's allowance for each of them in 1977, on the bases that each of them was a 'severely handicapped child'.

In April 1981, as S's 16th birthday approached, a DSS medical officer reviewed S's file and concluded that he was suitable for vocational training. The medical officer then recommended that the DSS should not invite S to lodge a claim for invalid pension when he reached 16 years of age.

Shortly before S's 16th birthday, that is in August 1981, the DSS sent Dixon a claim form for continuation of family allowance for students aged 16 to 24 years. Dixon completed the form, stating that S would continue to be a full-time student after his 16th birthday. The DSS then decided that Dixon should continue to receive family allowance and handicapped child's allowance for S and she was paid accordingly. But the formal advice sent by the DSS to Dixon in September 1981 referred only to the continuation of family allowance for S.

In September 1982, when her second child turned 16, the DSS advised Dixon that both her children were eligible for invalid pension subject to a medical examination. S claimed and was granted an invalid pension in October 1982; but the DSS rejected Dixon's application for the grant of this pension to be back-dated to S's 16th birthday in September 1981.

Dixon then applied to the AAT for review of this refusal.

The legislation

Section 39 of the *Social Security Act* provides where an invalid pension is granted, the date from which it shall be paid 'shall not be prior to the date on which the claim for the pension was lodged . . .'

Section 145 of the Act carries the heading, 'Acceptance of claims for inappropriate pension, and c.'. It provides where a person claims some payment under this Act, and a claim might properly have been made under some other provision of this Act, the Director-General may treat the first mentioned claim as a claim for whatever payment is appropriate in the circumstances. (In effect, this section allows payment of a pension or other payment to be back-dated, so long as the claimant has lodged, at the appropriate time, a claim for some other payment.)

Standing

The AAT first decided that Dixon was an appropriate person to ask the Tribunal for review of the decision. She was a person 'whose interests are affected by the decision' of the Director-General within s.27(1) of the *AAT Act*. This was because S had signed an authorization appointing his mother to receive the pension on his behalf, he lived with her and she had the management of the household.

The purpose of s.145

The AAT said that s.145 was intended to enable the back-dating of payment of a claim in two situations: either where the original application had been for a payment to which the applicant was not entitled; or, as in this case, where the original application had been for a payment to which the applicant was entitled but there was a more substantial payment available to the applicant which had been overlooked at the time of lodging the application.

In other words, when an individual satisfied the requirements for more than one pension, allowance or benefit, s.145 should be used as a means of ensuring receipt of the more substantial payment where as in this case, the original claim had been for a less substantial payment. The AAT expressly rejected a DSS argument that s.145 should be restricted to situations where the initial claim had been for an inappropriate pension allowance or benefit: the heading to the section, the Tribunal said, should not be

read as controlling the interpretation of the section. The AAT adopted some observations from the earlier decision in *Tiknaz* (1981) 5 *SSR* 47 that 'the *Social Security Act* is welfare legislation which should be administered beneficially and with common sense'.

The AAT rejected an argument raised by the DSS that, because Dixon's claim for family allowance had been accepted and paid and was not outstanding, s.145 could not be used. The Tribunal said that there was nothing in s.145 to suggest that only an outstanding claim could be acted upon under that section; if the section were read in that way, it 'would have a somewhat limited operation'.

Eligibility for invalid pension

The Tribunal then turned to the question whether, at the time when Dixon lodged her claim for continuing family allowance, 'S could be described as 'permanently incapacitated for work' and so qualified for invalid pension.

The Tribunal noted that S had been a 'severely handicapped child' as defined in s.105H(1) of the *Social Security Act* immediately before his 16th birthday: he was a person who, because of his physical or mental disability, required constant care and attention. The probabilities were, the AAT said, that any person who answered that description immediately before his 16th birthday would be 'permanently incapacitated for work' within s.24 of the Act on his 16th birthday.

Dixon's evidence was that S's condition had not changed between his 16th birthday and the grant of invalid pension some 13 months later. On the balance of probabilities, therefore, S had been 'permanently incapacitated for work' at the date of his 16th birthday and had remained incapacitated until the grant of invalid pension some 13 months later.

Criticisms of DSS procedures

The AAT suggested that, given the probability that a 'severely handicapped child' would qualify for an invalid pension after her or his 16th birthday, it would be more appropriate for the DSS to send out an invalid pension claim form to each severely handicapped child immediately before her or his 16th birdday, rather than waste the Department's resources in considering whether or not it would be appropriate to invite a claim for invalid pension.

Moreover, the AAT said, DSS officers –

> should be well aware that suitability for vocational training is not, of itself, sufficient to disqualify an applicant for an invalid pension. It is certainly not a reason not to invite a person to lodge a claim for that pension.

(Reasons, para. 37)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Dixon's son S be granted an invalid pension from the first pension day after his 16th birthday.

Invalid pension: permanent incapacity

ADAMOVIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/397)

Decided: 26 June 1984 by R. Balmford.

The AAT *set aside* a DSS decision to cancel an invalid pension held by Ivan Adamovic, a 38-year-old former factory worker who had not worked since 1974.

The medical evidence presented to the Tribunal showed that Adamovic had suffered an industrial injury in 1974, that this injury had not led to any organic disability but that he suffered from a psychiatric condition, on which medical specialists expressed different opinions. The condition was described as a 'severely disabling anxiety neurosis', schizophrenia, 'inadequate personality and anxiety symptoms', and an 'abnormal illness behaviour'. None of the medical specialists maintained that Adamovic was malingering.

The Tribunal said that, whatever medical condition Adamovic suffered, the consequence was that he was a sick person. Apart from some part-time work, he had been living an invalid role for almost 10 years; he had received an invalid pension for 5 years and sickness benefit for 3 years: 'Thus his adoption of that invalid role has been confirmed', the Tribunal said.

Having noted that, in order to qualify for an invalid pension, Adamovic's incapacity must result from his medical condition, the Tribunal said:

> It must be borne in mind that in a case such as the present one, where the applicant's medical condition is essentially psychological, 'a lack of any genuine interest in obtaining paid employment' may itself form part of that medical condition. Even in such case that lack of interest may be soundly based in a realistic appreciation by the applicant that in fact he will never again be able to attract an employer prepared to engage and remunerate him.

(Reasons, para. 28)

This, the AAT said, was one of those cases referred to in *Vranesic* (1982) 10 *SSR* 95: Adamovic's 'perception of himself (rightly or wrongly) as an invalid incapable of work, [had] become so entrenched and so ineradicable as to itself constitute a psychological condition which [destroyed] the person's capacity for work'.

A further factor which affected Adamovic's incapacity for work was the successful worker's compensation claim which he had made following his 1974 injury. That claim, combined with Adamovic's complaints of continuing back pain, would reduce his prospects of finding an employer willing to hire him.

JOSEPH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/428)

Decided: 29 June 1984 by R.C. Jennings.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 51-year-old former clerk who had suffered a neck injury in 1975.

The Tribunal found that Joseph had only a moderate organic disability and that his complaints of pain and immobility were based on conscious exaggeration. The Tribunal said that, unlike the applicant in *Batzinas*, Joseph had 'not become a mental invalid'; nor was there any 'evidence such as was adduced in [*Alchin* (1984) 19 *SSR* 206] that a combination of organic and psychological factors [had] rendered the applicant totally incapacitated for work.'

The Tribunal noted that Joseph was qualified to work as a clerk and as an interpreter, being fluent in English, Arabic and Asyrian;

> 42. I regard this as a case in which it would be appropriate to require the applicant to test the market. I believe he should be required by reason of the conditions imposed on persons who are granted unemployment benefits to take continuing reasonable steps to secure employment . . .

CHEHADE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/342)

Decided: 16 May 1984 by B.J. McMahon, M.S. McLelland and I. Prowse.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 61-year-old man who had worked in Australia as a cleaner though he had been in a clerical position in his native Middle East. He suffered from arthritis, diabetes and a depressive anxiety state.

The possibility of the applicant obtaining work as a translator was canvassed. (He spoke five languages.) The Tribunal heard evidence from a CES employment officer that described

> Mr Chehade's prospects of employment as: 'remote', 'negligible' and 'very remote'. The negligible opportunities available to a 61-year-old man are . . . cancelled by any physical ailments that may afflict him. His talents with languages would not increase his prospects as . . . younger persons would always be preferred for the few jobs available that might require such talents.

(Reasons, p. 8)

The AAT concluded that he no longer had the ability to attract an employer who was prepared to engage and remunerate him.