Invalid pension: permanent incapacity

WILLIAMSON and SECRETARY TO DSS (No. N83/291)

Decided: 8 March 1985 by B. J. McMahon.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 59-year-old man, who suffered from 'attacks' which produced debilitating symptoms, but whose medical cause could not be identified. As a result of his condition, Williamson had been obliged to give up his mixed business and had not worked since 1979.

The AAT accepted that, whatever the final diagnosis of Williamson's condition, he was more than 85% incapacitated for work. It said that his prospects of obtaining employment were remote, because of his age and the history of disabling attacks. The AAT noted that, in *Redding* v *Lee* (1983) 47 ALR 241, Brennan J had said that, when assessing eligibility for invalid pension,

> the state of the labour market reasonably accessible to a claimant is an indispensable consideration in ascertaining his qualification.

In the present case, evidence given by a CES officer established that the labour market for people over 45 years of age with a disability was extremely poor.

The AAT rejected a DSS argument that Williamson might be able to run a mixed business with the help of his wife:

> What the argument boils down to is the suggestion that the applicant is capable of part-time work which, because of the help of his wife, could be converted into joint full-time work. This is not what 'work' means in sections 23 or 24 of the *Social Security Act*. 'Work' means full-time work. If a person is able to carry out work only with the help of another person then he is still incapacitated for that work.

GALEA and SECRETARY TO THE DEPARTMENT OF SOCIAL SECURITY (No. N82/222)

Decided: 4 January 1985 by R.K.Todd.

The AAT *affirmed* a DSS decision to cancel an invalid pension held for some 5 years by a 48-year-old former factory worker and labourer, who complained of disabling back pain.

The medical evidence (from 9 medical practitioners) showed no more than a slight degree of disability. It followed, the AAT said, that this case was dependent on establishing that there was a sufficiently severe psychiatric or psychological disorder, so 'that the applicant's physical disabilities are thereby translated into an incapacity for work to the required extent in the sense understood by the Tribunal in a series of cases, commencing with *Panke* (1981) 2 *SSR* 9': Reasons, para. 14.

However, the Tribunal said, none of the psychiatric evidence established a substantial psychiatric or psychological disorder and the AAT concluded that Galea's –

> disability derives predominantly from his own satisfaction that he is sick and unable to work . . . The major factors in his present condition are the state of the employment market and the state of his own presentation to prospective employers which, I am confident, is such as to reflect his own satisfaction of the low state of his physical capabilities.

The Tribunal adopted the point made in *Sheely* (1982) 9 *SSR* 86 that a 'permanent incapacity' must result from a medical disability – that is, 'the medical disability . . . must be of such significance that the incapacity can be said to arise from the medical condition.'

The Tribunal also adopted a statement from *Box* (1984) 22 *SSR* 261 where the AAT had said that 'mere inability to obtain employment because of the state of the labour market' could not form the basis of a finding of 'permanent incapacity for work'.

While there was a degree of genuine disability in the present case, that disability was no more significant than the 'voluntary aspects of his symptomatic presentation or the state of the labour market.' His situation might change but, before the AAT could conclude that he was permanently incapacitated for work, 'more supportive psychiatric evidence than appears presently available would be needed': Reasons, para. 17.

GALVIN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q84/147)

Decided: 29 January 1985 by J.A. Kiosoglous, D.J. Howell and W.A. DeMaria.

The AAT *affirmed* a DSS decision to cancel an invalid pension held by a 50-year-old man who suffered from ischaemic heart disease and a paralysed right arm.

The unanimous medical opinion was that Galvin's impairments made him at least 85% permanently incapacitated for work. But Galvin told the AAT that he was working some 5 to 12 hours a week as office manager of a real estate agency, for which he was paid $270 a week. The AAT pointed out that, in *Panke* (1981) 2 *SSR* 9, the Tribunal had said that

> in order to qualify for an invalid pension medical evidence must support a physical impairment. Clearly this has been done in Mr Galvin's case. Secondly, however, the effect of the physical impairment on a person's ability to engage in paid work must be looked at. In the case at hand, Mr Galvin, despite suffering from physical impairment as outlined by the medical practitioners, is engaged in paid work.

(Reasons, para. 35)

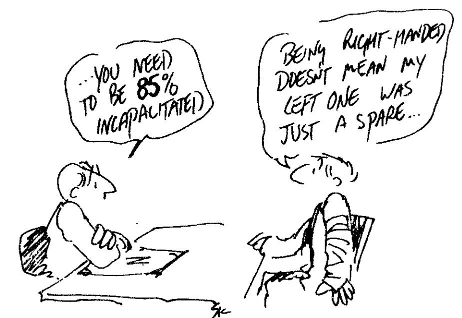
The AAT also referred to the earlier decision in *Kenna* (1983) 5 ALN N297 where the Tribunal had said that the necessary incapacity for work could not be conceded 'when a person is continuing to work effectively, even if under very great difficulties, at a skilled trade in which he has worked for many years.'

The AAT said that Galvin had shown an ability to work and, therefore, he could not be described as permanently incapacitated for work to the necessary extent to qualify for invalid pension.

Moreover, the AAT said, it did not follow that Galvin's pension should be restored if he stopped working:

> The applicant has displayed an ability to attract an employer despite his physical disabilities. Should these physical disabilities, however, render Mr Galvin unable to carry out his work or unable to carry out his work to the satisfaction of his employer, then the matter would require reconsideration.

(Reasons, para. 58)



FOX and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N84/315)

Decided. 21 January 1985 by B.J.McMahon.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 48-year-old man who worked as a brick layer for 20 years but who had lost the use of his left arm because of fibrositis and arthritis.

The AAT rejected a DSS submission that Fox had demonstrated that he was capable of working because he had, with the help of his wife, operated stall at a Sunday market for some 2 or 3 months. The Tribunal rejected this argument on two grounds:

> Firstly, work that can only be performed with the help of another person is not work within the meaning of section 24 of the Act. The work for which a person must be permanently incapacitated must be work that the applicant can carry out entirely by himself . . .
>
> Secondly, the stall in question was operated only on Sundays . . . It could not be said that this occupation is a full-time occupation as usually understood. 'Work' in section 24 means full-time work.

SANGRICOLI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q83/114)

Decided: 5 December 1984 by J.B.K. Williams.

The AAT *affirmed* a DSS decision to cancel an invalid pension held by a 47-year-old man who suffered a back injury, which prevented him from performing heavy work.

Sangricoli owned a 56-acre farm, which was planted with grape vines and fruit trees. The farm was worked by his two sons under Sangricoli's supervision, to which Sangricoli devoted 3 to 4 hours a day.

The AAT noted that the question of incapacity for work usually arose 'in the context of an employer/employee relationship, where the question has arisen of the ability of the disabled person to attract an employer who is prepared to engage him.' Here the applicant was self-employed, managing and supervising the farm. For that reason, he could not be considered as incapacitated for work:

> It seems to me that he is carrying out many of the functions that he has carried out for many years and that the only part of his former activities in which he does now engage is heavy physical work. This is now, apparently, carried out by his sons. This, to my mind, is not an unusual situation in a family business where young and active sons carry out physical work with which parents, advancing in years, find difficulty in coping.

(Reasons, p. 10)

WILLIAMS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N84/270)

Decided: 11 December 1984 by R. Balmford.

The AAT *set aside* a DSS decision to reject a claim for an invalid pension lodged by a 33-year-old man who suffered from epilepsy.

Williams had worked in a variety of unskilled occupations since 1968 but had been unemployed since 1979. He was currently living in Broken Hill, caring for his elderly father.

The AAT was told that Williams had applied for jobs without success; that his epilepsy ruled out much of the work for which he was qualified and made it unlikely that he would be offered employment; and that there was an accute shortage of jobs in Broken Hill.

The AAT said that Williams' case had to be considered on the basis that he lived in Broken Hill: it was his family home and he was the only person available to care for his father. Taking into account his medical condition and the employment situation in Broken Hill, the AAT was satisfied that he had lost his capacity to attract an employer and was therefore permanently incapacitated for work.

During its Reasons for Decision, the AAT examined the form letter sent to Williams when his application had been rejected by the DSS. This letter had emphasised that eligibility for invalid pension depended on the claimant having 'a significant physical or mental disability', which, along with other factors, such as age, sex, education and lack of skills, made the person 'unfit for work'.

The AAT said that, while this was a sincere attempt to explain the basis for the DSS decision, the form letter was 'simply wrong' as a summary of the tests of permanent incapacity:

> 16. Without wishing to analyse in detail the errors apparent in this letter, I should point out that the draftsman of the form letter has overlooked the fact that eligibility for invalid pension, as interpreted in the cases, beginning with *Panke* (1981) 2 *SSR* 9, is not related to incapacity to perform work as such, but to incapacity to obtain employment.

TRENGOVE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/818)

Decided: 11 December 1984 by R. Balmford.

The AAT *set aside* a DSS decision to reject an application for invalid pension lodged by a 49-year-old former miner, who had defective eye sight and hearing and who suffered from lower back pain and depression.

The AAT accepted medical evidence that Trengove could undertake no work which involved decision-making, responsibility, heavy lifting or bending or working in a dusty atmosphere.

Trengove had lived all his life in Broken Hill, where there were 1265 unemployed men and 62 job vacancies (for both men and women). A local union official said that there was, in his opinion, no chance of Trengove finding a job, given his disabilities.

The AAT said that Trengove's position had to be considered on the basis that his home was in Broken Hill; and it referred to *Bavcevic* v *Commonwealth* (1957) 98 CLR 296, where two High Court justices had said, when discussing a person's capacity to find work in the labour market:

> In many places in Australia avenues of employment can hardly be dignified by such terms [as 'labour markets']. Yet one can hardly expect the injured man to change his habitat in search of work . . .
>
> The 'concomitant conditions' in which the capacity is to be exercised must be judged reasonably in accordance with common conceptions of what is customary in travelling to work or in the movement of labour when suitable work is available elsewhere although not at hand.

After declaring the employment situation in Broken Hill should not be overemphasized, the AAT said that Trengove's incapacity derived from his medical condition in combination with that employment situation.

ALLBON and SECRETARY TO DSS (No. N83/533)

Decided: 17 January 1985 by A.P. Renouf.

The AAT *varied* a DSS decision to reject a claim for invalid pension lodged by a 38-year-old former carpet-layer, who had been injured in a car accident in 1981. There was, the AAT said, an unusually direct conflict in the medical evidence in this case. One orthopaedic specialist called by Allbon said that he would not 'be able to return to the workforce at any time in the future in any worthwhile capacity.' But another orthopaedic specialist, who had examined Allbon on behalf of the DSS, said that he was able to work full time in a light job.

The AAT said that it was impossible to resolve the conflict between this medical evidence and it was –

> extremely difficult at present to reach a decision whether Mr Allbon's incapacity for work is permanent, whether this medical disability is significant enough to attract the invalid pension or whether that incapacity is of the order of 85% or more.

This difficulty, the AAT said, was compounded by the fact that Allbon had failed to attend a rehabilitation programme which had been arranged for him. The AAT said that, in the absence of some assessment of Allbon's rehabilitation potential, it could not decide his entitlement to invalid pension.

Accordingly, it set aside the decision under review and remitted the matter to the Secretary, with a direction under s.135M(1) of the *Social Security Act* – that an invalid pension was not to be granted unless Allbon received suitable rehabilitiation treatment.

Unemployment benefit: industrial action

HENNESSY and OTHERS and SECRETARY TO THE DSS (Nos. A8/54, 57, 58 and 65)

Decided: 4 January 1985 by R.K Todd, P. J. Gibbes and H. N. Pavlin.

The four applicants had been employed on the new Parliament House construction site in Canberra, three as members of the Builders Labourers Federation (BLF) and the fourth as a member of the Building Workers Industrial Union (BWIU)

At the beginning of 1984, the Trade Unions on the site made a claim on their employers for severance pay and, when this was not granted, placed 'black bans' on selected areas within the site.

Before the AAT, there was some dispute as to what happened next. However, the AAT approached the matter on the basis that each of the applicants was then dismissed by his employer; and the AAT found that these dismissals occurred for reasons directly related to industrial action; but that none of the applicants had been engaged in that industrial action. Following their dismissal in February 1984, two of the applicants remained unemployed until work resumed on the site in May 1984; but the other two applicants obtain-