Income test: nett or gross income?

HALDANE-STEVENSON v DIRECTOR-GENERAL OF SOCIAL SECURITY
Federal Court of Australia (Full Court)

Decided: 7 June 1985 by McGregor, Davies and Pincus JJ.

This was an appeal from a decision of a single judge of the Federal Court, affirming a decision of the AAT (noted in (1984) 19 *SSR* 205). The central question before the Tribunal and before the Federal Court related to the calculation of Haldane-Stevenson's income for the purposes of the age pension income test. Haldane-Stevenson argued that, in calculating the level of his income, the DSS should deduct expenses which he had incurred in researching and writing a book, which he expected to publish in several years time.

For the purposes of the income test, 'income' was defined in s.18 of the *Social Security Act* (see now s.6) as

> any personal earnings, moneys, valuable consideration or profits earned, derived or received by [a] person for his own use or benefit by any means from any source whatsoever . . .

Nett Income
The Court said that, although the definition of 'income' in s.18 did not mention expenses or deductions, these should be taken into account when calculating a person's income. McGregor and Pincus JJ said:

> Having regard to the purpose of reducing the pension by reference to income earned, we are of the view that, at least in general, nett income is meant.

And Davies J said:

> [T]he *Social Security Act* is an Act which provides for income maintenance. It would not be consistent with this concept to bring into account gross income rather than nett income, the latter being the sum which is available for the maintenance of the pensioner.

Expenditure must relate to current income
However, the court insisted that, before expenses could be deducted from a person's income for the purposes of the social security income test, those expenses must relate to some current income and not to hypothetical future income. McGregor and Pincus JJ referred to observations by the High Court in *Harris* v *Director-General of Social Security* (1985) 24 *SSR* 94 to the effect that a pensioner's 'annual rate of income' was to be determined on the basis of 'the pensioner's sources of income at that time'; and McGregor and Pincus JJ continued:

> This statement and our own appreciation of the definition of income suggest to us that there must be income and not notional or anticipated income, which a court may have regard to before account is to be taken of deductions referable to that income which may then determine the true rate of that income.

(Judgment, pp.4-5)

The court also emphasized that the approach developed for the purposes of the *Income Tax Assessment Act* 1936 (which allowed expenses related to future income to be deducted from current income) was not relevant to the *Social Security Act*. McGregor and Pincus JJ said:

> [W]e are of the view that, whatever might happen for the purposes of the *Income Tax Assessment Act*, deductions of the kind here sought to be taken into account are not to be considered unless there is income with which they are associated.

(Judgment p.4)

Formal order
The Federal Court dismissed the appeal.

Background

INCAPACITY FOR WORK: HOW CRITICAL IS THE MEDICAL CONDITION?

In an earlier issue of the *Reporter* we discussed the interaction between an individual's medical impairment and the current structural changes in our industrial economy. These factors had troubled the AAT: to what extent could the structural changes be used to 'qualify' a person for invalid pension? (See 'Incapacitated for work: What happens when the work dries up?' (1984) 18 *SSR* 190.)

Our conclusion at that time was that

> . . . 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.

Recent AAT decisions suggest that the controversy continues and that, so far as the Tribunal is concerned, the difficulties remain unresolved.

Sommerfeldt
In *Sommerfeldt* (1985) 25 *SSR* 306, the AAT affirmed a DSS decision to refuse an invalid pension to a 61-year-old man who suffered from chronic obstructive airways disease and a moderate back disability.

Although Sommerfeldt had a capacity for sedentary or semi-sedentary work, he had sought employment without success for the past three years.

The DSS had argued that the applicant's medical condition was not the 'significant' factor in preventing him from returning to work; and that the age of the applicant was the main factor preventing him from obtaining employment.

The AAT accepted that line of argument, deciding that Sommerfeldt's incapacity for work was due to his age and current economic conditions. While the Tribunal conceded that Sommerfeldt's medical problems were permanent, it nevertheless held

> that they are not a material factor in his inability to find work, let alone a factor 'of such significance that the incapacity can be said to arise or result from the medical condition' (*Re Sheely, Re Martin*).

(Reasons, para. 25)

The case was, the AAT said, similar to *Fraser* (1983) 17 *SSR* 117, where the AAT had recognised that economic conditions would increasingly render persons aged over 50 virtually unemployable once made redundant. In *Fraser* (and in *Sommerfeldt*) the Tribunal called for a new 'unemployability' benefit to cater for such people, rather than what it saw as an artificial stretching of the concept of the invalid pension.

Boglis
In *Boglis* (1985) 25 *SSR* 306, the AAT set aside a DSS decision to refuse a invalid pension to a 61-year-old former waterside worker who had accepted early retirement.

As in *Sommerfeldt*, the DSS argued that the real cause of the applicant's incapacity for work was his age.

In this matter the AAT was able to say that Boglis' medical condition showed that he was incapacitated for work. Non-medical factors did not have to be considered.

However, the Tribunal apparently accepted an argument put forward by the DSS that, where medical and non-medical factors were involved, it should look for the 'primary cause' of an incapacity:

> The Tribunal must decide whether the medical disability or the age is the primary reason for the applicant's inability to attract an employer and that the applicant would only be qualified for invalid pension if the primary reason were found to be the medical incapacity.

(Reasons, para. 14)

Comment
The persistence of the difficulties surrounding non-medical factors in assessing permanent incapacity is puzzling.

In some cases the AAT appears to conduct a 'balancing act' in determining whether the medical condition is 'material' and 'significant' (as in *Sommerfeldt*), while in other cases the test appears to be the more flexible approach of what is the 'primary' or initial cause of the incapacity (as perhaps in *Boglis* or *Stamberg* (1984) 18 *SSR* 186).

It is submitted that this second approach is the correct approach. The seriousness or extent of a medical condition should not be critical to determining incapacity. A minor medical problem may lead to a person becoming incapacitated for work in the context of contracting job opportunities for that person, caused by structural changes in the economy.

The confusion seems to arise from two sources. The first is the comment, in an earlier AAT decision, on the relevance of non-medical factors in assessing incapacity. In the often cited *Sheely* (1982) 9 *SSR* 86, the Tribunal said:

> . . . 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.

This passage has been interpreted as meaning that the medical condition must, in a sense, lead directly to the incapacity for work. It appears to ask whether the medical condition was a 'substantial' cause of the incapacity.

Another reading of the passage equates with the more flexible approach suggested above. As *Sheely* suggests, if the medical condition is 'of such significance that the incapacity can be said to *arise or result* from the medical condition', it can be argued that a relatively minor medical condition may lead to a person becoming so disadvantaged in a depressed labour market that he or she becomes virtually unemployable (and so incapacitated for work).

The second source of confusion arises from the very notion of 'incapacity'. The link between incapacity and invalid pension has given rise to the view that medical factors are the main concern in examining the question of incapacity (see for example the passage from *Sheely* above).

This allows notions of 'serious' as opposed to 'minor' medical conditions to come into play which in turn permits the Tribunal to select the persons to whom the term 'invalid pensioner' fits most appropriately (to paraphrase *Sheely*).

Popular notions of 'invalid' have no place in determining qualification for invalid pension under s.23 of the *Social Security Act*. A consequence of our industrialized society and economic system is both a demand for fit and able workers and a pool of unemployed persons. If a person suffers from *any* medical condition which places them at a disadvantage in that context so that they become virtually unemployable, then suffering from that permanent incapacity they should be qualified to receive invalid pension.

B. S.