daughter provided her mother with suitable shelter. Even after Burman had left the house, the monthly payments to her of $200 should be seen as a gift or allowance. It was made—

> pursuant to a family arrangement assisting the applicant to have necessary shelter and to which the financial terms were not of the essence.

The fact that Burman's son-in-law was a party to the agreement under which she received this gift or allowance did not affect the fact that it was a benefit provided to her by her daughter. Accordingly, the benefits received by Burman under the agreement fell outside the definition of 'income' in s.18.

Formal decision

The AAT set aside the decision under review and substituted a decision that the benefits received by Burman should not be taken into account in determining her income for the purposes of the age pension income test.

Invalid pension: permanent incapacity

ROESLER and SECRETARY TO DSS (No. S84/94)

Decided: 24 July 1985 by J. A. Kiosoglous.

The AAT *set aside* a DSS decision to reject an application for an invalid pension lodged by a 45-year-old man who had worked for some 30 years in the Whyalla region of South Australia.

The bulk of Roesler's employment had been as a plumber but, towards the end of his career, he had been employed in a supervisory clerical position. In 1982, he had suffered an injury to his right elbow and, when his employer had assigned Roesler to labouring work in March 1983, he had resigned from that employment. He had not worked, but had been on sickness benefits, since then.

According to the medical evidence, Roesler had a permanent disability in each of his elbows and right shoulder, largely due to the heavy work he had done as a plumber. As a result, he was unable to work as a plumber or to engage in manual labour or clerical duties involving extensive writing.

The Whyalla CES told the AAT that the labour market in that region was very depressed, with about 25% of people in the employment market unemployed. Because Roesler was in receipt of sickness benefit, the CES would not refer him to any prospective employers.

The AAT said that many of the cases coming before it in the invalid pension area were now 'marginal cases', with applicants who had relatively minor disabilities which might be translated into an 85% permanent incapacity for work when other factors were taken into account. Although the rate of invalid pension appeals was settling down,

> the trend towards more marginal cases places a greater responsibility upon the Tribunal to gather together and refine the existing and accepted principles in order to arrive at 'an equation . . . involving a sensitive balance of fact and theory' in each particular application . . .

The Tribunal noted that its earlier decisions had pinpointed a number of problem areas and laid down principles to deal with such matters as permanence, percentage assessments, non-medical factors, psychological illnesses and disorders, rehabilitation, self motivation and mobility (both physical and geographical). The Tribunal continued:

> Any or all of these and other potential areas may present themselves in a particular application for review. The more marginal the case, the more likely they are to arise. As the trend continues towards the more difficult 'marginal' cases, the Tribunal is faced with the task of going beyond the application of the established general principles and of the settled collateral or incidental matters to then be in a position to isolate the potential problem areas arising out of a particular application.

In the present case, the AAT said, the major question was whether the variety of non-medical factors made Roesler at least 85% incapacitated for work. (The AAT concluded that, whatever incapacity Roesler had, his incapacity should be regarded as permanent.)

The AAT accepted that, given Roesler's extensive experience, he did have some residual physical capacity for work; but that capacity 'must be translated into the relevant context, taking the "whole person" of the applicant in the circumstances in which he finds himself'. The type of 'light duties' work for which Roesler retained some capacity was unlikely to be available in the Whyalla region and, if available, unlikely to be offered to a person of Roesler's age suffering from some residual disability which carried with it the inevitable workers' compensation risks. It was possible that if Roesler moved to a different locality, such as Adelaide, he would be successful in finding a job in which he could use his residual capacities. However, the AAT said, it was not reasonable to expect Roesler to move himself and his family from Whyalla where he had lived for 44 years.

The AAT concluded that, on balance, Roesler's medical disabilities, rather than any other factor, such as the state of the labour market, made the difference between him working and not working (and the Tribunal referred to *Howard* (1983) 13 *SSR* 134); and those disabilities were 'of such significance that the incapacity can be said to arise or result from the medical condition' (*Sheely* (1982) 9 *SSR* 86).

Although Roesler's physical disability might be regarded as a relatively minor one, in an employment context, when considered against the types of work for which Roesler was qualified and had performed, that disability incapacitated him for work to the extent of 85%, although this was a marginal case.

ALAM and SECRETARY TO DSS (No. N83/697)

Decided: 1 July 1985 by J. A. Kiosoglous.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 44-year-old man who had not worked since injuring his back in 1973.

Alam told the AAT that, since he had injured his back, he regularly suffered acute pain and was unable to sit, stand or walk for extended periods. He also claimed that he was sensitive to noise and suffered from frequent headaches.

According to the medical evidence, Alam suffered from a moderate to significant degree of back disability which left him with, at best, a capacity for light or restricted work which did not involve bending or lifting.

A CES officer described Alam's chances of finding employment as 'extremely difficult' if not virtually impossible, given his disability, the duration of his unemployment and his relatively poor English.

A psychiatrist told the AAT that Alam suffered from a mild personality disorder, as a result of which he had adopted a sick or invalid role reaction to his physical injuries. That reaction showed up in some of Alam's physical symptoms.

The Tribunal concluded that the cumulative effect of Alam's physical and psychological problems (which had been entrenched over the long period of his absence from the workforce) rendered him unable to attract an employer willing to employ him. Referring to the personality disorder from which Alam suffered, the AAT said:

> Although I am satisfied that such personality problems of themselves would not render the applicant permanently incapacitated for work to the requisite degree in the absence of any other physical disability, such a finding can be no more than mere hypothesis for the physical disabilities to exist and the psychological problems must be considered in conjunction with them.

DOUBLET and SECRETARY TO DSS (No. S84/76)

Decided: 11 July 1985 by J. A. Kiosoglous. The AAT *affirmed* a DSS decision to reject the claim for invalid pension lodged by a 57-year-old man who had worked as a welder and bricklayer until 1980.

He had stopped working then in order to care for his son, who suffered Downs syndrome.

Doublet had undergone operations to remove cataracts from each of his eyes in 1982 and 1983 and, following that operation, his eyesight had deteriorated. He was unable to tolerate bright light, he had a 30° angle of vision, could not see more than 4 metres ahead and could no longer judge distances. In addition, Doublet had developed arthritis in his hip and back which made it difficult for him to stand for long periods or to bend.

The medical evidence given to the Tribunal showed that Doublet had some handicap in his vision which could be improved if he were to wear soft contact lenses; and the consensus of medical opinion was that, although Doublet was incapacitated for some types of work, there were many varieties of work which he could undertake.

The Tribunal concluded that Doublet was not permanently incapacitated for work to the extent of at least 85%:

> [T]he applicant's voluntary retirement and continuing absence from the workforce were substantially motivated by his choice to stay at home to look after his sone while his wife was working. I am further satisfied that the difficulties that the applicant experienced in attracting an employer at all relevant times did not result substantially from difficulties which truly reflect an incapacity for work but resulted rather from difficulties which merely reflect an inability to exploit a capacity for work due to depressed job opportunities and the results of a lack of any genuine interest in obtaining paid employment . . .

CORINO and SECRETARY TO DSS (No. N84/79)

Decided: 11 July 1985 by J. A. Kiosoglous. The AAT *affirmed* a DSS decision to reject an application for invalid pension lodged by a 45-year-old man who had worked in a variety of semi-skilled occupations until 1980, when he had suffered a retinal detachment.

Medical evidence given to the Tribunal established that Corino had a substantial visual impairment, with his uncorrected sight being less than 6/60 and his corrected sight being better than 6/60 in each eye. He was incapacitated for any work which required close visual work or heavy lifting (because of the risk of a recurring detachment of his retina) but he was capable of performing other work.

Corino had made extensive efforts to obtain employment over the period between 1981 and 1985 but had not been offered any employment.

The Tribunal concluded that Corino could not be considered 'permanently blind' on the Snellen Test which had been applied by the Tribunal in *Touhane* (1984) 21 *SSR* 239.

Nor, according to the AAT, was Corino permanently incapacitated for work to the extent of 85%. He retained a 'total capacity in respect of any type of work that does not involve close vision or heavy lifting':

> In short, there are a number of job categories in which the applicant is capable of performing satisfactorily using his residual capacities and for which it cannot be said that it is his medical problems which make the difference between his working and his not working, but rather a combination of other factors such as age, insufficient relevant experience and the state of the labour market.

REEVES and SECRETARY TO DSS (No. N83/351)

Decided: 12 July 1985 by R. K. Todd.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 38-year-old man who had worked as a labourer until a series of back injuries had obliged him to stop working in 1977.

According to the medical evidence, Reeves suffered from spondylolisthesis, which produced severe pain in the lower back and prevented him from performing work involving bending or heavy lifting.

Reeves had undergone a rehabilitation programme which had been successful; and he had been recommended as suitable for clerical work, provided that he underwent a further education programme. However, Reeves was unable to attend an eduation programme because he and his wife and children lived some 65 kilometres from the nearest substantial town and his back condition made it very difficult for him to sit for any extended period.

The AAT concluded that Reeves was permanently incapacitated for work. Although the rehabilitation programme had indicated that there was work for which Reeves had a capacity, this capacity should be regarded as purely theoretical, given Reeves' health, his work history and his environment:

> 14. The reason of course for describing the applicant's ability to work as theoretical is that it is clear that the likelihood of his finding in the Grafton area the kind of work which his rehabilitation opened for him is virtually non-existent . . . I have no doubt whatsoever there is no question of a person in the present applicant's situation being under any obligation to move from his lifelong domicile to another environment in the slender hope that his briefly tested capacity for work can be fulfilled by the finding and holding, of remunerated employment of such a kind.
> a kind.

(Reasons, paras 14, 15)

COMMONS and SECRETARY TO DSS (No. N83/540)

Decided: 3 July 1985 by J. A. Kiosoglous.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 49-year-old woman who had worked in a variety of sales occupations between 1950 and 1975, when she was granted an invalid pension on the basis of several physical and psychological complaints. She worked for two months in 1980 and, after a medical review in June 1982, the DSS decided to cancel her pension.

Commons had a long history of physical illness and psychological problems. In 1967 she suffered a cerebral haemorrhage and a severe nervous breakdown; in 1971 she had been raped by an intruder; in 1981 she had suffered injuries to her hip and ankle; and in 1983 she had experienced severe stress because of her sister's death.

According to the medical evidence, she now suffered from hypertension, mild asthma and problems in her ankle which interfered with her ability to sustain a normal work effort. She also suffered from a personality disorder of long standing which gave her a low tolerance to stress. There was some conflict between the psychiatric evidence given to the Tribunal, with one psychiatrist saying that Commons retained her capacity for work; but another psychiatrist said that her psychological disorder meant that she could not hold a job in the open labour market.

The Tribunal concluded that, because of her psychological disorder (which was likely to remain with her for the rest of her life), Commons was not able to hold any employment for more than two months at a time. The Tribunal continued:

> I do not regard it as profitable in the present application to attempt a quantitative analysis of whether an ability to work only two or three months in a year, for example, constitutes greater or less than 85% incapacity for work. If a situation arose of an applicant who was demonstrably able to work one month on, one month off for example, with rest and recupteration in between in respect of either physical or psychological problems, assuming such work was available, it should be accepted that such an applicant should not qualify for an invalid pension. However that is not the case with the present application which must be examined on its particular facts. The applicant has only been employed for two or three months in the last ten years. On the evidence before me I am not satisfied that the applicant is well enough emotionally and psychologically to cope with the strain of full-time employment in the open labour market.

GRIGOR and SECRETARY TO DSS (No. S84/126)

Decided: 8 July 1985 by J. A. Kiosoglous, D. C. Lock and J. T. B. Linn.

The AAT *set aside* a DSS decision to reject an application for invalid pension lodged by a 33-year-old man who had worked in a variety of unskilled occupations until injured in a motor vehicle accident in 1982.

As a result of his injuries, Grigor now suffered pain in his neck and left knee which prevented him from lifting heavy weights or standing for extended periods. The AAT accepted that Grigor's physical impairments, a depressive illness and his limited employment skills and education produced a permanent incapacity for work of at least 85%.

The Tribunal commented on the practice adopted by medical practitioners of describing a person's incapacity in percentage terms:

> It is apparent that medical witnesses before this Tribunal tend to show an educated but approximate and incomplete understanding of the statutory percentage required of not

less than 85% of permanent incapacity for work. This is not surprising. 85% appears to be a magic figure. It is not so. Section 23 of the *Social Security Act* 1947 does no more than ameliorate the provisions of s.24 of that Act. It is considered that medical witnesses when asked to make percentage assessments should be asked to do so only in relation to matters in which they are aware of medical guides . . . such as in relation to angular loss, rotational loss, loss of function and so forth. When questioned in relation to matters beyond these matters, questions leading to arbitrary percentage assessments should be avoided where possible. The variety of factors which the individual witness may take into account often leads to confusion. Percentage assessments which go above and beyond purely medical percentage assessments are best left until final legal argument.

(Reasons, para. 18)

RAKETIC and SECRETARY TO DSS (No. N83/677)

Decided: 9 August 1985 by R. A. Hayes, D. J. Howell and M. S. McClelland.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 39-year-old former labourer and truck driver who had not worked since injuring his back in 1975.

According to the medical evidence, Raketic complained of severe pain and restricted movement which was out of proportion to the signs of impairment to his back and knee. Those impairments left him with a residual capacity for light work. But, according to a neuro-psychological assessment, Raketic's low intelligence, illiteracy, lack of skills and prolonged absence from the workforce meant that he was unlikely to find suitable employment.

The AAT referred to a substantial body of research material on pain, particularly functional pain, and expressed the following conclusion:

> An hypothesis open on the evidence, and supported by research into pain, is that the applicant is continuing to experience persistent pain because of psychological factors such as loss of provider status, family investment in the patient role, unsuccessful surgery, and depression generated by the circumstances in which he now finds himself. Indeed, taking the evidence as a whole, and in light of the research into the difficulties of assessing pain, the Tribunal is satisfied that this hypothesis is far more likely than that suggested by the respondent, namely that the applicant is consciously lying and simulating his disability.

(Reasons, para. 17)

A conclusion that Raketic was genuinely incapacitated by his symptoms of pain rather than that he was a malingerer, the AAT said, 'represents the triumph of scientific research over prejudice': Reasons, p.18. In the present case, because Raketic's symptoms of pain were sufficient severely to limit his work capacity and substantially to remove any motivation which he might have to seek work, he should be regarded as permanently incapacitated for work to the extent of at least 85%.

FRENDO and SECRETARY TO DSS (No. N84/456)

Decided: 18 July 1985 by B. J. McMahon, J. H. McClintock and J. B. Nicolls.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 38-year-old woman who had last worked in 1970.

Frendo had migrated to Australia in 1965 and worked for some 4 years until she suffered an industrial accident. She then gave up work and, shortly afterwards, married her present husband. She gave birth to 2 children (now aged 16 and 19). In 1972 Frendo suffered further injuries in a motor vehicle accident.

The AAT accepted medical evidence that, because of her injuries Frendo now suffered from a variety of disabilities which prevented her from performing the only type of work of which she was capable. The AAT accepted that her condition was likely to persist into the indefinite future and that she was, accordingly, permanently incapacitated for work to the extent of at least 85%.

The Tribunal then considered the question whether a person, who had been absent from the workforce for a prolonged period, could qualify for invalid pension. The Tribunal noted that the problem of a non-working applicant for invalid pension had been referred to in *Monteleone* (1984) 22 *SSR* 261 and in *McDonald* (1984) 21 *SSR* 241. The AAT observed:

> It must be demonstrated that it is the combination of the medical disability and personal factors that incapacitates an applicant for work. If she cannot or does not work for some other reason, for example a lack of desire or a desire to do duties other than paid work, then she is not qualified.

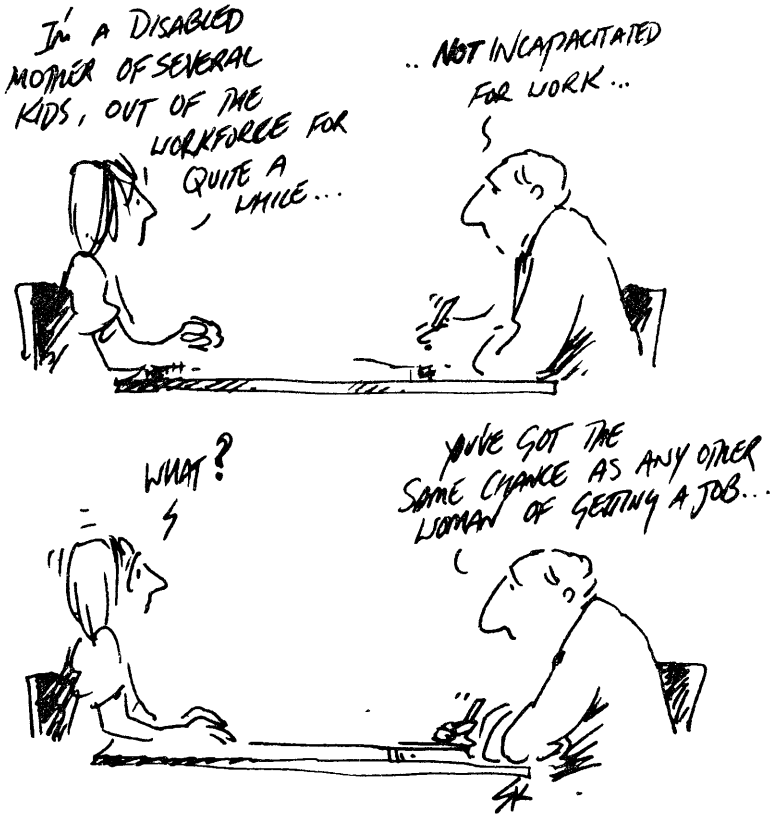
However, the AAT said, an argument raised on behalf of Frendo, that a person who did not wish to enter the workforce would be qualified for invalid pension if he or she had an 85% incapacity for work, 'reached an unacceptably extreme conclusion'. After referring to *Sheely* (1982) 9 *SSR* 86, the Tribunal continued:

> If the loss of capacity therefore is brought about by causes lacking any medical content or significance, then it is not incapacity within the meaning of the statute. The sections contemplate the existence of an invalid, the meaning of which has been extrapolated over many decisions of this Tribunal. They do not contemplate a person who (for no physical reason) does not wish to work or who would find work inconvenient or who has reasons other than medical reasons for not wanting to or not being able to work.

However, the AAT accepted that invalid pension should not be limited to '*bona fide* workers'. For example, severely disabled children would qualify for invalid pension when they reach the age of 16. And a woman, whose children had grown up and who wished to enter or re-enter the workforce, should qualify for pension if she was unable to obtain any employment because of physical disabilities:

> If, however, she did not or could not work only because she wished to look after her children, then the reasoning referred to above would apply. She would not be permanently incapacitated for work as the phrase has come to be understood.

In the present case, however, the evidence established that, at the moment, Frendo should not be regarded as having withdrawn from the workforce. It was a combination of her medical disabilities and her illiteracy, work experience, time out of the workforce and lack of skills which produced her incapacity for work.



NIELSEN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q84/101)

Decided: 3 July 1985 by J. B. K. Williams, W. De Maria and H. Pavlin.

The AAT *set aside* a DSS decision to reject an application for invalid pension lodged by a 33-year-old man who had been injured in a motor vehicle accident in 1976.

According to the medical evidence, Nielsen continued to suffer some physical disability but his major problem was psychogenic pain which was a recognised psychiatric disorder. The AAT concluded that the combination of physical disability and psychiatric disorder meant that Nielsen would be unlikely to attract an employer in any field of employment in which he had training or experience and that, because his condition was unlikely to alter in the foreseeable future, he was permanently incapacitated for work within ss.23 and 24 of the *Social Security Act*.

The AAT referred to the distinction, made in *Sheely* (1982) 9 *SSR* 86, between the person who is sick and the person who merely thinks he is sick. The AAT continued:

> Whether or not a person's perception of himself as an invalid incapable of work has become so entrenched or ineradicable as to constitute a psychological condition cannot, in our view, be determined by reference only to the person's own statements. They must, we think, be supported by evidence of a person or persons professionally qualified to express a view upon the matter.

(Reasons, p.6)

One member of the Tribunal (**W. De Maria**) criticised the delays which had occurred in the processing of Nielsen's appeal: his application for an invalid pension had been rejected in December 1982 and the hearing of this matter before the AAT had not concluded until March 1985:

> I am of the view that the delays in hearing this appeal further consolidated in Mr Nielsen his current image of himself as an incapacitated person by keeping him intensively preocuppied about his medical and psychological conditions for a protracted period of time. Additionally, the fact that he has been paid sickness bneefits continuously since June 1981 could well have provided in his view an official and long term endorsement by the Department of his incapacities.

GOURLAY and SECRETARY TO DSS (No. N84/253)

Decided: 19 August 1985 by A. P. Renouf.

The AAT *affirmed* a DSS decision to reject an application for invalid pension lodged by a 47-year-old man who had worked as a barman, clerk and storeman until 1981 when he had injured his back.

According to the medical evidence, the injury to Gourlay's back had left him unable to perform work which involved heavy lifting but he retained the capacity to work in a wide variety of jobs, including clerical work. However, there was very little of this type of work available to a person of Gourlay's age in the area where he lived (around Gosford, NSW). The AAT said that it was not reasonable to expect Gourlay to move from the Gosford area because he was paying off his house and looking after young children without the help of his wife (from whom he was separated).

The AAT noted that in *Box* (1984) 22 *SSR* 261 the Tribunal had said that 'mere inability to obtain employment because of the state of the labour market' would not qualify a person for invalid pension. The present case involved more than that 'mere inability' because there was a degree of physical disability present and there was the question of Gourlay's age. Nevertheless, the AAT said, Gourlay was physically capable of, and experienced in, full-time work which he would be able to obtain if conditions in the local economy where he lived were different: Reasons, para. 31.

JOHNSTONE and SECRETARY TO DSS (No. N83/772)

Decided: 30 July 1985 by J. R. Dwyer.

The AAT *affirmed* a DSS decision to cancel an invalid pension held by a 46-year-old man, who had worked in a variety of sales, advertising and entertainment occupations until 1973, when he had stopped working because of a combination of back pain and psychological stress.

Johnstone had been granted an invalid pension in 1978 because of degenerative changes to his back but, following a medical review, the DSS had cancelled the pension from November 1983. According to the medical evidence, Johnstone's capacity for work was limited because of the changes to his back: he had to avoid heavy lifting, repeated bending and prolonged sitting. However, he did retain a capacity for sedentary work; and he had been engaged at working his own 233-acre property in northern NSW and in some community activities in that area. (Johnstone told the AAT that he was able to engage in these activities because he could take frequent rests and participate in a developed exercise programme.)

The local CES assessed Johnstone's chances of finding employment in that area as 'very remote'; but it seemed that Johnstone's disabilities were not critical in this assessment as there were 4700 registered unemployed (out of a total population of 50 000) in the area. The AAT concluded that, although Johnstone's medical disability did limit his capacity for work, he retained a significant capacity to undertake the type of work in which he had extensive experience. The major factors which contributed to his inability to obtain employment included the shortage of that employment in the area where he lived, his age, his lengthy period out of the workforce and possible employer resistance because of Johnstone's involvement in community activities.

Because Johnstone's medical disability was not a factor of such significance that his incapacity for work could be said to arise or result from a medical condition (the approach developed in, for example, *Sheely* (1982) 9 *SSR* 86), he could not be said to be permanently incapacitated for work within ss.23 and 24 of the *Social Security Act*.

The AAT acknowledged that the result of cancelling Johnstone's invalid pension would be to oblige him to apply, each fortnight, for unemployment benefit, as it was the practice of the DSS to require an application for renewal of that benefit to be lodged every 2 weeks. The AAT suggested that there might be a case for extending that 2 week period, where the DSS believed that the person was unlikely, because of limited skills or the state of the labour market, to find employment.

The AAT also endorsed observations made in *Fraser* (1983) 17 *SSR* 176 and *Sommerfeldt* (1985) 25 *SSR* 306, that the current categories of income support (invalid pension, sickness benefit and unemployment benefit) were not designed to provide for those people who, because of their age and some moderate disability, had no realistic expectation of ever again being gainfully employed. There might be a case, the AAT said, for providing a single form of benefit or pension 'whether a person is unemployed or incapacitated due to a medical condition': Reasons, para. 41.

BARTOLO and SECRETARY TO DSS (No. V84/344)

Decided: 12 July 1985 by H. E. Hallowes.

The AAT *affirmed* a DSS decision to reject a claim for invalid pension made by a 29-year-old woman who had worked as a cleaner for some 10 years until January 1984, when she developed acute traumatic tenosynovitis.

According to the medical evidence, Bartolo's condition had prevented her from working in 1984, but, because of her 18 month absence from the workforce, she could now use her right hand so long as she did not place her right wrist under stress.

On the basis of that evidence, the AAT said that it was—

> satisfied that it is more likely than not that the disability Mrs Bartolo suffered from will resolve, enabling her to return to work particularly if she is given the opportunity for some rehabilitation and training. Even without retraining I am satisfied on the evidence that the applicant will be able to work part-time or irregularly and so earn more than 15% of a prescribed wage.

(Reasons, para. 20)

Accordingly, Bartolo's incapacity for work could not be described as 'permanent', as that word had been interpreted in *Panke* (1981) 2 *SSR* 9.

TREMPETIC and SECRETARY TO DSS (No. Q84/183)

Decided: 3 July 1985 by J. B. K. Williams, W. DeMaria and H. Pavlin.

The AAT (in a majority decision) **affirmed** a DSS decision to cancel an invalid pension held by a 45-year-old man who had last worked in 1979.

According to the medical evidence, Trempetic had injured his back in 1979 and now had some physical disability. However, that disability was not sufficient to prevent him from working. Trempetic complained of persistent pain in his back and right hip, which he said restricted his movements and his ability to lift weights or to sit or stand for prolonged periods. These complaints were attributed by one psychiatrist to Trempetic's 'false belief which is not susceptible to argument' and were described by another psychiatrist as due to a 'fixed idea'.

The majority of the tribunal (**Williams and Pavlin**) said that there was no cogent evidence of any substantial medical disability (either physical or psychological). The most that could be said was that Trempetic's disability derived predominantly from his own satisfaction that he was sick and unable to work:

> It would, we think, lead to results not contemplated by the legislature for entitlement to invalid pension to be established upon the applicant's self-assessment of belief, unsupported by cogent expert evidence of incapacity for work by reason of a medical disability, whether physical or psychic or a combination of both.

(Reasons, p.14)

On the other hand, the dissenting member (**DeMaria**) concluded that Trempetic's symptoms had become an entrenched part of his psychological make-up; and that this problem had been reinforced by his long absence from the workforce, by the grant of sickness benefit to him and by his extended dispute with the DSS over invalid pension.

MITRIC and SECRETARY TO DSS (No. S84/99)

Decided: 29 July 1985 by R. A. Layton, J. T. B. Linn and F. A. Pascoe.

The AAT *set aside* a DSS decision to refuse an invald pension to a 49-year-old man who had worked in several skilled occupations until July 1983 when, because of developing back pain, he had declined a transfer to a labouring position and had been retrenched.

The medical evidence showed that Mitric suffered from degenerative changes to his spine, which incapacitated him from work involving heavy lifting and bending. It was agreed that he could only undertake light work if he were able to set his own pace and take frequent rests.

The local CES office said that Mitric would be most unlikely to obtain this type of employment: most employers would only hire workers below 45 years of age with no previous injury or workers' comepnsation claim; and few employers were prepared to hire a person who could not work at the standard pace.

The AAT concluded that, in the light of Mitric's age, his inability to write English, his injury, the limited work he could perform and the restrictions which must be placed even on that limited work, it was most unlikely that he would find an employer who was willing to employ him. Adopting the approach in *Panke* (1981) 2 *SSR* 9, the Tribunal said that, while Mitric could perform some work, only a sympathetic employer would hire him; that it was not likely that a sympathetic employer could be found; and that, accordingly, Mitric was 'virtually unemployable'.

PISANI and SECRETARY TO DSS (No. N83/765)

Decided: 16 August 1985 by R. A. Hayes, D. J. Howell and J. F. Sutton.

The AAT *affirmed* a DSS decision to reject an application for an invalid pension lodged by a 37-year-old man who had not worked since 1978.

Pisani had migrated to Australia in 1965 and had worked in a variety of unskilled occupations. He had returned to Malta for several extended periods between 1965 and 1980; and, after returning to Australia in 1980 he had been unable to find employment. He was granted unemployment benefit in March 1980 and sickness benefit in June 1981. Payment of that sickness benefit was continuing at the time of the hearing of this matter.

Pisani claimed that he was now permanently incapacitated for work because of his series of injuries suffered in 1973 and 1978. He said that he could not undertake work which involved lifting or prolonged standing or sitting. Although his complaints were supported by his own medical advisers, specialists who had examined him on behalf of the DSS said that he had very little physical disability and that he had adopted a sick role largely because of cultural and personal problems. Amongst the cultural problems was the dislocation involved in moving from a primitive rural environment in Malta to the highly industrialized urban context in Australia; and amongst his personal problems was a degree of instability in his family background.

The majority of the Tribunal (**Hayes and Howell**) concluded that Pisani was not permanently incapacitated for work to the extent of at least 85%:

> In this case, the Tribunal considers the applicant has tended to put the blame for his unemployment upon a physical condition to which he resorts as a rationale for his unemployment, whereas the main cause thereof is a combination of life circumstances and events, unconnected in any material or in any significant way with a permanently disabling injury which, over time, have produced a situation where the applicant finds himself to be unemployable.

(Reasons, p.21)

The dissenting member of the Tribunal (**Sutton**) said that the evidence given to the Tribunal was of questionable standing. In particular, she criticized the assumption that a person with an unstable family background would be likely to display instability. She also referred to 'the possibility the cultural trauma of the change from poverty-stricken life in Malta to the highly industrialized environment in Australian cities can increase susceptibility to trauma such as an industrial accident . . .': Reasons, p.3.

Invalid pension: permanently blind

ZIRONDA and SECRETARY TO DSS (No. N83/70)

Decided: 2 August 1985 by J. O. Ballard.

The AAT *set aside* a DSS decision to refuse an invalid pension to a man, who was more than 65 years of age and who had severely reduced vision.

Zironda's claim for an invalid pension was based on the alternative qualification that he was 'permanently blind'. (If he were accepted as 'permanently blind', he would receive his invalid pension or an age pension free of the income and assets tests.)

Zironda had migrated to Australia in 1928 and, shortly after, had lost all sight in his left eye. In 1981, he had a cataract removed from his right eye and his uncorrected vision in that eye was now less than 6/60. With the aid of a strong correcting lens, the sight in his right eye was assessed at 6/9—described by medical specialists as 'reasonably good vision as regards his central field of vision'. However Zironda experienced considerable difficulty in wearing his spectacles because of the distortion and reduced field of vision which resulted.

According to expert medical opinion, Zironda's vision in his right eye would be significantly improved if he were to wear a contact lens; but, so far, he had been unable to fit and wear such a lens.

The Tribunal accepted the proposition from *Touhane* (1984) 21 *SSR* 239 that a person was legally blind if that person had less than 6/60 vision. The Tribunal noted that the question whether a person's vision should be measured with or without a correcting lens had been left open in *Touhane*.

The AAT referred to Mann's *Medical Assessment of Injuries*, which declared that the 'visual disability which remains after the refractive error is corrected by the lens is the one which expresses the residual disability produced by the particular injury'. But the AAT noted that in various workers' compensation decisions it had been held that the degree of loss of sight was to be measured without the aid of correcting lenses. These decisions were *Rodios* v *Trefle* [1937] WCR 285, *Keenan* v *Doherty* [1934] WCR 193 and *Moore* v *Schweppes Ltd* (1950) 3 WCBD (Vic) 7.

The Tribunal noted that it had been established in *Dragojlovic* (1984) 18 *SSR* 187 that decisions under workers' compensation legislation were not necessarily applicable to the *Social Security Act*. However, the Tribunal thought that it was appropriate to follow those workers' compensation decisions rather than the text book:

> It seems that the distinction of principle between the two Acts [that is, workers' compensation and social security legislation] predicates the adoption of a more beneficial approach to a claimant under the [*Social Security*] *Act* and can hardly be called in aid to warrant a more restrictive approach.

(Reasons, para. 20)

Accordingly, it followed that Zironda should be treated as permanently blind because his uncorrected vision was below 6/60. The AAT said that, even if his eyesight was to be tested with the aid of correction, the evidence in the present case would establish that he was permanently blind because of his inability to wear lenses or to wear spectacles for any extended period.