Federal Court decision

Invalid pension: permanent incapacity

SCOGNAMILLO v SECRETARY TO DEPARTMENT OF SOCIAL SECURITY
(Federal Court of Australia)
Decided: 18 July 1985 by Wilcox J.

This was an appeal, under s.44(1) of the AAT, against a decision of the AAT affirming a DSS decision to refuse an invalid pension to Scognamillo see (1985) 25 *SSR* 305.

Scognamillo had originally been granted an invalid pension in 1979. In 1982 he had asked the DSS to cancel that pension because he was returning to work. However, some 6 months later he lodged a fresh application for the pension and it was this second application which was the subject of the present appeal.

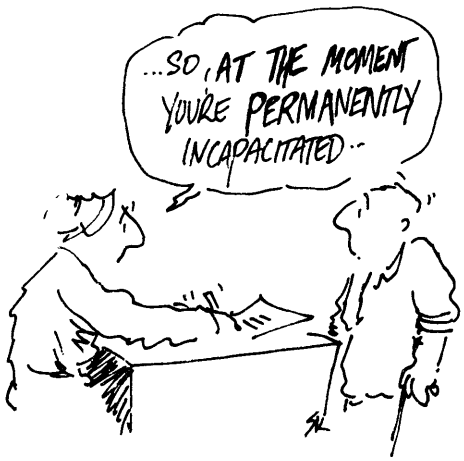
Scognamillo argued that the AAT had been mistaken because it had not approached the review of that second decision on the basis that the earlier grant of a pension meant that the DSS had to demonstrate either that the earlier grant had been mistaken or that there had been some change in Scognamillo's condition since that earlier grant.

The Federal Court acknowledged that, where an applicant had previously been assessed as permanently incapacitated, that fact and any medical reports on which the assessment had been based would generally be relevant to a new application for invalid pension. But, the Court said, the weight to be given to those matters must depend on the circumstances of the case. There was, the Federal Court said:

> nothing in the Act to suggest that the determination of a second application must depend on demonstration of some error in, or relevant change since that [earlier] assessment; to require the decision-maker to first make such a finding is to subvert the scheme of the Act.

(Judgment, p.5)

The Federal Court then referred to its decision in *McDonald* (1984) 18 *SSR* 188, where the Court had rejected the argument that there was a formal onus of proof in proceedings before the AAT.



Legislation

RECENT CHANGES TO THE *SOCIAL SECURITY ACT*

In addition to the changes in pension and benefit levels described in the last *Reporter* (see 27 *SSR* 339), the 1985 Budget saw a number of significant changes to the *Social Security Act*.

Amongst the amendments introduced by the *Social Security and Repatriation (Budget Measures) Amendment Act* 1985 were the following:

- The Secretary no longer has an apparently wide discretion to fix the rates of pension (age, invalid, wife's, carer's and widow's) and supporting parent's benefit. This discretion was, according to the explanatory memorandum, 'an anachronism'. Section 28(1) has been repealed and s.63(1) has been amended 'so that [according to the explanatory memorandum] the base rates of all . . . pensions will be fixed at the maximum rate.'
- A new section, s.135TJA, establishes a process for stopping payment of a pension, benefit *etc.* under the Act after some event which affects the recipient's eligibility. If the recipient notifies the DSS, the payment ceases to be payable (usually) 14 days after the event. But if the recipient does not notify the DSS, the payment ceases to be payable on the day after the event. In the words of the explanatory memorandum, 'There is, accordingly, an incentive for a person to comply with the notification requirements.'
- The overpayment provisions, s.140(1) and (2), have been replaced by two new subsections. The explanatory memorandum offers the following justification for these changes:

> 'Decisions of the Federal Court of Australia have shown weaknesses in s.140. The decisions, *Hangan* (1982) 11*SSR* 115 and *Hales* (1983) 13 *SSR*, have interpreted s.140 in such a way as to create discretions in relation to the application of s.140. This result is not wholly satisfactory.'

The new s.140(1) provides that an overpayment, made in consequence of the recipient's failure to comply with the Act, 'is a debt due to the Commonwealth', presumably in an attempt to remove what the Federal Court and the AAT had identified in the old provision as the Secretary's discretion to recover or not recover such an overpayment.

The new s.140(2) provides that an overpayment, made for any reason, to a person receiving a current pension, benefit or allowance 'shall . . . be deducted from that last-mentioned pension, benefit or allowance' - unless the Secretary takes action under s.146(1).

A new s.146(1) authorizes the Secretary to write off, or waive or defer recovery of debts under the Act. The exercise of some of these powers depends on the Minister specifying 'a class of debts' by a notice published in the *Gazette*.

The purpose of these changes is, according to the explanatory memorandum, to ensure that an 'an overpayment must either be -

. recovered by a refund or by legal proceedings in a court;
. recovered by direct deduction from continuing social security payments; or
. dealt with under the "waiver" provision [s.146(1)].'

Statistics

	Jun. 85	Jul. 85	Aug. 85	Sep. 85	Oct. 85
Applications lodged*	43	48	44	57	49
Decided by AAT	22	28	15	17	23
Withdrawn	9	3	10	8	13
Conceded	16	10	10	13	8
No jurisdiction	2	3	2	5	0
Lapsed	2	1	1	0	0
Awaiting decision at end of month	678	681	687	701	706

*** Applications lodged: type of appeal**

Unemp. B	4	4	7	10	2
Sickness B.	1	4	4	3	2
Special B.	1	1	1	1	0
Age Pension	10	3	8	3	8
Inv. Pension	10	19	16	11	13
Widow's P.	4	4	0	3	2
Supp. Parent's B	3	0	2	0	2
HCA	2	3	3	6	6
Fam. Allow.	1	0	2	6	3
FOI	3	4	1	2	4
Other	4	6	0	12	7

State where application lodged

ACT	3	0	1	0	0
NSW	13	15	12	26	18
NT	1	0	0	0	0
Qld	1	2	3	4	3
SA	3	10	6	9	4
Tas.	4	3	2	2	2
Vic.	15	11	13	9	11
WA	3	7	7	7	11