

Administrative Appeals Tribunal decisions

Sickness benefit: 'loss of income'

OAKLEY and SECRETARY TO DSS
(No.T5/17)

Decided: 7 November 1985 by
R.C.Jennings.

Rodney Oakley had been granted sickness benefit in August 1981, after an injury to his back. He continued to receive this benefit (at the full rate) until 14 September 1984, when the DSS cancelled it on the ground that he was no longer incapacitated for work.

In October 1984, Oakley again claimed sickness benefit, which the DSS granted, accepting that his 1981 back injury now incapacitated him for work. However, because Oakley had 'nil income' in October 1984, the rate of sickness benefit which the DSS paid to Oakley was reduced to the rate of unemployment benefit which he would have been paid - significantly lower than the rate of sickness benefit which the DSS had been paying him up to September 1984.

Oakley asked the AAT to review these decisions.

The legislation

Section 108(1) of the *Social Security Act* sets out the qualifications for sickness benefit. A person may qualify by satisfying the Secretary that 'he [or she] was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he [or she] has thereby suffered a loss of salary, wages or other income' - s.108(1)(c)(i); or the person may qualify by satisfying the Secretary that he or she has a temporary incapacity for work 'and that he [or she] would, but for the incapacity, be qualified to receive an

unemployment benefit" - s.108(1)(c)(ii).

At the relevant time, s.112(1) provided that the rate of sickness benefit payable to Oakley (who was unmarried and over 18 years of age) was \$91.90 a week in October 1984; and that the rate of unemployment benefit payable to a person in Oakley's position was \$81.10 a week.

Section 113 limits the rate of sickness benefit payable to a person. If the person has qualified under s.108(1)(c)(i), the sickness benefit is not to exceed the rate of salary, wages or other income lost by the person through incapacity. If the person has qualified under s.108(1)(c)(ii), the sickness benefit must not exceed the applicable rate of unemployment benefit.

The decision to cancel

The AAT agreed with the DSS that Oakley's sickness benefit should have been cancelled in September 1984. There was evidence that, at that time, he was working virtually on a full-time basis as a taxi driver so that Oakley 'by his observed conduct had shown himself to have capacity for work': Reasons, p.4.

Rate of sickness benefit

However, the AAT said that, when Oakley was re-granted sickness benefit in October 1984, the rate of that sickness benefit should not have been limited to the applicable rate of unemployment benefit.

This was because the October 1984 grant of sickness benefit was based on an incapacity for work flowing from the 1981 injury. That incapacity for work had originally produced a loss of

wages in 1981 and, therefore, Oakley should be regarded as qualifying for sickness benefit under s 108(1)(c)(i), not (ii). The AAT pointed out that the higher rate of sickness benefit was available for persons who had been receiving income when they were incapacitated; and the lower rate was reserved for those who were not receiving income at that time. The AAT continued:

'The fact that the applicant fell into the latter category during the weeks which preceded his second claim does not justify ignoring the fact that his loss of wages derives from the accident which caused his incapacity for work in 1981. If an injured person engages in work in an effort to rehabilitate himself but fails because he cannot cope with the pain, he does not thereby deprive himself of sickness benefit at the rate at which he was being paid prior to such efforts. Indeed "recurring incapacity" is a condition expressly recognised by the Act in s.119(2A) and was conceded to be applicable in the present case in the letter to the applicant which granted his claim from the date it was made.'

(Reasons, p.8)

Formal decision

The AAT affirmed the decision to cancel Oakley's sickness benefit in September 1984; and set aside the decision to grant Oakley sickness benefit at the lower rate in October 1984, directing the Secretary to adjust the amount payable to Oakley on the basis that he was entitled to receive the higher rate.

Age pension: portability

DRACUP and SECRETARY TO DSS
(No.Q85/41)

Decided: 29 October 1985 by
J.B.K.Williams.

Mr and Mrs Dracup had migrated to Australia from the United Kingdom in 1953. They lived here until 1979 when they travelled to the United States, where they were granted permanent resident status. They returned to Australia on 6 August 1983 and claimed age pensions on 16 August 1983. The DSS granted those pensions on 5 September 1983.

In November 1983, Mr and Mrs Dracup told a DSS officer that they intended to leave Australia for the United States in February 1984 and

confirmed this intention in January 1984. They told the DSS that, if they remained away from the United States for more than 12 months, they would lose their permanent resident status under American law.

However, in February 1984, Mr and Mrs Dracup told the DSS that they would not be leaving Australia until August 1984, 'after completing the necessary 12 months residence here'; and they confirmed that information in June 1984.

On 28 July 1984, Mr and Mrs Dracup left Australia, without telling the DSS. When the DSS subsequently learned of their departure, it cancelled their pensions. Mr and Mrs Dracup

asked the AAT to review that cancellation.

The legislation

Section 83AB of the *Social Security Act* permits payment of a pension to a pensioner who is outside Australia.

However, s.83AD limits this right. According to s.83AD(1), a pension granted to a former resident of Australia, who returns to Australia, claims a pension and leaves Australia within 12 months of her or his return, is not payable while the pensions is outside Australia.

Section 83AD(2) gives the Secretary a discretion to waive the requirements of s.83AD(1) where the Secretary is satisfied that the person's reason for