

perannuation payment of \$120 per week after tax, her house was not fully paid for and she had savings of \$2000.

Formal decision

The AAT set aside the decision under review and recommended that no further action be taken for the recovery of any amount overpaid.

RAVEN and SECRETARY TO DSS (No. V85/273)

Decided: 15 May 1986 by H.E. Hallowes.

Margaret Raven had been granted a widow's pension in May 1986. She had completed various entitlement review forms between 1979 and 1982, indicating on these forms that she had no other source of income and was divorced.

On 14 November 1984 the DSS claimed an overpayment of \$22 663 for the period from April 1976 to February 1982, on the ground that she had been living with a man as his wife on a *bona fide* domestic basis and so did not fall within the definition of 'widow' in s.59(1) of the Act. She asked the AAT to review this decision.

A recoverable overpayment

The AAT decided, on the evidence before it, that Chapman had been living with a man as his wife during the relevant period. She had thus failed to comply with s.74(5) of the Act which

required her to notify the Department of a change in her status, and the amount paid to her was recoverable as a 'debt due to the Commonwealth' under s.140(1) of the *Social Security Act*.

Should the overpayment be recovered?

The DSS had entered into an agreement with to recover the amount of \$10 per month. Raven was no longer receiving a pension and so s.140(2) (allowing recovery by deductions from a current pension) could not apply.

The AAT did not consider there was any reason to exercise the discretion to waive recovery of all or part of the debt under s.146(1)(b) or (c) of the Act. The applicant had supplied false information and, although the Tribunal felt compassion for her ill fortune in health, 'the fact that she has received public moneys to which she is not entitled must be the paramount consideration': Reasons, p.15.

The limitations period in s.146

The AAT commented on the effect of the limitation period in s.146.

Section 146(2) provides that, subject to sub-s.(3), proceedings for recovery of any amount payable by a person to the Commonwealth under the Act 'shall not be commenced after the end of the period of 6 years commencing on the day on which that amount became payable'.

Section 146(3) provides that the 6-year limitation period for recovery of any amount payable by a person to the Commonwealth under the Act because of the person's false statement or failure to comply with the Act commences 'on the day on which an officer becomes aware that the statement or representation was false or that the person has not complied with that provision as the case may be.'

The AAT said that these provisions 'have now provided a period of limitations in respect of proceedings for the recovery of any amount payable. Proceedings shall not commence after the end of the period of 6 years commencing on the day on which the amount became payable. Should the [DSS] wish to vary [the decision to recover the overpayment at the rate of \$10 per month], s.146(3) provides that proceedings for the recovery of the amount may be commenced at a time within the period of 6 years commencing on the day on which an officer became aware that a statement or representation was false, or that the person had not complied with the provisions of the Act . . .

Sub-section 146(2) provides that, subject to sub-section (3), proceedings for recovery of any amount payable as a result of the Act shall not be commenced after the end of 6 years commencing the day on which the amount became available. *The period over which an overpayment has been made is not relevant to the question as to whether the overpayment be waived. It may be relevant to the decision as to the means by which recovery of the debt due to the Commonwealth should be sought.* Sub-sections 146(2) and (3) do not extinguish the cause of action, but affect only the period within which it may be brought.

(Reasons, pp.16-17; our emphasis)

Formal decision

The AAT affirmed the decision under review.

Sickness benefit: back-payment

BAATS and SECRETARY TO DSS (No. V85/449)

Decided: 8 August 1986 by J.R. Dwyer, E. Coates, and D.M. Sutherland.

In December 1984, Wilhelmus Baats successfully applied for sickness benefit. In January 1985 he applied for invalid pension which the DSS granted and, eventually, decided to backdate to December 1984.

However, the DSS refused to backdate payment of the invalid pension to 1980, a date when Baats claimed that he had lodged an earlier application. Baats asked the AAT to review that refusal.

The earlier claim

Baats told the AAT that he had attempted to claim an invalid pension or sickness benefits (he was not sure which) during 1980; but that the DSS had told him that, because he had recently recovered worker's compensation, he was not eligible to make the claim.

After hearing evidence from DSS officers, the AAT decided that Baats had not lodged a written claim for either invalid pension or sickness benefits before the end of 1984 but that he had made enquiries at a DSS office in early 1981 about his eligibility for invalid pension or sickness benefit and that he had been incorrectly told by a DSS officer that he would not be eligible.

The legislation

At the time of the decision under review, s.39 of the *Social Security Act* provided that an invalid pension should not be paid from any date prior to the lodging of a claim.

Section 145 gave the Secretary a discretion to treat a claim lodged for one pension or benefit as a claim for another, more appropriate, pension or benefit.

From 5 September 1985, these provisions were repealed and replaced by new sections, ss.135TBA and 135TB(5), which were substantially to the same effect.

Section 119(2) provides that a sickness benefit can be paid from the date of eligibility if the claim for that benefit is lodged within 13 weeks of eligibility. If the claim is lodged after that 13 week period, the benefit is to be paid from the date of the claim unless the Secretary is satisfied that the delay 'was due to the cause of the incapacity or to some other sufficient cause', in which case the benefit is to be paid from the date of eligibility.

According to s.24, invalid pension is payable for permanent incapacity for work; and, according to s.108, sickness benefit is payable for temporary incapacity for work.

Jurisdiction

Section 15A(1) of the *Social Security Act* gives the AAT jurisdiction to review a decision of the Secretary affirming, varying or annulling an officer's decision which has been reviewed by an SSAT. In this case, the SSAT had considered backpayment of invalid pension but not of sickness benefit.

The AAT noted that there was a difference of opinion in earlier AAT decisions as to how critical it was that an SSAT have reviewed every aspect of a case brought before the AAT. A technical and restrictive view had been taken in *Guirguis* (1985) 28 SSR 351, where the AAT said that it did not have jurisdiction to consider a point which had not been reviewed by an SSAT. On the other hand, the AAT had taken a more flexible approach in *Hurrell* (1984) 23 SSR 266 and *Kay* (1986) 30 SSR 393.

The AAT decided that it did have jurisdiction to review the question whether Baats could be paid either invalid pension or sickness benefits for the period from 1981 to December 1984:

'We regard the issue which was before the SSAT and is now before this Tribunal as Baats' eligibility for arrears of assistance under the Act on the ground of his physical incapacity for work. We share the view of the Tribunal in *Hurrell* and *Kay* that it would be taking too narrow a view of this Tribunal's power to review if the Tribunal were only able to consider the points considered by the SSAT . . . It is appropriate for the Tribunal to exercise all the powers of the Secretary in considering whether the applicant should receive any pension or benefit on the ground of his incapacity for work at [27 December 1984]. (Reasons, para.16)

Backdating payment

The AAT said that, because it had decided that Baats had not lodged a written claim for invalid pension or sickness benefit before December 1984, there was no question of backdating invalid pension beyond December 1984. The former s.39 prevented that backpayment.

However, it might be that a payment of Baats' sickness benefit could be backdated beyond December 1984 if his delay in lodging claim for that benefit was due to the cause of his incapacity or to some other sufficient cause.

Baats' incapacity had resulted from an industrial injury in 1978. This injury had severely disabled him, both physically and psychologically for an extended period - that is, from late 1978 until about the middle of 1980. On that basis, the AAT concluded that Baats' failure to lodge his claim within 13 weeks of his first becoming incapacitated (in late 1978) was due to the cause of his incapacity. It followed that the discretion in s.119(3) could be exercised to backdate payment of sickness benefit to Baats beyond December 1984 to June 1981 (the date from which Baats had separated from his wife and from which he now sought payment of invalid pension or sickness benefit).

The Tribunal said that there was no doubt that Baats had been incapacitated for work during this period; the only question was whether his inca-

capacity had been permanent (in which case he would have been qualified for invalid pension and not sickness benefit) or temporary (in which case he would have been qualified for sickness benefit and not invalid pension). The AAT referred to the Federal Court's decision in *McDonald* (1984) 18 SSR 188 and said that although this was a borderline case, it was satisfied that between 1981 and 1984 Baats' incapacity was temporary in the sense that it had not been established that it was likely to persist into the foreseeable future.

Turning to the question of the discretion to backdate payment of sickness benefit, the AAT said that there were several matters which indicated that this discretion should be exercised in favour of Baats: he had been given misleading advice by a DSS officer in 1981 about his eligibility for pension or benefit; his incapacity had been a significant contributing factor in his delay in lodging a claim; he had suffered considerable financial hardship since giving up work in 1978 and the end of 1984; and, if he had lodged his claim for worker's compensation 17 weeks earlier, he would have been entitled to sickness benefit from October 1978.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Baats should be paid arrears of sickness benefit from June 1981.

Income test: annual rate of income

SLAVIK-BEHAR and SECRETARY TO DSS (No. V85/405)

Decided: 24 July 1986 by J.R. Dwyer, G.F. Brewer and R.W. Webster.
Laura Slavik-Behar had been granted an age pension in June 1983. In October 1983 she advised the DSS that she intended to start a business and that she would notify the DSS if her income from that business exceeded 'the allowed limit'.

After the end of the 1983-84 tax year, Slavik-Behar supplied the DSS with copies of her tax returns which showed that she had a nett income from her business of \$3998 for the tax year and which claimed a loss carried forward from the preceding year of \$2370.

The DSS then decided that Slavik-Behar had an income, for the purposes of the *Social Security Act*, of \$3998 during the 1983-84 tax year and calculated that, as at September 1984, her rate of income was \$154 a fortnight.

The DSS then reduced the rate of Slavik-Behar's age pension accordingly. This decision took effect from October 1984 and remained in force

until March 1985, when Slavik-Behar was granted a pension under the *Repatriation Act* 1920 and her age pension was cancelled.

Slavik-Behar asked the AAT to review the decision of the DSS, arguing that the DSS should have used her current business income, rather than her income for the 1983-84 tax year, when calculating her rate of income in September 1984. Slavik-Behar also argued that, in calculating her rate of income, the DSS should have deducted from her income the losses carried forward from the previous year and the amount of repayments which she was making on loans obtained for the business.

The legislation

Section 28(2) of the *Social Security Act* provides that the annual rate of an age pension is to be reduced by reference to the pensioner's 'annual rate of income'.

Section 6(1) defines 'income' as meaning -

'personal earnings, moneys, valuable consideration or profits earned derived or received by the person for the person's own use or benefit by

any means from any source whatsoever . . .'

Calculating the 'annual rate of income'

The AAT referred to the High Court decision in *Harris* (1985) 24 SSR 294, where the High Court had said that a person's 'annual rate of income' was

'the aggregate of those income payments which would be received by the pensioner during the ensuing year on the assumption that [she] retains all [her] current sources of income for the year and that they continue to yield income at the current level. The annual rate thus ascertained enures until something occurs which falsifies the assumption on which the particular annual rate was ascertained . . .'

In the present case, the AAT said, there was nothing before the DSS or before the AAT which falsified the assumption that Slavik-Behar's earnings would continue at the level revealed in her 1983-84 tax return. Accordingly, it was appropriate to calculate her pension entitlement from September 1984 onward on the assumption that her annual rate of in-