Remote area allowance: residence

TAYLOR and SECRETARY TO DSS (No. W86/5)
Decided: 23 June 1986 by E. Smith.
Henry Taylor asked the AAT to review a DSS decision not to grant a remote area allowance.

Taylor, aged 81, and his wife lived in Esperance but due to medical advice lived in Carnarvon during the winter months, where the climate was warmer. Carnarvon is in Zone A for the purposes of s.79A of the *Income Tax Assessment Act* 1936, which allows residents certain tax allowances. The applicant had been granted such an allowance for the part of the year when he lived there

The legislation
Section 17C of the *Social Security Act* provides that a person who is in receipt of a pension or benefit and who 'is physically present in, and whose usual place of residence is situated in, the remote area, is eligible to receive a remote area allowance'.

Section 17B provides that 'remote area' has the same meaning as in the *Income Tax Assessment Act*.

'Usual place of residence'
The issue was, where was the applicant's 'usual place of residence'? The Tribunal referred to *Hafza* (1985) 26 *SSR* 321 where the Federal Court said that a person could have only one 'usual place of residence', although the general legal concept of 'residence' would allow a person to have two or more places of residence.

The AAT adopted that principle and concluded that for the purposes of remote area allowance, a person can have only one usual place of residence.

Taylor had not abandoned his Esperance home and contacts there; he and his wife they only moved temporarily for health reasons during the cold months. Esperance was the applicant's usual place of residence.

Intent of legislation
The AAT looked at the Second Reading speech and Explanatory Memorandum of the Act. These contained 'no indication of any intention to provide benefits in the circumstances' of this case. The Tribunal did not think it was the intention of the legislation to allow pensioners to take a holiday in a 'a remote area' for part of each year and qualify for the allowance. Of course, had Taylor moved indefinitely, the conclusion may have been different.

Formal decision
The AAT affirmed the decision under review.

Income test: 'derived' or 'received'?

SHARP and SECRETARY TO DSS (No. S85/131)
Decided: 4 August 1986 by R.A. Layton.
Ronald Sharp had been granted unemployment benefit in January 1984.

In October 1984, he advised the DSS that he had performed some work for the National Parks and Wildlife Service, as a result of which he would be paid $100 in a few weeks time. The DSS then decided to treat the $100 as Sharp's income in the two week period from 11 to 24 October 1984 and to reduce the rate of his unemployment benefit accordingly. Sharp asked the AAT to review that decision.

The legislation
Section 114(1) provides that the rate of unemployment benefit payable to a person is to be reduced where that person's income exceeds $20 per week.

Section 106(1) defines 'income' as meaning -

> 'Any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person . . .'

'Earned' or 'derived'?
The AAT said that the words 'earned, derived or received' in s.106(1), each had a separate and distinct meaning. Money was to be treated as part of a person's income if it was either 'earned' or 'derived', notwithstanding the fact that the money had not yet been received. This much, the AAT said, had been established in a series of decisions: *Smith* (1982) 9 *SSR* 89; *Siebel* (1983) 14 *SSR* 142; *McBow* (1984) 20 *SSR* 224; *Paula* (1985) 24 *SSR* 288; *Heidemann* (1985) 26 *SSR* 312.

It was necessary, the AAT said, for a person 'to have a present legal entitlement to moneys before they be described as either "earned" or "derived"': Reasons, para.23.

The evidence before the AAT established that Sharp became legally entitled to payment of the $100 during the period in question, although the $100 was not 'received' by him until some weeks later. Section 114(1) conferred no discretion to disregard moneys: 'It is mandatory for the Secretary to reduce the . . . benefit for the week in which income is either earned, derived or received, whichever first occurs': Reasons, para.26.

Formal decision
The AAT affirmed the decision under review.

Sickness benefit: recovery from compensation

Re KHABBAZ and SECRETARY TO DSS (No. S85/29)
Decided: 3 June 1986 by R.A. Layton.
Antonias Khabbaz had given up work in November 1982 because of industrial injuries. The DSS then granted him sickness benefit which was still being paid to him in June 1986.

In December 1983 Khabbaz settled a claim for worker's compensation against his former employer on terms that the employer pay him $10 000 under s.69 of the *Workers' Compensation Act* 1971 (SA) and $9900 under s.70 of that Act.

The DSS then calculated that $14 200 of the total compensation payment had been paid for the same incapacity as that for which Khabbaz was receiving sickness benefit. The DSS demanded that Khabbaz refund $756 (representing part of the sickness benefit payments received up to January 1984); and decided that $12 a week would be deducted from his future sickness benefit payments.

Khabbaz appealed against these two decisions but, when the SSAT considered his appeal, it only reviewed the decision to deduct $12 a week from his continuing sickness benefit payments. The SSAT recommended that the appeal be upheld but the DSS did not accept that recommendation. Khabbaz then asked the AAT to review both the recovery decision and the deduction decision.

Jurisdiction
Section 15A of the *Social Security Act* provides that the AAT may review a decision of the Secretary to the DSS affirming or varying an earlier decision if that earlier decision has been reviewed by an SSAT.

The AAT said that, as the decision to recover money from Khabbaz had not been reviewed by an SSAT, the AAT had no jurisdiction to review that aspect of the present case.

Compensation and sickness benefit: the same incapacity?
Section 115D(1) allows the DSS to reduce the weekly amount of sickness benefit being paid to a person for an incapacity if that person has received a compensation payment which is, in the opinion of the Secretary 'in respect of that incapacity'.

The AAT noted that payments of compensation under ss.69 and 70 of the *Workers' Compensation Act* 1971 (SA) were not payments of compensation for incapacity arising from an injury. Rather, those sections provided for the payment of compensation for physical disabilities - according to a table of injuries in s.69 and according to a process of adapting that table in s.70.

The AAT referred to its earlier decision in *Siviero* (1985) 28 *SSR* 348, where it had held that compensation paid to a person under s.70 of the *Workers' Compensation Act* 1971 (SA) could not be regarded as including any component covering the incapacity for which the person received sickness benefit, as sickness benefit was paid, not for injury or for disability, but for 'incapacity for work'.

The AAT said that the same rule applied to s.69 of the *Workers' Compensation Act* 1971 (SA). Moreover, the AAT said, a careful examination of Khabbaz's case and the compensation settlement did not reveal that he and his employer had settled the case under ss.69 and 70 so as to avoid the impact of s.115B(1) of the *Social Security Act*.

Accordingly, none of the compensation payment made to Khabbaz could be regarded as compensation in respect of the incapacity for which he was receiving sickness benefit and the DSS was not entitled to reduce the amount of his sickness benefit.

Formal decision

The AAT set aside the decision to reduce the weekly payments of Khabbaz's sickness benefit.

Handicapped child's allowance

MORGAN and SECRETARY TO DSS (No. W85/179)

Decided: 27 June 1986 by J.O. Ballard.

Shirley Morgan had applied for a handicapped child's allowance in respect of her son, C, in 1982, when he was 12 years of age.

The claim, which was made on the basis that C was suffering from mental retardation and from hydrocephalus, was rejected by the DSS and Morgan asked the AAT to review that decision.

Morgan failed to attend the hearing of her application for review in June 1985 and the AAT dismissed her application without proceeding to review the decision. However, the AAT later learned that Morgan's failure to attend the June hearing had been due to the fact that she had moved interstate and, in October 1985, the AAT purported to set aside the dismissal order.

Jurisdiction

When Morgan's application for review came on for hearing again in April 1986, the AAT indicated that the earlier dismissal had disposed of the original application for review and that it had no jurisdiction to proceed.

Morgan then applied to the AAT for an order extending the time for lodging a new application for review and, when the AAT immediately extended that time, Morgan lodged a fresh application for review.

Access to DSS files

Morgan told the AAT that C had been granted an invalid pension in February 1986 and asked that she be given access to C's invalid pension file in order to establish her eligibility for handicapped child's allowance during the period from 1982 to 1986.

Although the DSS suggested that the simplest procedure for obtaining that access was under the *Freedom of Information Act*, Morgan was unable to use those procedures because C had left home and was not available to sign an authority to the DSS to release his file to Morgan.

The AAT then issued a summons, requiring the DSS to produce to the AAT C's invalid pension file. The DSS produced that file to the AAT but asked for an order under s.35 of the *AAT Act* 1975 to prevent the contents of the file being disclosed to Morgan and to her legal advisers. This application was based on s.17 of the *Social Security Act*, which prevents a DSS officer from disclosing information relating to the affairs of another person and protects an officer against being required to produce information, acquired by the officer in the performance of her or his duties, to a court.

The AAT held that s.17 of the *Social Security Act* did not affect the question of disclosure to the AAT, which was not a court and which was exercising its review functions. However, the AAT decided that it was appropriate, because of the concerns of the DSS about C's privacy, to restrict access to C's invalid pension file to officers of the AAT and to Morgan's legal adviser.

Eligibility for handicapped child's allowance

C's invalid pension file showed that he had been granted the invalid pension from February 1986 on the basis that he was permanently blind. It also appeared that C had suffered from very poor vision since the age of 3; that, as a consequence of this disability, he had required assistance from his mother and stepfather; and that, because of his other disabilities, he had required close supervision.

The Tribunal said that, in the absence of convincing evidence to the contrary, the fact that C was eligible for an invalid pension in February 1986 established that he had suffered from a sufficient disability so as to be treated as a 'handicapped child', as defined in s.105H of the *Social Security Act*, prior to that date.

Although the original application for handicapped child's allowance had not been based on C's visual disability, the AAT was not prevented from taking that disability into account in deciding whether C had been a handicapped child before February 1986: it was the function of the Tribunal to reach the correct decision on the evidence presented before it, rather than to determine whether the decision under review was correct on the evidence available at the time of that decision, the AAT said.

After reviewing the evidence, the AAT decided that C had required care and attention because of his disabilities, only marginally less than constant care and attention, during the period from September 1982 until February 1986; and that, because of the provision of that care and attention, Morgan had suffered severe financial hardship. It followed that, during the period in question, Morgan had been qualified to receive a handicapped child's allowance under s.105JA of the *Social Security Act*.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Morgan was entitled to handicapped child's allowance for her son, C, from September 1982.