

Invalid pension: permanent incapacity

GIEVSKI and SECRETARY TO DSS
(No. V85/495)

Decided: 13 October 1986 by H. E. Hallowes, G. Brewer and D. Sutherland

The Tribunal *affirmed* a DSS decision to reject the claim for invalid pension of a 41 year old former fitter who suffered from a shoulder injury sustained at work.

The disability was assessed as being minor although the applicant complained of limited use of his left arm and some pain. He also gave evidence that he would not consider employment which was below his status.

The AAT concluded:

'In purely 'medical terms', Mr Gievski has a moderate disability which has had some effect on his ability to engage in paid work but the disability is not of such significance that his incapacity arises or results from the restricted abduction of his left shoulder. Rather Mr Gievski's problems arise to a considerable degree from his reluctance to look for a position which he perceives as not making use of his qualifications.'

(Reasons, para.11)

Formal decision

The AAT set aside the decision under review and directed that the applicant be granted the invalid pension.

HUNT and SECRETARY TO DSS
(No. S85/211)

Decided: 24 October 1986 by A. P. Renouf, F. A. Pascoe and J. T. Linn

The AAT *affirmed* a DSS decision to refuse invalid pension to a 35 year old man who suffered from leg problems. The medical evidence was that with appropriate treatment there was a very good chance of complete recovery from his condition. The applicant had little trust in the treatment.

The AAT was not satisfied that his condition was permanent nor that he was 85% incapacitated for work. The tribunal commented that sickness benefit was probably a more appropriate benefit for the applicant but did not refer to the possible use of s.135TB of the Act which gives a discretion to treat an application for a pension or benefit as an application for another in appropriate cases and thus avoid time limits [see 'The AAT's power under s.135TB(5) (formerly s.145) - A question of flexibility' (1985) 28 SSR 355].

HARVEY and SECRETARY TO DSS
(No. N85/341)

Decided: 25 November 1986 by J.A. Kiosoglous

The AAT *set aside* a DSS decision to refuse invalid pension to a 33- year-old man who suffered from an arm

injury, partial blindness and lower back pain.

In determining whether the applicant was incapacitated for work the Tribunal considered whether his unemployability arose from his physical disability or his very limited education and personal qualities.

The AAT observed:

'This issue is essentially one of degree to be determined on the facts of each case. On balance, the Tribunal feels that the applicant's main physical disability combined with his partial blindness and lower back pain makes the difference between the applicant finding a job and not finding one. Although his skills are very limited, his physical injuries, nonetheless, are very material aspects in his unemployability.

...one finds in the instant case that the applicant does suffer from a physical disability and that this disability has resulted in his permanent incapacity for work when it is considered in the context of the depressed economic circumstances prevailing in Broken Hill, and against the background of the applicant's limited skills.'

(Reasons, paras 26-7)

Special benefit: prohibited non-citizen

KANDASAMY and SECRETARY TO DSS
(No. V87/16)

Decided: 19 February 1987 by H.E. Hallowes, R.A. Sinclair and D.M. Sutherland

The applicant applied to the AAT to review a DSS decision to refuse special benefit. The applicant had arrived in Australia from Malaysia in September 1976 on a six or nine month temporary entry permit. In February 1977 he applied for permanent residence but was advised that he would have to return to Malaysia and apply from there. He stayed on in Australia illegally and in October 1986 again applied for permanent residence having married an Australian citizen. This application was being processed.

The applicant had had various jobs since his arrival and had obtained an Australian passport by representing that he had been born in Darwin. He had travelled to Malaysia on this passport on two occasions. He was separated from his wife who had custody of their two children. In February, 1987 he had been charged with various offences arising out of

his status as a 'prohibited non-citizen' and was sentenced to 5 month's imprisonment and a fine of \$500. He had appealed against that sentence and was currently on bail. The applicant had not received permission from the Department of Immigration and Ethnic Affairs (DIEA) allowing him to work. Since October 1986 he had lived on amounts provided from Poor Boxes and charity.

The legislation

Section 124 of the *Social Security Act* provides that the Secretary may, in his discretion, grant special benefit (a) to a person not in receipt of any pension, benefit or allowance, (b) who is not a person to whom unemployment benefit or sickness benefit is payable and (c) who 'by reason of age, physical or mental disability or domestic circumstances, or for any other reason is unable to earn a sufficient livelihood for himself and his dependants (if any)'.

The DSS guidelines

It was not disputed that the applicant satisfied parts (a) and (b) above. It then remained a question of the

exercise of the discretion of the Secretary. The DSS produced its guidelines with respect to the granting of special benefit to prohibited non-citizens. They read:

'24.2300 Prohibited non-citizens do not qualify for unemployment or sickness benefit because they cannot legally satisfy the residence test, payment should not generally be made to a person who is unlawfully present in Australia.

...
24.2302 Only those prohibited non-citizens who have become such without deliberate unlawful intent should be considered for special benefit. Close liaison should be set up with the DIEA on these cases, particularly where we cannot provide assistance.'

While recognising the need of the DSS to evolve guidelines in the administration of the Act the Tribunal referred to the decision in *MT* (1986) 30 SSR 372 where it was observed that even though the guidelines are necessary the AAT should 'adopt a guarded approach to such guidelines'.