

**Incapacity for work not due to medical condition**

The AAT noted that ss.23 and 24 of the *Social Security Act* had been significantly amended from 1 July 1987. But this did not affect Barnes because he had acquired an accrued right to have his claim determined under the old provisions when he lodged his claim. On this point, the AAT followed *Reilly* (1987) 39 SSR 494 and *Phillips* (1987) 40 SSR 508.

However, the AAT said, Barnes was not permanently incapacitated for work to the extent of at least 85%. The AAT accepted that Barnes suffered from hypochondriasis - he genuinely believed that he was ill. But the question was whether Barnes was 'unemployable because of his psychological condition or because of his very limited education and personal qualities', as the AAT had indicated in *Howard* (1983) 13 SSR 135.

The Tribunal concluded that, although Barnes' psychological disability was an aspect of his unemployability, it did not prevent him from working in his former occupation; and his incapacity for work could not be said to arise from that condition.

**Formal decision**

The AAT affirmed the decision under review.

**CORNEJO and SECRETARY TO DSS (No. W87/29)**

**Decided:** 9 December 1987 by R.K. Todd, K.J. Taylor and P.A. Staer.

The AAT affirmed a DSS decision to reject a claim for invalid pension lodged by a 41-year-old man.

Cornejo had migrated to Australia from Chile in 1969. In 1980, he injured one of his feet in an industrial accident but, because he did not understand the workers' compensation system, he made no claim for that injury.

He had some time off work, resumed working until 1982 and then left his job because of depression as a result of his wife and children leaving him to return to Chile.

Cornejo had not worked since 1982 and told the AAT that his lack of skills, limited work experience and his medical problems prevented him from getting a job - although he had tried to find employment.

Cornejo complained of pain in his foot and leg and in his back. An orthopaedic surgeon said there was no clinical indication of any abnormality in Cornejo's foot or leg; and that there was some disc degeneration in his spine, which would not prevent Cornejo from working but would restrict his capacity for heavy unskilled labour.

Cornejo's general practitioner said that Cornejo's pain symptoms prevented him from undertaking heavy labouring but he might be able to do lighter and varied tasks. However, it might be unrealistic to think that Cornejo could obtain such employment. The general practitioner also referred to Cornejo's depression, a result of his family breakdown, and to the psychological problems which he attributed to Cornejo's belief that he had been victimised by a complex system which he did not understand.

The AAT took the view that a large part of Cornejo's incapacity for work

did not arise from a medical condition but from his marital and family situation. The incapacity resulting from physical and mental disabilities was no more than 60%, the AAT said:

'The remainder of the applicant's incapacity for work is derived from the dissociative effects of his troubled personal life, and he was thus not in our opinion, at the date of his claim for invalid pension, incapacitated for work to the extent, and in the manner required, by s.23 of the Act.'

(Reasons, para.16)

The AAT concluded with the following comments:

'It has sometimes been said that the Tribunal has "taken into account socio-economic factors", or words to that effect. It is not clear what this expression means. What the Tribunal emphasised in all of the decisions was that the concept of "incapacity for work" involved consideration not merely of percentage loss of function in the sense long understood in the worker's compensation area, but also of the claimant's incapacity to obtain and hold remunerative employment in the light of his or her physical or mental disability. It did not take into account the depressed state of the labour market as such. The Tribunal often said however that even in a time of full employment it is perfectly likely that there will be two applicants for a job and that in that situation the job will go to the fit and active person rather than to the partially disabled.'

(Reasons, para.17)

## Invalid pension: permanent incapacity

**ROMEO and SECRETARY TO DSS (No. S87/7)**

**Decided:** 17 November 1987 by J.A. Kiosoglous.

The AAT set aside a DSS decision to reject a claim for invalid pension lodged by a 41-year-old man, who had worked as a French polisher for some 20 years before injuring his back.

Romeo complained of pain in his back, right leg and right foot, which severely restricted his movements; and he declared that he was unable to work as a French polisher.

Medical evidence confirmed that Romeo had suffered an injury in his lumbo-sacral spine, which had left him capable of light work only; and that surgical treatment, either a discectomy or Chymopain injection, could significantly improve his capacity.

However, Romeo refused to undergo any surgical treatment because of what he described as a fear of

injections which dated from a childhood hospital experience. Romeo had also refused rehabilitative treatment because, he said, he could not afford the cost of travel involved.

A psychiatrist told the AAT that Romeo had a mixed neurotic disorder with anxiety and depression and that he had adopted, largely consciously, an invalid role. There was, the psychiatrist said, no more than a 15% disability due to unconscious factors.

According to a specialist in occupational medicine and a social worker, Romeo was unlikely to obtain employment. His physical disability meant that he could not obtain work as a French polisher; and his inability to write English largely restricted him to unskilled light duties, where any potential employer would be unlikely to risk the possibility of aggravation to Romeo's back condition.

The AAT said that Romeo's moderate physical disability and minor psychiatric disability, when considered

in the light of his age, skills and education, meant that he was highly unlikely to attract an employer to engage him for the limited range of duties within his capabilities. He was therefore, incapacitated for work to the extent required by ss.23 and 24 of the *Social Security Act*.

This incapacity, the AAT said, was permanent in the sense that it was likely to persist in the foreseeable future. Romeo's refusal to undergo surgical treatment was based on a genuine fear of such treatment and did not prevent his incapacity from being treated as permanent. On this point, the AAT followed the earlier AAT decision in *Korovesis* (1983) 17 SSR 175 and the Federal Court decision in *Dragojlovic* (1984) 18 SSR 187.