Invalid pension: payment to detainee

GILBERT and SECRETARY TO DSS (No. W86/275)
Decided: 2 October 1987 by J.O. Ballard, N. Marinovich and K.J. Taylor.

Robert Gilbert had been charged with murder and found not guilty by reason of unsoundness of mind by the Supreme Court of Western Australia. The Court committed him to prison during 'Her Majesty's pleasure'. In April 1986, he applied for and was granted an invalid pension.

Following an amendment to the *Social Security Act*, the DSS cancelled Gilbert's invalid pension; and he asked the AAT to review that cancellation.

The legislation
At the time when Gilbert was granted an invalid pension, s.135THA of the *Social Security Act* prevented the grant of an invalid pension to a person who had been imprisoned after conviction for an offence but did not affect a person confined in a psychiatric institution without being convicted of an offence.

The Act was then amended, so that s.135THA(2)(b)(ii) prevented the grant of an invalid pension to a person who was -

> 'confined in a psychiatric institution, whether by order of a court or otherwise, in consequence of having being charged with the commission of an offence . . .'

According to s.135THA(7) -

> 'A reference to a psychiatric institution shall be read as including a reference to a psychiatric section of a hospital and to any other place where persons with psychiatric disorders are, from time to time, confined.'

Subsequently, s.135THA was further amended by inserting subsection (9), which saved the position of any person confined in a psychiatric institution while 'undertaking a course of rehabilitation.'

It was argued on behalf of Gilbert that he was not confined in a psychiatric institution as defined in s.135THA(7) as he was held in a prison; and that, because he was undertaking a 'resocialisation program', s.135THA(9) preserved his entitlement to invalid pension.

'A psychiatric institution'
The AAT adopted a broad reading of the term, 'psychiatric institution'. The Tribunal noted that the definition of this term in s.135THA(7) referred to 'any other place' as well as to 'a psychiatric section of a hospital'; and this was sufficient to cover Gilbert's situation.

Because the two meanings of 'psychiatric institution' were separated by the words 'and to', the specific phrase did not control the meaning of the general phrase, 'any other place'. This reading of s.135THA(7), the AAT said, was consistent with the literal meaning of the words in the subsection. The AAT commented:

> 'The Act is designed to support those in need. The intention of the section is surely to exclude from a benefit under the Act persons who are receiving food and sustenance while in a prison. It seems to us that this application is designed to defeat the manifest purposes of Parliament in enacting the amending legislation.'

(Reasons, para.14)

The AAT also referred to the Minister's Second Reading speech on the Bill to amend s.135THA:

> '. . . the Bill precludes payment of pensions and benefits to mentally ill persons who are confined without being convicted of an offence. The Act will treat such persons in the same way as a person who is imprisoned in connection with his or her conviction for an offence.'

If there were any doubt about the meaning of 'any other place' in s.135THA(7), the AAT said, s.15AB(2) of the *Acts Interpretation Act* allowed it to refer to the Minister's speech. That speech conclusively resolved the interpretation of s.135THA(7) against Gilbert.

'A course of rehabilitation'
Gilbert was undergoing a 'resocialisation programme', designed to allow him to fit into the normal prison environment and to prepare him for ultimate release from prison. The programme was described by a prison doctor as common to all long term prisoners, and as having no rehabilitative aspect.

On the basis of that evidence, the AAT decided that Gilbert was not undergoing 'a course of rehabilitation' within s.135THA(9).

Formal decision
The AAT affirmed the decision under review.

Handicapped child's allowance

BRYER and SECRETARY TO DSS (No. W87/78)
Decided: 23 September 1987 by R.D. Nicholson, I.A. Wilkins and P.A. Staer.

Robin Bryer gave birth to her child, A, in May 1986. The child was diagnosed as suffering from phenylketonuria (PKU).

Bryer applied for a handicapped child's allowance. When the DSS rejected that application, Bryer applied to the AAT for review.

The legislation
At the time of the decision under review s.105J (now s.102) of the *Social Security Act* provided that a person was qualified for handicapped child's allowance if the person provided constant care and attention to a 'severely handicapped child' in their private home.

Section 105H(1) (now s.101(1)) defined a 'severely handicapped child' as a child with a physical or mental disability who, by reason of that disability, needed 'constant care and attention', and was likely to need that care and attention - 'permanently or for an extended period'.

The DSS had adopted an administrative guideline which declared that 'PKU children will not generally be classified as "severely handicapped" unless there are other significant disabilities.'

The evidence
The condition of PKU prevented the normal use of protein food and would, without treatment, lead to impaired brain development. A's condition was expected to continue until he reached 10 years of age. In the meantime, it was necessary for his diet to be carefully controlled by Bryer in consultation with a dietitian. In addition, she had to consult regularly with medical advisers and supervise closely A's activities and contacts.

'Constant care and attention'
The AAT observed that the evidence in this matter -

> 'casts some doubt on the appropriateness of the present guideline relating to PKU but in any event shows the guideline produces an unjust decision in its application to [A].'

(Reasons, p.15)

The care and attention needed by A and provided by Bryer, including preventive care, was 'constant' in the sense that it was regular and continually recurring, rather than spasmodic.

As there was no dispute that A had a physical disability and that his need for care and attention would continue for an extended period, Bryer met the requirements to qualify for handicapped child's allowance.

Formal decision
The AAT set aside the decision under review and substituted a decision that Bryer qualified for handicapped child's allowance from June 1986.

Sickness benefit: recovery

WALKER and SECRETARY TO DSS (No. V86/552)
Decided: 30 November 1987 by J.R. Dwyer.

As the result of an industrial injury in 1975, Bruce Walker was obliged to give up working in 1981. He was paid sickness benefit from May 1981 to October 1982. He then received weekly payments of workers' compensation from October 1982 to October 1984.

In October 1984, the Victorian Workers' Compensation Board made a consent award of $32 500 compensation to Walker. The DSS then decided to recover $1874 sickness benefit from Walker. He asked the AAT to review that decision.

The legislation
At the time of the decision under review, s.115B(3) of the *Social Security Act* allowed the Secretary to the DSS to recover sickness benefit payments, where the Secretary was of the opinion that a payment of compensation received by a person was a payment, in whole or in part, by way of compensation for the incapacity for which the person had received sickness benefit. The right of recovery was limited to -

'(a) the amount of sickness benefit received by the person in respect of that incapacity; or

(b) the amount of the lump sum payment . . . or such part of that amount . . . as, in the opinion of the Secretary, relates to that incapacity -

whichever is the lesser amount.'

Identity of incapacity
The AAT noted that the Federal Court had decided, in *Siviero* (1986) 68 ALR 147, that the Secretary could only recover sickness benefit under s.115B(3) where the sickness benefit and compensation had been paid for the same incapacity 'in terms of cause, effect and time'.

The consent award declared that Walker abandoned 'all claims to past weekly payments of compensation' and 'claims to future medical . . . expenses'; and that the payment of $32 500 was in full settlement of Walker's claims for future compensation.

In the present case, it appeared from the consent award that the compensation was paid for incapacity from October 1984 on, whereas the sickness benefit had been paid for incapacity prior to October 1982. Accordingly, as the award stood, the necessary identity of incapacity was lacking.

A conclusive award
The DSS asked the AAT to look behind the terms of the award, arguing that it was a device to avoid the recovery provisions.

In *Siviero*, the Federal Court had said that it could not go behind the compensation award, even where it could not imagine a factual situation which would support the terms of the award.

The Tribunal noted that in *Castronuovo* (1984) 20 *SSR* 218 the AAT had said that the terms of the consent award in that case could not be taken at face value. But that, the Tribunal said, was because 'it was clear on the face of the award that there must have been some error in the statement': Reasons, para.25.

In the present case, there was no apparent error on the face of the award:

'27. In view of the clear statement by the Federal Court in *Siviero* that there is no basis to go behind the terms of an award, even where the Court could not conceive of a factual basis for the award, and the fact that in this matter, unlike in *Castronuovo*, there is no error apparent on the face of the award, I consider that the Tribunal and Secretary must accept the award at face value.'

Formal decision
The AAT set aside the decision under review and substituted a decision that the sum of $1874 was not recoverable.

Assets test: disposal of property

ROGERS and SECRETARY TO DSS (No. V86/02)
Decided: 23 October 1987 by R.A. Balmford, R.A. Sinclair and G. Brewer.

Annie Rogers asked the AAT to review a DSS decision that age pension was no longer payable to her because of the value of her property, including a farm.

Rogers argued that she had disposed of the beneficial ownership of the farm in favour of her sons.

The property
Rogers had inherited a dairy farm on the death of her husband in 1957. The farm was operated by sharefarmers and tenants until 1969, when Rogers' two sons, C and B, took over the farm. In 1975, the partnership between C and B was dissolved and, since then, the farm had been operated by C, who also worked full-time as a TAFE lecturer.

In 1980, the farm was divided into two lots. Lot 1, of 69 hectares with the farmhouse and other buildings, was sold by Rogers to C and his wife for $84 200. At the time of the hearing, Rogers was still owed $37 000, secured by an unregistered mortgage. The mortgage provided for annual repayments of the debt, free of interest, of $5000. No more than one instalment had been paid since 1980.

Lot 2, of 42 hectares, had been retained by Rogers but leased to C at a rent of $2800 a year. He regularly paid most of this rent.

Rogers' non-exempt assets consisted of an insurance policy ($3485); Lot 2 ($104 800); a fixed deposit ($2000); and the unregistered mortgage of Lot 1 (present value $20 870).

The legislation
Section 6 of the *Social Security Act* provides that where a person has disposed of property for inadequate consideration, on or after 1 June 1984, the value of that property is to be included in the value of the person's property for the purposes of the assets test.

Section 7 provides that the value of any property is to be disregarded for the purposes of the assets test, where *(inter alia)* -

(b) s.6 does not apply in relation to the person or the Secretary determines that s.6 should be disregarded;

(c) the person cannot, or could not reasonably be expected to, sell, realise or use the property as security for borrowing; and

(e) the Secretary is satisfied that the person would suffer 'severe financial hardship' if the property were taken into account.

No constructive trust
Rogers told the AAT that she proposed to leave Lot 2 to her sons as tenants in common in equal shares; and C told the AAT that he would be 'quite upset' if his mother sold Lot 2, because of his feeling for the land which had been in the family since 1860.

The AAT said that this did not fall into any of the recognised categories