PASHALIS and SECRETARY TO DSS
(No. S87/78)
Decided: R.A.Layton.

The AAT *affirmed* a decision to reject a claim for invalid pension from Pashalis, a 39-year-old man.

Pashalis was born in Greece and left school at the age of 14. He had worked mostly in the fishing industry until coming to Australia with his parents at the age of 17. Since that time he had worked in a series of factory jobs. His most recent job was as a chicken catcher, catching chickens in a shed and loading them into crates, which were then lifted by forklift trucks. This work was done in the dark, and on one occasion in April 1984 the applicant's back was injured when a forklift hit him and knocked him to the ground.

Pashalis had consulted numerous doctors since his injury. With one exception, all the reports available to the AAT, and the 4 doctors who gave evidence, were of the view that Pashalis was suffering from musculo-ligamentous strain of his back. One doctor was of the view that he had no organic disability. The AAT concluded that Pashalis had such a back injury, continued to suffer from it but that it was not severe, and there was a 25% disability of his total back function.

There was also conflicting psychiatric evidence. The AAT concluded that Pashalis had an anxiety or depressive state of mild to moderate severity. The Tribunal stated that Pashalis' back condition prevented him from doing heavy lifting or repetitive and sustained bending, twisting, standing or sitting. The Tribunal also noted Pashalis' lack of abilities in written English and limited educational qualifications, and the incapacity for work arising from his anxiety/ depression.

The AAT decided Pashalis' claim under the legislation in force at the time of the original decision, i.e., the old ss.23 and 24 of the *Social Security Act*. It concluded that he was 85% incapacitated for work.

However, there was a real question as to the permanence of Pashalis' condition. The AAT noted that Pashalis was only 39 and, although he had seen many diagnosing doctors, he had not received much treatment.

The AAT said:

> 'I do not consider that all avenues of treatment have been pursued whereby the applicant may, by a combination of psychotherapy and rehabilitation, be given an opportunity to improve the present level of incapacity.'

It concluded therefore that Pashalis was not permanently incapacitated for work.

[J.M.]

Invalid pension: permanent incapacity 'in Australia'

DIMISSIANOS and SECRETARY TO DSS
(No. V82/438)
Decided: 22 June 1988 by J.R. Dwyer.

Constantine Dimissianos asked the AAT to review a DSS decision refusing his claim for invalid pension. Dimissianos had lived in Australia from May 1963 until January 1968. He then returned to Greece and made his claim in February 1981.

The legislation

The only issue before the AAT was whether Dimissianos satisfied s.24A(c) [now s.29] of the *Social Security Act* - that is whether he 'became permanently incapacitated for work . . . while in Australia . . .'

The evidence

In 1964 and 1965, while in Australia, Dimissianos suffered headaches and pain in the right eye. He was hospitalised for 15 days; but a hospital report indicated that he had almost completely recovered from his condition in February 1966.

Dimissianos worked as a tailor to support his family from 1968 to 1979, while living in Greece. During that time the pain in his right eye recurred on four occasions but he did not require hospitalisation until 1979. Upon discharge he was advised to avoid his work as a tailor because it 'causes tiredness to the eyes'. When the matter was heard before the AAT the DSS conceded that Dimissianos was permanently incapacitated for work but denied that he was permanently incapacitated for work on his return to Greece in 1968.

Incapacity in Australia

The AAT concluded that, on the balance of probabilities, Dimissianos was able to work until 1979; and pointed out that:

> 'This is not a matter, like a workers' compensation claim, where if the original condition caused or contributed to the later incapacity for work there is entitlement for compensation. The requirement of the Act in this case is that Mr Dimissianos must have been permanently incapacitated for work while in Australia. Even though the eye problem which first manifested itself in Australia is the same problem as that which later deteriorated so significantly that Mr Dimissianos became incapacitated for work, that is not enough for him to succeed in his claim for invalid pension. Even if he was only fit to work from January 1968 when he left Australia until May 1968 when he had his next episode of that problem (in Greece), that alone would be sufficient to prevent him succeeding ...'

(Reasons, para. 23; original emphasis)

Formal decision

The AAT affirmed the decision refusing invalid pension.

[D.M.]

DAYAL and SECRETARY TO DSS
(No. N87/1102)
Decided: 27 May 1988 by B.J. McMahon, J.H. McClintock and M.T. Lewis.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 74-year-old man, who had migrated to Australia in May 1985, when he was 70 years old.

The DSS conceded that Dayal was now permanently incapacitated for work because of asthma; but maintained that he had not become incapacitated in Australia.

Up to the time of his migration, Dayal was worked on his family farm in India. The work had been strenuous and his working day long. Dayal had been medically examined by Australian immigration authorities 5 months before his arrival in Australia. The examination reported that he had no medical disorder and that his respiratory system was normal.

Following his arrival in Australia, Dayal had tried to obtain employment. His asthma had developed about 2 months after his arrival here and had increased in severity. Dayal had been offered 2 light jobs but had found that his asthma prevented him from accepting them.

At the time of the decision under review, s.24 of the *Social Security Act* [now s.28] provided that a person over the age of 16 and not receiving an age pension was qualified for invalid pension if he was 'permanently incapacitated for work' and residing in and physically present in Australia.

Section 25(1) ['now s.30(1)] provided that an invalid pension was not payable to a person unless that person became permanently incapacitated for work while in Australia or during a temporary absence from Australia.

The Tribunal referred to the AAT decision in *Panke* (1981) 2 *SSR* 9 and the Federal Court decision in *Annas* (1985) 29 *SSR* 366; and said that it followed from these decisions -

> 'that in determining whether a person became permanently incapacitated for work before he came to Australia, one must first evaluate his physical or mental condition at that stage, and secondly ascertain the extent to which that condition affected his ability to engage in paid work.'

(Reasons, para.21)

In this case, there was 'no evidence . . . of any physical incapacity prior to

the applicant arriving in Australia.' There was 'positive evidence' (in the immigration medical report) that there was no such incapacity.

The AAT noted that a specialist had examined Dayal for the DSS and observed that his incapacity for work was due to his advanced age at the time of his arrival in Australia. The Tribunal said that, even if it accepted this opinion (which it did not), the opinion -

> 'would not be sufficient to disqualify the applicant under s.25. There must be a medical component in the applicant's incapacity . . . As an Australian applicant could not successfully claim entitlement to an invalid pension simply because he was old, so also it cannot be alleged against an applicant that he was incapacitated for work outside Australia only because he was old outside this country.'

(Reasons, para.23)

On this point, the AAT referred to the statement in *Sheely* (1982) 9 *SSR* 86, 'that the "permanent incapacity" must result from a medical disability'.

The AAT went on to conclude that, despite his age, Dayal had been capable of attracting an employer and undertaking full time employment when he arrived in Australia. His situation differed from the applicants in *Krupic* (1984) 23 *SSR* 279 (Krupic had significant medical disabilities when he arrived in Australia), *Blando* (1987) 39 *SSR* 494 and *Maniatis* (1986) 32 *SSR* 407 (Blando and Maniatis did not have a 'history of regular full-time appropriate work' up to the time of their immigration).

[P.H.]

Special benefit: foster parent

CHRISTIE and SECRETARY TO DSS
(No. S87/309)
Decided: 1 July 1988 by J.A. Kiosoglous.

Carmel Christie had been a member of the order of the Sisters of Mercy since 1950. She had spent most of her time in the order caring for young children, both in institutions and in a home environment.

In 1984, Christie arranged with the State Community Welfare Department (DCW) and the State Housing Trust (SAHT) to foster children in a house provided by the SAHT. She inquired at the DSS and was told that she would be eligible for supporting parent's benefit or special benefit.

In June 1985 she began fostering 2 children and applied to the DSS for supporting parent's benefit. The DSS rejected her application because she did not have legal custody of a child; and also refused to pay her special benefit. Christie continued to foster the children until August 1985. In October 1985 she took another child into her foster care.

Christie asked the AAT to review the refusal of special benefit.

The legislation

At the time of the decision under review, s.124(1) of the *Social Security Act* gave the Secretary a discretion to pay special benefit to a person if the Secretary was satisfied that the person was,

> 'by reason of age, physical or mental disability or domestic circumstances, or for any other reason, . . . unable to earn a sufficient livelihood'.

'Unable to earn'

Over the 3 years from June 1985, Christie acted as foster parent for several children. She relied on various sources for her support: family allowance and family income supplement from DSS; a grant from her order; part-time work as a house cleaner; and income support from DCW, paid only while she pursued her appeal rights against the DSS decision.

The AAT said Christie had conceded that she could earn a sufficient livelihood; but that, if she did this, she would be unable to continue as a foster parent. The AAT apparently regarded this as sufficient to show that she was unable to earn a sufficient livelihood 'by reason of her domestic circumstances or for any other reason': Reasons, para.22.

The discretion

However, the AAT said, the discretion in s.124(1) should not be exercised in Christie's favour. The AAT referred to *Te Velde* (1981) 3 *SSR* 23, where the Tribunal had said that a person's control over the circumstances which prevented the earning of a sufficient livelihood was relevant to the exercise of the discretion to grant special benefit.

The AAT also referred to *Conroy* (1983) 14 *SSR* 143, where the Tribunal had said that special benefit was not intended to provide public support for people who voluntarily committed themselves to full-time social welfare. The AAT said:

> '25. The Tribunal feels considerable sympathy for the applicant and the exceptionally good work that she has been doing. It would be tragic if her services in this field were lost. In fact the media is constantly making the community aware of the need for caring persons such as the applicant to cater for the homeless and needy children in our society. It is hoped that those in positions of influence would give consideration to the special needs for circumstances such as these to enable the applicant and people like her to continue the excellent work they do in providing a much needed facility for children. However in the light of the principles enunciated in the cases cited before this Tribunal it is not possible for the discretion to be exercised in the applicant's favour.'

Misleading advice

The AAT said it was not disputed that Christie had been given wrong advice by DSS officers; and it found that she had acted on that advice. Although this was not a case where the s.124(1) discretion should be exercised, the AAT 'hoped that the respondent will be able to recompense the applicant in some way for the first period . . . from June 1985 to August 1985': Reasons, para.26.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Cohabitation

HORVATH and SECRETARY TO DSS
(No. N87/926)
Decided: 17 June 1988 by C.J. Bannon.

Anna Horvath asked the AAT to review a DSS decision to cancel her widow's pension and recover an overpayment. The basis of these decisions was the belief of the DSS that Horvath had been living with a man, E, on a *bona fide* domestic basis for over 6 years since July 1980.

The facts

Horvath and E had shared accommodation since 1976 in different houses. They had always occupied separate bedrooms as did Horvath's children, who lived with them over different periods of time.

They maintained separate finances and each paid a share of rent, gas and electricity. Horvath paid more of these bills than E (presumably because of her children). They never pooled their moneys. They did not have a sexual relationship. Horvath did some cooking, cleaning and clothes washing for E, although he mostly looked after himself.

However, there was some evidence that suggested Horvath and E were living in a *de facto* relationship. In 1976 she used the name 'Anna E' when undertaking part-time employment. The AAT accepted Horvath's explanation that she had used this name to avoid disclosure of her earnings to the DSS. Therefore the AAT did not regard Horvath as having passed herself off as E's wife.

E had told his employer's insurers, when claiming worker's compensation, and the Taxation Office that he was married to 'Anna E'. The AAT decided that this could not be used against