

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