physical or mental disability which required care and attention only marginally less than that required by a severely handicapped child, permanently or for an extended period.

A severely handicapped child was defined as one who had a physical or mental disability which required constant care and attention permanently or for an extended period.

The other two sections required the care to be given in a private home that was the residence of the child and the parent.

Developmental delay a mental disability

The AAT said the evidence from the school, which was supported by Pryor who spent many hours a week with C in an endeavour to overcome these problems, was sufficient to establish the existence of a mental disability that would call for further care and attention for some time to come. It is not necessary to describe it as a mental illness.

Although Pryor spent less time providing care and attention for the asthma than had been required a few years ago, she was 'constantly watchful of behaviour patterns which precipitate attacks'. By itself, the asthma would not have been sufficient to need the amount of care and attention required by statute. The enuresis, if it were a sole disability, would also have been insufficient. However the three disabilities taken together satisfied the requirements of the Act.

[B.W.]

Compensation payment: preclusion

KRZYWAK and SECRETARY TO DSS
(No. V88/47)
Decided: 9 September 1988 by J.R. Dwyer.

Barbara Krzywak claimed an invalid pension in May 1987. The DSS delayed considering the claim until September 1987. In the meanwhile, Krzywak received a lump sum compensation payment of $30 000. When the DSS dealt with the claim for invalid pension, it decided that Krzywak was precluded, because of s.153(1) of the *Social Security Act*, from receiving invalid pension from July 1987 until October 1988.

Krzywak asked the AAT to review that decision.

The legislation

At the time of the DSS decision, s.153(1) provided that a pension was not payable to a person 'during the lump sum payment period' (a period which was calculated under s.152(2)(e)) where that person, while 'receiving a pension' received a lump sum compensation payment.

From 16 December 1987, s.153(1) was amended so that it precluded payment of pension during the lump sum payment period where a person or the person's spouse while 'qualified to receive a pension' received a lump sum compensation payment. That amendment took effect from 16 December 1987.

The *Social Security Amendment Act* 1988 amended s.153(1), effective from 1 May 1987. The result of this retrospective amendment was that, between 1 May and 16 December 1987, s.153(1) precluded payment of pension where a 'person who is receiving a pension receives or has received (whether before or after becoming so qualified) . . . a lump sum payment by way of compensation'; and, from 16 December 1987, s.153(1) precluded payment of pension 'where a person or the spouse of a person who is qualified to receive a pension receives or has received (whether before or after becoming so qualified) . . . a lump sum payment by way of compensation'.

Preclusion before 16 December 1987

The AAT said that the retrospective amendment made by the *Social Security Amendment Act* 1988 to the form of s.153(1) in force before 16 December 1987 -

> 'did not apply a preclusion period to Mrs Krzywak, because even as retrospectively amended, s.153(1) only applied "where a person who is receiving a pension" receives lump sum payment of compensation. Mrs Krzywak was never "a person who is receiving a pension". She was never paid invalid pension because of the view of officers of the Department that her lump sum award of compensation precluded payment of pension to her, even though she had never been "a person who is receiving a pension".'

(Reasons, para. 17)

Preclusion from 16 December 1987

However, the AAT said, the form of s.153(1) in force from 16 December 1987, as retrospectively amended by the *Social Security Amendment Act* 1988, did have the effect of precluding payment of pension to Krzywak during the lump sum payment period. The new form of s.153(1) applied to all people qualified to receive pension who after 1 May 1987 received a lump sum compensation payment 'whether before or after becoming so qualified'; and Krzywak fell into this category.

According to s.152(3)(b), the lump sum payment period is to run from the day after the day that a person receives her last periodical payment of compensation. The AAT said that the effect of the new form (i.e. post-16 December 1987) of s.153(1) would prevent payment of pension to Krzywak during the whole of the lump sum payment period, even if that period began before 16 December 1987 (as it did in this case). The AAT explained:

> '19. There is therefore no advantage to Mrs Krzywak in the fact that s.153(1) as amended by the Retrospective Act did not apply to her until after 16 December 1987. Once s.153 "catches" Mrs Krzywak's payment of compensation, the preclusion period applicable is the same no matter when she first came within its ambit.'

Calculating the preclusion period

Section 152(2) provides that the 'lump sum payment period' (that is, the period during which payment of pension is precluded) is to be calculated by dividing 'the compensation part of the lump sum payment' by average weekly earnings.

Where a compensation claim was resolved before 9 February 1988 'the compensation part of the lump sum payment' is to be the portion of the lump sum payment which was, in the Secretary's opinion, 'in respect of the incapacity for work'.

Where a compensation claim is resolved on or after 9 February 1988, 'the compensation part of the lump sum payment' is a fixed statutory amount - 50% of the lump sum payment.

In the present case, the Victorian Accident Compensation Tribunal had awarded Krzywak $30 000, expressed to be in settlement of all forms of future compensation other than medical and similar expenses. That Tribunal's jurisdiction was to award payments of compensation for death, total or partial incapacity for work, various specified injuries, and medical expenses: *Accident Compensation Act* 1985 (Vic.).

Krzywak's solicitors had written to the DSS with two quite different interpretations of the award: first they had said that the whole of the award was

for 'pain and suffering and loss of enjoyment of life'; and later they had advised the DSS that only one-half of the compensation award represented 'economic loss'.

The AAT referred to earlier decisions in *Walker* (1987) 41 *SSR* 517 and the Federal Court's decision in *Siviero* (1986) 68 ALR 147; and said that it should not go behind the express words of the award. There was no error apparent on the face of the award (as there had been in *Castranuovo* (1984) 20 *SSR* 218) so that 'the compensation part of the lump sum payment', because the matter was settled before 9 February 1988, would be the whole of the award, $30 000.

Discretion to ignore part of the award

Section 156 of the *Social Security Act* gives the Secretary 'a discretion to treat the whole or part of a lump sum compensation payment as not having been made ... if the Secretary considers it appropriate to do so in the special circumstances of the case'.

The AAT decided that the circumstances of this case were sufficiently special to justify an exercise of the s.156 discretion. It would, the Tribunal said, be 'unjust, unreasonable or otherwise inappropriate for Mrs Krzywak to be without pension from mid-1987 to October 1988'.

The circumstances which supported this finding included extreme financial hardship - Krzywak had no savings and no income and was being supported by food vouchers from the local council. The bulk of the money from the compensation award had gone to pay long-standing debts and the rest had been spent on her living expenses.

Another factor which was relevant to the exercise of the discretion was the retrospective impact which the 1988 amendment to s.153(1) had worked on Krzywak's entitlements. The Retrospective Act operated 'harshly' on Krzywak because 'it operated to justify the actions of departmental officers who had previously wrongly denied her entitlement to pension' and 'removed Mrs Krzywak's grounds of success on the substantive legal argument in this application a matter of days [in fact, 12 days] before the hearing': Reasons, para. 51. Another factor which made the application of the Retrospective Act unjust to Krzywak was that it applied the preclusion rule retrospectively to her lump sum compensation payment but did not give her the benefit of the 50% formula in s.152(2):

> 'It is difficult to see any rationale for the difference in dates whereby s.153 applies to all payments made after 1 May 1987 but s.152(2) only offers a benefit in respect of matters resolved after 9 February 1988. The difference operates to Mrs Krzywak's substantial detriment.'

(Reasons, para. 53)

The AAT noted that Krzywak's solicitors had apparently given her incorrect advice about the effect of her lump sum compensation payment on her entitlement to invalid pension. The AAT observed that, if Krzywak's solicitors had carefully read the provisions of the Act and advised her properly, she could have pursued her appeal before the SSAT and the AAT on the correct legal basis and 'the matter may have been resolved in Mrs Krzywak's favour before the passing of the Retrospective Act': Reasons, para. 54.

The AAT said that the combination of wrong advice and the passing of retrospective legislation might amount to 'a special circumstance' within s.156. But it was not necessary to make a final decision on that question as there were other sufficient special circumstances.

The AAT also referred to Krzywak's ill-health as a special circumstance: her health problems included anxiety and depression; and her complete lack of any income was contributing to these problems.

The AAT decided that the s.156 discretion should be exercised so as to treat 50% of the lump sum compensation payment as not having been made. By exercising the discretion in this way, the AAT said, 'the object of the legislation will not be frustrated': Reasons, para. 58. This would achieve the same result as the legislation would have required if Krzywak had settled her case after February 1988; and the AAT could 'see no reason why a different principle should apply to cases settled before February 1988 from that applying to those settled after February 1988': Reasons, para. 58).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration with a direction that the s.156 discretion should be exercised to treat 50% of the sum of $30 000 as not having been paid.

[P.H.]

JOVANOVIC and SECRETARY TO DSS

(No. N88/484)

Decided: 21 September 1988 by M.D. Allen.

Prvos Jovanovic claimed unemployment benefit in September 1987. The DSS learned that Jovanovic was about to receive a lump sum compensation payment and, on 28 October 1987, the DSS rejected his claim. On 29 October 1987, Jovanovic received a lump sum compensation payment, of which $60 000 related to future incapacity for work.

Jovanovic asked the AAT to review the DSS decision to reject his claim for unemployment benefit.

The legislation

The question raised in this matter was whether the preclusion provision in s.153(1) of the *Social Security Act* applied to Jovanovic. The terms of s.153(1), and its rather complicated history, are set out in the decision of *Krzywak*, noted immediately above.

The term 'pensioner' is defined in s.152(1), for the purposes of the preclusion provisions as including unemployment benefit.

Relevant legislation

The AAT said that the question of Jovanovic's eligibility for unemployment benefit in October 1987 had to be decided in the light of the provisions of s.153(1) as it had been retrospectively amended by the *Social Security Amendment Act* 1988. The Tribunal was obliged to apply changes to the law which had occurred since the making of the decision to review, where those changes were retrospective. On this point, the Tribunal referred to *Banovich v Repatriation Commission* (1986) 69 ALR 395 and *Smith and DFRDB Authority* (1978) 1 ALD 374.

'Manifestly absurd' legislation

However, the retrospective amendment made to s.153(1) by the *Social Security Amendment Act* 1988 was, the AAT said, 'well nigh incapable of rational interpretation': Reasons, para. 14). In such a situation, the Tribunal said, a departure from the plain and natural meaning of the words used in s.153(1) would be justified by what the Tribunal described as 'the mischief rule'.

The AAT rejected a DSS argument that s.15AA of the *Acts Interpretation Act* 1901 could be used to resolve the difficulty. That section directs that, when interpreting legislation, 'a construction that would promote the

purpose or object underlying the Act . . . shall be preferred to a construction that would not promote that purpose or object'. This provision, the AAT said, did not authorise it to impose on the words of s.153(1) (in its pre-16 December 1987 form) a meaning which the words did not 'fairly bear'. It only dealt with the situation where there were two possible interpretations open.

Rather, the AAT said, it was s.15AB which was relevant. This section permitted reference to 'material not forming part of the Act' in order to determine the meaning of a provision which was ambiguous, obscure, or whose ordinary meaning 'leads to a result that is manifestly absurd or is unreasonable'.

The AAT said that the ordinary meaning of s.153(1) in its pre-16 December 1987 form (as retrospectively amended by the *Social Security Amendment Act* 1988) did lead to a 'manifest absurdity'. The words '(whether before or after becoming so qualified)' were, the AAT said, 'quite obviously an absurdity': Reasons, para. 9.

The explanatory memorandum which accompanied the *Social Security Amendment Bill* 1988 stated that the retrospective amendment to s.153(1) would 'clarify that the sub-section may apply whether compensation was received before or after the date on which the person became qualified to receive a pension'. The AAT said:

> '19. It seems clear from the above reference that non-retrospectivity of the amendment [made to s.153(1) from 16 December 1987] escaped the notice of the Parliamentary Draftsman and the intent was, as stated, to prohibit subsequent to 1 May 1987 the payment of pension after the receipt of an award of damages whether that award was received before or after the claimant became qualified in all other respects to receive a pension.
>
> 20. The intent of the legislature can be achieved if the word "receiving" in s.153(1) is read as "receiving or qualified to receive". Given the authority referred to above and the obvious intention of the legislature I am prepared so to do.
>
> 21. Applying this interpretation to the facts of this case, as at the time the decision was made to refuse the applicant unemployment benefits, namely 28 October 1987, he was qualified to receive those benefit. On 29 October 1987, however, he received a lump sum payment by way of compensation. Thus he, in the terms of s.153(1) as I interpret it, was rendered ineligible to receive that benefit.'

Formal decision

The AAT remitted the matter to the Secretary with a direction that the applicant was, pursuant to s.153(1), not entitled to receive unemployment benefit consequent upon his application made on 8 September 1987.

[P.H.]

Assets test: 'deemed income'

WALLACE and SECRETARY TO DSS

(No. V87/209)

Decided: 22 August 1988 by I.R. Thompson.

Norman Wallace was granted an age pension in 1978. In July 1985 the DSS cancelled his pension because of the value of his assets. Subsequently, the DSS re-valued Wallace's assets and restored his pension, but at a reduced rate, on account of 'deemed income' from Wallace's assets.

The property in question consisted of a farm of 91.64 hectares which was valued at $150 000 (excluding Wallace's house and its curtilage). Originally, this farm had been part of a much larger area; but adjoining property had been transferred to Wallace's brother, son and daughter. All of the properties were farmed using natural organic methods - that is, no chemical fertilisers were used on the properties. (Wallace's brother had acquired a reputation as an inventor and innovator in organic farming, having developed a special plough for aerating the soil without turning over the topsoil.) Wallace was adamant that, if he were to lease his land (which he was no longer farming) it would be on the strict condition that organic farming methods were used.

The AAT accepted evidence from a valuer that Wallace's farm could be let for an annual rental of $5520. However, before this could be done, the property required fencing and the construction of a stockyard, at a total cost of at least $9 000.

The AAT said that the principles set down by the Federal Court in *Haldane-Stevenson* (1985) 26 *SSR* 323 should be applied when calculating income for the purposes of s.6AD(3) [now s.7(4)] of the *Social Security Act*. That is, it was net income which was relevant. On the assumption that Wallace could lease the property out for $5 520 a year and that any tenant who paid $9 000 for erecting fences and a stockyard would withhold that amount from the rent payable, the AAT decided that the amount of rent which 'could reasonably be expected to be derived from . . . the use of [the] property' (the phrase used in s.6AD(3)) and 'the amount per annum that could reasonably be expected to be obtained from a purely commercial application of that property' (the phrase used, from 13 November 1987, in s.7(4)) was nil in the first year and $2040, less the rates payable on the land in the second year. However, in the third year (which the AAT calculated to run from 14 November 1987), the deemed income would be the full $5 520 less the rates payable on the land. It would be that amount of deemed income which would be used to reduce the rate of pension payable to Wallace.

The AAT observed that, taking into account the rates payable on the land, it was likely that the net deemed income would exceed 2.5% of the land's value. In that event, s.7(4) (as it operated from 13 November 1986) required that the lesser amount be treated as Wallace's deemed income.

In addition, the AAT noted that Wallace had made a loan to his daughter and son-in-law in 1985 and that they had made small repayments of the loan each year since then. The AAT said that the definition of 'income' in the former s.6(1) [now s.3(1)] of the *Social Security Act* was so broad that the receipt of the repayments of the loan should be treated as Wallace's income so as further to reduce the amount of pension payable to him and to his wife.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration.

[P.H.]

Amnesty: voluntary declaration

GARRAFFO and SECRETARY TO DSS

(No. V88/75 and V88/131)

Decided: 7 September 1988 by H.E. Hallowes.

Mr and Mrs Garraffo had been receiving age pension since 1976 and 1979. In 1983, Mr Garraffo told the DSS that he was receiving a pension from the Italian Pension Fund, INPS.