The AAT pointed out that the DSS did not dispute that Steficek had been wrongly advised that he would be entitled to pension if he returned; and suggested that this was a matter which might be raised with the Ombudsman.

Formal decision

The AAT set aside the decision of the Social Security Appeals Tribunal and substituted for it a decision that Mr Steficek was not an Australian resident at the time he became permanently incapacitated for work.

[R.G.]

Compensation payments: discretion to disregard

ZARVALIS and SECRETARY TO DSS

(No. 5432)

Decided: 12 October 1989 by B.J. McMahon, J.H. McClintock, and J. Kowalski.

The AAT *affirmed* a DSS decision that Anthony Zarvalis was precluded from receiving payments of invalid pension, by virtue of s.153(1)(a) of the *Social Security Act*, while he was receiving periodic payments of compensation.

In particular, the AAT refused to exercise the s.156 discretion to disregard the payments of compensation being received by Zarvalis. Zarvalis had argued that he was in a difficult financial situation, with a net income of $185 a week and expenses of $243 a week. However, the AAT pointed out that Zarvalis could easily increase his net income by claiming a dependent spouse rebate (worth $19 a week) and that he had managed to balance his budget by reducing expenditure:

> 'The income and expenditure account shows a tight balance but, in our view, not an unmanageable one.'

(Reasons, para. 11)

The AAT balanced against this tight current financial situation Zarvalis' substantial assets, including his unresolved common law action against his employer, which was expected to result in a damages award of $400 000 to $500 000.

The AAT also said that Zarvalis' serious health problems were not sufficiently unusual to amount to a 'special circumstance' within s.156. His physical and psychological disabilities provided the medical grounds on which he had been found eligible for invalid pension and, as was said in *Michor* (1988) 51 *SSR* 675, it was not a circumstance which distinguished Zarvalis from other persons 'similarly qualified by such disabilities': (Reasons, para.19).

[P.H.]

Age pension: assets test; severe financial hardship

SHERIDAN and SECRETARY TO DSS

(No. 2038)

Decided: 17 October 1989 by R.K. Todd.

Patrick Sheridan sought review of a DSS decision not to restore his age pension under the assets test 'hardship' provisions contained in the former s.6AD(1) of the *Social Security Act* [now s.7(1)].

Facts

Sheridan and his wife were granted age pensions from October 1982 and Sheridan was also receiving a war disability pension amounting to $39 a fortnight.

Age pensions ceased to be paid after March 1985 due to the commencement of the assets test provisions. The significant asset was a farming property valued at $264 968. Sheridan and his wife had moved from the farming property years previously leaving their son and family to run it. Sheridan, his wife and son remained in a stock/plant partnership.

Following the drought of 1981-82, the family went heavily into debt. However they estimated that the year ending 30 June 1989 would show a net partnership income of $20 000.

Sheridan's failing health meant he could no longer assist his son who would have to engage casual labour. It also caused him to consider ending the partnership and putting his son in control of the property.

Sheridan's son gave evidence that he had received unemployment benefit from 1983 until 1987 because of his financial difficulties. Since then he had been able to support his family out of his share of the farm profits and from casual work.

Jurisdiction

The DSS argued that the Tribunal only had jurisdiction in respect of the 1984-85 financial year, as only that year was considered by the SSAT. The Tribunal agreed but said that information gained after the SSAT decision remained relevant.

Severe financial hardship

The DSS conceded that it was not reasonable to expect Sheridan to sell or borrow against the farming property. So the crucial question was whether Sheridan had suffered financial hardship so severe as to attract the provisions of s.6AD(1).

The general approach adopted in earlier decisions had been that a person with income above the maximum rate of pension would not be treated as suffering 'severe financial hardship': see, for example, *Lumsden* (1986) 34 *SSR* 430; *Reynolds* (1986) 32 *SSR* 405.

In the 1984-85 year, Sheridan and his wife had taxable income in excess of $15 000. In later years, their combined income was much lower; but they drew heavily on the partnership capital accounts — in 1986, for example, combined drawings were $44 727.

The AAT examined the DSS Policy Manual as it related to the treatment of drawings from the partnership bank accounts. The guidelines stated that drawings were not income for pension purposes but were relevant to 'severe financial hardship'.

Decision

The Tribunal decided that with respect to the year ending June 19854 there was no severe financial hardship because Sheridan and his wife had a combined income in excess of the combined pension rate. Nor were there any special circumstances. The Tribunal said that while there were difficulties on the farm as it recovered from drought, Sheridan and his wife each received $7851 from their share in the net profit and had a bank deposit of $5000.

While the Tribunal had no jurisdiction in respect of subsequent years, it noted that the evidence of the drawings suggested that no finding in favour of Sheridan would be made if put to the test.

Formal decision

The AAT affirmed the decision under review.

[B.W.]

Compensation award: preclusion

KOVACEVIC and SECRETARY TO DSS

(No. 5366)

Decided: 5 September 1989 by R.A. Balmford.

The AAT *affirmed* a DSS decision that Joseph Kovacevic was precluded from receiving an invalid pension, through the operation of s.153(1)(b) of the *Social Security Act*, following his receipt of a compensation payment of $30 000 in October 1987.

In particular, the AAT agreed with the DSS decision that the whole of the $30 000 compensation, paid under the *Accident Compensation Act* 1985 (Vic.) was a payment in respect of incapacity for work.

This was because the *Accident Compensation Act* limited the grounds on which compensation could be awarded, following an industrial injury, to compensation for death, compensation for specified injuries and compensation for incapacity for work. The Act made no provision for compensation for pain and suffering or for loss of enjoyment of life. In the present case, Kovacevic's claim for compensation had not related to death or to one of the specified injuries; accordingly, the only possible finding was that the whole of the award made in his favour had been for incapacity for work. It followed that, under s.152(2)(c)(ii) the whole of that lump sum payment should form the basis of the calculation of any preclusion period under s.153(1).

The AAT also declined to find 'special circumstances' within s.156 of the *Social Security Act*, which would justify disregarding all or part of the compensation payment. In particular, the AAT said that the fact that Kovacevic's wife had given up her full-time employment in the expectation that Kovacevic would be granted an invalid pension was not a 'special circumstance', when balanced against his financial position.

[P.H.]

HARLAND and SECRETARY TO DSS

(No. 5422)

Decided: 11 October 1989 by R.A. Balmford.

Roy Harland sought review of a DSS decision precluding him from receipt of invalid pension for a period of 134 weeks, from the day after the cessation of weekly compensation payments on 24 May 1987 to 15 December 1989.

The facts

Harland had suffered a back injury in a motor vehicle accident in November 1984, and he stopped working in August 1985. On 23 May 1987 he settled both his workers' compensation and common law claims against his employer by executing a release on receipt of $90 000.

He lodged a claim for invalid pension on 4 October 1988 and was found to be permanently incapacitated for work on 25 November 1988. Subsequently, however, it was determined that he was precluded from receipt of pension for a period of 134 weeks, to 15 December 1989.

The legislation

Section 152(2)(e) of the *Social Security Act* provides for the calculation of the lump sum payment period, taking into account the 'compensation part of the lump sum payment' as defined in s.152(2)(c).

Since the settlement took place prior to 9 February 1988, s.152(2)(c)(ii) requires the Secretary to form an opinion as to the amount of the lump sum payment which is in respect of an incapacity for work.

After considering a number of cases where the lump sum payment was made under a statutory scheme where payments were expressly limited by reference to economic losses (see, eg *Krzywak* (1988) 45 *SSR* 580), the AAT noted that this was a settlement of both common law and workers' compensation claims and hence no such limitation could be presumed. Accordingly, the AAT needed to determine what part of the $90 000 settlement represented compensation in respect of an incapacity for work.

Benefit of the doubt

The AAT had before it a letter to Harland from his solicitors, outlining the breakdown as follows: $25 000 for general damages; $20 000 for past economic loss, $40 000 for future economic loss; and $5000 for costs and disbursements.

Since s.152(2)(c)(ii) makes no distinction between past and future economic loss, the DSS had determined the amount in respect of an incapacity for work to be $60 000.

However, shortly before the hearing in the AAT, Harland received advice from the Transport Accident Commission, which stated that $30 000 was assessed as general damages, with $15 000 for past and $40 000 for future economic loss, a total of $55 000.

The AAT found that the latter advice was more likely to be an accurate reflection of the composition of the award. Applying the principle from *Tiknaz* (1981) 5 *SSR* 45, that social welfare legislation should be administered beneficially, the Tribunal decided that, in view of the discrepancy, the amount most favourable to the applicant should be taken to be the compensation part of the lump sum payment, namely $55 000.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that the amount of the lump sum payment of compensation in respect of an incapacity for work was $55 000.

[R.G.]