

Minda raised several factors which, he said, amounted to 'special circumstances'. The first of these was that he had been incorrectly advised by his solicitors that, if he settled his compensation claim, his entitlement to invalid pension would not be affected.

The AAT said that it had some reservations about the evidence on this point. It said that 'positive incorrect advice upon which a person acted to his detriment in particular circumstances' could be a factor in establishing 'special circumstances', where the person did not have the financial capability to pursue a legal remedy against the person who gave the incorrect advice; but, in general, that incorrect advice would not be a 'special circumstance' within s.156.

The AAT also rejected Minda's argument that a 3-month delay on the part of the DSS in advising him that he would be precluded had contributed to him spending most of the compensation award before he discovered that the preclusion period would be applied to him. The AAT said that there was no legal duty imposed on the DSS to give to a claimant for invalid pension advice about a lump sum compensation award; but the delay of the Department in warning Minda was a factor to be taken into consideration in deciding if special circumstances existed.

Minda also argued that the retrospective amendment of s.153(1) in June 1988 operated harshly on him. The AAT agreed that this was 'a factor to be considered but not given such weight as to be rendered ineffective', given the clear intent of the 1988 amendment: Reasons, p.14.

The AAT noted that, if Minda's claim had been settled on or after 9 February 1988, the formula in s.152(2)(c) would have applied to that award and 50% of the total compensation payment of \$47 500 would have been used to calculate the preclusion period. The operation of the legislation, the AAT said, did not amount to a 'special circumstance' in Minda's case.

Turning to Minda's financial circumstances, the AAT noted that Minda had paid various amounts of money to his adult children, paid off the mortgage on his house and improved that house, and was unable satisfactorily to explain how he had spent some \$13 500. His financial position did not, the AAT said, constitute a 'special circumstance'.

[P.H.]

Compensation award: preclusion

COWARD and SECRETARY TO DSS

(No.4967)

Decided: 20 March 1989

by H.E. Hallows.

The AAT *affirmed* a DSS decision that the applicant, Warren Coward, was precluded from receiving a pension from November 1987 to May 1989, as a result of Coward having received a worker's compensation lump sum award of \$35 000 in November 1987.

The AAT adopted the approach in *Kryzwak* (1988) 45 SSR 580, concluding that the retrospective amendments made to s.153(1) in June 1988 applied to Coward's lump sum award received by him in November 1987.

Award taken at face value

Coward's solicitors argued that only part of the compensation award should be used for the purpose of calculating any preclusion period. The award had described the sum of \$35 000 as 'future compensation' in respect of Coward's injuries, apart from any future medical or similar expenses. The solicitors said that the award had been drafted in this way at the insistence of Coward's employer, to enable the employer to obtain a payment from the Workers' Compensation Board Fund.

The AAT did not accept that argument. It noted that, in the matter of *Cocks* (1989) 48 SSR 622, the Tribunal had looked behind the terms of a compensation award. However, in the present case, the evidence before the AAT was consistent with the terms of the award and there was no error apparent on the face of that award.

The AAT referred to comments of the Tribunal in *Cristallo* (1988) 46 SSR 597, to the effect that it was doubtful whether the AAT or the DSS 'should act on advice of the worker's lawyer as to how the lump sum should be apportioned, if that is in conflict with the express terms of the consent award'.

The Tribunal also decided that there were not sufficient 'special circumstances' within s.156 of the *Social Security Act* to justify disregarding any part of the \$35 000 when calculating the preclusion period.

[P.H.]

TESTA and SECRETARY TO DSS
(No. 4956)

Decided: 14 March 1989

by R.N. Watterson.

Michael Testa suffered an industrial injury in December 1985. In May 1987 he settled a claim for worker's compensation for \$61 500 and a common law action for damages for \$1000.

In July 1987, Testa claimed an invalid pension. The DSS applied the preclusion provision, s.153(1) of the *Social Security Act*, against Testa, calculating the preclusion period on the basis that the sum of \$61 500 was a payment in respect of incapacity for work, within s.152(2)(c).

Testa asked the AAT to review that decision.

The preclusion period

The AAT approached this case on the basis that the retrospective amendments made to the various sections in June 1988 applied to Testa's compensation claim, received by him in May 1987. This approach is consistent with the general line of AAT decisions since *Kryzwak* (1988) 45 SSR 580.

Testa's solicitor argued that the AAT should look behind the terms of the compensation award. The solicitor said that the figure of \$61 500 referred to in that award was 'merely a convenient device', covering both the worker's compensation and the common law claims.

The Tribunal said that the 'correct principle' had been laid down in decisions such as *Secretary to DSS v Siviero* (1986) 68 ALR 147, *Walker* (1987) 41 SSR 517, and *Cristallo* (1988) 46 SSR 597. [The AAT did not mention the decision in *Cocks* (1989) 48 SSR 622.]

There was, the AAT said, 'no evidence . . . as to the precise terms of the redemption award'. Nor was there any evidence of an error on the face of the award:

'accordingly, the redemption should be accepted at face value and the whole of the sum of \$61 500 regarded as payment "in respect of an incapacity for work" within ss.152 and 153.'

(Reasons, para. 16)

'Special circumstances'

Testa then asked that the AAT exercise the s.156 discretion to treat all or part of the compensation award as not having been made, because of the 'special circumstances' of the case.

The AAT noted that neither the Secretary nor the SSAT had expressly considered the s.156 discretion.

However, the evidence which was relevant to that discretion had been before the Secretary and the SSAT; and, therefore, both the Secretary and the SSAT 'must be taken to have decided that the circumstances of this matter were not special circumstances which made it appropriate for the Secretary to exercise his discretion in favour of the applicant pursuant to s.156': Reasons, para. 26. This was sufficient to give the AAT jurisdiction to review the s.156 discretion, under the terms of the former s.17 of the *Social Security Act*. (That section allowed the AAT to review a decision of the Secretary which had been reviewed by the SSAT.)

Testa told the AAT that his legal advisers had told him that the effect of his settling the compensation claim would be to prevent him from receiving invalid pension until December 1988 and he had relied on that advice; whereas the DSS had decided to preclude him until December 1989.

The AAT accepted that Testa had been given this advice and relied upon it. However, consistent with earlier decisions of the AAT in *Zito* (1987) 42 SSR 533, *Jerkin* (1988) 42 SSR 533, and *Venables* (1988) 43 SSR 548, the AAT said that Testa's reliance on the advice did not create a special circumstance.

The AAT said that Testa had been told in December 1987 that the DSS regarded him as precluded from receiving pension until December 1989. At that time, Testa had \$28 000 left in the bank and this would have been ample '(in terms of the currently weekly rate of invalid pension) to see him through until December 1989': Reasons, para. 35.

The Tribunal noted that Testa was in poor health and was permanently incapacitated for work because of a degenerative brain condition and an injured back. But, 'having regard to the whole of the circumstances of this case', the AAT said that Testa's health was not 'a good reason to disregard the payment that he has enjoyed the benefit of': Reasons, para. 36.

Bearing in mind that the purpose of s.153, to prevent 'double dipping', the AAT was 'not persuaded that the circumstances of this case justified disregarding in whole or part the payment by way of compensation that the applicant has in fact enjoyed the benefit of': Reasons, para. 38.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Invalid pension: backdating

COOPER and SECRETARY TO DSS

(No. 4980)

Decided: 21 March 1989

by J.A. Kiosoglous.

Cooper was born in 1971 and suffered from Downs syndrome. Her father was granted handicapped child's allowance from May 1985 on the basis that Cooper was a severely handicapped child.

Following Cooper's 16th birthday in April 1987, her father lodged a claim for continuation of handicapped child's allowance, which was granted by the DSS.

In November 1987, Cooper's father lodged a claim on her behalf for invalid pension, which the DSS granted from the date of that claim. Cooper's father then asked that payment of invalid pension be back dated to Cooper's 16th birthday in April 1987, the date when she had become eligible for invalid pension. When the AAT refused to backdate payment of the pension, an appeal was lodged to the AAT.

The legislation

The DSS accepted that Cooper had been qualified for invalid pension from April 1987 but relied on s.158(1) of the *Social Security Act*, which prevented the grant or payment of a pension 'except upon the making of a claim for that pension . . .'

Cooper asked the AAT to exercise the discretion in s.159(5), which allows the Secretary to treat a person's claim for a pension, allowance, benefit or other payment as a claim for another pension, allowance or benefit 'that is similar in character', for which the person might properly have made a claim, where the Secretary considers it reasonable to do so.

According to the former ss.101(1) and 102 of the *Social Security Act*, handicapped child's allowance was payable to a person who provided constant care and attention to a severely handicapped child — that is, the child, who because of a physical or mental disability needed constant care and attention, either permanently or for an extended period.

According to s.28 of the Act, a person who was 'permanently incapacitated for work' and was above the age of 16 years was qualified to receive an invalid pension.

'Similar in character'

The AAT said that invalid pension was 'similar in character' to handicapped child's allowance. Each of these payments was based on medical factors and neither was a 'supplementary payment'.

The AAT noted that family income supplement had been classified by the Tribunal as a supplementary payment *Favara* (1988) 45 SSR 584, where the Tribunal had concluded that a claim for family income supplement could not be treated as a claim for invalid pension under s.159(5). The special character of handicapped child's allowance enabled the AAT to distinguish the decision in *Favara*.

The AAT noted that there were differences between handicapped child's allowance and invalid pension: the allowance was paid to a parent, rather than to the incapacitated person, and the allowance was paid at a lower rate than the pension. But these differences were not significant, the AAT said.

Discretion

Having decided that there was power, under s.159(5) to treat the claim for handicapped child's allowance as a claim for invalid pension, the AAT then turned to the discretion in s.159(5).

The AAT referred to the decision in *Te Velde* (1981) 3 SSR 23, which had focused on the discretion to pay special benefit conferred by the former s.124(1) of the *Social Security Act* [now s.129(1)]. In that matter, the AAT had treated the degree of control which a person could exercise over her circumstances as relevant to the exercise of the discretion to grant special benefit.

Although the facts and the legislative setting in *Te Velde* were different from those in the present matter, the Tribunal adopted 'the principle enunciated there' and decided to exercise the discretion in s.159(5) in favour of Cooper, so as to allow the handicapped child's allowance claim to be treated as a claim for invalid pension: (Reasons, para. 22).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Cooper be granted invalid pension from the first pension pay day after her 16th birthday in April 1987.

[P.H.]