

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.]