# Invalid pension: permanent incapacity

**DRASKOVIC and SECRETARY TO DSS**
**(No. 4706)**
**Decided:** 28 October 1988
by M.D. Allen.

Milan Draskovic applied to the AAT for review of a DSS decision refusing his claim for invalid pension. The apparent basis of that decision was that he was not permanently incapacitated for work. Draskovic's claim for invalid pension was made on 26 February 1987.

## The legislation

The AAT applied the old ss. 23 and 24 of the *Social Security Act* which simply required that a person be not less than 85% permanently incapacitated for work to qualify for invalid pension. (That is, the current 50% physical or mental impairment rule, contained in s.27(b) of the renumbered Act, did not apply.)

## Incapacity for work

Draskovic fractured his left heel at work in March 1982. Six months later he returned to work on light duties but was dismissed after 4 days because he was too slow. He had not worked since then. The two medical assessments of the permanent disability in his left leg were 15% and 30%. Walking on uneven ground caused pain and disability.

Although Draskovic was a qualified cabinet maker, his last 19 years of work had been as a building site carpenter. His injuries made him unsuited to building work and the AAT found that he would be unable to attract work as a cabinet maker after so long. His ability in English was adequate for his purposes but insufficient for clerical work.

Most weight was placed by the AAT on the opinions of a rehabilitation doctor, Dr Baz. She said Draskovic required predominantly seated work with the freedom to move his ankle regularly. He lacked experience in processing work and Dr Baz believed that, as a tradesman, Draskovic would have psychological problems adjusting to unskilled work at his age. (His age was unfortunately not recorded in the reasons.)

The AAT commented that

> 'the *Social Security Act* does not require a skilled tradesman such as the Applicant to seek out menial employment for example as a process worker if there is some evidence that such employment will of itself create further impairment, albeit psychological, as opposed to physiological.'

(Reasons, para. 20)

It was then noted that 'if it were not for medical incapacity [Draskovic] would still be employed: Reasons, para. 21. These and 'the other factors peculiar to this Applicant' (which were not specified) were sufficient to satisfy the Tribunal that Mr Draskovic was permanently incapacitated for work.

## Formal decision

The AAT set aside the decision of the DSS and substituted a decision that Draskovic was entitled to an invalid pension.

**[D.M.]**

**SALIBA and SECRETARY to DSS**
**(No. 4748)**
**Decided:** 19 October 1988
by H.E. Hallowes, L.S. Rodopoulos and R.W. Webster.

Saliba claimed invalid pension in 1984. His treating doctor had diagnosed multiple sensitivity to foods and chemicals, spastic colon, depression, myalgia, confusion and headache. Treatment included avoidance of many foods and chemicals. Saliba told the DSS his condition severely limited his ability to perform everyday tasks.

Pension was granted subject to review in 2 year's time.

In 1987, a Commonwealth medical officer, described Saliba's symptoms as being more depressive in nature than allergic and recommended further investigation. A psychiatrist diagnosed 'severe hypochondrias' and described his 'so called allergy' as 'grossly exaggerated'. She concluded he was not capable of working because of his hypochondriasis.

The CMO, on receiving the psychiatrist's report, concluded that Saliba was not 85% incapacitated for work.

The DSS delegate in recommending cancellation of pension concluded that Saliba's psychological condition was treatable and not permanent.

## The law

The AAT said the relevant legislation was s.27 and s.28 of the *Social Security Act* in force at the date of the decision under review, i.e. 5 January 1988. Section 27 required at least half of a person's incapacity to be 'directly caused by a permanent physical or mental impairment'.

The case of *Panke* (1981) 2 *SSR* 9, which was expressly approved by the Federal Court in *Annas* (1985) 29 *SSR* 366, was cited as authority for the proposition that incapacity for work denotes an incapacity to engage in remunerative employment.

In *Vranesic* (1982) 10 *SSR* 95, the AAT had referred to the situation where:

> 'a person's perception of himself (rightly or wrongly) as an invalid incapable of work, may become so entrenched and so ineradicable as to itself constitute a psychological condition which destroys the person's capacity for work . . .'

The case of *McDonald* (1984) 18 *SSR* 188 was cited for its interpretation of the term 'permanently'. In *Sheely* (1982) 9 *SSR* 86 the AAT had noted that, while 'permanently incapacitated for work' has a wide application, it is not unlimited and 'at its boundary there is a distinction between a person who is sick and a person who merely thinks he is sick . . .'

## The AAT's conclusion

In *setting aside* the decision under review, the AAT accepted there was medical evidence of allergies and that Saliba had focused on these as a basis for withdrawal from society. The AAT said that while he perceived his condition had improved to some extent the psychiatric evidence did not support this in context of his ability to work. His permanent incapacity for work arose from his physical and mental impairments rather than other factors such as age or education and background.

The AAT accepted the psychiatrist's opinion that there was a treatment available. It considered, however, that a determination of whether the treatment improved his condition or not could only be made after a protracted period. The Tribunal was satisfied his condition was permanent within the meaning of that expression in the Act, and his medical condition precluded him from entering the paid work-force.

## Formal decision

The AAT set aside the decision under review.

**[B.W.]**

**JACKSON and SECRETARY TO DSS**
**(No. 4838)**
**Decided:** 21 December 1988
by J.R. Dwyer.

The AAT *affirmed* a DSS decision to reject an application for invalid pension.

**The relevant legislation**

Jackson had applied for an invalid pension in February 1986 and the Tribunal based its decision, following *Reilly* (1987) 39 *SSR* 494, on the old ss.23 and 24 of the *Social Security Act*, so that there was no legislative requirement that at least half of the claimant's incapacity for work was caused by a physical or mental impairment (now expressed in s.27(b)).

However, the Tribunal applied the test enunciated in *Sheely* (1982) 9 *SSR* 86, that 'it is not sufficient that the medical disability be a material factor in the incapacity, it must be of such significance that the incapacity can be said to arise or result from the medical condition.'

**The medical evidence**

Jackson suffered from bilateral rotator cuff impairment, bipartate patella of the right knee and an injury or disease in his right wrist. There was some evidence that Jackson could have had an operation on his wrist which may have improved the wrist pain but he had refused to do so, because of a lack of confidence in medical practitioners.

The AAT confirmed, as it had in *Kiki* (1984) 23 *SSR* 279 that such a refusal did not mean that the appellant's medical condition should not be considered permanent.

On the basis of a variety of medical evidence, the AAT found that Jackson's rotator cuff impairment was not as great as he had described though it did cause some pain and restriction in movement.

Similarly, the AAT found that Jackson had some pain and restricted movement in his right wrist.

**Incapacity for work?**

Finally, the Tribunal concluded that Jackson's bi-partate patella was a congenital deformity that did not affect Jackson's capacity for work, provided he avoided labouring work.

Jackson had last worked full-time in 1982 as a delivery driver and the AAT did not accept his contention that he left work because of his three disabilities. It had access to various unemployment benefit claims he had made after he had left work where he had stated he was fit for all types of work and had no disabilities and which explained that he had ceased work because of unhappiness with his employer.

Jackson was also unable to explain what aspect of his work as a delivery driver would cause him difficulties and the SSAT report had stated that he had ceased work because he was likely to be retrenched.

Throughout the AAT hearing Jackson had referred to a mental problem with undertaking various types of work; he rejected the AAT's invitation to produce evidence of this, stating that he wished to keep some matters private.

Jackson told the AAT that the only job he had tried since ceasing work as a driver was as a fruit picker, which hurt his wrist and shoulders. The AAT accepted that he was permanently incapacitated for such work; but went on to consider whether there was other work he could do.

There were suggestions that Jackson could work as a car-park or cinema attendant or as a telephone operator, or in other clerical work, of which he had some experience. Jackson rejected these suggestions with the comment that they would 'drive him mental'.

The AAT noted that Jackson had a very negative attitude to work, which made it difficult to assess the extent to which his physical impairments affected his ability to work. However, in accord with *Sheely* it was not able to accept Jackson's own assessment as to his unfitness for paid work.

Placing particular reliance on the medical reports and evidence from doctors who had examined Johnson, the AAT concluded he could undertake clerical, attendant or driving work and he was thus not permanently incapacitated for work.

**[J.M.]**

**ZWECK and SECRETARY to DSS**
**(No. 4777)**
**Decided:** 28 November 1988
by J.A. Kiosoglous.

Meryl Zweck, a 20-year-old student studying for a social work degree, who had suffered rheumatoid arthritis for some 15 years, appealed against a decision by the DSS to refuse her claim for invalid pension on the grounds that she was not at least 85% permanently incapacitated for work.

The AAT *affirmed* the decision of DSS finding that, although the applicant was permanently incapacitated for work, she was not incapacitated to the extent of at least 85%.

**The legislation**

Relying upon the decisions in *Reilly* (1987) 39 *SSR* 494 and *Phillips* (1987) 40 *SSR* 508, the AAT determined the applicant's eligibility under s.23 and s.24 of the *Social Security Act*, as they stood prior to 1 July 1987. The AAT said:

> 'If, after the decision in this matter by this Tribunal, the Department is of the clear view that a different decision is warranted under the new legislation, that is a matter for separate determination by the DSS.'

**The facts**

Zweck suffered from arthritis which caused her considerable discomfort and disability. She described her treatment regime to the Tribunal and also said she has suffered no major flare-up since 1979. Her social work course comprised 20 contact hours per week, as well as assignments and field education. She stated that students undertook 50-60 hours study per week but this could not be equated with full-time employment as students were able to set their own limits.

The applicant achieved good results and during vacations had gained employment in retail stores. Each time she found duties such as stacking shelves too taxing to continue for long. At the end of her second year at college she had a 9-week placement at a DSS office, as a prerequisite to the completion of the degree.

The senior social worker who supervised her placement gave evidence that Zweck had handled her duties well and he was happy to pass her. He was at no time asked to make special arrangements for her and he could recall no complaint of pain nor of difficulties because of her medical condition.

The applicant had been supported by the Commonwealth Rehabilitation Service which paid her a training allowance and arranged treatment. In 1987 and 1988 she received 'courtesy payments' from the DSS for books. These are usually only paid to persons in receipt of invalid pension undertaking some form of rehabilitation. Such courtesy payments are made pursuant to the exercise of the discretion in the old s.135 [now s.150].

**The AAT's conclusion**

The AAT was satisfied on medical grounds that Zweck was permanently

incapacitated for work. However it decided that the degree of incapacity was less than 85%.

Although her medical condition precluded her from finding certain types of work, for example unskilled, physical work, she was capable of finding employment within the general labour market of people who had successfully completed a secondary education.

**Formal decision**

The AAT affirmed the decision under review.

[B.W.]

# AAT's jurisdiction: decision under review

**SIKETA and SSECRETARY TO DSS**

**(No. 4776)**

**Decided:** 25 November 1988

by R.A. Balmford.

Annette Siketa was granted an invalid pension in 1979, shortly after suffering serious injuries to her eyes in a motor vehicle accident. The pension was granted on the basis that Siketa was permanently blind.

In 1984, Siketa obtained full-time employment with the public service. In June 1987, an officer of the DSS reviewed her case and decided that she was 'not permanently blind to the extent required for invalid pension under the *Social Security Act*'. The DSS then wrote to Siketa, telling her that she could 'no longer be considered as permanently blind' and that her pension would cease from 1 October 1987.

With the assistance of a DSS review officer, Siketa then appealed to the SSAT against 'the decision to cancel my invalid pension from 1 October 1987'. The SSAT considered whether Siketa was permanently blind; and recommended to the Secretary to the DSS that the decision of June 1987 should be affirmed.

A delegate of the Secretary then made a decision which affirmed the 'proposed cancellation of invalid pension'.

Siketa applied to the AAT for review of that decision.

**Jurisdiction**

At the time of Siketa's appeal to the AAT, s.16(2) of the *Social Security Act* allowed a person, who had been affected by a decision of an officer under the act to appeal to the Secretary, who could affirm, vary or set aside the decision.

Section 17(1) provided that, where the Secretary had affirmed, varied or set aside a decision of an officer, which had been reviewed by an SSAT, an application could be made to the AAT for review of the Secretary's decision.

The AAT pointed out that the original decision, made in June 1987, was not a decision to cancel Siketa's invalid pension, but a decision that she was not permanently blind. Although that June 1987 decision had been reviewed by the SSAT, it had not been affirmed, varied or set aside by the Secretary or the Secretary's delegate. It followed that the preconditions for an appeal to the AAT had not been met; and that, accordingly, the AAT had no jurisdiction to review any of the decisions made in this matter.

The AAT pointed out that the cause of the confusion was the letter written to Siketa following the June 1987 decision. That letter had not set out the precise terms of the decision but had attempted to paraphrase the decision:

> 'It may be that the form of the letter derived from an intention in the Department to make its correspondence recipient-friendly and reduce what is seen as an undesirable degree of formality in official correspondence and other documents. Laudable though that intention is, it should be implemented with care. The history of this matter highlights the risks inherent in paraphrasing material which has, or should have, legal effect.'

(Reasons, para.28)

**Permanent incapacity for work**

Although the AAT had decided that it did not have jurisdiction to review this matter, it went on to express its opinion on Siketa's eligibility.

The AAT noted that Siketa was in permanent and fulltime employment, as a telephonist, and that she had worked in this position for some 4 years. The Tribunal endorsed what had been said in the earlier decisions of *Kenna* (1983) 5 ALN N213 and *Galvin* (1985) 24 *SSR* 291, to the effect that a person could not be regarded as incapacitated for work to the extent required by the *Social Security Act* when the person was 'continuing to work effectively, even if under very great difficulties, at a skilled trade . . .'

It followed, the Tribunal said, that Siketa could not be regarded 'permanently incapacitated for work' so as to qualify for an invalid pension under s.28 of the *Social Security Act*.

**Permanent blindness**

In the present case the evidence was that, unless Siketa wore contact lenses, she was extremely visually handicapped - i.e., she was more than 95% incapacitated in the right eye and 75% in the left eye. However, if she wore contact lenses, her incapacity was reduced to 70% in the right eye and 10% in the left eye.

The AAT adopted the approach taken in *Smith* (1986) 31 *SSR* 396, that a person's blindness was to be measured by 'what can be seen with normal correction by spectacles or contact lenses'.

The Tribunal also adopted the views expressed in *Cowley* (1986) 33 *SSR* 423 to the effect that a person was blind if he or she was totally blind or if the effect on the person's day to day living was essentially the same as the effect of total blindness.

In the present case, Siketa was able to wear her contact lenses for 12 hours a day, was able to carry out her work (which involved some reading) satisfactorily and held a driver's licence (although she only drove for short distances). On the basis of the approach taken in *Smith and Cowley*, the AAT said, it 'would not be able to find that Mrs Siketa is "permanently blind", in terms of s.28 (of the Act)': Reasons, para.41)

**Formal decision**

The AAT directed that this matter be removed from the list of matters before the Tribunal.

[P.H.]

# Claim for another benefit

**LOMBARDI and SECRETARY TO DSS**

**(No. 4701)**

**Decided:** 5 October 1988

by H.E. Hallowes.

Michael Lombardi sought review of a DSS decision to pay him sickness benefit only from 11 August 1987, the day on which he lodged a claim for sickness benefit.