

percentage of impairment, has nothing to do with [s.] 27(b).'

In the present matter, a DSS officer had used the DSS procedures to assess Zanos and had concluded that, although he was 85% permanently incapacitated, his medical impairment was zero and, accordingly, he could not qualify for an invalid pension. 'That statement', the AAT said, 'is clearly internally inconsistent', and was based on 'the inappropriate thought processes required by [the DSS Guide and] also on the artificial construct "impairment" required by the Invalid Pension Guide': Reasons, para. 50.

The AAT repeated its definition of 'impairment' from *Kadir* (1989) 49 SSR 638 - that is 'a changing for the worse, diminishing in value or deterioration from a previous unimpaired or less impaired state'. That ordinary meaning, the AAT said, could not be replaced by the definitions used in the DSS Guide.

Turning to the present case, the AAT decided that Zanos was permanently incapacitated for work because he was unable to attract an employer who would hire him. This meaning of 'incapacity for work' had been developed by the AAT and the Federal Court since *Panke* (1981) 2 SSR 9 and had not been disturbed by the amendments to the *Social Security Act* introduced in 1987 (when s.27(b) was added to the Act).

Zanos' inability to attract an employer was, the AAT said, caused by 3 factors: his periodic total incapacity because of his back condition; his constant pain and discomfort from that condition; and the risk which any employer would face of receiving significant sick leave and workers' compensation claims. The AAT concluded as follows:

'I find that all of those factors are directly caused by Mr. Zanos' back condition, which I find to be a permanent physical impairment. That being so I find that . . . his permanent incapacity for work is directly caused by his permanent physical impairment. He thus satisfies the requirement of [s.] 27(b), so as to be "permanently incapacitated for work" for the purposes of Division 3 of Part IV of the Act and qualified to receive an invalid pension.'

(Reasons, para. 56)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration with a direction that Zanos had been permanently incapacitated for work since the cancellation of his invalid pension.

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Income test: victim of Nazi persecution

ALBERA and SECRETARY TO DSS

(No. 5094)

Decided: 17 May 1989 by B.J. McMahon.

Greta Albera had left Austria, as a refugee, in January 1939, less than a year after the German Anschluss. She came to Australia in 1954 and worked until 1979, when she was obliged to retire because of ill health.

Albera was then granted a pension under provisions of the Austrian social insurance legislation which allowed victims of Nazi persecution to qualify for pension after making a nominal contribution to the social insurance fund.

When Albera was subsequently granted an age pension, the DSS decided that her Austrian social insurance pension should be treated as income for the purposes of calculating the rate of age pension payable to her. Albera asked the AAT to review that decision.

The legislation

Section 3(1) of the Social Security Act defines a person's 'income' as meaning —

'personal earnings, moneys, valuable consideration or profits, whether of a capital nature or not, earned, derived or received by that person for the person's own use or benefit by any means from any source whatsoever, within or outside Australia, and includes a periodical payment or benefit by way of gift or allowance . . . but does not include —

(ka) an amount paid by way of compensation by the Federal Republic of Germany, or by a State of that Republic, under the laws of that Republic, or of that State, relating to compensation of victims of National Socialist persecution.'

An agent for the Federal Republic?

On behalf of Albera, it was argued that, in making the payments to Albera, the Austrian Government was acting as an agent for the Federal Republic of Germany and that, accordingly, it was covered by the exemption from the definition of 'income' in para (ka).

The AAT observed that a treaty had been made between Austria and the Federal Republic in 1961. Under this

treaty, the Federal Republic paid Austria DM101 million, which provided a pool from which Austria could meet claims against it by victims of Nazi persecution in that country. Austria then passed its own compensation legislation to cover the administration of claims from victims of Nazi persecution.

The AAT also noted that the Austrian social insurance legislation allowed victims of Nazi persecution to qualify for a social insurance pension if they made a nominal contribution to the insurance fund, the balance of their contributions being met 'out of Federal funds'.

The AAT said that there was no evidence that the 'Federal funds' referred to in the Austrian social insurance legislation were directly provided by the Federal Republic of Germany. The AAT continued:

'Even if that could be established, however, it could not possibly be said that the Austrian Insurance Authority was paying the applicant's pension as an agent of the Republic of Germany so as to act as a mere conduit. There is nothing to establish a relationship of agency. There is nothing to establish any degree of control by the German Government over, or responsibility for, the actions of the Austrian agency. It would be astonishing, in any event, to find such a relationship between two sovereign countries or between one of them and an agency of the other. It is altogether too long a bow to draw to suggest that such a relationship exists.'

(Reasons, para. 20)

Even if a relationship of agency could be established, the AAT said, para. (ka) in the definition of 'income' could not be read as covering the payments made by the Austrian Government to Albera. The exception expressed in that paragraph was clearly expressed and was confined to payments made by the Federal Republic of Germany or by a State of that Republic. To extend the exception to payments made by Austria 'would be a clear usurpation of the legislative function': Reasons, para. 21.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

