Administrative Appeals Tribunal decisions

Invalid pension: incapacity

ANAGNOSTOPOULOS and SECRETARY TO DSS
(No. 5115)

Decided: 24 May 1989 by B.M. Forrest.

The AAT *affirmed* a DSS decision to reject a claim for invalid pension lodged by a 48-year-old man, who had suffered a series of industrial injuries in 1980, 1981 and 1983.

Although Anagnostopoulos claimed to have severe restriction of movement in one of his knees, medical examinations had failed to find any clinical explanation for this. In any event, the consensus of medical opinion was that an operation (arthroscopy) would clear up any problems in that area.

There was medical evidence that Anagnostopoulos was suffering from a chronic depressive reaction or a pathological preoccupation with his health, which amounted to a psychological illness. The consensus of medical opinion was that a course of rehabilitation over some 6 months would reduce this problem.

However, Anagnostopoulos had refused to undergo treatment for his knee condition and his psychological state. Of this refusal, the AAT said:

> 'If the applicant is impaired to the extent he says he is, the question arises whether his refusal to undergo the recommended treatment is unreasonable. I think it may be said that a refusal of treatment does not comfortably fit the pattern of a person described in evidence as [preoccupied] with his health. Quite apart from that, it is not sufficient for the applicant to say he is sick, yet refuse treatment unless he can demonstrate that the reasons for such refusal are genuine. See *Dragojlovic* (1984) 18 *SSR* 187.'

(Reasons, p.12)

The AAT noted that Anagnostopoulos was a qualified electrician who spoke English fairly well. The Tribunal noted that the demand for qualified tradesmen in Melbourne remained strong and concluded that his disability had not destroyed his prospect of employment so as to qualify him for invalid pension.

[P.H.]

VXE and SECRETARY TO DSS
(No. 5284)

Decided: 2 August 1989 by R.A. Balmford.

VXE was granted an invalid pension in 1984. He suffered from diabetes mellitus and the Commonwealth medical officer (CMO) said that VXE was mainly handicapped by his depressed and anxious attitude to his disease.

In October 1985 another CMO examined VXE and concluded that his diabetes was fairly stable and he could do factory assembly work though remaining unfit for heavy work. She referred him to a psychiatrist who found no psychological disturbance nor evidence of any specific psychiatric illness. A social worker's report recommended VXE remain on pension, particularly in view of his emotional state.

In a 1987 review, VXE's treating doctor diagnosed diabetes mellitus and stress from social isolation but felt invalid pension was not appropriate. While acknowledging hypoglycaemic episodes about once a month, the CMO noted: 'Doesn't impress as being anything like 85% incapacitated'.

The decision under review, to cancel VXE's pension, was made as a result of that examination.

In 1988 VXE undertook a secretarial and administrative course. He managed to attend 4 or 5 days a week for approximately 20 hours a week and completed the course.

The legislation

At the date of grant of invalid pension, ss.23 and 24 of the *Social Security Act* applied. These were repealed and new provisions were inserted from 1 July 1987 by the *Social Security and Veterans' Entitlements Amendment Act* 1987.

The new provisions were renumbered by the Social Security Amendment Act 1987, so that the relevant provisions at and since the date of cancellation were ss.27 and 28.

The decision

The AAT said the significant distinction between the old and new provisions was the insertion of s.27(b). Section 28 was identical with the old s.24 and it was to be assumed that the legislature had approved the interpretation of that section by the courts.

The AAT then used authorities established under the old provision on the meaning of the expression 'permanently incapacitated for work'. (It was a separate issue whether at least 50% of that permanent incapacity was directly caused by a permanent physical or mental impairment.)

The leading authority on the concept of permanence is *McDonald* (1984) 18 SSR 188, where Woodward J said:

> '. . . the true test of a permanent, as distinct from temporary, incapacity is whether in the light of the available evidence, it is more likely than not that the incapacity will persist in the foreseeable future'.

The assessment of incapacity was considered in *Panke* (1981) 2 *SSR* 9, which was approved by the Federal Court in *Annas* (1985) 29 *SSR* 366.

The AAT said an assessment of the incapacity for work involved, first, an evaluation in purely medical terms of the physical or mental impairment; and, second, an assessment of what work was suitable to be undertaken by the applicant. Such assessment involved consideration of the whole person and the cumulative impact upon him of such matters as the nature and extent of his disabilities, his capacity to sustain his work efforts throughout a normal working day or week, his age, his previous work experience, and the types of paid work available.

The AAT referred to VXE's dedication to qualifying himself for other than factory work. It found he had good spoken and written English, presented well and was on unemployment benefit and attending at the CES. The CES was not sending him for heavy jobs and was discouraging about his ability to obtain administrative work.

The Tribunal acknowledged that some employers were reluctant to employ people who had diabetes but referred to equal opportunity requirements in the State and Commonwealth public services.

The AAT was satisfied that VXE had the ability to attract an employer prepared to engage and remunerate him in an office in an administrative or secretarial capacity. That being so he was not qualified to receive an invalid pension because he was not permanently incapacitated for work.

Formal decision

The AAT affirmed the decision under review.

[B.W.]

TROIANO and SECRETARY TO DSS
(No. 5295)
Decided: 9 August 1989 by R.A. Hayes, D.J. Howell and J.H. McClintock.

Following a divided SSAT decision, Amalia Troiano sought review of a DSS decision to reject her claims for invalid pension.

The majority of the AAT *affirmed* the decision under review on the grounds that the medical evidence did not satisfy it that Troino had a level of physical disability which would interfere with her capacity for employment. The third member of the AAT, Mrs McClintock, came to the opposite conclusion.

The facts

Troiano was born in Egypt in 1949 and went to school for 4 years (to the age of 9). She arrived in Australia in 1966 and language difficulties prevented her finding work for the first few years. She then obtained work in various factories. In 1969 she married and had not been employed in the paid workforce since then.

She separated from a violent husband in 1985 and from July 1986 until January 1988 received supporting parent's benefit until her youngest child reached 16 years.

In 1976 Troiano was involved in an accident and was dragged for some distance when her clothing caught in a taxi door. From that time she suffered neck and back pain.

In 1978 an X-ray showed a ruptured spinal disc and Troiano underwent surgery for spinal fusion. This did not relieve her pain. From the time of the accident until 1989, Troiano's mother 'did almost everything' for the applicant. Her mother died in 1989 and all housework was now done by her daughter.

The medical evidence was divided in assessment of the level of disability. Following surgery, some orthopaedic surgeons considered her complaints of pain well justified while others suggested 'functional overlay'.

A psychiatrist diagnosed chronic anxiety state with chronic neurotic symptoms and a psychiatric incapacity for work of 30%. He discounted her physical condition.

The legislation

Section 27(a) of the *Social Security Act* requires the degree of a person's permanent incapacity for work to be not less than 85%.

Section 27(b) requires at least half of that incapacity to be directly caused by a permanent physical or mental impairment.

The cases

The AAT referred to *Panke* (1981) 2 *SSR* 9, which was approved in the Federal Court case of *Annas* (1985) 29 *SSR* 188, as authority for the proposition that incapacity for work denotes an incapacity to engage in remunerative employment.

It also referred to *Vranesic* (1982) 10 *SSR* 95, where the AAT referred to a person's self-perception as an invalid as being so entrenched that it was a psychological condition.

Minority opinion

One member of the AAT, **McClintock**, found there had been a consistency of complaints over 13 years and both treating doctors gave a consistent history of pain. Objective signs of pain were found by one doctor but this was contrasted with the view of another who found the opposite. The weight of evidence, McClintock concluded, was that there was a physical complaint. All doctors agreed there was a mental element and two psychiatrists concluded that the applicant suffered from a chronic anxiety state.

In relation to the degree of incapacity, McClintock said there was no disagreement in the medical evidence that the applicant would find it difficult to find or retain a job. The incapacity had continued for 13 years and must be seen as permanent.

Taking into account the applicant's limited education, lack of formal qualifications, time out of the workforce and lack of English, the minority decision was that the applicant fulfilled the requirements in *Panke* and was at least 85% incapacitated for work. The physical and mental impairment from which the applicant suffered accounted for more than 50% of her permanent incapacity for work.

The majority opinion

While adopting the summary and legal analysis of McClintock, the majority (**Hayes** and **Howell**) disagreed with her findings and conclusion. It noted that the decision,

> 'whether there is both physical and mental impairment to the required degree, involved more than a mere tallying up of the various doctors' votes — how many in favour of a disability and how many against; and it involved more than an averaging out of the various percentages ascribed to the disability by those doctors whose evidence supported the applicant's case. It required us to use our own knowledge and experience in reviewing the whole of the evidence, proceeding to reflect whether our state of mind was one of reasonable satisfaction that the applicant has the necessary degree of physical and mental impairment'.

The majority found that the applicant 'was not like the person described' in *Vranesic* (1982) 10 *SSR* 95.

[B.W.]

VELLA and SECRETARY TO DSS
(No. 5286)
Decided: 9 August 1989 by H.E. Hallowes.

Anthony Vella sought review of a DSS decision to cancel his invalid pension which had been granted in 1984. The AAT said the relevant legislation was s.27 and 28 of the *Social Security Act*. Section 168 gives the Secretary power to cancel a pension.

The facts

Vella was born in Malta in 1945 and came to Australia in 1970. He worked as a labourer and machinist until the motor accident in 1978. He spent a day in hospital and was referred to his local doctor who treated him for backache, chest and knee pain.

In December 1983, X-rays of Vella's back were normal. In 1984 a Commonwealth medical officer found no evidence of depressive illness and stated that Vella's back pain was 'in no way severely incapacitating'. However, he found Vella unsuitable for rehabilitation.

Vella was granted invalid pension after a social worker noted he had been out of the workforce for 5 years, making him unattractive to an employer. His lack of motivation to return to work arose out of his having to cope with pain.

The findings

The Tribunal found that Vella suffered from a minor physical impairment which was permanent. He had been on workers' compensation, sickness benefit and invalid pension for 11.5 years.

His impairment limited his capacity to sustain his work effort throughout a normal working week in the type of work he was doing before his motor accident.

He had an entrenched view of himself as an invalid, but not so as to constitute a psychological condition. The AAT found him to be a person 'who thinks that he is sick, rather than being

a person who is sick'. His previous work history was the main bar to him obtaining work and he had got out of the habit of working. He was, the AAT said, permanently incapacitated for work within s.27(a).

Section 27(b)

Although Vella satisfied s.27(a) of the Act he could not satisfy s.27(b). The AAT found that, although Vella was an anxious man, he did not suffer 'mental impairment'. This finding, the Tribunal said, put Vella in a difficult position. He had been in receipt of some income maintenance ever since his car accident and was at present in receipt of sickness benefit. However, sickness benefit was intended for those whose incapacity is temporary.

Formal decision

The AAT affirmed the decision under review.

[B.W.]

ROBERTSON and SECRETARY TO DSS

(No. 5372)

Decided: 8 September 1989 by H.E. Hallowes.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 42-year-old woman who suffered from asthma, lumbar disc degeneration and wrist pain.

Robertson had been granted an invalid pension in 1984, on the basis of her severe asthma which required continuous medication. Following the introduction of s.27(b) into the *Social Security Act* in July 1987, the DSS decided to cancel Robertson's invalid pension.

The DSS defended this cancellation because Robertson was living in an area of limited employment opportunities, she was aged 42 years with minimal education and few work skills and she had no recent work history. It followed, the DSS argued, that, if Robertson was 85% incapacitated for work, less than half of that incapacity was caused by her physical impairment.

One of her doctors reported that frequent attacks of asthma could disable her from regular employment; and Robertson told the AAT 'that every time she had worked she had ended up in hospital with asthma'.

The AAT concluded that Robertson was at least 85% permanently incapacitated for work, meaning full-time work (as explained in *Mann* (1982) 8 *SSR* 75).

Turning to s.27(b) of the *Social Security Act* (which requires that at least 50% of a person's incapacity for work be caused by permanent physical or mental impairment) the AAT found that Robertson satisfied this requirement. Her asthma and her back condition limited the range of work which she could undertake, and although she had some capacity for short periods of casual employment, she could not attract an employer who was prepared to engage and remunerate her because she was 'always at risk of exacerbating both her asthma and her back condition'.

The non-medical factors (such as lack of skills, work history, and lack of means of transport) 'do not constitute more than 50% of the cause of a lack of a job offer': Reasons, para. 19.

[P.H.]

Invalid pension: incapacitated while in Australia

CHAPARRO and SECRETARY TO DSS

(No. 5373)

Decided: 8 September 1989 by H.E. Hallowes.

Edna Chaparro had migrated to Australia from Chile in 1984. She was then aged 35 years. Chaparro had worked in Chile as a hairdresser for more than 15 years before leaving Chile with her husband and two children.

On her arrival in Australia, Chaparro found that she would need to undertake a six month course to upgrade her qualifications and she enrolled in English language classes before undertaking that course. However, before she could complete the English language classes, she was found to be suffering from epilepsy.

Chaparro then claimed an invalid pension, which claim was rejected by the DSS on the ground that, although she was permanently incapacitated for work, she had not become incapacitated for work in Australia. Chaparro asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.24 of the *Social Security Act* provided that a person who was 'permanently incapacitated for work' was qualified for an invalid pension.

However, s.25(1) provided that an invalid pension should not be granted to a person unless that person 'became permanently incapacitated for work ... in Australia ...'

The Tribunal's decision

The AAT accepted Chaparro's evidence that she had been capable of working in Chile before coming to Australia, although she had suffered dizzy spells and some loss of vision and nausea (early symptoms of her epilepsy) in Chile.

The Tribunal said that the question of Chaparro's incapacity for work depended on a combination of medical and non-medical factors: the present s.27(b) of the Act was not in force at the time when she had claimed her invalid pension.

Chaparro's lack of English language skills and Australian hairdressing qualifications meant that the only work available to her would have been 'light production work on an assembly line'. But the attacks of dizziness which she had experienced in Chile would have made this work unsuitable for her. The AAT concluded as follows:

> 'She "never was as sick" in Chile as she was in Australia but the symptoms she had in Chile were a material factor in her incapacity for work on arrival. Together with her lack of marketable skills, her age, and the limitations placed on her employability by her lack of English satisfies me that she did not become permanently incapacitated for work while in Australia. She was permanently incapacitated for work on arrival. Had the relevant provisions of the Act, now requiring 50% of the permanent incapacity to be directly caused by a permanent physical impairment, come into force before the applicant migrated to Australia, the test to be applied in this application would have been different.'

(Reasons, para. 15)

In coming to this conclusion, the AAT referred to the earlier decision in *Yusuf* (1984) 22 *SSR* 259, where a similar approach had been adopted to the same issue.

Formal decision

The AAT affirmed the decision under review.

[J.M.]