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.

History of the claim

Lombardi suffered a grave illness on 24 March 1987 requiring hospitalisation until 3 June 1987. On 1 May 1987 he made a claim for compensation (presumably under the *Victorian Accident Compensation Act)*, which was declined by the insurer. Lombardi received sick pay and other entitlements from his employer until 31 May 1987. He lodged a claim for sickness benefit on 11 August 1987.

The legislation

To qualify to receive a sickness benefit a person must show that he or she lost income as a result of incapacity for work: s.108(1)(c)(i) of the *Social Security Act* - now s.117(1)(c)(i).

Where a claim for sickness benefit was lodged on or after 1 July 1987, it had to be lodged within 5 weeks of the claimant becoming incapacitated for there to be any backdating of payments: s.125(3). This provision was the result of amendment by the *Social Security and Veterans' Entitlements Amendment Act* 1987, which substituted the 5-week period for the previous 13-week period and removed a number of significant discretions that ameliorated the effect of that lodgement requirement. (One of the repealed provisions permitted the date of lodging a claim for worker's compensation to be treated as the date of lodging a sickness benefit claim.)

Section 125 was again amended in June 1988 when the current sub-section (4) was inserted. Sub-section 125(4) applies retrospectively to all claims lodged on or after 1 July 1987 and permits back payment of sickness benefits for up to 4 weeks if the sole or dominant cause of the failure to lodge in time was the incapacity concerned. (The DSS in fact applied this provision prior to the hearing before the AAT and paid 4 weeks arrears for the period 14 July 1987 to 10 August 1987.)

Section 159(5) of the *Social Security Act* permits a claim for a payment 'under this Act, under another Act or under a program administered by the Commonwealth' to be treated as a claim for some other payment 'for which the person . . . might properly have made a claim'.

The crucial provision is s.158(2) which deems a claim made at a time when a person is not qualified to receive that payment to not have been made. (Section 159(2), which gives some claimants 3 months from lodgement in which to become qualified, does not apply to sickness benefits.)

No proper claim in time

The AAT decided that -

> 'Even were this Tribunal to consider treating Mr Lombardi's claim for compensation, lodged 1 May 1987, as a claim for sickness benefit, under the provisions of s.159(5) of the Act, the claim could not properly be made until Mr Lombardi was qualified for sickness benefit on 1 June 1987, the day on which he suffered a loss of wages.'

(Reasons, para.16)

This was because of s.108(1)(c)(i) [now s.117(1)(c)(i)] which made such a loss a necessary condition to qualify for sickness benefit. Accordingly, s.159(5) could not be applied in this case.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Income: war restitution payments

KRAMPEL and SECRETARY TO DSS

(No. 4808)

Decided: 8 December 1988

by H.E. Hallowes, G.F. Brewer and D.M. Sutherland.

Irene Krampel was granted age pension on 17 April 1978. She received German restitution payments which were taken into account as 'income' for the purpose of calculating her rate of pension.

On 10 April 1985 she sought review of the decision as to her pension rate, arguing that the German restitution payments were not 'income' because they were compensation for loss of property and health.

On 22 November 1985, following an SSAT hearing, the Department decided to treat Mrs Krampel's German restitution payments as 'capital' and not as 'income' and reassessed her pension with effect from 8 March 1985. This date was the day after the AAT decision in *Artwinska* (1985) 24 *SSR* 287.

Apparently, following that decision, the Minister announced that German restitution payments would only be taken into account under pension income tests where they were made for loss of income.

On 12 June 1987, Krampel requested an adjustment of her rate of pension for the period prior to 8 March 1985. Upon that being refused Mrs Krampel lodged this application with the AAT for review on 18 February 1988.

The issue before the AAT was whether Mrs Krampel was entitled to payment of arrears for the period prior to 8 March 1985. This depended on whether or not her German restitution payments came within the definition of 'income'.

The legislation

Until 21 September 1984, 'income' was defined in the old s.18 of the *Social Security Act*. It was then moved to s.6(1) [renumbered 3(1) from 2 July 1987].

According to the AAT, the definition of 'income' for the relevant time was

> 'personal earnings, moneys, valuable consideration or profits 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 of benefit by way of gift or allowance but does not include . . .'

The current wording, 'whether of a capital nature or not' inserted after 'profits', did not come into operation until 27 October 1986. Paragraph (ka), which now excludes German restitution payments from the meaning of 'income', was inserted in 1988 with effect from 30 November 1987. Accordingly, neither of these amendments affected the outcome of this review.

Included as income

After considering the West German legislation under which Krampel's restitution payments were made and the basis on which the West German authorities granted Krampel a pension, the AAT found that she was periodically paid restitution for damage to body or health.

The AAT then held that Krampel's restitution payments came within the second and inclusive part of the definition of income as they were 'periodical payment(s) . . . by way of . . . allowance'. In coming to this decision it applied *Kelleners v Secretary to the DSS* (15 November 1988, Federal Court, Ryan, J: see this issue of the *Reporter*), where it was decided that those words comprehended *ex gratia* acquisitions irrespective of whether they are referable to the possession by the donor of some special characteristic or status. The AAT did not decide whether the