Plain meaning

The AAT concluded that the plain meaning of the words was clear, so that it was unnecessary to refer to extrinsic materials. It also accepted the DSS argument that, if it had been intended to exclude the first $1500 of lump sum maintenance, there was an obvious way to do it, following the model of s.48(3)(a) noted above. To treat the whole of the lump sum as capitalised maintenance 'did not lead to an abusrdity or incongruity' because amounts below $1500 would be treated as maintenance income, which was dealt with elsewhere in the Act.

Formal decision

The AAT set aside the SSAT decision and substituted a decision that the whole of the $5000 received by Westerman constituted capitalised maintenance income.

[J.M.]

Carer's pension: care in home

KINSEY and SECRETARY TO DSS (No. 5361)

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

Ruth Kinsey was granted a carer's pension from March 1987 on the basis that she was caring for her adult daughter, who was a severely handicapped person in receipt of invalid pension, in their home.

In August 1988, the DSS cancelled Kinsey's carer's pension on the ground that she was no longer providing care to her daughter in the same home.

Kinsey asked the AAT to review that decision.

The legislation

Section 39(1) of the *Social Security Act* provides that a person is qualified to receive a carer's pension if the person 'personally provides constant care and attention for another person in a home of the person and of the other person', where that other person is severely handicapped and receiving an age or invalid pension.

The evidence

It was not disputed that Kinsey provided constant care and attention to her daughter, aged 28, who suffered from a severe disability, requiring constant supervision. It was also accepted that providing this care placed Kinsey under a great deal of stress. Initially, Kinsey had shared her house with her daughter and her daughter's family (a husband and child) but had been able to finance the purchase of the flat next door, demolish the fence between the two properties and install an 'intercom'.

Kinsey divided her time between her own house and the flat next door, attending to domestic chores in both places, eating her meals in either dwelling. She maintained that her 'home' was the house and flat.

Kinsey explained that she had used the money provided by the carer's pension —

> 'to pay someone to sit with [her daughter] and help me with a little housework so I can get a much needed break. My health is not the best and my husband suffers from diabetes and schizophrenia and there is no-one else to help us'.

The AAT's decision

The Tribunal said that it would be 'regrettable' if Kinsey, because of lack of financial support, was 'unable to get the relief she needs to enable her to have some respite from her demanding duties'. However, the AAT said it had to apply the *Social Security Act* to the facts as found in each case.

The AAT referred to comments made in *Dickeson* (noted in this *Reporter*) and *Todd v Nicol* [1957] SASR 72, where some attempt had been made to define what was meant by a 'home'.

The Tribunal concluded that Kinsey's home was her house, rather than the flat occupied by her daughter, and that, accordingly, the care provided by Kinsey was no longer provided by Kinsey in her own home.

The AAT noted that the 2 dwellings had different keys and were on different titles, the flat was being purchased in the name of Kinsey's daughter and her husband and had been bought to provide some independent living for her daughter. The AAT expressed its conclusion as follows:

> 'I am satisfied that there are two households in this application, both run by the applicant, rather than one household. The applicant's heart is with her daughter rather than the flat in which her daughter resides.
>
> 22. As when the question as to whether a person is a "married person" for the purposes of the Act is determined, what constitutes a person's "home" is not a matter of checking criteria to see whether or not they are satisfied but rather it is a matter of deciding the relationship of a person to a place, which is the centre of their affection and attention, where they ordinarily sleep and keep their personal possessions. The answer to the question emerges from the facts found on the evidence in each particular case. The answer will depend on the person's past experiences and their changing circumstances. Mrs Kinsey has a relationship with [the house] which is her home. Her care and concern for her daughter does not extend that relationship to her daughter's flat. Nor does her daughter have the same relationship with [Kinsey's house] as she had before she moved to the flat.'

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Sickness benefit: medical certificates

SIMIC and SECRETARY TO DSS (No. 5169)

Decided: 22 June 1989 by J.A. Kiosoglous.

Miroslav Simic was granted sickness benefits in December 1985. He left Australia in September 1986 to visit his dying father in Yugoslavia.

Before leaving Australia, Simic provided the DSS with a medical certificate, to the effect that he was incapacitated for work from September to November 1986.

For various reasons, Simic did not return to Australia until August 1987. In the meantime the DSS cancelled his sickness benefit from December 1986 because no further medical certificates relating to his incapacity for work were lodged.

Shortly after his return to Australia, Simic applied for and was granted sickness benefit from 26 August 1987. He requested payment of benefits for the period from December to August 1987 and produced several documents in Serbo-Croatian, which he said were medical certificates relating to his incapacity for work during his time in Yugoslavia. He also produced a certificate from an Australian doctor (Dr K), dated January 1988, to the effect that Simic had been incapacitated for work between September 1986 and August 1987.

When the DSS refused to pay him sickness benefits for this period, he appealed to the AAT.

The legislation

Section 117(1) of the *Social Security Act* provides that a person is qualified for sickness benefit if *inter alia*, the person satisfies the Secretary that, throughout the relevant period, he or she was temporarily incapacitated for work and had suffered a loss of income.

Section 124(1) provides that a claim for sickness benefit shall 'be supported by the certificate of a medical practitioner', unless the Secretary otherwise directs 'in special circumstances'.

Section 3(1) of the Act defines a 'medical practitioner' as 'a person registered or licensed as a medical practitioner under a law of a State or Territory'.

Section 168(1) authorises the Secretary to cancel a benefit by reason of the failure of any person to comply with a provision of the *Social Security Act*.

'Medical certificates' not adequate

The Tribunal said that it could not accept the documents produced by Simic and originating in Yugoslavia because the Tribunal was not satisfied that those certificates had been provided by a 'medical practitioner' as defined in s.3(1) — namely one who was registered or licensed under the law of a State or Territory.

Nor could the AAT accept the certificate provided in January 1988 by the Australian doctor:

> 'As the applicant was in Yugoslavia during the period referred to in the certificate the Tribunal cannot accept that Dr K would have examined him at that time to be able to give such an opinion of his own knowledge.'

(Reasons, para. 8)

The AAT said that Simic's failure to provide medical certificates after November 1987 had inevitably led to the cancellation of his sickness benefit. The lodging of such certificates was necessary so that the DSS could —

> 'be sure of a claimant's continuing incapacity for work: without such knowledge the Department has no authority to continue to pay the benefit and pursuant to s.168(1), it must be cancelled. Entitlement to the benefit does not revive until the lodgment of another claim in the proper form.'

(Reasons, para. 12)

The AAT also said that the decision in *Freeman* (1988) 45 *SSR* 587 made it clear that there could be no restoration of a cancelled benefit until the person had lodged a further claim in accordance with the Act. As Simic had not lodged his claim following cancellation of his sickness benefit until August 1987, there was no basis on which he could be paid benefit for the period prior to August 1987.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Compensation award: preclusion

ABBATE and SECRETARY TO DSS
(No. 5285)

Decided: 1 August 1989 by R.A. Balmford.

The AAT *affirmed* a DSS decision that Maria Abbate was precluded from receiving pension from June 1987 to March 1988, following her recovery of a compensation payment of $17 500.

The AAT found that this compensation award was made under the *Accident Compensation Act* 1985 (Vic.), which allowed compensation to be awarded for incapacity for work, for specified injuries, and for medical expenses. In the present case, it was clear that the award had related to incapacity for work, and, accordingly, the whole of that award was to be used as the basis for calculating the preclusion period. This was in line with the approach taken in *Littlejohn* (1989) 49 *SSR* 637 and *Emetlis* (1989) 50 *SSR* 660.

The AAT noted that Abbate had used the compensation award to finance the purchase of a holiday house and that the house in which she and her husband lived was fully paid for. Her husband was in full time employment. The AAT said that it could find nothing 'special' in Abbate's circumstances to support the exercise of the s.156 discretion.

[P.H.]

RAFFAI and SECRETARY TO DSS
(No. 5276)

Decided: 21 July 1989 by G.L. McDonald.

Attila Raffai suffered 2 industrial injuries in 1970 and 1977. Each of these left him with a partial incapacity for work.

It was not until September 1987 that he recovered a lump sum compensation payment (of $20 000) for the first injury — the delay being due to the inefficiency of his solicitors.

On the same day, Raffai also recovered a lump sum compensation payment (of $40 000) for his second injury.

The DSS then added those 2 payments together and calculated a preclusion period under s.153(1) of the *Social Security Act*. As a result, the DSS decided that he could not be paid pension until March 1990.

Raffai asked the AAT to review that decision.

Can separate compensation payments be aggregated?

The AAT noted that s.152(2) and (3) of the *Social Security Act* provided that a preclusion period, imposed under s.153(1), was to run from a date which depended upon the particular circumstances surrounding the lump sum payment.

In the present case, the AAT said, Raffai had received 2 compensation payments for different injuries occurring at different times whilst employed by different employers. They were separate matters which had been treated separately under the NSW *Workers' Compensation Act* 1987. The only common factor was that the awards of compensation had been made on the same day.

The Tribunal said that, in the absence of any legislative authority authorising the aggregation of the compensation awards when calculating the preclusion period, the relevant provisions of the Act should be applied to each award separately, so that 'the preclusion periods should run concurrently': Reasons, p.8.

Discretion to disregard part of compensation awards

The AAT decided that there were, in the present case, 'special circumstances' which would support the discretion to disregard part of the compensation payments. This discretion is given by s.156 of the *Social Security Act*.