

Invalid pension: degree of incapacity

DODIN and SECRETARY TO DSS
(No. N88/1061)

Decided: 11 July 1990 by J. McGirr. Dodin was granted an invalid pension in 1986, on the basis of back strain suffered in 1983 and again in 1984. In March 1988, Dodin told the DSS he was going overseas for 12 months and a medical examination was arranged with a Commonwealth Medical Officer. His impairment was assessed at 20%. A decision was made after he left Australia to cancel his pension. He subsequently appealed to the SSAT, which recommended his appeal be rejected. That recommendation was accepted and Dodin appealed to the AAT.

The facts

According to the AAT's Reasons, Dodin gave evidence at the hearing and walked to and from the witness box extremely slowly with his shoulders almost horizontal to the floor. He performed 'exaggerated loosening up exercises' at the back of the Tribunal room and 'his reactions in the witness-box were exaggerated almost to the point of being theatrical'.

The Tribunal noted inconsistencies between the evidence given by Dodin and the statements of medical examiners and found his description of his pain and its devastating effect on his life to be incompatible with his recent courtship and marriage. The Tribunal was not prepared to rely on Dodin's evidence.

Dodin was born in Mauritius and attended school until the age of 18. His first language was French but he was fluent in English. He trained to be a pest control adviser and for 5 years advised cane growers and market gardeners as to appropriate pesticides. He came to Australia in 1967 and worked as a labourer, a process operator and a plant operator, a tram conductor and driver, and a storeman. In 1984 he ceased work because of back strain. In May 1985 he lodged a claim for invalid pension. An orthopaedic surgeon assessed his orthopaedic impairment at 30% and indicated that Dodin was unfit for duties involving heavy lifting but was otherwise capable of full-time work.

The decision

The Tribunal accepted that the applicant had been out of the workforce for 6 years but felt his age (49 years) was not

an impediment to employment. He had fluency in English and French to the extent that he could undertake basic clerical or sales work. He could perform most forms of light, unskilled or semi-skilled work with restrictions on bending and was thus not 85% incapacitated.

The Tribunal concluded by saying that it was unnecessary to decide whether the applicant would qualify under s.27(b). The AAT was satisfied that 'such permanent incapacity as the applicant has, is not directly caused by a permanent physical or mental impairment to the extent of 42.5%'.

Formal decision

The AAT affirmed the decision under review.

[B.W.]



Invalid pension: permanent incapacity for work

SAN and SECRETARY TO DSS
(No. V90/5)

Decided: 26 September 1990 by R.A. Balmford.

The Tribunal *set aside* a DSS decision and substituted a decision that the applicant had, since 17 June 1988, been qualified to receive an invalid pension.

The facts

San was born in Turkey in 1938 and came to Australia in 1971 where he worked at a variety of unskilled occupations. He was injured in a tractor accident in 1977 and was granted invalid pension the same year. This was cancelled in 1978 but a fresh claim in 1979 was successful. He received pension until 1987 when it was suspended and then cancelled while he served a gaol sentence. The claim relevant to this review was lodged in June 1988.

San suffered from osteoarthritis of the spine and right knee, and depression which created some functional overlay.

The legislation

At the dates of the first two grants of invalid pension (1977 and 1979), ss.23 and 24 of the *Social Security Act* were the relevant sections. These were repealed, with new provisions substituted, from 1 July 1987. At the date of cancellation of San's invalid pension in November 1987, ss.27 and 28 applied and this application was determined according to the new provisions.

The Tribunal said the significant distinction between the old and new provisions was the new s.27(b), relating to impairment. The new s.28 was identical with s.24 of the old provisions. Thus, the essential qualification for invalid pension continued to be that the claimant was 'permanently incapacitated for work'.

When legislation was re-enacted after interpretation by the courts, the AAT said, the legislature should be taken to have approved that interpretation; so, in order to ascertain the meaning of the expression 'permanently incapacitated for work', it was necessary to turn to the authorities which established the meaning of that expression for the purposes of the old provisions.

If San was found to be permanently incapacitated for work it would then be necessary to consider as a separate issue whether that permanent incapacity, or at least 50% of it, was directly caused by a permanent physical or mental impairment in terms of s.27(b).

The cases

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

'In my view 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 for the purposes of the old s.24 was considered in *Panke* (1981) 2 SSR 9, which was approved by the Full Court of the Federal Court in *Annas* (1986) 29 SSR 366, where Davies J considered the scope and purpose of the *Social Security Act* in deciding that the term 'incapacity for work' denoted incapacity to engage in remunerative employment and the ability to attract an employer who was prepared to engage and to remunerate the disabled person.

The assessment of incapacity for work involved first, an evaluation in purely medical terms of the physical or mental impairment, and second, the assessment of what work was suitable to be undertaken by the applicant. This included 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 effort through a normal working day or week, his age, his previous work experience, and the types of paid work available.

The decision

The Tribunal took into account San's arthritis and psychiatric condition, his time out of the workforce, his invalid pension history and adoption of an