

short time when he was physically fit. Since problems developed with his back he is no longer fit to work at the only sort of work for which he was attractive to employers. He is totally untrained for any other sort of employment and has had only a limited amount of education, therefore his work capacity depended on his strength and physical fitness. It is the pain and lack of physical fitness which are the major factors stopping Mr Kibar seeking work.'

(Reasons, para. 48)

Formal decision

The AAT set aside the decision under review and decided that Kibar had been qualified to receive invalid pension since March 1988.

[P.H.]



Invalid pension: incapacity for work

MANCUSO and SECRETARY TO DSS

(No. 5535)

Decided: 1 December 1989 by J. Handley.

Domenico Mancuso, a 46-year-old man, had worked as a builder's labourer until 1977, when he injured his back. After receiving worker's compensation payments and sickness benefit, he was granted an invalid pension from December 1984.

In August 1988, the DSS cancelled Mancuso's invalid pension and he asked the AAT to review that decision. Shortly before the cancellation, Mancuso attempted to work as a gardener, but was forced to abandon this attempt after 2 or 3 days.

The legislation

According to s.28 of the *Social Security Act*, a person is qualified for invalid pension if the person meets age and residence requirements, and is 'permanently incapacitated for work'.

Section 27 of the Act provides that a person is permanently incapacitated for work if the person is at least 85% permanently incapacitated and at least 50% of that permanent incapacity 'is directly caused by a permanent physical or mental impairment of the person'.

Impairment

The Tribunal noted that this reference to a permanent impairment contributing to at least 50% of a

person's permanent incapacity for work, as expressed in s.27(b) of the Act,

'insists on an enquiry into medical factors contributing to the permanent incapacity, whereas previously, considerable latitude was allowed in determining the factors contributing to the permanent incapacity by reference for example to age, availability of work, domicile of applicant, sex, employer perception, command of language, trade and academic skills.'

(Reasons, p.7)

The DSS accepted that Mancuso was at least 85% permanently incapacitated for work, by reason of a variety of factors — his age, limited education, inability to speak English, limited work skills, compensation history, long period out of the work force, adoption of the role of a sick person, and his disabilities.

However, the DSS maintained that Mancuso could not meet the requirements of s.27(b) of the *Social Security Act* in that his permanent incapacity for work was not at least 50% due to his permanent physical or mental impairments.

The Tribunal noted that the term 'impairment' was not defined in the Act but thought that it was 'intended to refer to some diminished or reduced capacity by injury': Reasons, p.8. The Tribunal referred, with apparent approval, to the definition of 'impairment' in the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*:

"'impairment' means the loss, the loss of the use, or the damage or malfunction, of any part of the body or of any bodily system or function or part of such system or function.'

What was intended by s.27, the AAT said, was that 'of all the factors which contribute to [a person's] incapacity, medical factors must be significant': Reasons, p.8.

Evidence was presented from 4 medical practitioners who had regularly treated Mancuso, to the effect that he suffered from degeneration in his cervical and lumbar spine and from a chronic anxiety state. In combination, these practitioners said, Mancuso's disabilities left him at least 85% permanently incapacitated for work. On the other hand, 2 specialists, who had examined Mancuso on behalf of the DSS, said that he had only a minor incapacity which would prevent him from doing heavy labouring which required bending or lifting, but was fit for other work.

The Tribunal accepted the evidence given by Mancuso's treating medical practitioners and concluded that 'almost all of the permanent incapacity

for work is directly caused by physical or mental impairment': Reasons, p.10.

The only matter of significance now as in 1977, the AAT said, was Mancuso's injuries, which were now probably worse than they had been in 1977:

'Now, and then, he didn't speak English, he had limited education and did not possess any trade skills or qualifications. How can it be said that these factors contribute to his incapacity now? He is of course 12 years older but I do not believe that 46-year-old persons cannot obtain employment.'

(Reasons, p.10)

The AAT rejected the suggestion that Mancuso had a lack of motivation for work. It noted that the DSS had chosen to pay Mancuso sickness benefits, rather than unemployment benefit, after the cancellation of his invalid pension — that is, the DSS had not required Mancuso to test his work skills on the open labour market.

The AAT also rejected the DSS suggestion that Mancuso had adopted the role of a sick person:

'Rather his "sickness" is reinforced by the presence of injury and its pain, the failed attempt to return to work, and by the [DSS], itself, placing him on a sickness benefit when invalid pension payments ceased.'

(Reasons, p.11)

Formal decision

The AAT set aside the decision under review and decided that Mancuso was entitled to invalid pension from the date of the cancellation of that pension.

[P.H.]



JARRETT and SECRETARY TO DSS

(No. 5601)

Decided: 15 December 1989 by S.A. Forgie.

Margaret Jarrett, a 55-year-old woman, claimed an invalid pension in July 1987. The DSS rejected that claim and she asked the AAT to review the rejection.

The legislation

Jarrett's eligibility for invalid pension depended on ss.27 and 28 of the *Social Security Act*.

Section 28 provides that a person is qualified for invalid pension if the person is 'permanently incapacitated for work'.

Section 27 provides that a person will be 'permanently incapacitated for work' if the person is at least 85% permanently incapacitated for work and at least 50% of that permanent

incapacity 'is directly caused by a permanent physical or mental impairment of the person'.

The evidence

Jarrett had worked in a number of relatively unskilled jobs — as a waitress, cleaner, hospital orderly, kitchen hand, and process worker. She had last worked in 1981 when a combination of problems had obliged her to stop working.

These problems included carpal tunnel syndrome in her right hand (which had resulted in a substantial loss of strength in that hand), a degenerative disc disease in her lumbar spine and degeneration in the cervical spine. An orthopaedic specialist expressed the opinion that Jarrett was capable of light work but could not work as a cleaner. Another orthopaedic surgeon expressed the opinion that Jarrett was at least 85% permanently incapacitated for work because of a variety of conditions, including her spinal and wrist problems, arthritis in her feet and toes, a hiatus hernia, anxiety and an ulcer. Jarrett's treating general practitioner supported this assessment.

Jarrett told the Tribunal that she had serious difficulties in performing heavier household tasks, that she was only able to sit for short periods and had difficulty using her hands. A social work report was presented to the AAT. According to this report, it was unlikely that Jarrett could attract an employer; and, even if she were able to find employment, it was unlikely that she could work through a normal working day, even on light duties.

The AAT's decision

The Tribunal noted that Jarrett was 55 years of age and had completed only 7 years of education. Her only significant work experience had been as a cleaner and in heavy domestic work. There was no evidence that she had the skills needed for light work, such as operating a telephone.

Taking into account all Jarrett's disabilities, her age, previous work experience and the type of paid work available in the community, the AAT was satisfied that she was at least 85% incapacitated for work. At least 50% of that incapacity, the AAT said, was 'due to a permanent physical incapacity' [sic]: Reasons, para. 34.

Formal decision

The AAT set aside the decision of the Secretary and substituted a decision that Jarrett was entitled to invalid pension from July 1987.

[P.H.]

Overpayment waiver: 'double punishment' and delay in recovery

FORD and SECRETARY TO DSS (No. 5553)

Decided: 19 December 1989 by D.W. Muller, K.J. Lynch and J.D. Horrigan.

Paul Ford sought review by the AAT of a decision permitting the DSS to recover overpayments which arose between 1975 and 1977.

The facts

In 1977 Ford was sentenced to a total of 2 years' imprisonment on 18 counts of imposition on the Commonwealth. As a result of committing those offences, he was overpaid a total of \$5453.

After considering a transcript of the sentencing proceedings, the AAT was 'in no doubt that, when Mr Ford was sentenced in 1977, he was given an extra punishment because the sentencing judge took the view that restitution was out of the question' Reasons, para. 8.

The decision to raise this overpayment was made in later 1977 and some benefits were withheld from Ford in November 1977. On 21 October 1985 a delegate of the Minister for Finance approved the write-off of the debt, then standing at \$5319.54, subject to recovery from any future benefits that might be granted to Ford. No civil proceedings for recovery of the overpayments were ever instituted.

Ford lived in Italy from 1980 until 1986. In 1987 he received unemployment benefit and, by the time of the AAT hearing, 22 August 1989, he was receiving invalid pension from which \$36.20 per fortnight was being withheld in recovery of the overpayment that arose between 1975 and 1977. (It would have taken about five and a half years to repay the debt at that rate.)

It was argued for Ford that there were a number of reasons for waiving the debt still owing but the AAT only relied on two of those — the delay in recovering the debt and double punishment because the unlikelihood of restitution led to Ford receiving extra punishment in 1977.

The legislation

Sections 251(2) and (3) of the *Social Security Act* set a 6-year limit on the commencement of proceedings for recovery of a debt under the Act. No such limit is referred to in ss. 246(1) and (2), the latter of which permits recovery by withholdings from ongoing social security payments. The discretion to waive a debt is contained in s.251(1)(b).

Delay in recovery action

Ford's barrister conceded that the DSS was entitled to recover the debt by way of the fortnightly withholdings from his invalid pension and pointed to the delay as a factor in favour of waiver. The AAT formed the view that 'twelve to fourteen years is an inordinately long period to wait before attempting to recover a debt': Reasons, para. 7.

Double punishment

The AAT found that 'if Mr Ford is now forced to repay the debt of 1977 he will be twice punished for the same series of offences insofar as the sentence of imprisonment was imposed on the basis that the applicant would not repay the money': Reasons, para. 8.

The AAT decision in *Letts* (1984) 23 SSR 269 was distinguished because in that case there was no evidence that the trial judge imposed a sentence on the assumption that the applicant would not have to repay the moneys which he had improperly received.

Formal decision

The AAT set aside the decision under review and decided that the right of the Commonwealth to recover any debt owing to it arising out of the overpayments during 1975, 1976 and 1977 which still remained unpaid after 1 January 1990 should be waived.

[D.M.]

Special benefit: resident of Australia

SECRETARY TO DSS and ETHEREDGE and HEMPLE (No. 5567)

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

The Secretary to the DSS applied for review of an SSAT decision that Etheredge and Hemple were each eligible to receive special benefit.