invalid role, his lack of motivation to work, his limited work skills, his age, gaol sentence and lack of skills in English. Taken cumulatively, these factors were likely to have the effect that San did not have the ability to attract an employer who was prepared to engage and remunerate him. He was therefore incapacitated for work. The Tribunal also found his incapacity to be not less than 85% and permanent.

The applicant also satisfied the requirements of s.27(b), in that at least 50% of the incapacity was directly caused by some permanent physical or mental impairment, namely San's psychiatric condition and his arthritis.

[B.W.]

Moneys wrongly withheld: payment of interest?

TRIMBOLI and SECRETARY TO DSS
(No. N86/837)

Decided: 28 September 1990 by E.T. Perrignon.

Trimboli received sickness benefits from October 1978 to May 1983 following a work related injury in 1975. On 12 April 1984, he received a lump sum worker's compensation payment of $50 000.

Initially, the DSS sought to recover $15 114 (representing sickness benefits paid to Trimboli) from the worker's compensation insurer as the relevant pay-back figure for the sickness benefit. This sum was paid by the insurer to the DSS on 16 October 1984. Trimboli sought review of the decision of the Secretary's calculation of the pay-back figure by the AAT alleging that:

(1) the worker's compensation payments did not relate to the same incapacity as that for which the sickness benefits were paid;
(2) in the alternative, the Secretary should exercise his discretion under s.115E to disregard the worker's compensation payments; and
(3) interest should be paid by the Secretary to Trimboli on any wrongfully withheld moneys which the Secretary had claimed from the worker's compensation insurer.

Three days before the AAT hearing, the DSS refunded to Trimboli the sum of money being an amount the DSS considered to have been an excess collection from the worker's compensation insurer. When the matter came before the AAT for hearing, the Tribunal found against Trimboli in all 3 points referred to above. The Tribunal did, however, allow certain medical costs to be deducted from the recovery figure.

Trimboli then appealed to the Federal Court on the grounds, *inter alia*, that the Tribunal had failed to take account of the losses caused to Trimboli by the Secretary's belated decision to refund the sum of the previously withheld moneys 3 days before the hearing of the Tribunal.

The Federal Court held that the Tribunal had failed to take into consideration this issue in the exercise of discretion under s.115E and that this constituted an error of law: *Trimboli* (1989) 49 *SSR* 645. The Federal Court remitted the matter to the AAT for a fresh exercise of its discretion under s.115E. There were suggestions in the Federal Court that the lost interest to the applicant by reason of the Secretary's over-collection from the worker's compensation insurer should be remedied by the AAT by way of exercise of its discretion under s.115E.

Legislation

Section 115E [now s.156] provided:

'The Secretary may, for the purposes of this Part, treat the whole or part of a payment by way of compensation that has been, or that will be made as not having been made or as not likely to become liable to be made, if the Secretary considers it appropriate to do so in the special circumstances of the case.'

The decision

The AAT found as a fact that the initial over-collection by the Secretary from the worker's compensation insurer was due to miscalculation by the DSS and that this miscalculation was the cause of Trimboli's losses.

The Tribunal proceeded to calculate, on the basis of the Supreme Court scale of interest, Trimboli's losses by reason of the wrongful withholding of the excess collections. These losses amounted in all to $2459. The Tribunal, in exercise of its discretion of s.115E, determined to treat this sum as having not been received by Trimboli. In so far as the full amount claimed by the Secretary had already been recovered from the worker's compensation insurer, this sum of $2459 represented a debt due from the Secretary to Trimboli.

The Tribunal seems to have allowed the applicant interest on the money paid to him by the worker's compensation insurer for the period that those sums were held by the worker's compensation insurer pending negotiations and advice from the Secretary as to the correct pay back figure.

Formal decision

The Tribunal set aside the decision of 24 February 1988 and decided that 'so much of the payment to the applicant by way of compensation should be treated as not having been made as will result in the payment by the respondent to the applicant, in addition to the payment which has already been made by the respondent to the applicant, with the sum of $2459'.

[A.A.]

Income test: German pension

SECRETARY TO DSS and SVOLAKS
(No. 590/4)

Decided: 19 September 1990 by J.A. Kiosoglous, D.B. Williams, D.J. Trouse.

The Secretary sought review of a decision of the SSAT concerning an alleged overpayment. The SSAT had decided that certain payments received by Svolaks from the Federal Republic of Germany were compensation payments for Nazi persecution within the meaning of para. (ka) of the definition of income in s.3(1) *Social Security Act* 1947, and accordingly were exempt from the definition of income.

The Secretary argued that the payments did not come within the exclusion of para. (ka) and accordingly were income for the purposes of income testing. In so far as Svolaks' German payments had not been taken into account in calculating his previous entitlements, it was the Secretary's position that an overpayment had occurred.

The facts

Svolaks lived in Latvia during World War II. He was aged 26 when the German and Soviet armies came into conflict in Latvia. Svolaks was a civilian farmer at the time. On one occasion he was caught in cross-fire and sustained an injury to his leg. He was hospitalised and treated in Germany until the end of the war.

After the war, Svolaks commenced receiving a pension in Germany called a '*Bundesversorgungsgestz*' (BVG) pension. In 1950 Mr Svolaks migrated to Australia, and in 1962 commenced receiving an invalid pension under the *Social Security Act*, which was converted to an aged pension in 1980. Throughout this time and up to the date of the hearing before the AAT, Svolaks continued to receive the BVG pension.

Evidence was received from the West German equivalent of the Department