

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.