

On the issue of permanency the Tribunal followed *McDonald* (1984) 18 SSR 188 as to the test of whether an incapacity is likely to persist into the foreseeable future. All the medical evidence, and Riley's own evidence, indicated that he would eventually return to some sort of employment. Therefore the incapacity, if it existed, would not continue into the foreseeable future.

The Tribunal also examined whether at least 50% of the permanent incapacity (if it had existed) would be directly caused by Riley's physical or mental impairment. It concluded that at all relevant times the physical impairment was mild only. During retraining the stress and anxiety improved and the major factor preventing Riley from obtaining paid work was his desire to keep on training. Neither the community nor Riley would benefit from a finding of invalid pension eligibility. He had the capacity to make something of his life and retraining should be encouraged. The Tribunal noted that its decision did not prevent consideration of whether Riley was eligible for a rehabilitation allowance under s.150 of the *Social Security Act*.

#### Formal decision

The AAT affirmed the decision under review.

[B.W.]

## Blind pensioners: income test

**RURAK and SECRETARY TO DSS**  
(No. 5703)

Decided: 12 February 1990 by  
G.L. McDonald, M. Allen and  
J. Billings.

Alberta Rurak asked the AAT to review a decision originally made by the Department on 4 August 1988, varying her rate of invalid pension from \$318.10 to \$284.10 per week as a result of the application of the income test.

#### The facts

Rurak received an invalid pension as a result of being permanently blind, but also qualified for invalid pension on the basis of other conditions that perma-

nently incapacitated her for work. She was unmarried, supported two dependent children aged 16 and 13 years and received \$35 per week maintenance.

#### The legislation

Under s.33(6)(a) of the *Social Security Act* 1947, a blind person cannot receive additional pension for children under s.33(4) or guardian's allowance under s.33(3) unless she could qualify for an invalid pension if she was not permanently blind and was permanently incapacitated for work.

Section 33(6)(b) then purports to apply the income and maintenance income tests to these additional pension payments by stating that the person's pension '... shall not be increased by an amount under sub-section (3), or ... (4) ... that exceeds that amount that would, if the person were not permanently blind be the amount ... of the increase by virtue of sub-section (3), or ... (4) ... that comprises the annual rate of the person's age or invalid pension as reduced in accordance with sub-section (12)'.

Section 33(12) applies the income and maintenance income tests to 'a pension under this Part payable to a person (other than a person who is permanently blind and who is qualified to receive an age or invalid pension) ...'

[Section 33(10) is also relevant to the application of the income test to blind pensioners with children but was not referred to by the AAT.]

#### Conflict between s.33(6) and s.33(12)?

The AAT considered the wording of s.33(6)(b) and the exemption for blind persons from the operation of s.33(12), noting that the exemption in s.33(12) was amended by Act No. 130 of 1987 from 'other than a person who is currently blind' to its current wording set out above, which contains the additional words 'and who is qualified to receive an age or invalid pension'.

[Editor's note: These words were added because Act No. 130 of 1987 extended the operation of s.33 beyond age and invalid pensions to also cover wife's and carer's pension. Unfortunately the AAT did not seem to appreciate this.]

The AAT then said:

'It seems to the Tribunal that the closing words of [sub-section] 6 and the exception created by [sub-section] 12 are inconsistent and are unable to stand together. In those circumstances the *maxim leges posteriores contrarias abrogant* applies and the section in the Act later in time is deemed to repeal the inconsistent earlier section ... In those circumstances the exemption from reduction provided for in

s.33(12) must prevail in cases where a pensioner is both blind and otherwise entitled to an age or invalid pension. The applicant is therefore entitled to the receipt of her pension with guardian and other allowances not subject to reduction.'

(Reasons, p.5)

[The AAT did not clearly state why they thought there was an inconsistency nor why s.33(12) was regarded as the later in time. Perhaps the amendment by Act No. 130 of 1987 explains the latter.]

#### Formal decision

The AAT set aside the decision under review and remitted it with a direction that the applicant qualifies for the receipt of guardian and other allowances pursuant to the provisions of s.33(3) and (4) and that pursuant to the provisions of s.33(12) guardian and other allowances are not subject to reduction.

[D.M.]

## Maintenance income test: transitional provision preserving 'total income'

**JAKOVLJEVIC and SECRETARY TO DSS**

(No. 5384)

Decided: 13 September 1989 by  
J. Handley.

Ljubica Jakovljevic sought review of decisions by the DSS which (1) failed to increase her rate of widow's pension on 23 June 1988 in line with the general indexation increases of pensions and (2) reduced her pension from 13 October 1988 following an increase in maintenance paid to her by her former husband.

#### The legislation

This review was determined by the application of the savings provision in s.21(4) of the *Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Act* 1988. That Act introduced into the *Social Security Act* 1947 the maintenance income test, which commenced operation on 17 June 1988. Under s.21(4) of the amend-