

Invalid pension: permanent incapacity to work

L. PERECZ and SECRETARY TO
DSS
(No. 5751)

Decided: 9 March 1990 by
H.E. Hallowes.

Leslie Percz applied to the AAT for a review of an SSAT decision affirming a DSS decision to reject his application for invalid pension.

The applicant was 16 years old and his mother had been, until his 16th birthday, the recipient of child disability allowance and family allowance for him. The applicant's mother also applied to the AAT for review of the decisions to cancel these payments and a decision to reduce her rate of invalid pension: see the case of *A. Percz* in this issue of the *Reporter*.

The facts

The mother told the Tribunal that Leslie was a student in Year 11 and was expected to complete his Victorian Certificate of Education in 1991. He required constant attention and supervision as he had a gap in his skull leaving his brain unprotected. He also had a curled down lower lip, and suffered from headaches, a slight tremor in his hands and perspiration. The Tribunal was told that he missed few days of school.

The Tribunal was also told that apart from not engaging in contact sports, there was no special provision made for him at school. His marks were average and medical evidence suggested that the only restriction on his future employment prospects would be that he could not work in high risk areas, such as building sites.

The decision

Relying on *Panke* (1981) 2 SSR 9, the Tribunal concluded that the applicant was not incapacitated for work for many occupations which would be available to him. The fact that he was attaining skills led the AAT to find that, even if he was presently incapacitated, it could not be said that the incapacity was permanent.

The applicant's mother had been told that upon her son reaching 16 he would be moved from child disability allowance to invalid pension. The Tribunal commented that any incorrect advice the mother was given was not a

relevant matter to consider in deciding the applicant's eligibility for invalid pension.

Formal decision

The AAT affirmed the decision under review.

[B.S.]



Invalid pension: degree of incapacity

NELSON and SECRETARY TO
DSS
(No. 5804)

Decided: 27 March 1990 by
S.A. Forgie.

Nelson applied for review of a decision to reject his claim for invalid pension. The dispute between the parties was his state of health after he ceased work in September 1976 and whether he remained incapacitated for work.

Jurisdiction

The Tribunal rejected a preliminary argument raised by the DSS, that there had not been a decision to cancel pension but only a decision that Nelson was not incapacitated to the extent of 85%. The DSS relied on the decision in *Siketa* (1988) 47 SSR 611, where the AAT found that there had been no decision to cancel pension but only an expression of an intention to do so. The Tribunal said that, in the present case, a letter sent to Nelson by a DSS officer stating the delegate was unable to vary the original decision to cancel pension and inviting him to appeal to the SSAT was a clear notice of cancellation of pension.

The facts

Nelson was born in 1937 and grew up in country Victoria where he had a number of farming and labouring jobs. He later became a truck driver. In 1976, after a week of carting sorghum which had been treated with a fumigant, Nelson became ill. He said he began suffering 'funny turns' and to feel fatigued and this caused him to cease work.

Nelson and his *de facto* wife were in the process of building their own home and Nelson said he had a lot of assistance from friends, undertaking only light work himself. He had made some attempts to rejoin the workforce but found he got too tired. A statutory declaration from a builder with whom

Nelson had worked for one day stated that he found Nelson to be willing and having the necessary skills but unable to cope with work loads, even in the case of light duties. Nelson drove a car and said he found it difficult to concentrate for any length of time.

Medical evidence

Medical evidence indicated Nelson had 'impaired glucose tolerance', an intolerance to some medication and, in 1975, had suffered a bad reaction to an anaesthetic. An orthopaedic surgeon described Nelson's main impairment as his back and neck conditions. He considered Nelson to be permanently incapacitated for heavy work but not for truck driving, provided he did not have to lift heavy weights. Major symptoms were fatigue and tiredness, rather than pain. He assessed the disability in the vicinity of 30-40%. Other medical evidence indicated total and permanent incapacity for heavy work.

Findings

The AAT was satisfied that Nelson had suffered 'certain symptoms' since he came into contact with a fumigant in 1976 but had no evidence on which to base a finding that it was the fumigant which caused the symptoms.

In finding the appellant was at least 85% permanently incapacitated, the Tribunal was satisfied that he suffered cervical spondylosis, lumbar disc disease, headaches, fatigue, muscle spasms, back problems and anxiety. There was sufficient evidence to find the conditions were permanent and that Nelson had adapted to an invalid role. The Tribunal found that 'his symptoms are real to him and his belief that he is an invalid is genuinely held'.

The Tribunal said it was open to question how a man, even though 50 or 60% medically incapacitated, could take part in building his house, driving (albeit once) to Melbourne (6 hours driving per day for 3 days) and go fishing, and still could claim to be incapacitated for work. The Tribunal was also satisfied that Nelson believed he suffered ill effects when he worked. While accepting the DSS submission that Nelson's attempts to get back into the workforce were 'feeble', there were very few employment opportunities open to him due to his incapacity.

Formal decision

The AAT set aside the decision under review and decided that Nelson was entitled to be paid invalid pension from January 1988.

[B.W.]

