Invalid pension: weight to be given to medical evidence

ALMOND and SECRETARY TO DSS
(No. 5810)
Decided: 6 April 1990 by R.A. Hayes.

Donald Almond's claim for invalid pension was rejected by the DSS in September 1987 on the basis that his incapacity for work was less than 85%. He asked the AAT to review that decision.

The facts

Almond, who was 53 years old, had been born in England and stayed at school until he was almost 15 years old. He found work as an office boy and later in the insurance business. He went to live in New Zealand and worked there in insurance. When he was about 40 years of age he had a nervous breakdown.

On medical advice he turned to physical work. He later found a job selling builder's hardware and became responsible for delivery dates which could not always be met. He could not cope and left after 3 years to become a stock and station agent delivering produce and building materials to farms. He felt better 'in himself' but had trouble with his shoulders and neck and could not lift heavy goods. He was transferred to his employer's shop where he sold white goods.

Almond came to Australia in 1980 and obtained work with a hardware firm, where he felt under stress because of poor systems in the firm.

Almond was in a motor bike accident when he was 21 and later suffered pain in his shoulders, neck, skull, temples and elbows (when he had to lift) and was unable to sit for any length of time. He had been treated with traction, ultra sound and injections into his shoulders. His medical condition limited his social activities. Group therapy sessions assisted but he felt he could not cope with a supervisory job because as soon as he was under stress he suffered a 'splitting headache'.

Medical evidence

The Tribunal considered written and oral medical evidence from two specialists who had seen the appellant on one or two occasions at the most, and written evidence only from two general practitioners and one specialist who had been treating him over a considerable length of time.

The DSS submitted that written reports which had not been tested by cross-examination should be given less weight.

The cases

In *Milligan and Repatriation Commission* (25 September 1989), the AAT had referred to the High Court case of *Bayer Pharma v Fabenabriken Bayer AG* (1965) 120 CLR 265 and said:

> 'We do not give written reports by a witness who had not given oral testimony and faced cross examination the same weight as the evidence of witnesses whose demeanour has been observed.'

The AAT distinguished *Bayer* on the grounds that s.33(1)(c) of the *Administrative Appeals Tribunal Act* provides that the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate. It cited *Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, where Brennan J. said the Tribunal is entitled to have regard to evidence which is logically probative whether it is legally admissible or not. The weight placed on evidence whether cross-examined or not is entirely within the discretion of the Tribunal.

In the *Bayer* case, Kitto J. was concerned with issues in which the demeanour of the witnesses had considerable relevance. In this case the AAT said, the demeanour of the doctors in the witness box had little to do with the consideration of their evidence. What was more important was whether they had reached their conclusions on the basis of a full knowledge of Almond's condition.

In many instances a doctor's report might be supplemented by his giving oral evidence but it did not follow that greater weight must be given to a doctor who had given oral evidence. Factors such as the qualifications of the doctor, knowledge of the patient and the thoroughness of consideration of the patient's condition must also be borne in mind and given appropriate weight.

The AAT accepted the evidence of the two general practitioners who had treated Almond for a considerable length of time, and that of an orthopaedic surgeon who had seen him only twice; because, despite their difference in qualifications, their assessments were essentially the same and accorded with the oral evidence given by the appellant, his wife and friends.

Formal decision

The AAT set aside the decision under review and decided that Almond was entitled to be paid invalid pension.

[B.W.]

Invalid pension: entrenched invalid role

KAMVISSAS and SECRETARY TO DSS
(No. 5741)
Decided: 5 March 1990 by R.A. Hayes.

The decision under review was that Kamvissas' invalid pension should be cancelled from 16 March 1978. The Tribunal decided that in the context of the legislative formula, as it appeared in 1979, Kamvissas had not satisfied the requirements of s.23 and 24 and the decision under review was *affirmed.* The AAT also found that the DSS had made an incorrect decision to grant pension in 1976 when Kamvissas was not 'seriously and permanently ill'. This set in train a process which led to a totally incapacitating mental impairment, which would now qualify him for invalid pension under the present s.27, should a new claim be made.

The facts

Kamvissas last worked in 1976. He was then suffering from anxiety and depression but was not mentally impaired. He was granted invalid pension in 1976 and went to Greece in 1977. Pension was suspended in 1978 and cancelled in 1978 on the ground that he was not at least 85% permanently incapacitated for work.

Findings

The Tribunal found the DSS had incorrectly granted invalid pension in 1976 when medical evidence indicated depression of short duration. The mistake was compounded by an 'unscientific' report of a Commonwealth Medical Officer that there was a 'chronic depressive psychosis'. This set in train a process,

> 'whereby [he] has come to perceive himself as a chronic invalid and has become entrenched in an illness behaviour pattern consolidated within the situation of a dysfunctional family'.