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'.

Kamvissas received little or no psychiatric treatment or medication on his return to Greece until he learned, in 1978, that his invalid pension was to be cancelled. It was then he began to become entrenched in a pattern of illness behaviour and consulted doctors who certified that he was mentally ill. The Tribunal found,

> 'in 1986 Kamvissas was still consciously "acting up" and was not so far immersed in a pattern of illness behaviour and disabled by the manifestations of his inadequate personality as to be significantly incapacitated for manual work.'

Since the mid-1980s, psychiatrists had been prescribing psychotropic medication for Kamvissas as if he were a person suffering from a psychiatric illness. His financial situation and his drawn out dispute with the DSS had exacerbated his problems.

[B.W.]

Invalid pension: children outside Australia

BUCCI and SECRETARY TO DSS (No. 5867)
Decided: 3 May 1990 by H.E. Hallowes.

Simone Bucci migrated to Australia from Italy in 1955, when he was 22 years of age. In 1967 he returned to Italy and married. He then came back to Australia, leaving his wife in Italy.

Bucci continued to live in Australia, returning to Italy several times over the following years. His wife and 4 children continued to live in Italy and had never been to Australia.

In 1984, Bucci suffered an industrial injury and, following the completion of compensation proceedings, he was granted an invalid pension by the DSS from September 1988. This pension was paid at the single rate and included no additional pension for the 3 of his children who were still attending school in Italy.

In April 1989, Bucci advised the DSS that he wished to apply for family allowance; and he lodged a claim for family allowance supplement (FAS) on the same day. That claim was rejected.

On review, the SSAT affirmed the DSS decision to pay Bucci invalid pension at the single rate, without any additional pension for his children, and the DSS decision to reject his claim for FAS.

Bucci asked the AAT to review the decisions of the SSAT.

Family allowance supplement

Section 73(1) of the *Social Security Act* provides that a person is qualified to receive FAS for a child, if the person and the child are in Australia, the person is receiving family allowance for the child and the person is not receiving another form of income support under the *Social Security Act*, including invalid pension.

The AAT said that, as Bucci was receiving an invalid pension, he was not qualified to receive FAS for his children. Even if he were not receiving invalid pension, he could not qualify for FAS as his children were not present in Australia.

Rate of invalid pension

Section 33(4) of the *Social Security Act* provides for the payment of additional invalid pension to a pensioner who has a dependent child, a term which is defined in s.3(1) to mean, *inter alia*, a child under 16 years in the person's custody, care and control.

However, s.3(10) provides that a child is not to be treated as a dependent child in relation to a person for the purposes of, *inter alia*, invalid pension, unless -

> '(a) the child is an Australian resident;
> (b) the child is living with the person while the person is an Australian resident;
> (c) the child had been an Australian resident and is living with the person outside Australia; or
> (d) the child had been living with the person in Australia and is living with the person outside Australia.'

The AAT said that there was no evidence on which it could be satisfied that Bucci had the custody, care and control of his children; but, even if this were so, s.3(10) prevented an increase in the rate of invalid pension for pensioners in Bucci's circumstances where his children were living overseas in the care of his wife.

A claim for family allowance?

The Tribunal then considered the question whether Bucci's claim for FAS could be treated as a claim for family allowance, under the provisions of s.159(5). This provision allows the Secretary to treat a claim for one type of payment under the *Social Security Act* as a claim for another payment that is 'similar in character'.

The AAT said that it was satisfied that Bucci was not qualified to receive family allowance, because his children were not his 'dependent children' as that term is used in the *Social Security Act*, as required by s.82(1) of the Act.

Reciprocal agreement

Finally, the AAT referred to the agreement between Australia and Italy, set out in Schedule 2 of the *Social Security Act*. The AAT observed that Article 4 of the Agreement gave Bucci, an Australian citizen, the right to be treated equally to an Italian citizen under the social security laws of Italy; but suggested that this was likely to be of little assistance to him. The AAT concluded with the observation that Bucci was -

> 'In unfortunate circumstances, being only entitled under the Act, to a pension payable at the single rate with which to provide for himself, his wife and 3 of his 4 children. Despite the Agreement between Australia and Italy, the Act does not help those breadwinners who live in Australia while maintaining their families who have never resided in this country, in Italy.'

(Reasons, para. 13)

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Invalid pension: permanent physical or mental impairment

RADOVANOVIC and SECRETARY TO DSS (No. 5786)
Decided: 22 March 1990 by H.E. Hallowes, G. Brewer and L. Rodopoulos.

When invalid pension was granted to Radovanovic, the relevant legislative provisions were s.23 and 24 of the *Social Security Act*. At the date of decision to cancel, s.27 and 28 applied. The Tribunal *set aside* the decision to cancel the pension.

The facts

Radovanovic was born in Yugoslavia and had 4 years of schooling before working in a tyre factory. He came to Australia in 1972 and worked in various labouring jobs including the assembly line at Ford.

When he was unable to keep up with other employees at Ford, he was moved