Administrative Appeals Tribunal decisions

Compensation award: identity of incapacity

SECRETARY TO DSS and MASTORAKOS
(No. 5891)
Decided: 11 May 1990 by W.J.F. Purcell.

The AAT *affirmed* an SSAT decision that, of a common law damages settlement of $41 964 received by Mastorakos, only $7000 was 'a payment by way of compensation in respect of [the same] incapacity' as the incapacity for which Mastorakos had received sickness benefit within s.115B(A) of the *Social Security Act*.

Mastorakas had been paid sickness benefit between December 1984 and February 1987. In May 1988, his common law action for damages was settled for $41 964. According to the insurer responsible for payment of the settlement, $7000 of the settlement represented past economic loss and $10 000 represented future economic loss.

The DSS had decided that $17 000 of the settlement was a payment in respect of incapacity for work and that this amount was available for recovery of the sickness benefits paid to Mastorakos.

On review, the SSAT had decided that only $7000 could be considered for the purposes of calculating recovery of sickness benefit, because only that amount related to the same incapacity as the incapacity for which the sickness benefit had been paid.

The AAT referred to the decision of the Federal Court *Littlejohn* (1989) 53 *SSR* 712, where the Court had said that, in the context of s.115B(2A), 'incapacity . . . has both a causal and a temporal aspect'. The AAT concluded:

> 'In my view the payment to the respondent of $10000 for future economic loss was in respect of an incapacity which was not the incapacity for which sickness benefit was paid, and the payment does not come, therefore, within the provisions of s.115B of the Act.'

(Reasons, para. 13)

[P.H.]

Capitalised maintenance income

HOPE and SECRETARY TO DSS
(No. 5842)
Decided: 8 March 1990 by C.J. Bannon.

Moreen Hope was being paid an age pension. This appeal concerned the treatment under the *Social Security Act* of an amount which the Family Court had ordered Hope's former husband to pay her as maintenance.

The Family Court order stated that Mr Hope was to pay Mrs Hope weekly maintenance or 'in lieu of $126 per week maintenance for the applicant for 3 years, the liability for that maintenance was to be taken in satisfaction by a transfer of interest between the husband and wife in the former matrimonial home,... together with a sum of $10 600 which the wife was required to pay the husband'. The AAT accepted that this was capitalised maintenance income.

The legislation

Section 3 of the *Social Security Act* defines 'capitalised maintenance income' as:

> '[M]aintenance income of the person:
> (a) that is not a periodic amount or a benefit provided on a periodic basis; and
> (b) the amount or value of which exceeds $1500'

The way this is to be dealt with by the Secretary is determined by s.4A. Under s.4A(2), where a court order specifies the period 'in relation to which the capitalised maintenance income was to be provided', the Secretary is required to use that period to calculate the effect of the capitalised maintenance income on the rate of pension.

However, s.4A(2) is expressed to be subject to s.4A(5). Section 4A(5) provides that, where the period 'is not appropriate in the circumstances of the case', the Secretary should determine a capitalisation period that is considered 'appropriate in the circumstances of the case'.

The AAT's assessment

The DSS had taken the 3 years specified in the Family Court order as the relevant period. This had the effect of reducing Hope's pension from some $133 per week to approximately $78 per week.

The AAT observed that the provisions of s.4A are mandatory and the Secretary must therefore consider the discretion in s.4A(5) in deciding how to deal with capitalised maintenance income.

The AAT noted that the Family Court judge was not concerned, in making his order with the question of the appropriate rate of pension to be paid to Mrs Hope. The rate being paid, the AAT found, was 'an insufficient amount of money to live on' (Reasons, p.4).

The Tribunal concluded that the discretion in s.4A(5) should be exercised to change the capitalised maintenance period from 3 years to 6 years. It noted that, at the end of the 3 year period, Mr Hope might well commence payment of regular maintenance, but until that time 'she does need extra help'.

Formal decision

The AAT directed that the discretion under s.4A(5) be exercised to extend the capitalised maintenance period from 3 years to 6 years.

[J.M.]

Family allowance supplement: income test

LINES and SECRETARY TO DSS
(No. 5984)
Decided: 22 June 1990 by D.W. Muller.

This application concerned a dispute between Lines and the DSS about the correct rate and date of effect of family allowance supplement (FAS) to be paid to her. (There were in fact 2 applications, one by the Secretary, but as the facts were so intertwined they were dealt with as one matter by the AAT.)

The facts

Rosemary Lines married Warren Lines in December 1987. On 27 July 1988, she claimed family allowance and FAS in respect of 2 children. At the time of her application, Mr Lines' income was $696.24 a fortnight, which under the legislation in force at the time was converted into a 4-weekly rate, allowing for the