Retrospective payment of pension

CONDER and SECRETARY TO DSS (No. 5939)
Decided: 7 June 1990 by D.W. Muller, K.J. Lynch and J.D. Horrigan.

The AAT *affirmed* a decision of the DSS that Conder's age or invalid pension could not be restored for the period 1 July 1986 to 30 June 1987 following Conder's lodgment of a claim seeking that restoration on 14 July 1987.

Conder had been paid an invalid pension between June 1981 and March 1985, when the introduction of the assets test led to the DSS deciding that Conder was no longer eligible for payments of invalid pension.

On 14 July 1987, Conder wrote to the DSS, advising that she and her husband had suffered losses and accumulated substantial debts in operating their farm business and seeking restoration of her pension for the financial year 1986-87. Although an earlier version of the *Social Security Act* had provided, in s.135TJ(3), that the Secretary could increase the rate of a person's pension with effect from any date specified by the Secretary, s.135TJ was amended with effect from 1 July 1986, so as to provide that any determination made under s.135TJ(3) to increase the rate of a person's pension could only take effect from the day on which the Secretary received advice from the person which led to the decision to increase the rate of pension: s.135TJ(4)(c). [These provisions now appear in s.168(3) and (4) of the *Social Security Act*.]

The AAT said that, because of these provisions, there was no legal basis on which Conder could be paid pension for the financial year ending 30 June 1987, because she had advised the Secretary of the change in her financial circumstances after the end of that period. The AAT commented:

> 'The amendments to the Act [which took effect from 1 July 1986] create difficulties for people who operate farming or business ventures and who qualify for pensions because of their age or their physical handicaps. In some cases, it may be virtually impossible to inform the Department of any change in financial circumstances until the end of each financial year. A crop may fail or prices may in fact turn out to be a lot lower than anticipated. The value of the farm or a business will very often depend on the income that it can generate. Mrs Conder's case highlights those difficulties.'

(Reasons, para. 15)

[P.H.]

Sickness benefit: loss of income

WEBB and SECRETARY TO DSS (No. 5952)
Decided: 7 June by J.A. Kiosoglous.

Webb, a self-employed full-time farmer, suffered ill health because of a schizophrenic disorder which first appeared in October 1985. He applied for sickness benefit in May 1987. Tax returns revealed the farm ran at a loss during the 1987-88 financial year and during the previous financial year.

Medical evidence indicated that, during the period under review, Webb was unable to work because of his illness. The DSS agreed that the applicant was incapacitated in terms of being eligible for sickness benefit but there was an onus on him to show that the incapacity caused the loss of income. The DSS argued the property was not capable of returning an income whether or not Webb was there.

The legislation

Section 117(1)(c)(i) of the *Social Security Act* provides that a person is eligible for sickness benefit if he satisfies the DSS that he was incapacitated for work throughout the period by reason of sickness, the incapacity was of a temporary nature, and he had thereby suffered a loss of salary, wages or other income.

The decision

The Tribunal agreed the incapacity could be regarded as 'temporary' and that Webb was unable to work during the relevant period. It accepted that he had suffered a loss of income as a result. It seems that the AAT took into account that Webb's sales of barley (his major crop) were as follows in the relevant years:

1985–86:	$12 457
1986–87:	$6696
1987–88:	$1949.

[B.W.]

Claim for pension: no power to back-date payment

FRY and SECRETARY TO DSS (No. 6024)
Decided: 12 July 1990 by D.H. Burns.

Alice Fry arrived in Australia from the United Kingdom on 21 June 1982. On 25 June 1982 she applied for an age pension which was granted with effect from 1 July 1982.

On 22 December 1988, the DSS decided, after an administrative review of Fry's case, to transfer her from age pension to widow's pension, with effect from 15 September 1988.

Fry asked the DSS to back-date her widow's pension to 21 June 1987, the date when she would have been eligible to receive that pension had she lodged a claim for it. When the DSS refused to do this, she asked the AAT to review that refusal.

The legislation

Section 158(1) of the *Social Security Act* provides that the payment of a widow's pension is not to be made, 'except upon the making of a claim for that pension'. According to s.159 of the Act, a claim for a pension is to be in writing in accordance with a form approved by the Secretary and lodged at an office of the DSS or other place approved by the Secretary.

These provisions were formerly numbered as ss.135TA and 135TB and were in force at the time when Fry first became eligible to claim widow's pension in June 1987.

Estoppel

On behalf of Fry it was argued that the DSS could not raise the provisions of ss.158 and 159 of the *Social Security Act*. It was argued that, because the DSS had granted Fry a widow's pension as if she had claimed that pension, the DSS was estopped from raising ss.158 and 159.

The AAT referred to the Full Federal Court's decision in *Formosa* (1988) 45 *SSR* 586. In that case, the Federal Court had said that estoppel could not be used to lift the prohibition imposed by s.158(1), so as to allow for payment of a pension without the lodging of a claim:

> '... estoppel does not operate so as to sanction the appropriation of public moneys without the authority of the Parliament...'

Failure to advise applicant

The AAT also rejected an argument that there had been some form of onus on the DSS to inform Fry of her rights to claim a widow's pension at the time when she had claimed her age pension in 1982:

> 'Whilst one would expect that the Department would and does make every endeavour to explain to would-be applicants, when appropriate, their right to apply for the many and various social welfare benefits administered by the Department, there is no legal obligation upon the Department or its officers to do so. Failure to do so does not thereby override statutory requirements to entitlements.'

(Reasons, para. 11)

Formal decision

The AAT set aside the decision of the SSAT and decided that arrears of widow's pension were not payable to Fry for the period from 21 June 1987 to 14 September 1988.

[P.H.]

Family allowance: whether payable prior to lodgment of claim

SECRETARY TO DSS and PERKINS (No. 5693)

Decided: 10 May 1990 by R.K. Todd.

The DSS asked the AAT to review a decision of the SSAT that arrears of family allowance were payable for the period November 1987 to May 1989.

The facts

Perkins and his wife separated in July 1984. From that time, the 3 children of the marriage remained in his care and control. Family allowance continued to be paid in the name of Mrs Perkins into a joint account. Mr Perkins paid little attention to the allowance and during the period July 1985 to August 1986, when he and his children were in Washington.

Family allowance was cancelled from October 1987 after Mrs Perkins failed to respond to correspondence.

Mr Perkins lodged a claim for the allowance on 7 May 1989. His claim was granted from 2 May 1989, but he was advised that no arrears would be paid. He then sought review and the SSAT set aside that decision, and granted payment from November 1987.

The legislation

Prior to 29 December 1988, s.88 of the *Social Security Act* provided that a family allowance should be payable either from the first day of the family allowance period during which the claim was lodged or from the commencement of the next family allowance period after lodgment.

At all relevant times, s.158(1) provided (and still provides) that the grant or payment of (inter alia) a family allowance, 'shall not be made except upon the making of a claim for that . . . allowance'.

Sections 87 and 88 were repealed from 29 December 1988 and replaced with a new s.87 and s.159(4A), (4B) and (4D).

Section 87 now provides that 'a family allowance is payable . . . on each family allowance pay-day on which the person . . . is qualified to receive family allowance in respect of the child'.

Section 159(4A) deems a claim to have been lodged on the date of a child's birth, if it was lodged within 4 weeks of the birth, in effect, providing for arrears of up to 4 weeks in the case of a claim for a newborn child.

Section 168(3) gives the Secretary a power to determine that a claim should be granted, a payment should be made or a rate increased 'having regard to any matter that affects the granting of a claim for, or the payment of, a pension benefit or allowance . . . '

Section 168(4) deals with the date of a determination under s.168(3).

The SSAT decision

The SSAT granted the claim for arrears by deciding that, as Perkins was qualified for family allowance from July 1984, s.87 provides for payment of family allowance 'on each family allowance payday on which a person is qualified to receive' it. The SSAT further decided that nothing in ss.82, 87, 158 or 159(4A) evinced a clear intention that family allowance was not payable prior to the lodgment of a claim.

The DSS case

The DSS conceded that Perkins was qualified from July 1984; but argued that there was no power under the Act to backdate payment of family allowance prior to lodgment of a claim.

The main submission was that, under s.158(1), a person does not qualify for payment until a claim is lodged.

As for the suggestion that s.87 authorises payment where a person is 'qualified', the DSS maintained that s.87 could not be read in isolation: an allowance is only payable if a person has a vested right to payment, having regard to s.158(1). Moreover, if arrears were payable without the lodgment of a claim, no purpose would be served by ss.159(4A-4D), inserted from 29 December 1988.

It was also argued that s.159(4C) and (4D) indicated that Parliament intended that a claim for family allowance must have been made before family allowance is payable.

In conclusion, the DSS case was that, apart from the limited exceptions contained in s.159(4A) and (4B) (which deals with children in institutional care), family allowance was not payable in respect of any pay-day prior to claim.

The respondent's case

In addition to relying on the SSAT decision, Perkins claimed that DSS had mishandled the matter, first, by failing to inform him of his need to lodge a claim and, secondly, through its own administrative procedures. These included a letter which indicated that if, after cancellation for failure to provide income information, that information was supplied within 3 months, payment could be restored.

Perkins also relied on an analogy with taxation: if a taxpayer could be required to pay tax once liability was established, DSS should be required to pay family allowance once qualification was established. He also argued that an interpretation of the Act allowing for payment of arrears was warranted by the presumption that welfare legislation should be interpreted beneficially.

The cases

After noting that there were no decisions on this issue, the AAT considered a number of other cases involving related issues of arrears, including *Tiknaz* (1981) 5 *SSR* 45; *Gray* (1984) 22 *SSR* 250; *Waterford* (1981) 1 *SSR* 1 and *Turner* (1983) 17 *SSR* 174.

These were contrasted with *Hurrell* (1984) 23 *SSR* 236, where the AAT had held that the benefit there had been suspended, rather than cancelled and hence, since there was a subsisting claim, it was not a bar to payment of unemployment benefit that Hurrell had not lodged his fortnightly income statements.

The AAT decided that the decision in *Hurrell* did not assist Perkins since, even if it could be maintained that the original claim subsisted (which the AAT did not accept), that claim was a claim by Mrs Perkins, not by the respondent.

The AAT noted that 'there is no provision conferring on the Secretary a