

Australian resident during a 2-year absence from Australia.

Formal decision

The AAT set aside the decision under review and remitted the decision to the DSS for re-assessment in the light of the above findings.

[B.S.]

Invalid pension: permanent incapacity

PANUCCI and SECRETARY TO DSS (No. 5885)

Decided: 14 May 1990 by E.T. Perrignon, D.J. Howell and C.J. Stevens.

The DSS had decided the applicant was not permanently incapacitated for work within the meaning of s.23 of the *Social Security Act* prior to its amendment from 1 July 1987.

The facts

Panucci was born in 1946. In 1986 he worked as a partner in a fruit and vegetable business. This work involved heavy lifting of bags and boxes, some of which weighed more than 50 kg. In January 1986 he suffered back pain which later radiated to the right leg. The last time he worked was 5 March 1986. He later developed problems with his right shoulder and neck and had diabetes and a hernia.

The decision

The Tribunal considered many medical reports and preferred that of a general practitioner who had treated Panucci since 1977. It was the doctor's view that Panucci had a genuine back problem and was now a chronic invalid. A specialist in rehabilitation medicine considered that Panucci's incapacity was likely to be permanent but there was some prospect of an improvement if he were to do a Commonwealth Rehabilitation Unit course. A consultant physician's evidence was that Panucci needed only reassurance and an early return to the workforce.

In the Tribunal's view the back condition, Panucci's education and limited skills in written English, indicated he had very little prospect of obtaining remunerative employment. It considered his incapacity to be not less than 85% and followed *McDonald* (1984) 18 SSR 88 in deciding that his incapacity would persist into the foreseeable future.

[B.W.]

PAULER and SECRETARY TO DSS (No. 5904)

Decided: 18 May 1990 by D.P. Breen, D.W. Muller and A. Brennan.

The Tribunal affirmed a DSS decision not to grant invalid pension.

The facts

When Pauler was 11 and 12 years old he underwent surgery on his lungs. The childhood illness impeded his education and at age 16 he commenced work as a labourer in a factory. He remained there for 4 years then worked a further 5 years in a textile factory. In 1968 he 'ran away' from Czechoslovakia and arrived in Australia the same year. He worked in manual jobs including the Snowy Mountains Scheme, and his employer sent him to Bougainville Island.

A broken wrist brought him back to Australia. On recovering he obtained a taxi driver's licence. After some months he became a bus driver. Pauler had remained constantly in manual employment from his teenage years until his mid-40s and had no other work experience.

The Tribunal accepted that Pauler was a hard worker, self-reliant and largely self-taught, who 'seems convinced that he will never return to the workplace'. He had sought invalid pension since 1987. His childhood illness had left him with reduced breathing capacity and recurrent bronchitis and he had hypertension. Since 1982 he had suffered a degree of back pain. He told the Tribunal he had been forced to give up bus driving because of pain radiating to the right leg.

The Tribunal also accepted that Pauler's view, that he could not undertake clerical work, was reasonable in view of his total lack of experience, his age and language difficulties.

The applicant was examined for the DSS by Dr Anderson, orthopaedic surgeon, who told the Tribunal that Pauler's symptoms were 'normal for a man in his mid-40s' and that he had examined quite a lot of people who had the same changes in their spine and who had no difficulties at all. A consultant physician considered that Pauler could undertake work which did not involve heavy physical tasks.

The decision

The Tribunal, having considered all of the medical evidence, said it was —

'left with the conclusion that the degree of incapacity which the applicant perceives himself to have is beyond that which realistically can be attributable to the pathology — the sum of morbid processes or conditions — revealed by all of the medical evidence when it is weighed as a collective body of evidence.'

(Reasons, para. 41)

The Tribunal followed *Panke* (1981) 2 SSR 9 in considering that Pauler was unable to satisfy the tests for invalid pension. As he could not show that he was incapacitated as defined in s.27 of the Act, he could not qualify in terms of s.28(a).

[B.W.]

Australian resident: 'resides in Australia'

AGNEW and SECRETARY TO DSS (No. 6042)

Decided: 6 July 1990 by J.R. Dwyer, G.F. Brewer and D.M. Sutherland.

Crystal Agnew was born in Australia in November 1925. In 1951, she began living in India, where she worked as a church missionary.

Until 1985, Agnew visited Australia once every 5 years. She visited Australia for about a month in 1986 and again in 1987 and made similar visits on 2 occasions in 1988; and, in 1989, she made a short visit in January and a more extended visit from September 1989 to March 1990. She came back to Australia again on 24 June 1990.

On 13 January 1989, Agnew lodged a claim for age pension with the DSS. When the DSS rejected her claim, and the SSAT affirmed that rejection, Agnew asked the AAT to review the DSS decision.

The legislation

Section 25(1) of the *Social Security Act* provides that a woman who has attained the age of 60 years, who has been an Australian resident at any time for a continuous period of at least 10 years, and is in Australia on the day when she claims the pension, will qualify to receive an age pension if that person 'is an Australian resident'.

The term 'Australian resident' is defined in s.3(1) to mean —

'a person who resides in Australia and who is ... an Australian citizen.'

'Resides in Australia'

The AAT said that the central issue was whether, at the time that Agnew claimed her age pension on 13 January 1989, she resided in Australia.

Agnew told the AAT that she intended to stay in India as long as her health permitted and her work was of value to