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

her church. She maintained a bank account in Australia and had the use of a room in her brother's house, where she kept clothes not needed in India. She explained to the AAT that she had spent 6 months in Australia between September 1989 and March 1990 because of a health problem which required treatment here. Although the doctor had advised her not to return to India, Agnew felt obliged to do so.

On this evidence, the AAT concluded that, between 1951 and 1989, Agnew had resided not in Australia but in India. From September 1989, or from the date when Agnew was told by her doctor that she would need to stay in Australia for an extended period for treatment, it appeared that Agnew had a residence in Australia as well as one in India. (On this point, the AAT referred to a decision of the Federal Court, *Collector of Customs v Perkins Shipping Pty Ltd* (1989) 85 ALR 279, 285-6, to the effect that a person may have 2 places of residence.) However, the AAT acknowledged that the combined effect of ss.158 and 159 of the *Social Security Act* meant that this could not assist Agnew in the present case. She would need to have an Australian residence on the day when she lodged her claim (13 January 1989) or at some time over the 3 months after that date.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Compensation award: preclusion

SECRETARY TO DSS and BUNGE (No. 5951)
Decided: 31 May 1990 by J.A. Kiosoglous, D.B. Williams and D.J. Trowse.

The AAT *set aside* a decision of the SSAT that, for the purposes of the preclusion rule in s.153(1) of the *Social Security Act*, the 'compensation part' of a compensation award received by Bunge in September 1987 was 50% of that award.

The legislation

Because Bunge's compensation award was received before 9 February 1988, the compensation part of the lump sum award was, according to s.152(2)(c)(ii) of the *Social Security Act*, that part of the award which was, 'in the opinion of the Secretary, in respect of an incapacity for work'.

The DSS decision

The DSS had concluded that, of the award of $175 000, the amount of $133 875 represented the amount paid 'in respect of an incapacity for work'. This decision had been based on the fact that the 'incapacity for work' component in Bunge's original claim for compensation had amounted to 76.5% of that claim. The DSS had then taken 76.5% of the settlement figure as the 'incapacity for work' component of that figure.

The AAT's approach

The SSAT had described this approach as 'arbitrary' and had decided that only 50% of the settlement figure should be taken as the 'incapacity for work' component. The AAT commented,

> 'The Tribunal understands that the method of applying a reduced percentage based on a comparison of formulated claim with settlement receipt is a common practice within the Department and in its view such a system appears in all the circumstances appropriate. The method is not without some logic and is a reasonable basis for the forming of an opinion by the delegate. We do not accept the SSAT finding that such a system is too arbitrary and express the view that its decision to apply 50% of the award has no foundation.'

(Reasons, para. 18)

However, the AAT adopted a method of calculation which differed from that of the DSS. It noted that the compensation claim had been settled for 76.5% of the original claim and discounted the 'incapacity for work' component in the original claim ($199 000) by that 76.5%, producing an 'incapacity for work' component of $133 927.

[P.H.]

SECRETARY TO DSS and SWORD (No. 6046)
Decided: 16 July 1990 by J. Handley.

David Sword suffered an industrial injury in 1984. On 9 November 1987 he settled a common law action for damages for $64 260. Of this amount, $10 000 represented past loss of earnings and $30 000 represented future loss of earnings.

In February 1989, Sword applied to the DSS for an invalid pension. The DSS decided that he was eligible, but that s.153(1) precluded payment of pension to him until January 1991. This calculation was based on the decision that $40 000 of the damages settlement was 'in respect of an incapacity for work' and, therefore, represented the 'compensation part' of the settlement.

On appeal, the SSAT decided that only $30 000 of the settlement represented 'an incapacity for work' and, accordingly, varied the preclusion period.

The DSS asked the AAT to review that decision.

The legislation

Section 153(1) of the *Social Security Act* provides that, where a person, qualified to receive a pension, receives or has received a lump sum payment by way of compensation, then pension is not payable to that person during the 'lump sum payment period'.

Section 152(1) defines 'pension' to mean an invalid pension, unemployment benefit, sickness benefit, special benefit or sheltered employment allowance.

Section 152(2)(a) provides that a reference to a payment by way of compensation includes a payment in settlement of a claim for damages 'that is, in whole or in part, in respect of an incapacity for work'.

According to s.152(2)(e), 'the lump sum payment period' is to be calculated by dividing 'the compensation part' of a lump sum payment by current average male weekly earnings.

Section 152(2)(c)(ii) provides that a reference to the 'compensation part of the lump sum payment by way of compensation' where the lump sum payment was made before 9 February 1988, is a reference to 'so much of the lump sum payment as is, in the opinion of the Secretary, in respect of an incapacity for work'.

The same incapacity?

The AAT noted that ss.152 and 153 (and their accompanying sections) had replaced the former s.115B from 1 May 1987. The former s.115B had applied where a person had received a compensation award in respect of the same incapacity for which the person had been paid the sickness benefits. According to the decisions in *Siviero* (1986) 68 ALR 147, *Piatkowski* (1987) 12 ALD 291, and *Littlejohn* (1989) 55 *SSR* 712, the incapacity referred to in s.115B had to be identical in terms of cause and time.

On its face, the AAT said, the reference in s.152(2)(c)(ii) to '*an* incapacity for work' rather than '*that* incapacity' would allow the Secretary to take account of any sum paid for an incapacity for work, no matter what period of time was covered by that incapacity.

The AAT considered that this was an appropriate case in which to examine the