

Formal decision

The AAT directed that the establishment fees charged by the fund were not allowable deductions; that the management fees charged by the fund were allowable deductions; and that any reasonable fee charged by the fund as a condition of joining the fund on or after 9 September 1988 should be allowed as a deduction from income.

[P.H.]



Staying the decision under review

SECRETARY TO DSS and GUNER (No. 6118)

Decided: 24 July 1990 by H.E. Hallows.

In June 1989 the DSS rejected Turgut Guner's claim for invalid pension. In the same month the DSS also cancelled his sickness benefit. An appeal to the SSAT was determined in March 1990. The SSAT decided that Guner was entitled to invalid pension and that he was not qualified to receive sickness benefit because his incapacity was not of a temporary nature.

The DSS lodged an appeal to the AAT and sought a stay of the SSAT decision. In June 1990, the AAT made such an order with the consent of both parties. Guner consented on the basis that he was in receipt of sickness benefit and would continue to receive that payment. The decision to grant sickness benefit had been made by the DSS in April 1990.

On 13 July 1990, Guner was advised by the DSS that, in view of the decision of the SSAT, payment of sickness benefit would cease on 16 July. Guner then asked the AAT to remove the stay order on the SSAT decision.

Effect of staying the SSAT decision

Section 41(1) of the *AAT Act 1975* provides that:

'... the making of an application to the Tribunal for a review of a decision does not affect the operation of the decision or prevent the taking of action to implement the decision.'

Section 41(2) of the *AAT Act* gives the Tribunal power to stay the operation of a decision, pending review of that decision, 'for the purpose of securing the effectiveness of the hearing and determination of the application for review'.

The AAT noted that, if the SSAT decision had not been stayed in June, Guner would have been entitled to arrears of invalid pension as well as payment of invalid pension after the cessation of his sickness benefit in July.

The DSS was concerned that if the SSAT decision was not stayed Guner might return to his country of origin and apply for portability of his pension. The DSS argued that this would place the Department 'in a difficult position with respect to the application for review'.

The AAT considered the effect of staying or not staying the SSAT decision. If the stay remained and Guner did not lodge a claim for any benefit or pension, his spouse would receive an increase in the rate of her invalid pension to the full married rate. If he did lodge a claim and received a pension or benefit to which he was qualified, then he would receive half the married rate. On the other hand if the AAT removed the stay order, then the Tribunal concluded:

'Even were the applicant correct in its contention that the respondent is not qualified for invalid pension under ss.27 and 28 of the Act; and if the respondent lodges a claim for a benefit, the applicant would not be paying out money over and above that to which the respondent would be entitled under the Act, assuming he is qualified for either sickness benefit or unemployment benefit. If the only reason he is not qualified for a benefit is that he is qualified for invalid pension, he should not be denied support while that issue is decided.'

(Reasons, para.10)

Criteria for staying a decision

The Tribunal also commented on the considerations relevant to determining whether an order to stay a decision should be made under section 41:

'As was pointed out in *Re Repatriation Commission and Delkou* (1985) 8 ALD 454, it is appropriate to recall at the outset that the primary rule established by sub-section 41(1) of the *Tribunal Act* is that the making of an application to the Tribunal does [not] affect the operation of the decision, or prevent the taking of action to implement it. The interests of any person who may be affected by the application for review must be taken into account. Orders made under sub-section 41(2) are "for the purpose of securing the effectiveness of the hearing and determination of the application for review", and in particular to ensure that the right of review is not rendered nugatory. Although there should not be a preliminary trial of the issues in deciding whether or not to order a stay of the operation or implementation of a decision, it is relevant for the Tribunal to consider whether there are facts and circumstances which would provide a basis for the applicant's success in the application.'

(Reasons, para.11)

In the present case the Tribunal considered the medical evidence that supported Guner's claim and the fact that the amount of money paid to him would not be greatly affected by the making of a stay order, because he was entitled to

income support either under the SSAT decision or under a claim for the correct benefit if the SSAT decision was set aside. If Guner went overseas, the AAT said, the DSS could seek a further variation of the order. The conclusion was not to stay the part of the SSAT decision granting Guner invalid pension from the date his sickness benefit ceased to be paid.

Formal decision

The AAT varied the order of 12 June 1990 and ordered that, until the application for review was heard or until further order, the implementation and operation of that part of the SSAT decision which set aside the decision that Guner was not permanently incapacitated for work be not stayed.

[B.S.]



Child disability allowance

DITTON and SECRETARY TO DSS (No. 6150)

Decided: 24 August 1990 by J. Handley. The applicant asked the AAT to review a decision of the SSAT to affirm a DSS decision that she did not qualify for receipt of child disability allowance.

The facts

Ditton's daughter was a full-time student aged 16 who suffered from diabetes. She was not totally dependent on other persons and was able to bathe, toilet and dress herself. She had no intellectual disability.

However, her parents closely scrutinised the administration of insulin and her diet. It was noted by the Tribunal that unstable diabetes can cause vision problems, including blindness, kidney failure, heart disease and limb amputation. These risks had caused stress for Ditton's family as had the failure of her daughter fully to comprehend the risks of unstable diabetes.

Although Ditton's daughter was able to administer the required insulin and generally regulate her diet, Ditton still supervised these matters. This was particularly required as the daughter had rebelled against the restrictions imposed by her condition and had consumed food which adversely affected her blood sugar level. Such resentment of the restrictions also required the provision of emotional support by Ditton and her husband.