by a child of the same age not having such a disability.

### The cases

In *Phillips* (1990) 61 *SSR* 839 it was said that the question of 'substantially more' is one of fact. The Tribunal allowed itself to be guided by *Bosworth* (1989) 51 *SSR* 678 where it was said that the word 'substantially' is used in a comparative sense meaning 'significantly' or 'more than'. The decision must turn on the amount of care and this is an objective judgment.

### The findings

Sonya's age (she was 9) was considered a relevant factor by the Tribunal. She was older than the child in *Phillips* and more able to look out for herself because of that. The comparative test, showing that the extra care is substantially more, could not be met by Milas. The Tribunal said that notwithstanding the considerable care and attention given by her to Sonya it was not enough to satisfy the test.

### The decision

The AAT affirmed the decision under review.

**[B.W.]**

# Invalid pension: permanent incapacity for work

**MOURATIDIS and SECRETARY TO DSS**

**(No. 7375)**

**Decided:** 8 October 1991 by J.R Dwyer, A. Argent and D.M. Sutherland.

Themistocles Mouratidis was granted an invalid pension from June 1973. He was medically reviewed in 1975, 1978, 1982 and 1983, and continued to receive invalid pension until June 1990, when the DSS decided to cancel his pension.

That decision was reviewed and affirmed by the SSAT. Mouratidis then appealed to the AAT.

### The legislation

Section 28 of the *Social Security Act* 1947 provided that a person who was 'permanently incapacitated for work' was qualified for an invalid pension.

Section 27 provided that a person was permanently incapacitated for work for the purposes of the Act if the person's incapacity for work was at least 85% and at least 50% of that incapacity was caused by a permanent physical or mental impairment.

After the hearing of this appeal but before the AAT made its decision, the 1947 Act was replaced by the *Social Security Act* 1991. The AAT said that s.94 of the 1991 Act required the same matters to be proved to establish qualification for invalid pension as had ss.27 and 28 of the 1947 Act.

The AAT said that it proposed to apply the provisions of the 1947 Act.

### Incapacity for work

The DSS had reviewed Mouratidis' eligibility in 1989-90 following receipt of information that he had been working as a builder's labourer. This information was presented in the form of a statement from a DSS employee, who also gave evidence to the AAT.

The employee said that Mouratidis had been employed as a labourer by a builder (whose surname was also Mouratidis) on extensions to the employee's house for 6 weeks in 1987. The builder had also recommended Mouratidis to the employee as someone who could complete a substantial painting job on the employee's house.

Both Mouratidis and his namesake, the builder, denied that Mouratidis had worked for the builder. They said that Mouratidis had regularly visited the building site during the period in question, in order to discuss Greek history and play backgammon with the builder.

The AAT noted inconsistencies in the statements made by Mouratidis to the DSS and the evidence given by Mouratidis to the SSAT and to the AAT, and between the evidence given by Mouratidis and by the builder. It found the evidence given by the DSS employee to be credible. The AAT found that Mouratidis had worked for a period in 1987 and probably during other periods between 1981 and 1987. It noted that the builder had himself given up working in 1987.

However, the AAT said, it did not follow that the decision to cancel Mouratidis' pension in 1990 was correct. To affirm that decision, the AAT had to be satisfied that Mouratidis was not permanently incapacitated for work in 1990. The builder who had employed Mouratidis in 1987 and probably during earlier periods had told the AAT that he had now retired from business, so that Mouratidis 'may have lost access to the only sympathetic employer likely to employ him'.

The AAT described the medical evidence on Mouratidis' current condition as inconclusive. There had been no objective evidence of injury at the time when Mouratidis gave up work before the grant of invalid pension. One medical specialist thought Mouratidis had a 'gross psychiatric disturbance'; his general practitioner said he had no capacity for work because of a lumbar disc degeneration and his self-perception as an invalid; and another specialist said that Mouratidis' spinal condition might not prevent him from undertaking some types of work but that it was now too late for him to return to the workforce. On the other hand, specialist witnesses called by the DSS said that medical factors were not preventing Mouratidis from working — the major problem was Mouratidis' age, language difficulties and absence from the workforce.

The AAT referred to *McDonald* (1984) 18 *SSR* 181, and said that the decision to cancel Mouratidis' invalid pension should not be affirmed unless the AAT was satisfied that Mouratidis was no longer permanently incapacitated for work.

Notwithstanding Mouratidis' work history between 1981 and 1987, the AAT could not be satisfied that he could, in 1990, attract an employer willing to employ him — the test laid down in *Panke* (1981) 2 *SSR* 9. The barriers which Mouratidis faced included some physical impairment, an extended absence from the workforce, and limited work and language skills. Although Mouratidis had some residual capacity for work, the AAT could not be satisfied that the degree of his permanent incapacity for work was less than 85%: Reasons, para. 81.

### Impairment

The factors which contributed to Mouratidis' permanent incapacity for work included his back condition, his long time out of the workforce and on invalid pension, his lack of English and his limited work skills. The absence from the workforce had been directly caused by the back problem, the AAT said.

On balance, the AAT said, 50% of Mouratidis' incapacity was directly caused by his physical impairment: Reasons, para. 83. The AAT concluded:

> 'We have not overlooked the difficulty facing the Secretary in attempting to assess Mr Mouratidis' entitlement to ongoing pension as we have found that at times he has been engaged in remunera-

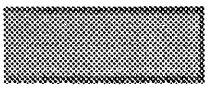
tive employment which he has not disclosed. We consider that it is unlikely that Mr Mouratidis will again succed in using his residual work capacity to attract an employer or find work on his own behalf as a painter. However, in case he should do so, we emphasise to him that it is essential to disclose any earnings he may receive to the Department of Social Security. As Deputy President Thompson said in *Cowley* (1986) *SSR* such employment does not cease entitlement to pension though earnings from such employment *must* be disclosed and taken into account in assessing the rate of pension payable.'

(Reasons, para. 85)

**Formal decision**

The AAT set aside the decision under review and directed that the original grant of invalid pension to Mouratidis authorised 'continuance of payment of invalid pension to him'.

**[P.H.]**



**DOMANSKI and SECRETARY TO DSS**

**(No. V90/615)**

**Decided:** 23 July 1991 by J. Dwyer, L. Rodopoulos, and R. Webster.

Mr Domanski's claim for invalid pension was rejected by the DSS and that decision was affirmed by an SSAT on 26 July 1990.

**The facts**

Domanski was 43 years of age and came to Australia from Poland in 1980. He had completed a degree in archaeology and had worked as a tutor/researcher. His studies and employment were interrupted by eye surgery on a number of occasions. He was granted a pension in Poland similar to an invalid pension but continued tutoring on a half-time basis.

In Australia, Domanski was accepted to study for a master's degree at La Trobe University in 1983. This was converted to study for a PhD in 1985 and he obtained a scholarship. He eventually lost the scholarship and had to resign his candidature from 22 June 1988 as he was unable to complete his research thesis within the time limits. He then applied for invalid pension hoping to continue his studies while supported by the pension. His claim for invalid pension was supported by the University Health Service on the grounds that he suffered from retinal detachment and psychological problems.

The Tribunal accepted that Domanski had restricted fields of vision, early developing cataracts and myopia. It found that he was becoming presbyopic, which is a normal process due to aging. It accepted that his fear, that heavy labouring work could cause further retinal detachment, was not unreasonable and he would have difficulty doing fine work. It also found that he could have trouble with night vision and should not drive at night. On the other hand medical information indicated that Domanski's vision would not interfere with many fields of employment, such as light labouring or factory work, teaching, tutoring, interpreting, cleaning, clerical or sales work. Domanski also had some experience as a lathe operator.

In September 1988 a psychiatrist diagnosed Domanski as suffering from a chronic anxiety state secondary to his eye disease, in conjunction with an underlying personality disorder, reinforced by immigration, dislocation aspects, and less than favourable academic progress. The psychiatrist at that stage considered Domanski to have an incapacity in excess of 85% but said it may not be permanent. He recommended rehabilitation and at least part-time employment. Domanski told the Tribunal that he thought he had improved since then and he did not want to see the psychiatrist again.

Domanski had made many applications for work but apart from two short term positions he had been unsuccessful. He did not refer to his medical problems in his applications though they may have affected the presentation of the applications. He produced evidence to show that he had made 24 applications for suitable positions over the last 6 months and many others for the previous 2 years.

The Tribunal, concerned that a man of Domanski's obvious skills and intelligence and fluency in English could only obtain two short term jobs, adjourned the hearing to have Domanski assessed for rehabilitation. The Tribunal was disappointed with the result and expressed its concern that the Commonwealth Rehabilitation Service failed to assist Domanski.

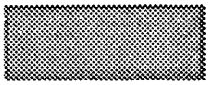
**The findings**

The Tribunal was not satisfied that Domanski was 85% permanently incapacitated for work. While it accepted he was having great difficulty in attracting an employer and that his eye condition and mental state contributed to that difficulty it was satisfied tat there were many jobs which he could perform. The Tribunal followed the cases of *Kadir* (1989) 49 *SSR* 638 and *Fliedner* (1983) 5 ALN N402 in setting out the criteria to be considered. These were: the nature and extent of his disabilities, his capacity to sustain his work effort throughout a normal working day or week, his age, previous work experience and the work available in the community which a person with his characteristics may reasonably be expected to perform.

**Formal decision**

The decision under review was affirmed.

**[B.W.]**



**WHITE and SECRETARY TO DSS**

**(No. 7338)**

**Decided:** 1 October 1991 by J.R. Dwyer, A. Argent and D.M. Sutherland.

On 24 May 1990 the DSS decided to reject Wayne White's application for an invalid pension. This decision was affirmed by the SSAT and White appealed to the AAT.

**The procedure**

White was not legally represented at the AAT hearing but was assisted by his fiancee. The DSS agreed to pay the costs associated with White calling a medical witness in support of his claim. The AAT applauded this action and cited it as an example of the DSS's 'obligation to investigate a claim, not with the purpose of defeating it'. It was also 'an example of the proceedings at the Tribunal not being conducted in an adversarial fashion'.

The AAT adopted a flexible approach to running the hearing, allowing White to tape record the proceedings and have a number of short adjournments. During the course of the hearing White 'left the hearing in some sort of protest' and consequently the AAT felt obliged to adjourn the hearing on several occasions because of White's behaviour. It was necessary to resume the hearing in White's absence when his fiancee was being cross-examined, and when his former employer gave evidence by telephone. He was given the option of cross-examining the witness when he returned but refused.

On the first day of the hearing White had requested an adjournment to seek legal assistance. This was granted and then White changed his mind. During the hearing White requested a further

adjournment to obtain legal assistance, but this was refused.

### The facts

On 26 April 1988, White injured his back lifting large drums whilst working as a painter. There was some debate before the AAT concerning how White injured his back, but the AAT decided that it was not necessary for it to decide how this happened.

The DSS argued that it wished to challenge White's credibility and submitted that White ceased work because he had an argument with his boss, not because of a back injury. The AAT decided that it was not necessary for it to make a finding on this point.

White complained of continual back pain and a 'lazy elbow' which caused his right arm to ache continually. Recently he had developed chronic neck jerking. White's fiancee confirmed that he appeared to be in severe pain. Since his injury White had worked for one week as a painter. He was unable to continue because of right arm pain.

Medical reports before the AAT showed that White had problems with the cervical, thoracic and lumbar spine. His neck condition had been diagnosed by a neurosurgeon as cervical spondylosis which did not permanently disable White. A general surgeon called on behalf of the DSS described a degenerative condition with White's neck functioning normally. However, there were some problems associated with the lumbar region. The surgeon could not explain White's chronic neck jerking.

### The law

The AAT noted that during one of the adjournments of proceedings the *Social Security Act* 1991 came into operation. After referring to the transition provisions the AAT decided that there was no difference in the qualification for invalid pension betwen the 1947 Act and the 1991 Act. Nonetheless the AAT decided that 'this matter should be determined in accordance with the substantive law contained in the 1947 Act and the procedure set out in the 1991 Act'.

When applying the substantive law the AAT applied the principles set out in *Fleidner* (1983) 5 ALN N402. The factors to be taken into account were:

(a) the nature and extent of the disability;

(b) capacity to sustain a work effort throughout a normal working day;

(c) age;

(d) previous work experience; and

(e) types of paid work available to the applicant.

### The decision

The AAT concluded that White was suffering from mild to moderate degenerative changes of the spine. However, it noted:

> 'The Tribunal cannot escape the conclusion that Mr White's 15 months of effort trying to persuade the DSS, the SSAT, and this Tribunal that he is entitled to invalid pension have had the consequence of making him believe that his condition is more disabling than it was when the relevant claim for pension was lodged and more disabling than it is in fact.'

(Reasons, para. 28)

White had 2 unsuccessful attempts at rehabilitation as well as refusing pain counselling and vocational counselling. The AAT accepted that White could not return to work as a painter, but noted that, at 36 years of age, fluent in English and with no obvious disabilities, White could, with retraining, obtain clerical, sales or other counter work.

### Formal decision

The AAT affirmed the decision under review.

[C.H.]

## SECRETARY TO DSS and KULJIC (No. S89/234)

**Decided:** 19 June 1991 by B.H. Burns, J.T.B. Linn, and D.J. Trowse.

On 16 January 1989 the DSS decided to cancel Kuljic's invalid pension from 13 April 1989. Kuljic requested review of that decision by the SSAT which set aside the decision to cancel the invalid pension. The DSS then appealed to the AAT.

At the date of hearing Kuljic was living in Yugoslavia having left Australia in January 1989. Kuljic was represented at the hearing.

### The facts

Kuljic applied to the DSS to have his pension paid in Yugoslavia whilst he was absent from Australia. This was approved by the DSS on 22 November 1988, subject to a medical examination prior to Kuljic's departure. He was also interviewed by a DSS social worker.

The Commonwealth Medical Officer (CMO) examined Kuljic and assessed a 5% impairment due to 'spine dysfunction'. Further disabilities of gout, depression and colic were stated to be temporary conditions and the conditions of hypertension, diabetes mellitus, dermatitis of hands and feet, migraines, knee pain, pain in the left foot and urinary calcules were also noted.

It was determined that Kuljic was less than 85% permanently incapacitated. In the CMO's opinion Kuljic's dermatitis and depression would impede his ability to work. Because of Kuljic's age and limited English he would find it difficult to find sedentary or semi-sedentary work.

In a letter to the DSS in February 1989, Kuljic stated that his condition had not improved and he did not feel capable of working. He set out the conditions outlined above and his resulting disabilities.

The AAT heard evidence from two specialists who had examined Kuljic in Australia — one in 1981 after a work injury and the other in 1988. Both doctors gave evidence that Kuljic could understand and speak English well.

The psychiatrist stated that Kuljic showed no signs of depression when he was examined in November 1988 and that Kuljic did not suffer from any psychiatric condition.

The orthopaedic surgeon stated that Kuljic had fully recovered from the injury to his foot with no residual disability.

The AAT found both these witnesses impressive.

Medical reports from Yugoslavia indicated that Kuljic was suffering from cervical and lumbar pain, as well as pain in the shoulders and legs. Further problems were caused by arthritis, gout, migraine headaches and depression. These reports were prepared 6 months after the CMO's report.

The social worker's report stated that Kuljic had little difficulty understanding English and he seemed a fit man.

### The decision

The AAT noted that the medical reports from Yugoslavia did not elaborate on Kuljic's incapacity for work. It accepted that Kuljic was suffering from all the conditions outlined above except for depression and left foot pain.

The only conditions which affected Kuljic's capacity for work were those of dermatitis, colic and lumbar spine dysfunction. The AAT was of the opinion that these conditions would cause a minor incapacity only. The only permanent condition amongst these was lumbar spine dysfunction.

It was noted that Kuljic could speak and understand English. After applying s.27 of the *Social Security Act* 1947, the AAT concluded that Kuljic was not permanently incapacitated for work at the date of cancellation of the invalid pension.

**Formal decision**

The AAT set aside the decision under review and substituted a decision that Kuljic's invalid pension be cancelled from 14 April 1989.

[C.H.]

# Invalid pension: impairment

**HARRIS and SECRETARY TO DSS (No. 7322)**

**Decided:** 24 September 1991 by M.D. Allen, J.H. McClintock and M.E.C. Thorpe.

The Tribunal affirmed a decision of the DSS to reject Nita Harris' claim for invalid pension which was lodged on 20 December 1989.

**The facts**

Harris was born in 1944. She elft school at age 15 and worked as a shop assistant for 12 months before marrying in 1959. She remained out of the workforce until she obtained work as a clerk in 1980. In 1984 her employment was terminated when she was diagnosed as having a repetitive strain injury. She also suffered from hypertropic cardiomyopathy and recurrent thoracic and low back pain. In addition Harris suffered a depressive reaction to her husband's sudden death. Medical evidence indicated that the depression was not a permanent condition.

**Not less than 85%**

The Tribunal accepted that the appicant was not less than 85% permanently incapacitated for work. Taking into account her physical and mental ipariments, the range of employment relevant to her education and experience, and especially the fact that she had already had one award of workers' compensation, the Tribunal decided she could not attract an employer prepared to engage and remunerate her.

However, the Tribunal concluded that 50% of her permanent incapacity was not directly caused by a permanent physical or mental impariment but rather was a factor of her education, time out of the workforce, lack of skills and the fact that she would be regarded as a workers' compensation risk by any prospective employer. At most, she suffered a 20% impairment respecting anxiety and depression. Her heart condition was not disabling, nor was the condition of her upper limbs or spine.

[B.W.]

# Rehabilitation costs: recovery from compensation

**SHARMAN and SECRETARY, DEPARTMENT OF COMMUNITY SERVICES & HEALTH (No. 7067)**

**Decided:** 21 June 1991 by P.W. Johnston.

Neville Sharman was injured in a motor accident in 1985. He commenced legal proceedings to recover damages for his injuries.

At the end of that year, Sharman was recommended for rehabilitation at the Commonwealth Rehabilitation Service (CRS), operated by the Department of Community Services and Health (DCSH).

Sharman was formally accepted by the CRS for assistance in August 1986, for treatment estimated to last 40 days. At about the same time, the DCSH notified Sharman's solicitor and the relevant third party insurer of its intention to recover unspecified rehabilitation costs.

Sharman commenced treatment at a centre run by the CRS on 11 August 1986. At no time was the cost of the treatment discussed with him. He remained in the centre for some 46 days.

In March 1987, the DCSH advised Sharman's solicitor and the insurer that it proposed to recover $4558.94 from any damages recovered by Sharman. Both the solicitor and the insurer advised the DCSH that the damages claim would probably be settled on the basis that Sharman was 2/3rd responsible for the accident; but the DCSH insisted that the full amount of the rehabilitation was recoverable from any settlement.

When Sharman's damages claim was settled in August 1989 for 1/3rd of the amount that would have been recoverable if Sharman had not contributed to the accident, the insurer paid $4558.94 to the DCSH.

In November 1990, Sharman asked the DCSH to release him from liability to refund this amount. When the DCSH refused that request, Sharman appealed to the AAT.

**The legislation**

Section 23(2) of the *Disability Services Act* 1986 obliges a person who has received both rehabilitation services and compensation to repay the cost of the services.

Section 23(3) confers a discretion on the Secretary to the Department of Community Services and Health to release the person from all or part of that obligation in 'special circumstances' (compare s.156 of the *Social Security Act* 1947).

**Special circumstances**

The AAT accepted Sharman's evidence that, if he had been told of the cost of the services being provided to him, he would have left the rehabilitation centre earlier.

The AAT also accepted evidence from an officer of the DCSH that the general practice was not to inform people undergoing rehabilitation of the costs of treatment.

The AAT first rejected Sharman's argument that his present financial situation amounted to 'special circumstances'. (Sharman gave evidence about his current income and expenses.) The Tribunal said a claim for release from liability under s.23(3) —

> 'must be based on special circumstances occurring at a time when the Commonwealth is seeking recovery of its costs or shortly after recovery is effected. It seems to the Tribunal that Parliament could not have contemplated a claim based on financial hardship arising some years after recovery has occurred. It is not proper, therefore, for the Tribunal to take into account the applicant's present financial circumstances.'

(Reasons, para. 8)

In any event, the AAT said, Sharman's financial situation did not amount to exceptional financial hardship — the balance between income and expenditure was not unusual.

Nor was the reduction of damages (on account of Sharman's contributory negligence) a 'special circumstance'.