

The cases

In *Sheely* (1982) 9 SSR 86, Davies J. stressed that a distinction had to be drawn between a person who is sick and one who merely thinks he is sick; and in *Vranesic* (1982) 10 SSR 95, Mr Hall referred to the situation:

'[W]hen a person's perception of himself (rightly or wrongly) as an invalid incapable of work, may become so entrenched and so ineradicable as to itself constitute a psychological condition which destroys the person's capacity for work...'

The decision

The Tribunal found that VXX continued to suffer left side sciatic symptoms with some degeneration in his lumbar spine. He only had his physical strength and his ability to drive trucks to offer to an employer and had a genuine physical impairment. He suffered pain as a result of his physical impairment which had a major effect on his ability to engage in the type of work available to him. He would not be able to sustain a work effort throughout a normal working day.

Although VXX lived in an area where job opportunities were limited, and was an unsuitable trainee for new skills, at least 50% of his incapacity for work was directly caused by his physical impairment and his physical impairment made him unattractive to an employer.

Formal decision

The Tribunal affirmed the SSAT decision which had set aside the DSS decision that the applicant did not qualify for an invalid pension.

[B.W.]



CAMPBELL and SECRETARY TO DSS

(No. T88/165)

Decided: 10 December 1990 by A.M. Blow.

Laurence Campbell was granted invalid pension in 1984 following a recommendation of an SSAT. The DSS cancelled his pension on 6 July 1987 and, after an unsuccessful appeal to the SSAT, Campbell asked the AAT to review the cancellation.

The law

The Tribunal said the leading authority as to the meaning of the words 'permanently incapacitated' is *McDonald* (1984) 18 SSR 188, which is authority for the proposition that a permanent incapacity is one that is more likely than not to persist in the foreseeable future.

The provisions of s.27(a) as to an incapacity for work (that is not less than 85%) do not require any form of arithmetic calculation, but simply relax the otherwise absolute requirements of s.28 (*Panke* (1981) 2 SSR 9).

In considering whether a person is incapacitated for work for the purposes of these sections, one must consider the economic effects of a disabling medical condition, and whether a person's labour is unsaleable in any market reasonably accessible to him, or whether he is incapacitated from ever earning a living.

The facts

Campbell was 51 years of age, left school at 14, did not read well, and had suffered a back injury when part of a tree fell on him in the course of his work. Prior to the injury he had worked digging potatoes, doing road maintenance, at a sawmill, general farm work, driving trucks and in the timber industry.

Since the injury he had made unsuccessful attempts to find and retain work. From 1982 he made a small income from a firewood business but, because of his back injury, did little of the heavy work involved and earned about \$80 a week from the enterprise.

The findings

The evidence of 2 orthopaedic specialists, the Tribunal said, established that Campbell was so restricted in the sort of work he could do, and would need to find so sympathetic an employer, that there was no realistic possibility of him ever earning a living as an employee. He was also incapable of earning a living in business on his own account, though by risking further injury he was able to derive a little income from the firewood enterprise.

In considering whether at least 50% of the applicant's permanent incapacity for work was directly caused by a permanent physical impairment within the meaning of s.27(b), the Tribunal took into account Campbell's age, education, work skills, injury and worker's compensation history. It concluded that the substantial cause of his incapacity for work was his back injury.

Formal decision

The Tribunal set aside the SSAT decision and remitted the matter to the DSS for reconsideration in accordance with a direction that Campbell was, and had been since 6 July 1987, permanently incapacitated for work within the meaning of s.27 of the *Social Security Act*.

[B.W.]



Arrears of family allowance

SECRETARY TO DSS and DAVIDSON

(No: 6385)

Decided: 14 November 1990 by P.W. Johnston.

Davidson's son James was born on 15 May 1989 but a family allowance claim was not lodged until 24 August 1989. The claim was rejected by the DSS on 13 September 1989 and Davidson applied to the SSAT for review.

The SSAT set aside the decision and substituted a new decision that Davidson was entitled to receive family allowance from the date of birth.

The DSS asked the AAT to review the SSAT decision. Although Davidson did not attend, the AAT heard the application in his absence, since the 'issues were essentially of a legal nature'.

No provision for backdating

The AAT referred to a number of recent, similar cases (see, eg *Perkins* (1990) 56 SSR 754; *Chatzikosmidis* (1990) 56 SSR 755) in deciding that legally there was no discretion other than to pay family allowance from the date on which the application for payment was made and there was no provision for the payment of arrears.

Referring in particular to *Perkins*, the AAT repeated the view that, notwithstanding the reference in s.87 to the allowance being 'payable' on every pay day once a person becomes qualified, ss.158, 159 and the overall context of the provisions makes clear that no payment can be made prior to the lodging of a claim:

"Payable" in s.87 should therefore be read as "capable of being paid" . . . It should not therefore be construed as "shall be paid" as if qualification gives rise to a claim in law.'

(Reasons, p.4)

The AAT also considered an argument for payment of arrears (not dealt with in *Perkins*) arising from the fact that the provisions do not refer to the quantum of the allowance and that, therefore, it may be possible to pay a larger sum (constituting arrears) on any payday after lodgment of the claim. However, s.88 refers to a set, regular amount of the allowance payable on any payday and in the AAT's view, this precluded any discretion to pay a larger amount.

Formal decision

The AAT set aside the decision of the SSAT and substituted for it a decision that Davidson was not entitled to any arrears for the period 15 May 1989 to 24 August 1989.

[R.G.]