# Invalid pension: incapacity for work

**STANISAVLJEVIC and SECRETARY TO DSS**
**(No. 6464)**

**Decided:** 5 December 1990 by J.R. Dwyer, B.G. Gibbs and D.M. Sutherland.

Stanisavljevic asked the AAT to review a decision of the DSS to reject her claim for invalid pension.

## The law

The relevant provisions were ss.27 and 28 of the *Social Security Act*, inserted from 1 July 1987. The DSS relied upon the discussion on the effect of these sections in *Kadir* (1989) 49 *SSR* 638. In that case the AAT said the essential qualification for invalid pension continued to be that the claimant was permanently incapacitated for work, and that it was assumed that, when legislation is re-enacted after interpretation by the courts, the legislature had approved that interpretation.

The concept of incapacity for work was considered in *Panke* (1981) 2 *SSR* 9 which was approved by the Federal Court in *Annas* (1985) 29 *SSR* 366. In *Panke*, Davies J. described as 'apposite' the remarks of Lord Loreburn in *Ball v Hunt* [1912] AC 496:

> '... there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him ...'

The other members of the Tribunal in *Panke* delivered their own reasons for decision, with which Davies J. concurred. They described the task of assessing incapacity for work as involving two steps: first, an evaluation in purely medical terms of the physical or mental impairment of the applicant; and, secondly, the ascertainment of the extent to which that physical or mental impairment affects the person's ability to engage in paid work.

## The facts

Stanisavljevic was 47, and had not worked since the birth of her son in 1972. She was in receipt of supporting parent's benefit until her son turned 16 in March 1988. She had attended primary school for 5 years in Yugoslavia and the only paid work she had undertaken was farm labouring. She came to Australia in November 1971. In 1985 she was involved in a car accident and received a whiplash injury to her neck, bruising to her abdomen and a sore back. She lodged a claim for invalid pension on 23 June 1988 stating she suffered from injuries to neck and upper back, constant pain in lower spine, depression and weakness in her limbs.

Stanisavljevic's treating doctor found in 1977 significant improvement in her neck movements. However, by May 1988, the neck movements were again severely restricted. The doctor described Stanisavljevic as depressed and suffering whiplash to her neck with evidence of degenerative disc disease. In February 1989, she referred Stanisavljevic to a specialist in rheumatology and rehabilitation. In February 1989 he found her to have excellent muscle bulk and strength and a predominantly functional disability. By October 1990, he observed marked pain and limitation of movement in the cervical, shoulder, thoracic and lumbar vertebrae and an area of spasm over the right sterno mastoid and that she seemed very depressed.

An orthopaedic surgeon examined Stanisavljevic in April 1986 at the request of solicitors making a damages claim on her behalf. He found her responses on examination to be exaggerated and that she had a severe subjective overlay to her problem. He confirmed x-ray findings of degeneration at C5/6, C6/7 and C7 to T1 and considered she had a 75% disability in the movements of her lumbar spine. He reviewed her in August 1988 and February 1990 and noted she was less anxious and her responses to examination less exaggerated. He considered she had a 30% disability in her cervical spine and 50% in her lumbar spine and continued to suffer a severe subjective overlay. His recommendations for treatment (other than medication) were not followed by her. In 1988 Stanisavljevic was diagnosed as having glaucoma.

Psychiatric evidence indicated a 10% impairment on psychiatric grounds, but Stanisavljevic was described as 'sad' rather than depressed. He later conceded he would not disagree with a diagnosis of slight depression.

The DSS had her examined in October 1988 by a rheumatologist, who concluded she had a physical disability of no more than 10% in the cervical area, and negligible disability in the lumbar area with a permanent impairment. He considered her fit for cleaning jobs, unskilled factory labour or farming.

## The findings

The Tribunal said that if Stanisavljevic was consciously exaggerating her symptoms, her incapacity would be less than 85%. It found that she had been so anxious about her injuries in the car accident and her subsequent inability to convey her pain to doctors that she was unconsciously exaggerating and had become depressed. The only work she was qualified for was unskilled which would be unsuitable for a person with a 30% disability of the cervical spine and a 50% disability of the lumbar spine. Section 27(a) was thus satisfied.

The Tribunal noted that Stanisavljevic's incapacity for work had never been tested in Australia because of her decision to stay at home and look after her son. It said:

> 'Our system of Social Security allows a parent to make that choice ... It becomes an unreal choice if a period on supporting parent's benefit ... is seen as indicating or creating an incapacity for work unrelated to medical conditions, and thus disqualifying a person for invalid pension, should he or she subsequently develop a permanent physical or mental impairment.'

Because the Tribunal found that at least 50% of the applicant's permanent incapacity was directly caused by her permanent physical and mental impairment, it was not necessary for it to consider what income support would have been available to her had she not been qualified for invalid pension. However, it referred to the case of *Orak* (1989) 53 *SSR* 703, in which concern was expressed about the apparent gap in the legislation whereby people who are not qualified for invalid pension, but genuinely do not believe themselves to be fit to seek employment, do not qualify for any income support.

## Formal decision

The Tribunal set aside the decision under review and substituted a decision that the applicant had been entitled to receive an invalid pension at all times since 23 June 1988.

**[B.W.]**

# Invalid pension: Incapacity for work

**SECRETARY TO DSS and SMITH**
**(No. S89/252)**
**Decided:** 7 September 1990 by J.A. Kiosoglous, J.T.B. Linn and D.B. Williams,

The Tribunal set aside a decision of an SSAT and restored the original decision of the DSS that Smith was ineligible for invalid pension as he could not satisfy the requirements of s.27(a) of the Social Security Act.

## The facts

Smith had always worked in labouring jobs and had a history of injuries which had kept him out of the workforce for various periods. He said he could not work because of his low back pain which restricted the amount of time for which he could stand. He said he wanted to work, but his record of injuries and his disability stopped employers considering employing him.

An orthopaedic surgeon gave evidence that Smith was no more restricted in his movements than any other 52-year-old man, that pain would not prevent him working full-time and the inevitable backache could be tolerated. He acknowledged that, if Smith had a medical examination on behalf of a potential employer, he might well not be accepted on medical grounds, not because of his inability to work, but because of his previous medical history.

## The decision

The Tribunal agreed with the DSS that Smith was 'to be congratulated for his fortitude' over the years but found that, based on the medical evidence, the incapacity arising from Smith's impairments, even when considered with accepted socio-economic factors, did not satisfy the requirements of s.27(a). His permanent incapacity for work was less than 85%.

**[B.W.]**

**SECRETARY TO DSS and ABAROA**
**(No. 6753)**
**Decided:** 14 March 1991 by P. Gerber.

Juan Abaroa was born in Australia in 1961, suffering the permanent physical impairment of cerebral palsy. He left Australia in 1965 or 1966 and lived in Spain until April 1990, when he returned to Australia, took up permanent residence here and claimed an invalid pension.

When the DSS rejected that claim, Abaroa appealed to the SSAT, which set aside the decision. The DSS then applied to the AAT for review of the SSAT decision.

## The legislation

In this review, it was agreed that Abaroa was permanently incapacitated for work, within ss.27 and 28 of the *Social Security Act*. However, the DSS argued that s.30(1)(a) of the Act prevented Abaroa from receiving an invalid pension.

Section 30(1)(a) provides that an invalid pension is not to be granted to a person on the basis of permanent incapacity for work unless the person 'became permanently incapacitated for work . . . while the person was an Australian resident'.

## When is incapacity for work determined?

The DSS relied on the AAT decision in *Mancer* (1989) 53 *SSR* 703 to support its argument that Abaroa had become incapacitated for work in Spain, where he had lived between the ages of 5 and 29.

In *Mancer*, a person who had come to Australia at the age of 14, suffering from physical and mental impairment, was held to have become permanently incapacitated for work while an Australian resident because she had become eligible to enter the workforce, and therefore test her employability, at the age of 16 — two years after becoming an Australian resident. In this matter, the DSS argued, Abaroa had been a resident of Spain, not an Australian resident, at the time when he had reached working age.

The AAT referred to what it called 'the eccentric consequences' of this approach: assuming a school leaving age of 16 years, an incapacitated person who arrived in Australia at the age of 15 years and 364 days would qualify for invalid pension one day later; but a person who arrived at the age of 16 years and 1 day would be ineligible until he or she had accumulated 10 years' residence: Reasons, para. 10.

The AAT said it was satisfied that the term 'permanent incapacity for work' was not a term of art. The term referred to 'the economic consequences which flow from . . . impairment'. That incapacity could be present before the person reached working age, just as blindness (the alternative basis for qualifying for invalid pension) could be present before a person reached that age:

> 'Why should the legislature be presumed to place a different — and more onerous — hurdle in the path of infants who are Australian residents and suffer a serious and permanently incapacitating trauma other than blindness?'

(Reasons, para. 13)

Moreover, the AAT said, the mischief at which s.30(1)(a) was aimed was 'migrants suffering from disabilities acquired abroad from claiming an invalid pension in this country until they have resided here for ten years': Reasons para. 14.

In no sense could Abaroa be said to be caught by this 'mischief'. There was 'no cogent reason why his intervening residence in Spain — of whatever duration — should compromise his right to a pension to which he is otherwise entitled': Reasons para. 15.

And, the AAT said, it was 'less artificial' to describe an infant with a congenital impairment as 'permanently incapacitated for work' at the time of birth than 'to thrust it upon the infant the day it leaves school or is eligible to leave school': Reasons para. 15.

## Formal decision

The AAT affirmed the decision under review.

**[P.H.]**