Rabbets was not living separately and apart from her husband but was living in a marriage-like relationship with him. The AAT thus affirmed the decision under review.

[B.W.]

Family allowance arrears: date of effect of decision

SECRETARY TO DSS and MOORE (No. Q90/455)

Decided: 25 February 1991 by D.F. O'Connor J.

The Department sought review of a decision that Mrs Moore be paid family allowance from the first allowance pay day after the date of lodgement of claim.

The facts

On 20 April 1989, Mrs Moore claimed family allowance in respect of her 2 children. She stated that the combined taxable income of her husband and herself for the 1987-88 year was $74 000. That income exceeded the allowable threshold. She advised that she had ceased employment on 25 December 1988. Following advice from the DSS, she completed a form headed 'Reduced income' which estimated that her family taxable income for the 1988-89 year would total $63 562. On 25 May 1989 she was advised by letter that she could not be paid family allowance because that income exceeded the allowable income.

On 8 February 1990. Moore lodged a further claim for family allowance which showed that the actual total combined taxable income for 1988-89 was $46 087. At the same time, she made a statement that her previous estimate of income had been too high and she asked that any arrears of family allowance owing be paid. Her claim was granted from 8 February 1990 only.

On 9 March 1990, Moore wrote to the DSS saying that she wished to appeal against that decision. On 25 May 1990 a review officer affirmed the decision. Moore sought review by the SSAT on 9 June 1990.

The SSAT decided that family allowance was payable from 20 April 1989, because she met the qualifications, although her rate of entitlement under the income test was nil. In the light of the new evidence as to her income for 1988/89, her rate could be adjusted to the maximum rate from the date of her April 1989 claim. However, the SSAT's decision took effect only from the date of lodgment of her appeal, as she had applied more than 3 months after being notified of the original decision. Therefore she would not get arrears for the period prior to 9 June 1990.

The legislation

Qualification for family allowance is set out in s.87 of the *Social Security Act* 1947. Payment of family allowance is subject to an income test set out in s.85. The income test is based on the taxable income of the person claiming family allowance (combined with the taxable income of that person's spouse, if married) in the previous financial year. Section 85(7) is an ameliorating provision which provides that where —

> 'the taxable income of the person for the year of income in which the request is made (in this sub-section called "the current year of income") is likely to be at least 25% less than the taxable income of the person for the last year of income of the person;'

payment of family allowance may be made based on the current year income rather than the taxable income of the previous year.

Section 158(1) provides that the grant or payment of family allowance shall not be made except upon the making of a claim for that allowance. Section 158(2) provides that where a claim is made and the claim cannot be granted because the person is not qualified or eligible to receive payment of a pension, benefit or allowance, the claim shall be deemed not to have been made.

Section 168(4) deals with the date of effect of certain determinations made by the Secretary under s.168(3) granting a claim. Section 183 deals with the date of effect of decisions of the SSAT determining an application for review.

Date of effect of Tribunal decision

The AAT found that the SSAT erred in stating that the decision under review was the decision made on 15 February 1990 (presumably, the determination granting her claim of 8 February 1990). The decision under review was that of the review officer made on 15 June 1990 affirming that decision.

In concluding that it was the decision of the review officer under s.174, and not the original decision, that was the 'decision under review' by the SSAT, the AAT noted that s.175(1) provides—

> 'Where a person gives the applicant notice under sub-section 174(2), the notice shall include:
>
> a) a statement to the effect that the applicant may, subject to this Act, apply to the SSAT for *review of the person's decision*'. (emphasis added).

Moore had applied for review by SSAT within 3 months of notification of the review officer's decision, and therefore s.183 did not affect her entitlement to any arrears.

The powers and discretions available to the AAT and SSAT are (with certain exceptions) those conferred on the Secretary (s. 182(4) and (5)). The powers and discretions available to the Secretary in deciding to increase the rate of family allowance from a nil rate to the maximum rate are set out in s.168(3) and (4). The date of effect of the decision made on review by the SSAT was to be determined in accordance with s.168(4)(a), and was 'the day on which the previous decision took effect'. That date was 8 February 1990, the date from which Moore had already been paid, so no arrears would be payable. The AAT added that even if the original determination of May 1989 was taken to be the 'decision under review', because more than 3 months had elapsed between notification and the lodging of an application for review, arrears would still be payable from a date not earlier than the date of the application for review.

Criticism of income test provisions

The AAT again criticised the operation of the family allowance and family allowance supplement income tests, as it had previously done in *Meadows* (1989) 52 *SSR* 693, *Chaplin* (1990) 55 *SSR* 733 and *Lines* (1990) 56 *SSR* 750. Moore would have received family allowance from May 1989 if she had not overestimated her income. The Act makes no provision for the backdating of family allowance payments in those circumstances.

Formal decision

The AAT set aside the decision of the SSAT and reinstated the decision of the review officer.

[*Editorial Comment:*There has been some uncertainty as to which decision is the subject of an SSAT review when the primary decision has been affirmed by a review officer. O'Connor J found in Moore that the SSAT should have reviewed the latter decision.

The question of which decision is the subject of the SSAT's review has important implications for the ability of

the SSAT and the AAT to direct the payment of arrears in favour of a successful applicant. This is because the date of effect of the SSAT's and the AAT's decision is, in some cases, 'the day on which the decision under review had effect'.

In some cases, it will make no difference because the SSAT's decision and the AAT's decision will be operative from the date of the primary decision. In other cases, the effect of O'Connor J's interpretation may be to limit arrears to the date of the review officer's decision.]

[P.O'C.]

Overpayment: unable to quantify

WEIR and SECRETARY TO DSS

(No. W90/153)

Decided: 12 June 1991 by T.E. Barnett.

Mr and Mrs Weir asked the AAT to review a decision of the SSAT that overpayments of Mr Weir's invalid pension and Mrs Weir's wife's pension were recoverable. The total amount of the overpayment had been calculated at $2747.71 in accordance with directions given by the SSAT to the DSS.

The facts

Mr Weir had been in receipt of an invalid pension and Mrs Weir of a wife's pension at the full rate since 1979. From 27 June 1983 until the end of October 1987, Mrs Weir was employed periodically by Dr H as a part time babysitter. She failed to notify the DSS of that fact until interviewed in November 1987.

In order to quantify the amount of the overpayment, the DSS relied entirely upon a statement prepared by Dr H's husband, stating that his wife was paying Mrs Weir a weekly rate of pay which varied between $80 and $160 per week. Dr H appeared to have signed the form, although there is no evidence on this point and she was not called to give evidence.

Legislation

Section 42(1) of the *Social Security Act* 1947 provided that, where the average weekly rate of a pensioner's non-pension income received in any period of 8 consecutive weeks was higher than $30 per week and was higher than the average weekly rate of the income last notified, the pensioner should notify the Department within 14 days after the expiration of that period of the income received in that period.

From 2 July 1987, the notification and review provisions were provided for by s.163. The Secretary could give a notice to a pensioner requiring the pensioner to notify within 14 days of the occurrence or likely occurrence of a specified event or change of circumstances.

Insufficient evidence of overpayment

The overpayment was raised under the former s.181(1), later renumbered s.246(1). The AAT found it impossible to rely upon the report of Dr H's husband for the purpose of calculating the amount of any possible overpayment. The report purported to be no more than a mere estimate of employment that was casual and sporadic. Furthermore, Mrs Weir claimed that Dr H's husband was not present when arrangements for payment were made between her and Dr H.

The AAT also discounted evidence of a bank loan application form signed by Mr Weir in which he declared that Mrs Weir earned '$650 per month babysitting'. The Tribunal accepted that he had falsely inflated the amount of income being earned by his wife in order to qualify for a bank loan.

The AAT accepted that there were weeks in which Mrs Weir probably received amounts of babysitting money in excess of the prescribed maximum non-pension income, and that therefore there had been overpayment. However, on the evidence before it the AAT was unable to be satisfied that there had been an overpayment in the amount claimed by the DSS, nor was there sufficient evidence to enable the DSS to make its own calculations.

Formal decision

The Tribunal set aside the decision to raise and recover overpayments and referred the matter back to the respondent to make any necessary adjustments to the entitlements of the applicants.

[P. O'C.]

Invalid pension: incapacity for work

ZAMMIT and SECRETARY TO DSS

(No. 7013)

Decided: 7 June 1991 by S.A. Forgie.

Zammit's claim for an invalid pension in December 1989 was rejected by the DSS. On appeal, this decision was affirmed by the SSAT. Zammit asked the AAT to review the decision. Zammit represented himself before the AAT.

The facts

Zammit was 49 years old with a *de facto* wife and 3 dependent children. He was born in Malta and came to Australia at the age of 18. He could not read or write in any language and had no work skills as he had always worked as a labourer. In 1972 and in 1976 Zammit injured his back at work. After a period on light duties, he was retrenched and had not worked since.

The findings

Zammit claimed to be suffering from 4 disabilities, these being bladder cancer, an umbilical hernia, pain in the knees, hip, feet and back, and a psychiatric condition.

The Tribunal was satisfied on the evidence before it that the hernia had been successfully treated and was causing Zammit no disability. It was also satisfied that, although Zammit's bladder cancer was causing him a great deal of concern and some pain, the cancer was not spreading and caused no disability to Zammit. However, the Tribunal thought that further investigation of this condition should be carried out by DSS.

With respect to the pain felt by Zammit in his back, hips, knees and feet, the Tribunal concluded after assessing all the medical evidence that Zammit suffered from spondylosis in his lower dorsal and lumbo-sacral spine. The condition did not totally disable Zammit and the Tribunal accepted that he had a '20% disability due to the lower back condition'. As there was no medical evidence concerning Zammit's feet the Tribunal found no disability, and similarly no disability was found with respect to Zammit's knees because of lack of medical evidence.

The only psychiatric evidence before the Tribunal indicated a 15% disability due to 'characterological factors' and