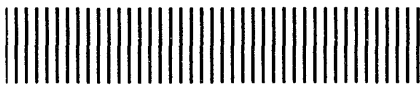


the SSAT and the AAT to direct the payment of arrears in favour of a successful applicant. This is because the date of effect of the SSAT's and the AAT's decision is, in some cases, 'the day on which the decision under review had effect'.

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