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

irritability. This was accepted by the Tribunal.

The legislation

The Tribunal quoted extensively from the earlier decision of *McGeary* (1983) 11 *SSR* 113, to interpret the provisions of s.27 of the *Social Security Act*. It concluded that Zammit was at least 85% incapacitated for work by reason of his illiteracy, limited work experience, lack of skills, bladder cancer, his unemployment for 16 years and his physical and mental disabilities.

The present economic situation was not taken into account when assessing Zammit's incapacity for work. The Tribunal decided that Zammit did not satisfy s.27(b), that is, at least 50% of this incapacity was not caused by physical or mental impairment:

> '[T]he highest assessment of disability which I can give Mr Zammit is 20% for his back condition and 15% for his psychiatric condition. On no view of the medical evidence which has been presented to me am I able to say that at least 50% of that incapacity is due to permanent physical or mental impairment.'

Formal decision

The AAT affirmed the decision under review.

[C.H.]

HUGHES and SECRETARY TO DSS

(No. W90/227)

Decided: 30 May 1991 by T.E. Barnett.

Hughes was granted invalid pension from 19 September 1986. His entitlement was reviewed in June 1990 and the invalid pension was cancelled. This decision was affirmed by the SSAT and Hughes requested review of that decision by the AAT.

The facts

Hughes had previously been employed as a labourer, shop assistant, salesman and clerical officer. He claimed to suffer from cervical spondylosis which restricted his neck movements and caused pain, as well as gout in his left hand and foot. Medical evidence showed that Hughes had cervical spondylosis with some nerve root compression. Hughes claimed to be unable to work because of severe pain which resulted in lack of sleep.

Besides being unfit for labouring type work, Hughes stated that he would be unable to undertake any work because he would not be able to arrive at work on time.

He took no medication to control the pain because of a previous bad experience.

In 1990 Hughes attended a rehabilitation course but was asked to leave because of his negative attitude.

Medical evidence presented to the AAT indicated that the pain suffered by Hughes could be controlled by non-addictive drug treatment and by wearing a cervical collar. A specialist orthopaedic surgeon stated that Hughes' physical incapacity was 10%.

The findings

Because of Hughes' age, time out of the work force and medical condition, the Tribunal found that the applicant was at least 85% incapacitated for work (*Panke* (1981) 2 *SSR* 9). However, the Tribunal was not satisfied that:

> 'such incapacity is permanent despite the fact that it has continued for over four and a half years. There are simple measures which the applicant could take to try and reduce the level of his pain and the effects of his sleeplessness . . . If he brings the level of pain more under control in these ways he would definitely have more than a 15% capacity to work in a fairly wide range of jobs for which he is reasonably well qualified'.

The Tribunal decided Hughes' incapacity was not permanent because he refused to take medication or wear a cervical collar. This of itself did not preclude Hughes from entitlement, but was a factor to be taken into account. Hughes' reasons for not taking medication appeared to be based on ignorance. The Tribunal concluded that:

> '[h]is incapacity to work at least 15% of a full-time job in employment suitable to his skill and experience is largely caused by his attitude towards work; particularly towards indoor work'.

Formal decision

The Tribunal affirmed the decision under review.

[C.H.]

STANISAVLJEVIC and SECRETARY TO DSS

(No. N88/1066)

Decided: 27 March 1991 by M.D. Allen, D.J. Howell and M.T. Lewis (dissenting).

Stanisavljevic was granted invalid pension from 19 March 1987. Her entitlement was reviewed in June 1988 and invalid pension cancelled. This decision was affirmed by the SSAT and Stanisavljevic requested review of that decision by the AAT.

The facts

Stanisavljevic complained of continual pain in her right forearm which prevented her using her right arm. She also complained of headaches continually which became severe 2 to 3 times per week. The specialist medical evidence before the Tribunal indicated that there was no objective evidence of an RSI-type injury.

Psychiatric evidence was provided by Dr Dinnen that Stanisavljevic suffered from a somatoform disorder, a genuine physical illness which develops as a result of a preoccupation with symptoms and sickness. This evidence contrasted with the evidence given by Dr Robbie, psychiatrist, that the applicant was not suffering from any psychiatric illness and he could find no evidence of a somatoform disorder.

The findings

The majority of the AAT preferred the evidence of Dr Robbie as he had had the benefit of examining Stanisavljevic with the assistance of an interpreter. The majority was also influenced by the fact that Stanisavljevic had been able to make 2 trips to Yugoslavia since 1988. They did not believe that she would have been able to undertake these trips if she had been as incapacitated as she stated. The majority concluded that Stanisavljevic was fit for any work not involving repetitive movements of the right upper limb.

The legislation

When applying s.27 of the *Social Security Act*, the majority took into account Stanisavljevic's age, ethnicity, and lack of English, as well as her medical disabilities and concluded that she was unable to obtain work at this time because of the economic situation. The majority of the Tribunal did not believe that Stanisavljevic had any interest in obtaining employment and that her physical and mental impairments were minor only.

The dissenting member of the AAT accepted that Stanisavljevic was suffering from a somatoform disorder. The fact that Dr Dinnen had not examined Stanisavljevic with the aid of an interpreter did not reduce his capacity to assess her credibility. The member concluded that on the basis of her ob-

servation of Stanisavljevic, her behaviour was consistent with the condition diagnosed by Dr Dinnen.

The trips to Yugoslavia were not inconsistent with her incapacity especially as she was seeking treatment for her illness.

The member dissenting applied s.27 and concluded that, on the basis of Stanisavljevic's language difficulties, age, lack of work skills, time out of the workforce and the depressed state of the labour market as well as her medical incapacity, Stanisavljevic had an incapacity for work of at least 85%.

Formal decision

The Tribunal by majority affirmed the decision under review.

[C.H.]

Compensation recovery: part of lump sum payment by way of compensation

SECRETARY TO DSS and ZANIN

(No. S89/255)

Decided: 15 February 1991 by J.A. Kiosoglous.

The DSS sought review of an SSAT decision that for the purposes of recovering sickness benefit and rehabilitation allowance pursuant to the compensation recovery provisions of the former s.115B of the *Social Security Act* 1947, the lump sum payment period be calculated by using a figure of $10 000, being the past economic loss component of the compensation settlement.

The facts

At the age of 16 Ms Zanin suffered severe injuries in a motor vehicle accident on 27 November 1983. She was paid, in respect of incapacity arising from that accident, sickness benefit from 2 January 1984 to 22 February 1984, rehabilitation allowance from 23 February 1984 to 14 November 1985, sickness benefit from 20 January 1986 to 17 February 1986 and from 1 May 1986 to 27 May 1987, unemployment benefit from 28 May 1987 to 21 July 1987 and sickness benefit from 5 October 1987 to the date of the AAT hearing.

Ms Zanin brought Supreme Court proceedings claiming damages for the injuries caused by the accident. Part way through the trial, the claim was settled for $185 000 plus costs on 16 November 1988.

Initially, the DSS applied s.152 of the *Social Security Act* 1947 using a $92 500 incapacity component of the lump sum settlement to derive a lump sum payment period from 27 November 1983 to 1 August 1987 and sought recovery of $14 165.02. This amount was paid to the DSS by the insurer.

Upon internal review, the DSS decided it should apply the former s.115B of the Act rather than the current provisions and sought advice on the composition of the lump sum settlement.

The insurers advised that their breakdown consisted of: $14 165.02 payable to DSS; $18 352.59 payable to the Department of Community Services; $10 000 for past economic loss; $45 000 future economic loss; $90 000 general damages; $5000 future care and $2482.39 interest.

Ms Zanin's solicitors advised that the damages claim was settled after the judge hearing the case remarked that she was fit for work as a receptionist. The solicitor's opinion was that the settlement amount covered pain and suffering, medical expenses, interest and a nominal amount for past economic loss.

After receiving this information the Department decided on 5 June 1989 to treat $69 165.02 of the settlement as being in respect of the respondent's incapacity for work and calculated that $10 464.82 was recoverable. The $69 165.02 figure was derived using the insurer's breakdown and adding together $10 000 for past economic loss, $45 000 for future economic loss and the $14 165.02 DSS refund which was also regarded as economic loss.

The legislation

The old compensation preclusion and recovery provisions of the Act were said to be preserved by s.42(2) of the *Social Security and Veterans' Affairs (Miscellaneous Amendments) Act* 1986, because sickness benefit commenced to be paid to Ms Zanin before 1 May 1987. Under s.115B(2A) of those provisions:

> 'where a person who is qualified to receive a sickness benefit in respect of an incapacity receives . . .
>
> (b) a lump sum payment that is . . . in whole or in part a payment by way of compensation in respect of that incapacity'

the amount of sickness benefit payable is to be reduced by the average weekly earnings for the period calculated under s.115B(2B). That period is calculated by dividing average weekly earnings into 'that part of the lump sum payment that is, in the opinion of the Secretary, by way of compensation in respect of that incapacity'.

The AAT's reasons

The AAT said it took into account the cases of *Cavaleri* (1989) 53 *SSR* 700, *Cocks* (1989) 48 *SSR* 622, *Gundogdu* (AAT 21.5.87) and *a'Beckett* (Fed. Crt) (1990) 57 *SSR* 779.

It then applied the Federal Court's decision in *a'Beckett* saying:

> 'The Tribunal . . . is satisfied that the relevant payment was a payment in respect of an incapacity for work. The Tribunal is satisfied and finds that the lump sum award included components for past and future economic loss.'

(Reasons, para. 15)

No other reasons were given by the AAT for its decision.

Formal decision

The AAT set aside the SSAT decision and reinstated the DSS internal review decision of 5 June 1989.

[D.M.]

SECRETARY TO DSS and GARDINER

(No. S90/215)

Decided: 6 May 1991 by R.A. Balmford, D.J. Trowse and D.B. Williams.

Claims for invalid pension and sickness benefit were lodged by Gardiner on 11 June 1987. The DSS decided on 31 July 1987 that he was precluded from receiving a pension or benefit from 31 May 1987 to 13 September 1991 because he had settled a claim for damages for personal injury against his former employer on 6 June 1987 for $145 000, of which $100 000 was for future economic loss.

The SSAT varied the DSS decision by terminating the preclusion period as at the date of its decision, 22 August 1990. DSS sought review of the SSAT decision.

The legislation

This case was sufficiently old to require consideration of the complex and confusing 1987 and 1988 amendments to the compensation preclusion provisions of the *Social Security Act* 1947.