Taylor (1987) 40 *SSR* 506, the Tribunal had said that all the circumstances, including the circumstances in which the overpayment arose should be taken into account, whether it occurred as the result of an innocent mistake or fraud, whether administrative delay or error contributed and all relevant compassionate circumstances. The impact of the recovery action on the social welfare recipient was not relevant here, as Mrs Aquino-Montgomery was not such a recipient. The Tribunal referred to a number of other decisions, including *Hales* (1983) 13 *SSR* 136 and *Gee* (1982) 5 *SSR* 49 which set down similar principles for the exercise of the discretion to recover the debt to those outlined above.

Should the debt be recovered?

Mrs Aquino-Montgomery gave evidence that she provided her mother with all of her needs but that some friction developed between her mother and herself over her mother smoking, which caused Mrs Aquino-Montgomery and her husband to be concerned about the mother's health. This led to her mother leaving home on three occasions. On the last occasion she did not return and Mrs Aquino-Montgomery, concerned that her mother might claim special benefit, contacted the DSS at this time to inform them that she was providing her mother with all her needs and that she should not be paid special benefit. She also gave evidence that she did not receive the letter dated 24 January 1990. The only letter she received was that of 19 June 1990 informing her of the debt. This letter was sent after her mother had made a second claim for special benefit when she turned 60 because she was not residentially qualified for age pension.

Mrs Aquino-Montgomery was employed as a secretary earning $31 000 per annum. She was paying off, with her husband, a $280 000 house mortgage. Her husband was running a small business from home which grossed about $50 000 per year, but he was also repaying debts from an earlier failed business.

Her sister and her niece lived with her. She had sent money to her brother and his family in the Philippines in the past, but could no longer afford to do so.

The Tribunal concluded that the marriage relationship between Mrs Aquino-Montgomery and her husband had been difficult for some years, and that the mother had been introduced into this situation and had chosen to leave the home and not return. The Tribunal also concluded that Mrs Aquino-Montgomery was at all times willing and capable of supporting her mother.

The Tribunal accepted that the DSS had omitted to inform Mrs Aquino-Montgomery of her mother's claim for special benefit until January 1990, but it was also accepted that the DSS had been correct in only seeking to recover the debt from the date of the letter. It was also accepted that she did receive the letter dated 24 January 1990. However, no contact was made after the mother made a second claim in May 1990 and there was no evidence that Mrs Aquino-Montgomery deliberately avoided contacting the Department.

The AAT concluded that there were insufficient grounds for the writing off or waiving of the debt under s.251(1), for the period 24 January 1990 to 2 May 1990. For that period Mrs Aquino-Montgomery owed an assurance of support debt and must repay it to the Commonwealth. However, the Tribunal felt that there were sufficient grounds for the exercise of the discretion to waive recovery of the debt owed in relation to the period from 3 May 1990 to 18 May 1990 which related to the period after the second claim for special benefit was made by the mother. (18 May 1990 was the end of the debt period referred to in the DSS letter of 19 June 1990.)

Formal decision

The AAT set aside the decision under review and substituted a decision that the respondent owed to the Commonwealth an assurance support debt of $2344.75 for the period 24 January 1990 to 18 May 1990; that the amount incurred between 24 January 1990 and 2 May 1990 be recovered; that the amount incurred between 3 May 1990 and 18 May 1990 be waived; and that the matter be remitted to the DSS with the direction that waiver and recovery action be taken in accordance with the terms of this decision.

[B.S.]

Invalid pension: permanent incapacity for work

BOURKE and SECRETARY TO DSS

(No. 7063)

Decided: 21 June 1991 by B.G. Gibbs, D.B. Travers and E. Stephenson.

Julia Bourke lodged a claim for invalid pension on 5 December 1988 and this was rejected by the DSS on 27 January 1989. An appeal was lodged with the SSAT and the decision was affirmed. Bourke requested that the AAT review this decision.

The facts

Bourke was 48 years old and separated. Two of her children had been killed in tragic circumstances. Approximately 7 years ago Bourke developed pain in her upper limbs whilst working as a process worker. She had time off work and returned on light duties. She ceased work in August 1988 and had not received Workers' Compensation benefits since November 1988. The SSAT found that Bourke was fit for rehabilitation and retraining in light work.

Bourke's symptoms were extensively investigated and no evidence of stenosing tenosynovitis or carpal tunnel syndrome was found. A number of specialists could find no evidence of any ongoing organic disability.

Bourke told the AAT that she was attending a stress management course, had trouble sleeping and suffered from frequent headaches.

The AAT also received evidence from 2 psychiatrists. Dr Veness diagnosed Bourke as suffering from chronic anxiety and depression which manifested itself as chronic pain syndrome. Dr Merrifield could find no evidence that Bourke had pain or depression. The Commonwealth Rehabilitation Service assessed Bourke and decided not to offer her rehabilitation.

The legislation

After referring to s.27 of the *Social Security Act* 1947, the AAT stated that the first question it must decide was whether Bourke was permanently incapacitated for work. The second question was whether at least 50% of that permanent incapacity was directly caused by a physical or mental impairment.

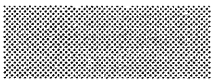
The AAT agreed with Dr Merrifield that Bourke had been led to believe that she was permanently incapacitated for work: 'Mrs Bourke's life experiences have had a profound effect upon the way in which she regards her personal capabilities, with her retrenchment coming as "the final straw"'.

The AAT concluded that the payment of sickness benefit, and the possibility of further compensation and of invalid pension contributed to Bourke's lack of motivation with regard to rehabilitation and a return to work.

Formal decision

The AAT affirmed the decision under review.

[C.H.]



COLLINS and SECRETARY TO DSS

(No. 7015)

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

Valerie Collins' claim for invalid pension was rejected by the DSS in March 1990. On appeal, this decision was affirmed by the SSAT and Collins asked the AAT to review the decision. Collins represented herself at the hearing.

The facts

Collins was 51 years old and had been a widow for a number of years. She was educated intermittently to Grade 5 and subsequently had a number of unskilled jobs as a waitress, shop assistant and process worker. She had not worked full-time for 5 years.

Collins suffered an attack of bronchial asthma once every few months and a bad headache once a month. At the AAT hearing Collins complained of pain in both thumbs and back pain. A report from Collins' treating doctor advised that she had osteoarthritis in both hands. She was diagnosed as suffering from spondylolisthesis of the lumbar spine in 1989.

Collins provided a report from her specialist dated 23 March 1991 and arranged a further examination by him just before the hearing. The specialist advised that he would not provide a further report although Collins later said that he would. The AAT contacted the specialist by telephone and requested that he give evidence by telephone. He refused and the AAT decided not to adjourn the hearing to enable Collins to obtain a further written report because of previous adjournments.

The legislation

After referring to *McGeary* (1983) 11 *SSR* 113 and *Panke* (1981) 2 *SSR* 9, the AAT decided that Collins was incapacitated for any job requiring heavy lifting. One of the doctors indicated that Collins was 5% incapacitated as a result of her hands and 15% incapacitated due to her back. The AAT observed: 'even if I were satisfied that she were 85% incapacitated, I am not satisfied that at least 50% of her incapacity is caused by her physical or mental incapacity': Reasons, para. 15.

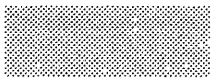
The AAT was also not satisfied that Collins' incapacity was permanent. However, the AAT did agree with one doctor that Collins was probably unemployable. Before deciding whether Collins' education, lack of skills and limited work experience affected her incapacity for work, the AAT decided that it would require further evidence.

Finally the AAT stated that Collins could apply for the invalid pension again if 'the doctors conclude that she is 50% permanently incapacitated because of her medical condition': Reasons, para. 16.

Formal decision

The AAT affirmed the decision under review.

[C.H.]



PANAGOPOULOS and SECRETARY TO DSS

(No. V89/626)

Decided: 17 June 1991 by I.R. Thompson, C.G. Woodard, and R.W. Webster.

Tony Panagopoulos was granted an invalid pension in May 1976 and shortly after left Australia to live in Greece. His pension was cancelled on 9 April 1979 after he was examined by the Director of Health who visited Greece for the purpose of examining persons in receipt of the invalid pension living in Greece.

Panagopoulos disputed this decision and he was re-examined in November 1982 by a medical team sent to Greece to examine a number of persons. The DSS wrote to the SSAT requesting an opinion on whether Panagopoulos was permanently incapacitated for work. The SSAT recommended that the decision to cancel Panagopoulos' pension be reversed. On 13 March 1984, the DSS affirmed the decision to cancel the pension after further correspondence with Panagopoulos. Panagopoulos appealed to the AAT on 24 January 1985. An order granting an extension of time to lodge an appeal was made.

The evidence

Panagopoulos came to Australia from Greece in 1968 and worked as a labourer in the building industry. He had previously worked as a farm labourer in Greece. In October 1972 he injured his back at work. Although he received various treatments, he was unable to resume work and was granted the invalid pension. As a result of the medication he had taken for his back pain, Panagopoulos developed stomach problems. After he returned to Greece he continued to seek treatment for both his stomach and back problems.

In 1978, a CMO examined Panagopoulos and diagnosed him as being fit for light work not involving lifting. Panagopoulos' doctors diagnosed him as suffering from chronic lumbago and sciatica. In 1982 the medical team who examined Panagopoulos noted that his history suggested a prolapsed intervertebral disc.

In the years since his application for review was lodged, his legal representative had supplied further medical reports from his Greek doctors as well as 3 statements by Panagopoulos. Later reports indicated that Panagopoulos was suffering from 'negative mental behaviour' and was afraid to undergo a CT scan. An X-ray in 1990 showed that Panagopoulos had lumbar disc problems. Panagopoulos' treating doctors in Greece asserted that he was suffering from a serious permanent condition which prevented him from engaging in any but the lightest physical work, and then only for approximately 2 hours a day.

A report from a psychiatrist stated that Panagopoulos was suffering from anxiety and mild depression. In the psychiatrist's opinion, Panagopoulos would have found work in Athens if he had not been on the pension and he could also work in his wife's coffee shop. Panagopoulos' wife swore an affidavit that her husband was capable of light work only and then for only short periods.

An orthopaedic surgeon who had examined Panagopoulos in Australia for the workers' compensation insurer provided a report in April 1991 in support of Panagopoulos' claim. He pointed out that Panagopoulos had not worked since 1972 and that, even though there was a 'large neurotic element in his condition', Panagopoulos was genuine.

Permanent incapacity for work

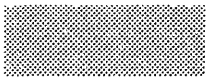
The AAT found Panagopoulos' refusal to undergo a CT scan understandable in the circumstances. It analysed Panagopoulos' ability to attract an employer both in Greece and in Australia and concluded that Panagopoulos was permanently incapacitated for work in both countries.

The AAT was satisfied that Panagopoulos had damaged his lumbar discs in 1972 and continued to suffer from the effects of that injury. It was also satisfied that there was a large functional neurosis and that this had been present since 1974. Further the AAT decided that Panagopoulos had been permanently incapacitated for work in the Australian market in 1979 when the decision was made to cancel his pension. The AAT took into account Panagopoulos' medical injury, lack of skills and lack of education when it came to its decision. It was also satisfied that Panagopoulos would not have been able to attract an employer in Greece except a member of his family, and therefore he had remained permanently incapacitated for work since 1979.

Formal decision

The Tribunal set aside the decision to cancel the invalid pension and substituted a decision that Panagopoulos was qualified to receive the invalid pension on 9 May 1979 and had remained so qualified since that date. (The AAT did not explain why it took more than 6 years from the date of lodgment of the appeal for this decision to be made.)

[C.H.]



SECRETARY TO DSS and SANDBACH

(No. A91/45)

Decided: 15 August 1991 by B.G. Gibbs, D.B. Travers and N.J. Attwood.

On 14 November 1990 the Department refused Sandbach's claim for invalid pension. The SSAT set this aside and recommended review in 12 months' time.

The facts

It was not in dispute that Sandbach suffered from a post-infection syndrome known as chronic fatigue syndrome (CFS) and that she had done so since August 1989. The issue was whether she was permanently incapacitated for work as a result. The Department conceded that her degree of incapacity was not less than 85%.

Sandbach had not worked since May 1990 and was in receipt of sickness benefit.

Dr Cavanagh examined her in February 1990 and diagnosed CFS but considered she would recover. There was no specific treatment available. He reviewed her in March 1991 and noted CFS and a reactive depression to the illness. He also noted symptoms of fybromyocytis and was unfit, 'for the moment'. He believed she should be placed on an invalidity arrangement for a period of about 12 to 18 months and then reviewed. He did not believe she should be classed as permanently invalided, and thought that she would recover 'at some stage' but it was difficult to know exactly when.

Professor Dwyer, who had been treating patients with CFS for 15 years and was researching the disease, gave evidence to the Tribunal. He assessed Sandbach on 22 May 1991 and noted aching muscles, particularly in her arms and fatigue which came on very rapidly after any physical activity. There were also problems with concentration and defects in short-term memory. There was an enhanced sensitivity to external stimuli, such as perfume, causing itching eyes and headaches. He found her totally incapacitated for work because of a combination of neuro-psychological and physical symptoms. He considered that efforts to engage her in either physical or mental activity would delay her eventual recovery. He had no doubt she was improving.

Professor Dwyer told the Tribunal that 70% of CFS sufferers recover completely over a 3 or 4 year time span; and suspected that, in a year or 18 months, Sandbach would be able to resume her normal activities. He did not think anyone could be absolutely certain she would recover but it was very likely. He could not say whether Sandbach came within the 70% of people who recover, but considered on the balance of probabilities that she would 'at some stage in the future' recover and be able to resume work. He agreed that some patients had not recovered even after 15 or 16 years.

The cases

In *Panke* (1981) 2 *SSR* 9, the Tribunal held that permanent incapacity is an incapacity that is likely to last indefinitely, as opposed to one which is likely to last only for a time.

In *MacDonald* (1984) 18 *SSR* 188, the Federal Court held that the distinction between temporary and permanent incapacity was based on assessment of future prospects. A permanent incapacity was one which, more likely than not, would persist in the foreseeable future. In assessing the likelihood of persistence, 2 factors should be weighed: the degree of likelihood of improvement and the time span for that improvement. The longer the time-span and the less probable the improvement, the more appropriate would be a finding of permanent incapacity. In a borderline case a belief that indefinite duration is more likely than foreseeable termination, will suffice. It was not necessary to have a 'settled expectation of permanency'.

Findings

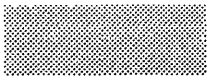
The AAT found that, on the balance of probabilities, Sandbach was not permanently incapacitated for work. She was, it found, totally incapacitated at present and, while there was an element of doubt as to full recovery, her chances of recovery were not borderline. The expectation is that she would recover in 18 months but the achievement of full recovery was a matter of speculation.

The AAT decided it was appropriate for her to be re-assessed for the purposes of invalid pension in November 1991 and noted that she was in receipt of sickness benefit.

Formal decision

The AAT set aside the decision of the SSAT.

[B.W.]



WEHRSTEDT and SECRETARY TO DSS

(No. 7072)

Decided: 24 June 1991 by B.M. Forrest.

Wehrstedt was 49 years of age and had lived all his life in a reasonably isolated area of New South Wales. He resided with his 80-year-old mother, who suffered from arthritis. They lived in her home which was on 4 hectares of land and Wehrstedt owned 36 hectares about 2 kilometres away.

Wehrstedt had left school at age 15, after 2 years at high school, and worked as a shearer and farm labourer. In February 1988, he suffered a severe back injury when a horse bolted dragging him along the ground for 30 metres until he crashed into the trunk of a tree. Since then he had suffered persistent back pain. He had made 2 attempts to return

to shearing without success because of back pain.

Medical evidence put to the Tribunal on Wehrstedt's behalf indicated he was not fit to engage in any work which involved lifting or bending. His treating general practitioner described him as 'crippled for life'. Wehrstedt also had Bell's palsy which paralysed the right side of his face.

A general practitioner, Dr Haynes, examined Wehrstedt for the DSS in May 1991 and assessed an impairment rating of 10%. He described Wehrstedt's level of incapacity as fairly mild and said he was involved in fairly heavy manual work on his farm. He conceded he had no idea what the duties were which he considered Wehrstedt to be carrying out.

Findings

The Tribunal decided that the evidence did not support Dr Haynes' claims which it discounted. It found the medical evidence established a significant back disability which totally incapacitated Wehrstedt from returning to his former occupation of labourer or shearer. Apart from his medical impairment, he had no skills or qualifications for other work and there was no evidence of any reasonably accessible work within his capacity. He was living in an isolated area and his back impacted upon his ability to travel. The Tribunal found him to be more than 85% permanently incapacitated for work and that at least half of the incapacity was as a result of the back condition.

Formal decision

The Tribunal set aside the decision under review and substituted a decision that Wehrstedt was qualified for the purposes of s.27 of the *Social Security Act* to receive an invalid pension.

[B.W.]

KENT and SECRETARY TO DSS

(No. T90/35)

Decided: 12 August 1991 by M.D. Allen.

Kent (who was unrepresented before the Tribunal) sought review of a decision to cancel his invalid pension. He was 39 years of age, resident of Saltwater River on the Tasman Peninsula and residing with his widowed mother. He had left school at the age of 14 or 15 after having repeated first year high school. He had worked in a series of labouring jobs, as a deckhand on fishing trawlers and driving vehicles. Whilst employed as a council labourer he injured his back. A further back injury occurred when he was employed by a construction company.

Kent was able to engage in some domestic chores and had a licence to drive a semi-trailer but experienced back pain which precluded any driving work. He told the Tribunal that pain prevented him from working. He had looked for work without success in other parts of Tasmania and considered himself to be in a better financial and emotional position residing with his mother, as they depended upon each other.

His orthopaedic surgeon, who had seen him in 1982 and in 1991, reported a back injury and spinal surgery in the early 1970s with some improvement of symptoms. He considered Kent was unable to undertake heavy work as a labourer but could undertake lighter duties. He assessed an incapacity 'of the order of 50%'.

Place of residence

The Tribunal found Kent's desire to continue to live at Saltwater Peninsula 'understandable' but considered his place of residence compounded his difficulties. He resided in an area where the principal occupations are fishing, farming or timber getting all of which require a high degree of physical ability. He had no clerical or other skills—

> 'yet the medical evidence is such that he is most certainly unfit for day-to-day work in a labouring type occupation. In addition, having already been the recipient of workers compensation it is extremely unlikely that he would be able to attract an employer who is prepared to engage and remunerate him. This is all the more so in the time of economic recession (if not depression). . . . On the other hand the medical evidence makes it clear that the applicant is capable of light work if such work existed in his locality.'

The Tribunal said Kent 'cannot expect the tax-payer to subsidise his semi-retired lifestyle in an area of quiet natural beauty with low economic activity'. It said if light work was not available at Saltwater River or on the Tasman Peninsula the remedy was in Kent's own hands and he must be prepared to move to where work was available.

Formal decision

The Tribunal affirmed the decision to cancel invalid pension.

[B.W.]

Overpayment: benefits not claimed or received

FARRAR and SECRETARY TO DSS

(No. 7191)

Decided: 31 July 1991 by Mr K.L. Beddoe.

The question for decision was whether the applicant had been overpaid sickness benefits totalling $1179.

The legislation

Section 246 of the *Social Security Act* 1947 provides for recovery of overpayments made in consequence of false representations. Section 246(2) provided in part that where an amount has been paid by way of benefits under the Act that should not have been paid and the person to whom that amount was paid is receiving benefits under the Act then the amount is to be recovered by amounts deducted from those benefits.

The evidence

Between August 1982 and April 1984, 5 duplicate cheques had been issued by the DSS on Applications for Duplicate Cheque forms allegedly signed by Farrar. On each occasion, both the original and the duplicate cheques had been negotiated for cash or deposited to the credit of Farrar's bank account at branches of the Commonwealth Bank in suburban Sydney. The cheques had been endorsed with a signature purporting to be that of Farrar.

On one occasion in October 1982 a driver's licence purporting to be that of Farrar was exhibited when a duplicate cheque was negotiated. Farrar denied having held a driver's licence at the time, but this was contradicted by a letter from VicRoads certifying that Farrar's licence was re-issued in May 1982 and remained current until May 1985.

Farrar denied having received the cheques or indeed any payments from the DSS in the period. He said that he had not applied for nor received benefits. The DSS was unable to produce the relevant applications for benefit which it alleged had been lodged by Farrar.

Farrar gave evidence, corroborated by his uncle, that he was at all relevant times in employment in Victoria, and that he had seen his wife's father forging documents.