

unable to live together as a result of illness or infirmity and that inability was likely to continue indefinitely.

Section 168(3) of the *Social Security Act 1947* gave the Secretary power to determine that an increased rate of pension be paid. Where that determination was made following advice of changed circumstances, s.168(4)(c) stated that the determination took effect on whichever was the later of the day the advice was received or the day on which the change occurred.

Arrears not payable

The AAT decided that the applicants met the requirements of s.33(2) and were *prima facie* entitled to the single rate of pension for the period 4 April 1990 to 3 July 1990. However, by the time they notified the DSS of their changed circumstances they were again able to live together and were no longer entitled to the single rate. Payment could not be made at the increased rate for the period 4 April 1990 to 3 July 1990 because of s.168(4)(c).

The AAT pointed out that 'the existence of qualifying circumstances alone does not give rise to entitlement to payment' under the scheme of the *Social Security Act 1947*: Reasons, para. 11. There was no entitlement to payment pursuant to s.33(2) until a formal determination to that effect was made under s.168(3) and 'entitlement commences only on the date on which the determination takes effect, which date is established by paragraph 168(4)(c)': Reasons, para. 10. In this case that was 20 August 1990, which was after the period during which the applicants met the requirements of s.33(2).

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Invalid pension: intellectual impairment/educational handicap

MARTIN and SECRETARY TO DSS

(No. 7607)

Decided: 20 December 1991 by M.T. Lewis, J. McClintock, and J. Kalowski.

Martin asked the AAT to review a decision of the SSAT which affirmed a DSS decision to reject his claim for invalid pension. The claim was rejected on the grounds that, although Martin had a permanent incapacity, it was less than 85% and his physical impairment did not directly cause at least 50% of his incapacity.

The legislation

The AAT had to determine which was the relevant legislation — the *Social Security Act 1947* or the 1991 Act. It followed the case of *Simek* (reported in this issue of the *Reporter*) and applied the 1991 Act.

The facts

Martin was 33 at the time he applied for invalid pension. He sustained a low back injury at work in February 1985 and was paid compensation until liability ceased in November 1987. On 19 October 1987 he lodged a claim for sickness benefit for chronic back strain. In June 1988 he lodged an application for unemployment benefit. In October 1988 he claimed both sickness and invalid pension.

Martin contended that the only work he could do was truck driving and driving machinery. He said he could no longer lift, bend, drive or do factory work because of his back. He could not read or do mathematics and was accordingly unsuited for clerical or sales work. He left school at 14 years of age and had worked sweeping and wrapping parcels and later gained a fork lift driver's licence. He also worked for 7 years driving a truck. In addition to back pain, he said he suffered headaches and was last admitted to hospital for migraine 8 or 9 months ago. He drove a modified car because of safety problems arising from his right leg disability following the work accident.

Psychological evidence to the Tribunal indicated Martin was at the lower extreme of the low average range

of intellectual capacity, with poorly developed numeracy and literacy skills but had sufficient intellectual capacity to work as a labourer, storeman or security officer.

The issues

The issues were whether or not Martin suffered from physical and/or mental conditions, and, if so, to what extent was he incapacitated for work. The Tribunal found that Martin had a behavioural problem which was part of his mental disability and that he suffered from quite significant social disabilities. He was found to be 85% incapacitated for work with at least half of that incapacity arising out of physical and mental impairment.

Formal decision

The decision under review was set aside.

[B.W.]

Invalid pension: which legislation?

SECRETARY TO DSS and MIFSUD

(No. 7649)

Decided: 9 January 1991 by I.R. Thompson.

Rose Mifsud claimed invalid pension on 17 September 1990. Her claim was rejected and she appealed to the SSAT. The SSAT set aside the rejection and directed that she was eligible for pension. On 15 May 1991, the DSS appealed to the AAT.

Which legislation?

The *Social Security Act 1947*, under which Mifsud had claimed invalid pension, was replaced from 1 July 1991 by the *Social Security Act 1991*.

Schedule 1A to the 1991 Act contains provisions dealing with transitional issues. Clause 15(1) of the Schedule provides that an application (to the AAT) for review under the 1947 Act which has not been determined before 1 July 1991 has effect, from 1 July 1991, as if it were an application for review under the 1991 Act.

According to cl.15(3), where a decision of the AAT takes effect prior to 1 July 1991, the decision takes effect in that period as if it were a decision made under the 1947 Act.