for a further 6 months and subsequently received workers' compensation until his claim was settled in 1983.

Apart from work as a casual bus driver in 1983 he had not worked in the paid workforce since then. He and his family lived on a 70-hectare rural property used as agistment and on which Hardy's wife kept a few horses and sheep.

In 1981 Hardy underwent a laminectomy which he hoped would enable him to return to work. He claimed his back condition had continued to deteriorate over time, that he suffered deterioration in his ankle, pain between his shoulder blades, pinches in his neck, numbness in his arms, cramps in his hands and pain down his back and legs. He described intermittent 'back attacks' associated with activity, and problems with his knee. He had received assistance from the Commonwealth Rehabilitation Service and was able to do housework including vacuuming. He walked on the property, swam in warm weather, enjoyed archery, photography and leatherwork and occasionally went rabbit shooting. He could drive and visited friends. Hardy told the Tribunal that he wanted to work and had pursued options through the Rehabilitation Service.

A report from an orthopaedic surgeon indicated that Hardy suffered from mild degenerative changes typical of a man of his age group, and although his physical impairment did not amount to 85%, he was eligible for invalid pension because of his low educational standard, time out of the workforce and age. Medical evidence called by the DSS indicated that the applicant had genuine pain but not of such a degree as to prevent him working.

Degree of incapacity

The question before the AAT was whether Hardy was permanently incapacitated for work to a degree of not less than 85% within the meaning of s.27 of the *Social Security Act* 1947. It cited with approval Wilcox J's summary of *Panke* (1981) 2 *SSR* 9 in the Federal Court case of *Adamou* (1985) 7 ALN N203. Wilcox J referred to the two stage process of evaluation of incapacity required by *Panke*: first, an assessment in medical terms of the extent of a disability; and, second, a determination of the extent to which that disability impaired the ability of the applicant to engage in employment.

The decision

The AAT found that Hardy did have a medical disability which gave him problems with his neck, back and ankle, but that he was not suffering total incapacity. It also decided he had not shown much initiative to obtain employment and that he acknowledged he was fit for light work. It rejected the evidence of a physiotherapist that Hardy was unable to undertake driving or any work involving lifting or bending, because her evidence conflicted with Hardy's description of his activities.

In considering the extent to which the disability impaired the ability of Hardy to engage in employment the AAT said the primary issue was whether Hardy lacked the capacity to earn, and whether he could be suitably trained or rehabilitated to engage in employment, taking into account his physical restrictions. It was satisfied that there were many occupations which would be suitable for him, after some training, and that he had the ability to set up his own business.

In considering whether Hardy had the ability to attract an employer, the AAT followed *McGeary* (1982) 11 *SSR* 112. It found that Hardy lacked motivation and had waited for employers to seek him out. Hardy's concern that activity might cause a back attack and make him unreliable was not considered to be a reason for finding that he was qualified for invalid pension. Although a person's capacity to sustain his work throughout a normal working day or week is a relevant consideration, medical evidence indicated that Hardy was capable of sustained activity. It decided that he was not 85% incapacitated for work.

Formal decision

The decision of the DSS to cancel invalid pension was affirmed.

[B.W.]

Invalid pension: both grounds

SECRETARY TO DSS and ASHTON

(No. 7983)

Decided: 26 May 1992 by J.A. Kiosoglous, D.J. Trowse and J.Y. Hancock.

Ashton sought review of a decision of the SSAT which had affirmed a decision of the DSS rejecting his claim for invalid pension. The SSAT found that Ashton was not 85% incapacitated for work and that there was insufficient medical evidence to show that at least 50% of his incapacity was directly caused by a permanent physical or mental impairment.

The facts

Ashton was 44 years old and was born in Sydney. He lived in Port Augusta and had suffered 2 injuries to his right ankle, myopia, degenerative spinal diseases and mild chronic bronchitis. He had left school at age 13 and worked briefly in a chrome plating factory, leaving because the fumes affected his lungs which had been damaged by a bronchial condition. He worked briefly in labouring jobs interspersed with periods of unemployment. In 1965 Ashton suffered a back injury in the course of his employment and he said he had suffered recurrent pain ever since.

He claimed invalid pension in June 1989 and following a medical assessment which found him to have a 10% disability the claim was rejected.

The decision

The AAT said that in the event that the bronchial condition had developed after the date of the application it would not have jurisdiction to take the condition into account. On the evidence, the AAT was satisfied that the condition did develop prior to the lodgement of the claim.

It was not disputed between the parties that Ashton had a permanent disability. In dispute was the extent of the permanent incapacity and whether at least 50% of it was directly caused by a permanent physical or mental impairment.

The AAT found that Ashton had shown great fortitude in attempting to obtain employment over the years and had always displayed a willingness to work. It accepted that he suffered significant injuries to his back, spine, right foot, ankle and chronic bronchitis and that these were permanent. It also found that the medical evidence indicated that if he had a capacity for work it was extremely limited.

In determining that those medical disabilities affected his ability to engage in paid employment, the AAT took into account the House of Lords case of *Ball v William Hunt & Sons* [1912] AC 496, in which Lord Atkinson confirmed that the ability to engage in remunerative employment involves an ability to attract an employer who is prepared to engage and remu-

nerate the injured person.

The AAT found that factors (other than the medical factors) which needed to be taken into account included the fact that he had no formal qualifications, and no skills or experience for clerical work. Job prospects in Port Augusta were very poor and Ashton's prospects were exacerbated by his medical conditions. The AAT decided that Ashton was virtually unemployable, considering the nature and extent of his disabilities, his inability to sustain his work effort throughout a normal working day, or week, his low educational standard and the absence of work in the community where a person with those same characteristics may reasonably be expected to perform. He thus satisfied the criteria set out in s.27(a) of the Act.

In finding that Ashton satisfied s.27(b) the AAT considered that he lacked the ability to attract an employer prepared to engage and remunerate him, and that this was directly related to his physical impairment.

Formal decision

The AAT set aside the decision under review and substituted a decision that Ashton was entitled to invalid pension from the date of his claim.

[B.W.]

Invalid pension: incapacity and impairment

HOCKING and SECRETARY to DSS

(No. 7798)

Decided: 5 March 1992 by S.A. Forgie.

Barry Hocking lodged a claim for invalid pension which was rejected by the DSS in December 1989. The SSAT affirmed that decision and Hocking asked the AAT to review the SSAT decision.

The legislation

The AAT said that there was no dispute between the parties that ss.27 and 28 of the *Social Security Act 1947* were the applicable provisions in the present case.

Section 28 provided that a person who met age and residence requirements and was 'permanently incapacitated for work' (or permanently blind) was eligible for invalid pension.

Section 27 provided that a person would be permanently incapacitated for work if the degree of the person's permanent incapacity for work was not less than 85% and at least 50% of that incapacity was directly caused by a permanent physical or mental impairment.

The evidence

Hocking was born on 27 September 1940. After leaving school at the age of 15 and undergoing 4 years' training, he worked as a pharmaceutical assistant for about 20 years, and as a hotel manager for 4 years.

In 1984, Hocking moved to Queensland, where he could not find a job.

Hocking suffered from degenerative changes to his lumbar spine, and suffered pain in his back. He was unable to sit or stand for any significant period without changing his position.

Although his doctor expressed the opinion that Hocking was unfit for work, other medical practitioners said that he could undertake sedentary work, particularly if he reduced his weight, increased his fitness and adopted pain management strategies. Two medical practitioners who had examined Hocking on behalf of the DSS assessed his medical impairment at no greater than 20%.

The AAT's conclusion

The AAT noted that, although Hocking's doctor had said that Hocking was unfit for work, the doctor had not addressed the degree of disability suffered by Hocking. The only evidence of that, the AAT said, was the evidence of the two practitioners who had reported for the DSS.

The AAT accepted their evidence: because they had put the degree of Hocking's medical impairment at no greater than 20%, the AAT was 'unable to find that the degree of any impairment of Mr Hocking's is at least 50% of any permanent incapacity from which he suffers': Reasons, para. 22.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Backdating invalid pension: claim for another payment

CALDERARO and SECRETARY TO DSS (No. 2)

(No. 7038A)

Decided: 5 June 1992 by I.R. Thompson.

Rosanna Calderaro was born in 1959 and left school at the end of 1975. She abandoned a business college course a few months later because of ill health and had never been in paid employment.

In November 1976, Calderaro claimed sickness benefit, which was granted and paid until July 1977. In July 1983, she claimed unemployment benefit, which was granted and paid until October 1986.

On 31 March 1989, Calderaro claimed invalid pension, which the DSS granted from 13 April 1989.

Calderaro appealed to the SSAT against the decision to pay her invalid pension from 13 April 1989. When her appeal was dismissed, she applied to the AAT for review. The AAT affirmed the SSAT's decision: *Calderaro* (1991) 62 *SSR* 874.

On appeal, the Federal Court set aside the AAT's decision and remitted the matter to the AAT for reconsideration: *Calderaro* (1991) 65 *SSR* 924.

The legislation

At the time of the first AAT decision, s.159(5) of the *Social Security Act 1947* gave the Secretary a discretion to treat a claim for one payment under the Act as a claim for another payment that was 'similar in character'.

The Federal Court decided that, although the AAT was correct that Calderaro's 1983 claim for unemployment benefit could not be treated as a claim for invalid pension (because the 2 payments were not 'similar in character'), the AAT had taken too narrow an approach when considering whether the 1977 claim for sickness benefit should be treated as a claim for invalid pension.

By the time the matter came back to the AAT, the 1947 Act had been repealed and replaced by the *Social Security Act 1991* (from 1 July 1991); and provisions in the 1991 Act dealing