Health: Platel and his wife are both incapacitated for work, but this of itself was not sufficient to find special circumstances. There was no evidence before the AAT that the Platels had ongoing substantial health costs.

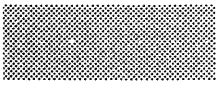
Incorrect legal advice: There are a number of AAT decisions which had found that incorrect legal advice was not a special circumstance.

The AAT concluded that the Platels were largly responsible for their straitened financial circumstances, and that it was not appropriate to exercise the discretion in this matter.

Formal decision

The AAT affirmed the decision under review.

[C.H.]



WILKS and SECRETARY TO DSS

(No. 8272)

Decided: 24 September 1992 by M.D. Allen.

Gregory Wilks requested review of a DSS decision (affirmed by the SSAT) to pay him the invalid pension at a rate which was less than he had been paid previously.

Wilks was granted invalid pension in 1986. He was also in receipt of miner's compensation which was assessed as income by the DSS. In 1989, Wilks was advised by his doctor to sell his house near Newcastle and move north. The proceeds from the sale of his house were placed in a bank account which raised his assets above the assets test limit. Payment of the invalid pension was cancelled.

In September 1990, Wilks purchased another house in Port Macquarie and re-applied for invalid pension which was granted at a reduced rate, i.e. at a rate less than it had been paid before it was cancelled.

The legislation

The *Social Security Act* 1947 was amended in 1987 so that, where a person commenced to receive a pension after 1 May 1987, any payment of compensation was deducted from the rate of invalid pension on a dollar for dollar basis. Where the pension was being paid before 1 May 1987, compensation was treated as income and the ordinary income test applied.

Because Wilks had re-applied for the pension after 1 May 1987, his compensation payments were directly deducted from the rate of payment of his pension. Thus he was paid at a lower rate than he had been before he sold his house in Newcastle.

Special circumstances

Although the 1947 Act applied when Wilks first sought review, the applicable legislation was now the *Social Security Act* 1991: see *Hodgson* (1992) 68 *SSR* 982.

Section 1184 of the 1991 Act states that the Secretary may treat the whole or part of any compensation payment as not having been made in the 'special circumstances' of the case.

The AAT found it appropriate to treat part of the compensation payments made to Wilks as not having been made for the following reason. Wilks had originally received his pension before 1 May 1987 and his compensation payments were treated as ordinary income. He lost his pension temporarily after he sold his house. The AAT said that Wilks did not lose his entitlement to the invalid pension, and — 'Strictly speaking I see no requirement for the applicant to have re-applied for the grant of invalid pension': Reasons, p. 3. Wilks simply had to satisfy DSS that that his assets and income were such that he was entitled to be paid the pension at a rate greater than nil.

Wilks was not told by the DSS that the legislation had changed when he attended their offices to provide information as required. Correspondence from the DSS to Wilks continued to refer to compensation payments as income which was misleading according to the AAT. Wilks had made his financial arrangements on the basis that his compensation payments would continue to be treated as income and so had suffered financial hardship. The AAT concluded that it could not direct the DSS to treat compensation payments to Wilks as income, but thought the same result would be achieved if half of each compensation payment was treated as not having been made.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary to DSS with directions that one half of every fortnightly payment of miner's compensation received by Wilks between 27 September 1990 and 12 October 1991 be regarded as not having been made.

[C.H.]

Cohabitation: job search allowance

GRAY and SECRETARY TO DSS

(No. 8216)

Decided: 1 September 1992 by B.J. McMahon, T.R. Russell and G.A.R. Johnston.

Robert Gray asked the DSS to pay him job search allowance after he was retrenched from his job. The DSS decided that he was living in a marriage-like relationship and assessed his claim accordingly. He asked for a review of the decision and, after it was affirmed by the SSAT, he appealed to the AAT.

The legislation

Section 4(2) of the *Social Security Act* 1991 sets out the circumstances under which a person will be treated as a member of a couple, including where the person is in a relationship which the Secretary considers to be a marriage-like relationship.

Section 4(3) lists the factors which must be taken into account in determining whether a marriage-like relationship exists. Broadly, the factors cover the financial relationship, the social relationship, arrangements concerning the household and any children, the existence of a sexual relationship and the parties' own perception and commitment.

The facts

Gray had moved in with Ms M in 1976, having first met her in 1975. They had continued to live together since then and three years ago, she had arranged for the house (which she owned, having bought out her ex-husband with assistance from Gray) to be transferred to him as a joint tenant. Although they originally had a sexual relationship, this ceased in 1979 and they had used separate bedrooms since that time.

In addition to the house they lived in, they also owned a time-share apartment as joint tenants and had holidays together there and at other places. Their social lives were considerably intermingled and they often socialised as a couple. They were both active Christians and 'a good deal of their life revolves around their Church and like-minded friends'.

Gray and Ms M had a joint bank account, from which shopping expenses were paid and they each had credit

cards in their own name, though settlement of those bills was usually made out of the joint banking account. As the AAT noted: 'There could not be a closer or more significant pooling of their financial resources': Reasons, para. 7.

The AAT's reasoning

The AAT noted, applying the Federal Court's propositions in *Lambe* (1981) 4 *SSR* 43, that in deciding whether a marriage-like relationship exists, 'all facets of the inter-personal relationship' must be taken into account.

Commenting first on its own perception of the relationship, the AAT noted that Gray and Ms M did not consider themselves to be in a marriage-like relationship. However, after noting that they were 'upright, truthful people', the AAT did not find their own perception of the situation determinative, commenting that they appeared to be 'under a misapprehension as to the legal nature of the relationship between them. Almost all the objective indicia point to such a lasting and almost total exclusive commitment to each other, that the statutory tests are amply fulfilled': Reasons, para. 14.

The AAT suggested that the relationship between Gray and Ms M 'is closer and more stable, more imbued with complete trust and more satisfying than many marriages'. The AAT concluded that it was bound to find the existence of a marriage-like relationship because of the terms of the statute and the many binding decisions of courts.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Sickness benefit: temporary incapacity

CONLON and SECRETARY TO DSS

(No. 8133)

Decided: 31 July 1992 by J.A. Kiosoglous, D.J. Trowse and R.E. Elsmie.

Conlon had been receiving sickness benefit since July 1989. In May 1991, the DSS decided to cancel Conlon's benefit on the basis of a Commonwealth Medical Officer's opinion that he did not have a disability warranting continuation of sickness benefit.

The SSAT affirmed this decision because Conlon's conditions were permanent and not temporary. Conlon applied to the AAT, relying upon the Commonwealth Medical Officer's opinion that his condition was 'improving and temporary'.

The legislation

One of the qualifying conditions for sickness benefit under s. 117(1) of the *Social Security Act* 1947 was that the person 'was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature)'.

Tests applied

The AAT adopted the 'global' approach used by the AAT in *Shearim* (1984) 20 *SSR* 217 of simply asking 'was the applicant for any period prior to the date of cancellation temporarily incapacitated for work by sickness or accident?' and focusing on whether the applicant 'fell within the total parameters or [*sic*] entitlement to Sickness Benefit, a benefit intended for those suffering short-term loss of income because they are too sick or injured to work but who can be expected to recover': Reasons, para. 12.

The following test of permanency from the Full Federal Court in *McDonald* (1984) 11 *SSR* 114 (an invalid pension case) was also applied:

> 'the true test of a permanent, as distinct from temporary, incapacity is whether in the light of the available evidence, it is more likely than not that the incapacity will persist in the foreseeable future.'

(Reasons, para. 12)

Applicant's conditions permanent

Two of the 4 medical conditions suffered by Conlon, scoliosis and chronic obstructive airways disease, were regarded by the AAT as having little or no bearing on his capacity for work.

However, his other conditions, backache and anxiety and stress, were regarded as more likely than not to persist in the foreseeable future. They were, accordingly, permanent because they were very long-standing (at least 10 years) and were unresponsive to treatment. In coming to this conclusion, the AAT preferred the other medical evidence over the Commonwealth Medical Officer's opinion upon which Conlon had relied.

The AAT noted that Conlon acknowledged that he had some capacity for work but also encouraged him to apply for disability support pension

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Invalid pension: Incapacity for work

ANTIC and SECRETARY TO DSS

(No. 8290)

Decided: 2 October 1992 by R.A. Balmford, R.C. Gillham and L.S. Rodopoulos.

Vera Antic claimed invalid pension on 7 December 1990 and this was rejected by the DSS on 24 January 1991 and affirmed by the SSAT on 9 September 1991. (Antic had originally claimed invalid pension on 23 January 1987 and the AAT affirmed the rejection of that claim on 17 March 1989.) That decision was made on the basis of ss.23 and 24 of the *Social Security Act* 1947 as they stood at the date of the claim. The present claim was decided on the basis of ss.27 and 28 of the *Social Security Act* 1947.

The facts

Antic was born in Yugoslavia in 1938 and came to Australia in 1974. She worked in factories until 1976, when she attended hospital with a 'sensitivity rash to quinine tablets', which had been prescribed for cramps. She was treated and the rash settled. She had neither worked nor looked for work since then. She divorced in 1987 and lived with her daughter who was an invalid pensioner.

Antic claimed attacks of shaking, a choking feeling and stiffness in her hips and legs. An orthopaedic surgeon diagnosed a disc prolapse causing low back pain and right sciatica and found her to be unfit for any work involving bending and lifting. Her treating psychiatrist diagnosed anxiety-depression with inadequate functioning and lack of confidence.

The AAT preferred evidence called by the DSS from Dr Minas to that of the treating doctor 'because of his recognised expertise in the field of tran-