Administrative Appeals Tribunal decisions

Age pension claim: 'Australian residence'

OESPER and SECRETARY TO DSS

(No.8567)

Decided: 5 March 1993 by B.A. Barbour.

Mrs Oesper was born in Germany in 1929. She lived and worked in Australia from April 1954 to December 1964, October 1965 to May 1969 and September 1969 to May 1973.

In May 1992 Mrs Oesper returned to Australia from Germany on a visitor visa in order to claim age pension. She left Australia on 26 June 1992 following rejection of her claim. That rejection was affirmed by the SSAT and the AAT application was determined on the papers, by agreement, the applicant then residing in Germany.

The DSS conceded that Mrs Oesper qualified for age pension (which included the necessary 10 years' qualifying residence) but rejected her claim because it was not a 'proper claim'.

The legislation

Section 48(1) of the *Social Security Act* 1991 requires a 'proper claim' to be made for age pension. A claim is not a 'proper claim' unless the person is (a) an 'Australian resident'; and (b) in Australia, on the day the claim is lodged (s.51).

'Australian resident' is defined in s.7(2) and requires the person to (a) reside in Australia; and (b) satisfy one of a list of statuses including Australian citizenship, holding a permanent entry visa or resident return visa or being an exempt non-citizen.

Not an 'Australian resident'

The AAT decided that because Mrs Oesper did not satisfy any of the status requirements of s.7(2)(b) she was not an 'Australian resident' and therefore had not made a proper claim. No decision was made as to whether she was residing in Australia as required by s.7(2)(a) because this was a cumulative criterion, making a decision on that issue unnecessary.

Mrs Oesper said she had applied for a visa that would enable her to claim age pension. The AAT expressed regret if she travelled to Australia on the basis of erroneous advice or the provision of incorrect forms but said it was powerless to remedy this.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Bereavement payment: entitlement

HARRIS and DEPARTMENT OF SOCIAL SECURITY

(No. 8512)

Decided: on 29 January 1993 by P.W. Johnson.

Harris sought review of a DSS decision dated 13 May 1992 denying her application for a lump sum bereavement payment under s.82 of the *Social Security Act* 1991.

The facts

Harris' husband had been in receipt of unemployment benefit from 9 November 1989. At the time of his death on 18 February 1992 Harris was in receipt of age pension and her husband received newstart allowance.

On 4 May 1992 the DSS advised Harris she did not qualify for the payment under s.82(1) as her husband did not fall within any of the categories listed in s.82(1)(d). A review officer affirmed the decision on 13 May 1992 on the grounds that 'Section 82 of the Act provides that only pensioner (social security pensioners and service pensioners) couples are entitled to receive the lump sum bereavement payments'.

Harris appealed to the SSAT arguing that the Act had been amended by the *Social Security Amendment Act (No.3)* 1991 to include 'long-term social security recipient' receiving a 'social security benefit'. Section 23(1) of the amended Act defined 'social security benefit' as including a newstart allowance. Thus, if the amendments had applied to the applicant on 18 February 1992 she would have been eligible to obtain the bereavement package.

The SSAT noted that the amendment to the Act occurred in 1991 but became effective from July 1992 and she was therefore not entitled. The SSAT also said it had no power to grant an act of grace payment. The two issues for decision were whether Harris qualified for a bereavement payment, and whether there were discretions available.

The findings

The AAT decided that the DSS decision was correct and Harris had no legal entitlement to the payment. Her husband, at the time of his death, did not come within any of the categories in s.82 and there is no power in the Act for a discretionary payment to be made.

Act of grace payments

The review officer had advised Harris that her case had been referred for consideration of an act of grace payment, and this was rejected by the Manager Pensions on 12 August 1992. Decisions concerning these payments are made under s.70C of the *Audit Act* 1901 and are not subject to review by the AAT nor by the SSAT because they are not made under the *Social Security Act*. While the AAT said it would be inappropriate for it to make a recommendation either way it noted that the DSS did not give any reason or explanation to Harris. It therefore recommended that the DSS give further consideration to the matter and that it give reasons for its decision.

The AAT commented that act of grace payments are usually made on the basis that there is something distinctively anomalous or inequitable about an individual's situation. Simply to be a member of a class of people who are not afforded a benefit is not enough. A relevant consideration would be whether, as against members of the public at large, there is some special justification for granting what is otherwise denied. A proposed legislative change would not be sufficient. As the AAT observed in the case of *Grillo* (1991) 58 *SSR* 786 the fact that someone dies on a certain day shortly before benefits become available is one of life's unfortunate ironies.

In previous decisions where the AAT has ventured into the sensitive area of commenting upon act of grace payments it has tended to draw attention to something peculiar to that particular case, such as misinformation by the Department (*Weston* (1991) 61 *SSR* 845) or the creation of some expectation by DSS inaction or silence as in *Grillo*.

[B.W.]

Child disability allowance: arrears

HARRIS and SECRETARY TO DSS

(No. 8614)

Decided: 25 March 1993 by J.R. Dwyer.

The applicant asked the AAT to review a DSS decision not to backdate her payment of child disability allowance (CDA).

The facts

The applicant's son was born in March 1977. A claim for CDA was lodged in September 1990. Her son suffered from mild intellectual impairment which had been diagnosed in November 1981. He began school but did not advance beyond 'prep'. He later attended a special school for children with special needs.

The legislation

The applicable legislation was the *Social Security Act* 1947 as it was the legislation in force on the date of making the claim. Section 101 of that Act provided that a 'disabled child' was a child who had a physical, intellectual or psychiatric disability, because of that disability needed care and attention provided by another person on a daily basis that was substantially more than the care and attention needed by a child of the same age without such a disability, and was likely to need that care and attention permanently or for an extended period.

Section 102 provided that a person was qualified to receive CDA for a child if the person was eligible to receive family allowance in respect of the child, the child was a disabled child and the child received care and attention on a daily basis from the person or the person's spouse in a private home that is the residence of the person and the child.

Section 105(1) allowed CDA to be backdated up to 12 months prior to the lodging of the claim. This section was repealed on 29 December 1988. From that date s.158(1)(e) provided that payment of CDA shall not be made except upon the making of a claim for the allowance. A new s.159(4C) replaced it. Section 159(4C) purported to have the same effect as the repealed section in that it provided for the backdating of the payment for up to 12 months. But the new section did not express this purpose clearly according to the AAT. Section 105(1) had provided that CDA was payable, in the case of a person who was qualified before the lodging of the claim, 'from the commencement of the earliest family allowance period, being a family allowance period that commenced within 12 months of the day on which the claim was lodged'. But s.159(4C) provided that in those circumstances the claim was to 'be taken to have been lodged on . . . the day occurring 12 months before the day on which the claim was lodged'.

The AAT pointed out that the Act after its amendment in 1988 appeared to have a gap in that 'there was no section stating that CDA was not payable in respect of a period before the claim for CDA was lodged or was deemed to have been lodged under s.159(4C)'. The DSS did not disagree.

The question of arrears thus came down to the effect of ss.158(1)(e) and 159(4C). The AAT thought that s.158(1)(e) was ambiguous:

> 'In saying that payment of CDA should not be made except upon the making of a claim for that allowance, it could mean that there was no entitlement to payment of CDA in respect of any period of qualification for that allowance prior to the making of the claim. Alternatively, it could mean that although payment should not be made except upon the making of a claim for that allowance, upon the making of the claim, payment should be made in respect of any period of qualification for the allowance. Section 159(4C) provided that where a person became qualified to receive CDA more than twelve months before lodging the claim for CDA, the claim shall be taken to have been lodged on "the day occurring 12 months before the day on which the claim was lodged".'

(Reasons, paras 9-10; original emphasis)

The Tribunal concluded that due to the wording of s.159(4C) the first of the two alternative meanings of s.158(1)(e) should be adopted. To choose the second meaning would make s.159(4C) pointless:

> 'It is only if entitlement to payment in respect of periods of qualification for the allowance is limited by the date on which the claim was made, that there is any point in taking the claim to have been made twelve months earlier than it in fact was made. If, once the claim was lodged, payment could be made in respect of any period of qualification prior to that date, s.159(4C) would have no purpose.'

(Reasons, para.10)

As a result the Tribunal concluded that there was no entitlement to payment of CDA in respect of any period of qualification prior to the lodging of the claim for CDA.

Section 159(5) of the 1947 Act did provide a discretion to treat a claim for the payment of a pension, benefit or allowance as a claim for some other pension, benefit or allowance under the Act that was 'similar in character'. It was suggested that the claim for family allowance lodged in April 1977 could be so treated. This had been accepted by the SSAT. The AAT rejected this proposition.

The expression 'similar in character' had been discussed by the Federal Court in *Cooper* (1990) 54 *SSR* 727 and in *Calderaro* (1992) 65 *SSR* 924. In the latter case Gray J said that whether particular pensions, benefits or allowances were similar in character was essentially a question of fact. It was necessary to examine the features of each payment to assess whether there was a sufficient degree of similarity in character. Three matters were raised in that case: that greater significance should be attached to a similarity in an essential respect than to the presence with it of some dissimilarity; that it is relevant to consider whether the payments 'are similarly suitable to meet the circumstances which give rise to the application, and whether they are similarly grounded in those circumstances'; attention should be paid to practical realities rather than legal technicalities.

The AAT applied these considerations and concluded:

> 'The circumstance giving rise to an application for CDA is the existence of a child characterised under the Act as a disabled child, being a child needing care and attention on a daily basis that is substantially more than the care and attention needed by a child of the same age who does not have such a disability. Family allowance does not meet that cir-