Invalid pension: capacity for work

SECRETARY TO DSS and WARREN

(No. 2832)

Decided: 12 February 1993 by D.P. Breen, D.W. Muller and J.B. Morley.

In late September or early October 1990 a decision was made by the DSS to cancel Warren's invalid pension. The SSAT on 27 June 1991 set aside the cancellation, in effect reinstating his pension. The DSS applied for review of that decision.

Legislation

The relevant legislation was s.27 of the *Social Security Act* 1947 which, although since repealed, was in force at the date that the DSS cancellation decision was made. To qualify for invalid pension, the applicant had to be permanently incapacitated for work to the extent of at least 85%.

Incapacity for work?

Warren claimed to be incapacitated for work by reason of the medical condition of his back. A Commonwealth Medical Officer had assessed the incapacity of his back at nil per cent. Warren produced medical reports which the AAT accepted for the purpose of finding that he suffered from considerable handicap resulting from the condition of his back, and that he was incapacitated for his previous work as a concreter.

The DSS produced evidence that Warren had since at least mid-1988 been engaged in remunerative employment as a real estate salesman. The AAT found that he had been so employed, rejecting his evidence that his attendance at the real estate office was by way of unpaid work experience. (It appears that the evidence of his employment had not been put to the SSAT). The AAT concluded that the cancellation decision was correct.

The decision

The AAT set aside the decision under review

[P.O'C.]

[Editor's note: The AAT said that Warren had been charged with imposition on the Commonwealth in respect of the receipt of invalid pension payments while employed, but did not say whether the charges had been dealt with.]

Invalid pension: portability and rate

VISKOVICH and SECRETARY TO DSS

(No. 8600)

Decided: 19 March 1993 by S.D. Hotop, J.G. Billings and N. Marinovich.

Viskovich applied for review of a decision of the SSAT, affirming a decision of an Authorised Review Officer of DSS that her invalid pension was not payable while she was overseas.

The facts

Viskovich was born in Australia in 1970 and has suffered from cerebral palsy since birth. In 1976 she was taken to Yugoslavia by her parents, where she remained until December 1990.

On 13 December 1990 she returned to Australia alone and commenced to reside with her aunt and uncle. On 2 January 1991 she lodged a claim for invalid pension which was granted by a delegate on 21 March 1991. She then decided to return to Croatia because of her feelings of homesickness and her concern for the safety of her parents in the deteriorating political and social climate in that country. She applied on 1 May 1991 for payment of her pension overseas, and on 11 June 1991 her application was granted and a pre-departure certificate provided to her under s.60A(1). She left Australia on 15 June 1991 and has not returned.

After her departure her case was referred to the International Operations Branch, and an officer of that Branch decided, pursuant to s.1220(1) of the 1991 Act that invalid pension was not payable to her while she was outside Australia. This was because the officer decided that she had left Australia within 12 months of commencing to receive a pension as a resident and that her departure did not arise from circumstances that could not reasonably have been foreseen at the time of her return to Australia.

The legislation

Section 60A of the 1947 Act provided that where a person who was in receipt of a pension proposed to leave Australia and notified of that, they were required to have a pre-departure certificate. If they did not notify, they could not be paid pension after the first six months of absence. Section 62(1) provided that where a former Australian resident once again became an Australian resident and lodged a claim for pension before a period of 12 months' residence and then left Australia before the expiration of that period, pension was not payable while they were outside Australia. However, s.62(2) provided that if the departure prior to the end of the 12-month period arose from circumstances that could not reasonably have been foreseen at the time of their return to Australia, then the Secretary may decide that sub-section 1 does not apply.

At the AAT, it was conceded by the Department that Viskovich's reason for leaving Australia before the end of the 12-month period arose from circumstances that could not reasonably have been foreseen at the time of her return to Australia. Therefore, the Department purported to make a fresh decision under s.62(2) of the 1947 Act that Viskovich could continue to be paid invalid pension outside Australia, with the only issue remaining the rate at which her pension was payable under s.61 of that Act. Section 61 provided that the rate was to be calculated by a formula based upon the person's period of residence. This provided for a reduced rate of pension for any period of residence less than 25 years.

Effect of a concession at hearing

The AAT pointed out that despite the apparent concession, once a decision has become the subject of an application for review by the Tribunal, it is not open to the original decision-maker to alter that decision. Therefore, the AAT had a duty to exercise its jurisdiction for the purpose of determining what was the correct or preferable decision under s.62 of the 1947 Act. However, the Department's concession regarding Viskovich's reason for leaving Australia was a matter to which the Tribunal stated it would have regard.

The AAT held that it was satisfied that her reason for leaving Australia before the end of the period of 12 months arose from circumstances that could not reasonably have been foreseen at the time she arrived here. These included the eruption of civil war in Croatia, the serious concern for the safety of her parents, and the advice of her doctor that she should return because of the 'mental anguish' she was experiencing.

Therefore, the AAT decided that as s.62(1) of the 1947 Act did not apply to her invalid pension, she had the right to continue to be paid invalid pension out-

side Australia, and the only remaining issue was the rate of payment.

Rate of payment

By virtue of s.61, the rate payable to her overseas was to be determined in accordance with s.61(3) unless her circumstances fell within s.61(5). That subsection provided that proportional rates do not apply where a person becomes qualified to receive her invalid pension by becoming permanently incapacitated for work while she was an Australian resident.

The applicant submitted that she became qualified to receive invalid pension at birth because, having been born with the condition of cerebral palsy, she became permanently incapacitated for work at that time. She relied on *Secretary to DSS and Abaroa* (1991) 13 AAR 359 where the AAT held that a claimant had become permanently incapacitated for work at birth while an Australian resident.

However, two other decisions of the AAT on this issue did not support that argument. In *Secretary to DSS and Mancer* (1989) 53 *SSR* 703 the AAT held that the applicant's incapacity for work did not arise until she reached the age at which she could legally enter the labour market (viz 15 years). And, in the recent decision of the President in *Secretary to DSS and Raizenberg* (1993) 71 *SSR* 1023, a similar approach to the interpretation of the phrase 'incapacity for work' was adopted, i.e. that a person became incapacitated for work at the time when her incapacity (or impairment) affected her economically, i.e. at the age of 16.

The AAT pointed out that the approach taken in *Mancer* and *Raizenberg* to ss.27, 28 and 30 of the 1947 Act was perhaps even more readily applicable to s.61(5)(c) of the 1947 Act. This is because that paragraph refers not to a person who 'became permanently incapacitated for work . . . while the person was an Australian resident' but rather to a 'person who is receiving an invalid pension that the person became qualified to receive by reason of becoming permanently incapacitated for work . . . while the person was an Australian resident'.

> 'Clearly a person does not become qualified to receive invalid pension in terms of s.28 of the 1947 Act unless he or she is above the age of 16 years, and is, inter alia, permanently incapacitated for work. In the context of s.61(5)(c) of the 1947 Act this must be a reference to a person's incapacity lawfully to engage in paid work.'

(Reasons, para. 21)

Applying this approach, Viskovich's circumstances do not fall within s.61(5)(c) of the 1947 Act because she became qualified to receive invalid pension in 1986 (when she turned 16) at which time she was not an Australian resident. It follows that by virtue of s.61(1), the annual rate payable to her is the rate calculated in accordance with the formula prescribed by s.61(3).

The AAT went on to note some doubt about the original decision to grant invalid pension to her, given her residence, but pointed out that that was not the decision under review.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration in accordance with the direction that Viskovich be paid invalid pension in respect of the period 15 June 1991 to 14 June 1992 at the annual rate that would be payable apart from s.61, and thereafter at an annual rate calculated in accordance with the formula prescribed by s.61(3).

[R.G.]

Disability support pension: continuing inability to work

CHAMI and SECRETARY TO DSS

(No. 2887)

Decided: 3 June 1993 by M.T. Lewis, H.D. Browne and T.R. Russell.

Chami had been receiving invalid pension and then disability support pension since May 1987 when, following a review, his pension was cancelled from 7 February 1992 on the ground that he no longer satisfied s.94(1)(c) *Social Security Act* 1991. The decision of the DSS was affirmed by the SSAT and Chami applied to the AAT for review.

Legislation

In order to qualify for disability support pension, s.94(1)(c) requires that the person have a 'continuing inability to work'. That term is relevantly defined in s.94(2), (3) and (5):

> '(2) A person has a continuing inability to work if the Secretary is satisfied that:
>
> (a) the person's impairment is of itself sufficient to prevent the person from doing:
>
> (i) the person's usual work; and
>
> (ii) work for which the person is currently skilled;
>
> for at least 2 years; and
>
> (b) either:
>
> (i) the person's impairment is of itself sufficient to prevent the person from undertaking educational or vocational training during the next 2 years; or
>
> (ii) the person's impairment does not prevent the person from undertaking educational or vocational training but such training is not likely to equip the person, within the next 2 years, to do work for which the person is currently unskilled.
>
> (3) In deciding whether or not a person has a continuing inability to work under subsection (2), the Secretary is not to have regard to:
>
> (a) the availability to the person of work in the person's locally accessible labour market (unless subsection (4) applies to the person); or
>
> (b) the availability to the person of educational or vocational training.
>
> (4) . . .
>
> (5) In this section:
>
> 'educational or vocational training' does not include a program designed specifically for people with physical, intellectual or psychiatric impairments;
>
> 'work' means work:
>
> (a) that is for at least 30 hours per week at award wages or above; and
>
> (b) that exists in Australia, even if not within the person's locally accessible labour market.'

It was not in dispute that the applicant had a 'physical, intellectual or psychiatric impairment' of 20% or more under the Impairment Tables, as required by s.94(1)(a) and (b).

The applicant, who was born in Lebanon in 1950, was injured in a car accident in 1982. He suffered an ankle injury and fracture of his left hand, and had not worked since.

Extent of the impairment

The AAT found that Chami's complaints of disabling pain were genuine. It also found that he suffered from chronic pain behaviour, which was at least partly psychological in origin. Because of his disability and lack of motivation to undertake rehabilitation, he was unlikely to respond to attempts to rehabilitate him. The AAT found that Chami's poor motivation arose directly from his abnormal illness