Administrative Appeals Tribunal decisions

Disability support pension: continuing inability to work

SECRETARY TO DSS and HAMAL
(No. 8967)

Decided: 6 September 1993 by O'Connor J, M. Lewis and J. Campbell.

Emil Hamal came to Australia from the Lebanon in 1969. He worked as a panel beater. He was granted an invalid pension in November 1987, and a disability support pension (DSP) in November 1991.

In May 1992, the DSS decided to cancel Hamal's DSP. On review, the SSAT affirmed that decision. Hamal appealed to the AAT. He was 45 years of age at the time of the AAT hearing.

The legislation

Section 94(1) of the *Social Security Act* 1991 specifies the qualifications for DSP. Apart from age and residence requirements, a person must have –

- a physical, intellectual or psychiatric impairment assessed at 20% or more under the Impairment Tables (in sch. 1B to the Act): s.94(1)(a) and (b); and
- a continuing inability to work: s.94(1)(c).

The concept of continuing inability to work is amplified in s.94(2) of the Act. There are two elements. To meet the requirement, a person's impairment must of itself prevent the persons:

- doing the person's usual work and work for which the person is currently skilled: s.94(2)(a); and
- undertaking educational or vocational training during the next 2 years which would be likely to equip the person, within the next 2 years, to do work for which the person is currently unskilled: s.94(2)(b).

Impairment

Hamal suffered from psoriasis, which produced psoriatic arthritic pain. An occupational medicine specialist, who examined Hamal on behalf of the DSS, assessed him as having an impairment of 15%, because of effects on his right arm and cervical spine.

An occupational medicine specialist who was treating Hamal disagreed. She found that Hamal had degenerative changes in his elbows, wrists and left hip as well as problems in his thoraco lumbar and cervical spines, skin problems and a psychiatric impairment. She assessed Hamal's impairment as 51%. Hamal's psychiatrist agreed that Hamal had a psychiatric condition, which by itself justified an impairment rating of 10%.

The AAT preferred the evidence given by Hamal's medical advisers. It rejected the assessment made by the DSS doctor, that Hamal was 'excitable'. That did not accord with the AAT's own observation of Hamal during the hearing and was, the AAT said, 'stereotyping and disparaging'. On the basis of the evidence given on behalf of Hamal, the AAT found that Hamal had an impairment of more than 20%.

Continuing inability to work

The occupational medicine specialist used by the DSS said that Hamal could not undertake his usual work as a panel beater; but expressed the opinion that Hamal could undertake training during the next 2 years for occupations such as a cleaner, car park attendant, service station attendant or cashier.

On the other hand, a psychologist gave the AAT the results of a number of tests which she had carried out on Hamal. He had a low IQ score (70-80), but scored in the first percentile level of Year 10 of the Australian technical student population on another test. The psychologist said that Hamal's scores suggested that he would learn skills best on the job and not in a situation involving study or formal tuition.

Hamal's psychiatrist told the AAT that Hamal's depression affected his motivation, producing lack of confidence and enthusiasm; and would interfere with his capacity to work and undergo training.

The AAT found that Hamal was functionally illiterate in English.

Turning to s.94(2), the AAT agreed with the approach taken in *Chami* (1993) 74 *SSR* 1073, that a person's 'usual work' is the work in which he had been commonly employed.

The AAT rejected the argument advanced on behalf of the DSS, that factors such as poor language skills and lack of motivation should not be taken into account when determining the impairment which 'of itself' prevented a person undertaking work:

> 'The test for determining whether a person's impairment prevents him or her from doing the "work for which the person is currently skilled", requires, first an objective assessment of the work for which the applicant is currently skilled. This will be a question of fact in each case. There may be a number of relevant factors which will assist in determining a person's current skill level, including, in our view, a person's facility with spoken and written English and education levels. The second step, after determining what work a person is currently skilled to perform, is to determine whether the person's impairment prevents him from performing it.'

(Reasons, para. 40)

The AAT said that Hamal's lack of English made it extremely doubtful that he had the current skill levels to perform such jobs as museum attendant, car park attendant, service station attendant or warehouse supervisor.

Even if Hamal had the necessary skills, the level of his impairment would prevent him undertaking that type of work. In considering this question, the AAT said, it should assume a 'normal' workplace and not the workplace of a 'benign employer'. Hamal had a limited capacity to lift and carry, he could not tolerate a dirty, chemical-laden environment and he could not sit for sustained periods.

In addition, the AAT said, Hamal's impairment was 'inextricably interrelated with a lack of motivation'. The AAT said that:

> 'a lack of motivation that is consequential upon the impairment found under the impairment Tables can be taken into account for the purpose of deciding whether the person has a continuing inability to work.'

(Reasons, para. 47)

The AAT then found, on the evidence as a whole, that:

> 'Hamal's physical, intellectual and psychiatric impairment, plus his lack of motivation consequent on that impairment, is of itself sufficient to prevent [Hamal] from performing the work for which he is currently skilled.'

(Reasons, para. 48)

Turning to the question whether Hamal's impairment of itself was sufficient to prevent him undertaking educational or vocational training in the next

2 years, the AAT said that the training referred to in s.94(2)(b) could not be 'on the job training', because it was formal training conducted prior to the person taking up employment: Reasons, para. 50. And training specifically designed for people with impairments was excluded from the definition of educational or vocational training in s.94(5).

It was clear from the evidence of the psychologist, the AAT said, that Hamal's impairment would prevent him undertaking educational or vocational training during the next 2 years: he did not have the intellectual capacity or aptitude for formal study; he lacked English skills, did not have sustained concentration and was unable to sit for prolonged periods; he had been assessed as unemployable by the Commonwealth Rehabilitation Service; and he had 3 failed attempts at rehabilitation.

Formal decision

The AAT set aside the SSAT decision and decided that Hamal was qualified for DSP and that his DSP should be reinstated.

[P.H.]

Income test: Italian pension

SECRETARY TO DSS and PELLONE
(No. 8786)

Decided: 11 June 1993 by W.J.F. Purcell.

Maddalena Pellone, an Australian resident, began to receive an Australian age pension in June 1985. She was granted an Italian 'survivor's pension', with effect from 1 August 1989, in November 1991.

The DSS then reduced Pellone's age pension on the basis that the survivor's pension was 'income' under the *Social Security Act* 1991.

Pellone appealed to the SSAT, which decided that Pellone's pension should be maintained without regard to the Italian pension (which Pellone had not yet received).

The DSS appealed to the AAT.

The legislation

Section 8(1) of the *Social Security Act* defines 'income' of a person to mean 'an income amount earned derived or received by the person for the person's own use or benefit'.

Section 1208(1) of the Act reads as follows:

> 'The provisions of a scheduled international social security agreement have effect despite anything in this Act.'

According to s.1208(4), an agreement is a scheduled international social security if it is an agreement between Australia and a foreign country, relating to reciprocity in social security matters and the text of the agreement is set out in a Schedule to the Act.

Schedule 3 contains an agreement between Australia and Italy. Article 16 of the agreement, entitled 'Determination of Claims', provides in art. 16(4) that one of the contracting parties (Australia or Italy) may request the other party to pay any arrears of pension, owing by the other party to a pensioner, to the first party so as to allow the first party to recover from the arrears any overpayment of pension made by the first party to the pensioner.

The AAT's decision

The AAT agreed with the DSS that Pellone's Italian pension was 'income' for the purposes of the *Social Security Act*, even though Pellone had received none of the pension by June 1993 and it was not known when she would receive the arrears of pension (owing from 1 August 1989). The Federal Court's decision in *Inguanti* (1988) 15 ALD 348; 44 *SSR* 568 required the pension to be treated as income because, even though it had not yet been received, it had been derived by Pellone.

However, the AAT said, art. 16(4) of the relevant agreement gave the DSS power to recover any overpayment of age pension made to Pellone while she was waiting for the payment of her Italian pension to commence; and the article should be used to avoid the harsh result which would follow from treating as income moneys not yet received. The AAT rejected an argument advanced by DSS that art. 16 only applied where a claim for pension had not yet been determined; and said:

> '15. The purpose of the Agreement between the two countries is to co-ordinate the operation of their respective social security systems, and to enhance the equitable access by people who move between Australia and Italy. An element of that co-ordination is to ensure that "double-dipping" does not occur, and that each Government is able to recover overpayment of benefit from lump sum arrears of the other Government's benefit.
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> 16. Social security legislation is beneficial in nature and should be so construed, unless it appears by clear words that such was not the intention of the legislation. In my view, as a matter of ordinary language, there are no such words which preclude a construction that avoids the harsh and inequitable effect for which the Department contends.
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> 17. It seems contrary to the spirit and the stated intent of the Agreement, to provide equitable access to benefit; that a person in the respondent's position, through no fault of her own, should be so disadvantaged. Article 16 contemplates the possibility of overpayment of benefit, and recovery of such overpayment by means of the Italian authorities paying lump sum arrears of Italian pension to the Australian Government, which may deduct any excess amount of the benefit paid by it, and shall pay any balance remaining to the beneficiary . . . '

The AAT said that it was satisfied that the provisions of art. 16 of the Agreement with Italy should prevail.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Assets test: constructive trust?

KIDNER AND SECRETARY TO DSS
(No. 8844)

Decided: 19 July 1993 by D.P. Breen.

George Kidner was the owner of several areas of land used in connection with his logging and earthmoving business. In 1982, Kidner agreed with his 3 sons that they would take over the business from him and he would retire.

Kidner and his sons entered into an oral agreement, under which the sons would buy the properties. The sons then ran the business and improved the properties. However, the oral agreement was not completed – the agreed purchase price remained unpaid and the properties remained in Kidner's name.

Kidner was granted an age pension in October 1991. The DSS subsequently decided that the value of Kidner's assets, including the subject properties, was too high and cancelled his pension.