

On 27 October 1992 the SSAT affirmed the DSS decision to reject both claims on the basis that Martin's husband was precluded from receiving DSP because compensation payments were being paid to his wife. Martin requested review by the AAT of the decision to reject her claim for wife pension.

The facts

Martin commenced full time employment in 1986 with the Ministry of Education (WA) as a teacher's aide. On the 8 August 1990 Martin injured her neck, arms and shoulders, and received workers' compensation payments for one month. In 1991 she returned to work but was unable to continue because of her injury. Payments of workers' compensation recommenced, and in August 1991 Martin asked the Ministry to place her on a rehabilitation program. She began a gradual return to work in September 1991, increasing her hours until she was working full time by the end of December 1992.

In June 1992 the Ministry attempted to discontinue payments of compensation to Martin. This decision was overturned by the Workers' Compensation Board after Martin supplied medical certificates which stated that she was totally unfit for work. She continued to supply these certificates until she returned to full time work.

Whilst on the rehabilitation program, Martin was paid her pre-injury wage, and her pay slips did not indicate that she was receiving compensation payments. A relief teacher's aide was employed for the whole period Martin was receiving compensation payments. The Ministry classified these payments as compensation and recovered the full amount from its insurer.

In 1989 Martin's husband was injured in a car accident. He claimed DSP in May 1992.

Income or compensation

The first issue the AAT had to address, was whether the payments to Martin between 21 May 1992 and 16 December 1992 were compensation or income. Income is defined in s.8 of the *Social Security Act 1991* as an amount 'earned derived or received', and income from personal exertion is defined as an amount earned, derived or received from personal exertion, but not including any amount received as compensation for a person's inability to work. Compensation is defined in s.17 of the Act as a payment of damages under a scheme of insurance etc., or any other compensation or damages

payments made wholly or partly in respect of lost earnings or lost capacity to earn.

According to s.98(1), a DSP is not payable if a person or the person's partner is subject to a compensation preclusion period, or if the rate of payment of the pension would be nil. Section 148 provides that a wife's pension is not payable if the rate of payment would be nil.

If a person is receiving periodical payments the rate a pension is paid to that person is calculated by referring to s.1168.

On behalf of Martin it was submitted that part of the payments made to her in the relevant period should be classified as income and not compensation payments. Income was that part of the payments representing earnings for the hours actually worked by Martin during the rehabilitation program. The balance of the payments was compensation. The AAT was urged to take into consideration the social consequences of deciding that the total amount paid was compensation. Applicants would not undertake rehabilitation programs because there would be no financial incentive to do so. The consequence of this would be that the person would remain unfit for longer, and thus possibly receive a social security benefit for a longer period.

The AAT decided that the question of whether the payments were compensation or income should be determined objectively according to the facts and the relevant provisions of the Act. The evidence indicated that payments to Martin during the relevant period were compensation payments made under the *Workers' Compensation and Rehabilitation Act 1981* (WA), because she was certified as medically unfit for her pre-accident employment. The payments were made under a scheme of insurance as provided by s.17(2), but according to Martin the payments were not made wholly or partly in respect of lost earnings. The payments were made because Martin was involved in a rehabilitation program, which demonstrated a capacity to work and a capacity to earn. The AAT rejected this argument and found that the payments were made because Martin was unfit for work and her involvement in the rehabilitation program did not influence whether or not she was paid. The AAT found some merit in the argument that persons in Martin's position would lack financial incentive to join a rehabilitation program because of this interpretation of the Act. An amendment to the Act

would be required to change this interpretation of the Act.

Payability of wife's pension

The AAT applied s.1168(3) and calculated the rate at which DSP was payable to Martin's husband. Because the payments to Martin were compensation, the rate of payment was reduced on a 'dollar for dollar' basis for every dollar of compensation received by Martin in weekly payments. The rate of DSP payable to Martin's husband was nil, and thus Martin was not qualified for wife pension.

Special circumstances

According to s.1184 of the Act the whole or part of a compensation payment can be considered as not having been made in the special circumstances of the case. On behalf of Martin, it was submitted that the following matters were special circumstances. The Martins' household income had been reduced from \$55,000 to \$18,000 a year causing financial hardship. Great stress had been placed on their marriage which aggravated their respective medical conditions. Martin's husband had received a compensation settlement as a result of his car accident, and this had enabled him to pay off the family home. The AAT found that special circumstances should be determined by comparing the particular circumstances of a person with the circumstances of most welfare recipients. The Martins' circumstances were no worse than those of most welfare recipients.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

Compensation preclusion: special circumstances

SECRETARY TO DSS and LEE
(No.8670)

Decided: 18 April 1993 by B.H. Burns.

Lee's husband was in receipt of compensation payments, when she claimed the invalid pension on 17 September 1991. The DSS decided to treat her husband's compensation payments as

periodic payments, and her entitlement to pension payments was reduced on a 'dollar for dollar' basis. This meant that no pension was payable to Lee. On 15 April 1992 the SSAT set aside this decision and substituted a decision that the DSS treat the compensation payments as ordinary income because of the special circumstances of the case. The DSS requested review of this decision.

The facts

Lee's employment as a clerk was terminated on 27 September 1991, but was due to resume again in March 1992. She was found to be qualified for invalid pension after examination by the Commonwealth Medical Officer (she had suffered from muscular dystrophy since birth, and had previously been on the invalid pension). Lee's husband was in receipt of weekly payments of compensation of \$409.37 until he returned to work on 30 January 1992. He continued to be entitled to partial periodic payments of compensation because of his injury after he returned to work. Lee was granted pension at the rate of \$20 a fortnight from the date he returned to work. She returned to work on 30 March 1992 and the pension was cancelled.

The assets of Lee and her husband consisted of household goods (\$14,000), a car (\$1500), bank accounts (\$17,482), the family home (\$100,000) and a life insurance policy for \$80,000.

Effect of compensation payments

The AAT referred to s.1168 of the *Social Security Act* 1991 and concluded:

'the table (in s.1168(3)) sets out a "dollar for dollar" reduction for an applicant in the same factual situation as Ms Lee, in that any social security payment included in s.1168 to which a person is entitled is reduced dollar for dollar by any periodic compensation payment received by that person or that person's partner.'

(Reasons, para. 10)

When the periodic compensation payments paid to Lee's husband were taken into account, Lee had no entitlement until her husband returned to work and received ordinary income and part compensation payments. Lee's invalid pension payment was first reduced according to the ordinary income test, and then on a 'dollar for dollar' basis for the partial compensation payments.

Special circumstances

According to s.1184 of the Act, all or part of compensation payments can be considered as not having been made in

the special circumstances of the case. A number of AAT and Federal Court decisions have considered the meaning of 'special circumstances'. In *Krzywak* (1988) 45 SSR 580 the AAT referred to severe financial hardship, any injustice caused by retrospective legislative changes, incorrect advice and ill-health as being matters relevant to special circumstances. The AAT referred to *Ivovic* (1981) 3 SSR 25 and noted that the threshold requirement when considering whether it was appropriate to find special requirements was:

'if the strict application of the legislation produced results which were "unjust, unreasonable or otherwise inappropriate".'

(Reasons, para.20)

Financial hardship

Lee told the AAT that it had been necessary to carry out renovations and modifications to her home because of her deteriorating condition. The cost of these modifications was approximately \$18,000, and Lee had taken out a second mortgage of \$13,000 to meet these costs. She had also borrowed \$3617.56 from her father, used savings and sold personal property to cover the costs. Between October 1991 and February 1992 Lee had a shortfall of \$1500 in her income.

After referring to the AAT decision of *Colalacola* (decided 24 April 1985), the AAT stated that any financial hardship must be exceptional for it to be a special circumstance. The AAT found that Lee's financial circumstances did not show exceptional hardship.

Incorrect advice

Lee told the Tribunal that a DSS officer told her that she would be entitled to a pension of \$130 per fortnight, after she had explained that her husband was receiving compensation payments. She states that she would not have gone ahead with the renovations if she had known she would not be entitled to a pension payment. However Lee's husband said that the renovations would have gone ahead anyway, although less extensively than originally planned. The DSS officer who interviewed Lee gave evidence that she would have advised Lee on the effect of any compensation payment.

The AAT found that the DSS did not give Lee misleading advice and that she had relied on her previous experience with the DSS. Also Lee did not act to her detriment when relying on DSS advice, as she would have proceeded with the renovations anyway.

Ill health

During the relevant period Lee, who is suffering from muscular dystrophy, consulted a psychiatrist for depression and stress. There were few costs associated with Lee's ill health, and her ill health could not be regarded as special circumstances.

Unjust result

The AAT referred to the Federal Court decision of *Secretary, DSS v Smith* (1992) 62 SSR 876 to note that the discretion in s.1184 could be applied to 'alleviate an injustice'.

'The discretion (in s.1184) to negate the effect of the legislation in "special circumstances" has been given to alleviate those cases where the operation of the legislation is unfair.'

(Reasons, para. 66)

In the AAT's opinion the operation of the legislation was unfair in this case because the legislation disadvantaged Lee whenever her husband received compensation payments rather than wages.

'The legislation was aimed at reducing pensions in situations where a social security recipient's entitlement is somehow connected with the fact that their spouse is in receipt of compensation payments and not wages.'

(Reasons, para. 68)

Lee's illness and entitlement to invalid pension had no connection with her husband's compensation. The AAT felt able to exercise the discretion in s.1184 because it did not defeat the rationale of the legislation. There was nothing in the legislation or the secondary material which would justify the injustice in this case. The AAT concluded that there were special circumstances because of this injustice and agreed with the SSAT decision that payments of compensation to Lee's husband should be treated by DSS as ordinary income.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

**DEZSO and SECRETARY to DSS
(No.8693)**

Decided: 7 May 1993 by B.H. Burns. Dezzo was in receipt of unemployment benefits when he was injured in a car accident on 18 November 1989. He remained on sickness benefits until October 1990 when he transferred to sickness benefit. In February 1991 he was transferred to unemployment benefits which he received until he obtained a job in February 1993. Dezzo was awarded \$74,975.14 on 10 July 1992 in a judgment of the District Court (WA). Of this sum, \$12,600 was allocated for past earnings and \$30,000 for loss of earning capacity.

On 3 August 1992 the DSS decided to recover \$8312.10 from Dezzo, the amount paid to him in sickness and unemployment benefits during the preclusion period from 18 November 1989 to 29 March 1991. This decision was affirmed by the SSAT on review, which also decided that there were no special circumstances in this case.

The preclusion period

The compensation part of a lump sum is determined by reference to s.17(3)(b) of the Social Security Act 1991. It defines the compensation part as so much of the payment as is, in the Secretary's opinion, for loss of earnings or lost capacity to earn. The AAT found that the amount of \$42,600 was compensation because the award included the two amounts, one for loss of past earnings and the other for loss of earning capacity.

The preclusion period is calculated by reference to s.1165(4). It was agreed between the parties that the preclusion period was 70 weeks, not 71 weeks as originally calculated. This figure was arrived at when the compensation amount was divided by male average weekly earnings, and then rounded down to a whole number.

The date the preclusion period commences is the day on which the loss of earnings or loss of capacity to earn begins (s.1165(3C)). The AAT had access to the judgment of the District Court and concluded that the loss of earnings commenced on the date of the accident, 18 November 1989. Therefore, the preclusion period of 70 weeks commenced on 18 November 1989.

Special circumstances

Dezzo submitted to the AAT that the operation of the legislation was unfair because he was not incapacitated for work for most of the preclusion period. He had in fact been receiving unemployment benefits for much of the period, and thus been actively seeking work in that period. The compensation he received was only for the period he was incapacitated for work.

The AAT rejected this argument. The District Court judgment made it clear that compensation was paid from the date of injury, and therefore it was not paid just for the period Dezzo received sickness benefits. The AAT concluded that no special circumstances existed as the operation of the legislation was not unfair.

Formal decision

1. The AAT set aside the decision to recover the amount of \$8312.10 and substituted a decision that Dezzo was liable to repay the unemployment and sickness benefits paid to him from 18 November 1989 to 22 March 1991 (70 weeks).
2. The AAT affirmed the decision that there were no special circumstances.

[C.H.]

**PAREZANOVIC and SECRETARY
to DSS
(No. 8761)**

Decided: 4 June 1993 by G. Ettinger, M. McGovern, I. Way.

On 3 July 1987 Parezanovic was injured in a car accident and as a result received the following payments:

- 17 July 1987–5 November 1989 – weekly payments from the third party insurer;
- 29 August 1987 – 28 February 1990 – sickness benefits;
- 1 March 1990–15 August 1991 – invalid pension (blind) together with wife's pension.

On 23 May 1991 an arbitrator of the Supreme Court (WA) awarded Parezanovic \$1,149,323. This was reduced by consent on 9 September 1991 to \$1,079,243. A preclusion period from 6 November 1989 to 17

February 2008 was imposed, and recovery of \$24,200 of social security benefits paid between 29 August 1987 and 15 August 1991 was sought by the DSS on 6 November 1992. These decisions were affirmed by the SSAT on review.

Effect of compensation on invalid pension (blind)

Parezanovic submitted that the payment of invalid pension/disability support pension (blind) should not be affected by a compensation payment. The rate of payment of the invalid pension/disability support pension (blind) is not affected by the level of a person's income or assets, and so should not be affected by compensation payments either.

The AAT noted that 'compensation' was distinguished from 'income' in the *Social Security Act 1991* (see s.8 and s.1167). The invalid pension/disability support pension (blind) was not specifically excluded from the operation of Part 3.14 (Compensation Recovery) of the Act, and therefore was subject to it.

The preclusion period

The DSS had taken into account a lump sum compensation amount of \$1,149,323 when calculating the preclusion period. Parezanovic submitted that the correct lump sum was \$1,079,243 less medical and legal costs of \$79,000. The AAT accepted that the appropriate lump sum was \$1,079,243, but found that medical and legal costs should not be deducted.

However, pursuant to s.17(4), the amount repaid to the third party insurer (\$58,244) should be deducted from the lump sum. The preclusion period had been incorrectly calculated because it had been based on an incorrect lump sum.

Recovery of social security benefits

The DSS had sought recovery of sickness benefits and invalid pension paid to Parezanovic between 29 August 1987 and 15 August 1991. Originally the DSS had calculated the preclusion period as commencing on 29 August 1987. This was subsequently amended to commence on 6 November 1989, the date when weekly payments ceased. Pursuant to s.1166 the DSS is entitled to recover the amount of social security benefits paid during a lump sum preclusion period, or the lump sum, whichever is the lesser amount. The AAT found that the DSS was entitled to recover the amount of sickness benefits and invalid pension paid between 6 November 1989 and 15 August 1991.

Special circumstances

Section 1184 provides that all or part of compensation payments may be disregarded in the special circumstances of the case. In *Krzywak* (1988) 45 SSR 580 the AAT set out a number of factors which could be taken into account when deciding whether special circumstances existed. These are financial hardship, legislative change, incorrect legal advice and ill-health. A further factor stated in *VXY* (1993) 73 SSR 1054 was incorrect advice. (Legislative change was not relevant in this matter.)

Ill health

Parezanovic explained that his disability was getting worse. He was taking tablets every day and received medical treatment as required. The AAT stated that Parezanovic's ill health was not sufficient to find special circumstances as most people in this situation were suffering from ill health.

Financial hardship

Parezanovic owned his own home which he had bought prior to his compensation settlement and since paid off. He was currently looking for a block of land to buy. He has 2 children aged 18 and 20 years living at home. His wife did not work outside the home, staying at home to care for him. Parezanovic could not provide details of his investments or income. The AAT referred to the fact that Parezanovic owned a substantial asset and decided that he could not be said to be suffering exceptional financial hardship.

Incorrect advice

Parezanovic complained that he had received incorrect advice from his solicitors and from the DSS. He said the DSS had advised him that he would continue to receive the pension after his settlement but that his wife would not. A letter from the DSS had advised that his pension was not subject to the income or assets test but did not refer to a compensation payment.

According to Parezanovic, his solicitors advised that his pension would continue after settlement based on the letter of advice from the DSS. The AAT noted that a number of AAT decisions had decided that incorrect advice from a person's solicitor did not amount to a special circumstance because the solicitor could be sued for negligence. Furthermore, there was insufficient evidence before the AAT to find that Parezanovic had been given incorrect advice by his solicitor.

The AAT referred to the decision of *Kulakov* (1991) 63 SSR 879 and noted that, if a person had acted to their detriment because of incorrect advice given by the DSS, then this could be special circumstances. Parezanovic told the AAT that if he had known that his pension would be cancelled, he would have asked for more compensation. The AAT found that the DSS had not given incorrect advice to Parezanovic, but that it had delayed answering his enquiries when he wrote and telephoned. Also the DSS had not supplied sufficient information about the effect of a compensation settlement on Parezanovic's invalid pension payments. Parezanovic had acted to his detriment because of this lack of information, and this was a special circumstance. When the AAT viewed Parezanovic's situation in its entirety, it found special circumstances existed and that recovery of benefits paid for the period 6 November 1989 to 15 August 1991 should be waived.

Formal decision

The AAT varied the decision as follows:

1. the preclusion period was reduced because the lump sum compensation payment was \$1,079,243 and this was reduced by the amount of \$58,244 repaid to the insurer;
2. the recovery of benefits paid during the lump sum preclusion period was waived because of the special circumstances.

[Editor's note: Section 1184 states that a payment of compensation may be treated as not having been made in the special circumstances of the case. Section 1237 provides that the Secretary to the DSS has a discretion to waive the right of the Commonwealth to recover a debt. The AAT appears to have confused these two sections.]

[C.H.]

Compensation and social security payments

SECRETARY TO DSS and GRAHAM (No. 8851)

Decided: 22 July 1993 by B.H. Burns.

Timothy Graham received a payment of \$30,000 in settlement of a claim against his employers under the *Workers Compensation and Rehabilitation Act* 1986 (SA).

The DSS decided that Graham was precluded from receiving pension by s.1165 of the *Social Security Act* 1991 for a period of 22 weeks.

On review, the SSAT decided that the compensation part of the payment received by the respondent was \$1000 and reduced the preclusion period. The DSS appealed to the AAT.

'Lump sum'

The SSAT had decided that only \$1000 of the compensation payment was a payment by way of compensation, because the insurer who made the payment to Graham had identified that amount as a payment under s.42 of the *Workers Compensation and Rehabilitation Act*. That section provided for the commutation of weekly payments by the payment of a lump sum. The balance of the \$30,000 was paid under other provisions of the Act.

The AAT noted that s.1165 of the *Social Security Act* only operated to preclude payment of pension when a person had received compensation in the form of a 'lump sum'.

The AAT said that, in *Banks* (1990) 20 ALD 19; 56 SSR 762, the Federal Court had said that 'a "lump sum" payment is simply one which includes a number of items'.

The payment to Graham answered that description: it was not a series of separate payments but a lump sum payment consisting of a number of elements. It was a lump sum payment of 'compensation', because it had been 'wholly or in part in respect of lost earnings or lost capacity to earn', as required by the definition of 'compensation' in s.17(2) of the 1991 Act: the payment of \$1000, an element in the 'lump sum', had been made in respect of Graham's incapacity for work.

Section 17(3) of the 1991 Act