sedentary unskilled work, although probably he does not have a motivation for such work': Reasons, para.31. The AAT also commented that personal preference for specific types of work is not something to be taken into account under s.94(2) of the Act.

The AAT also held that Kemp could be retrained in the next two years for simple clerical work or semi-skilled processing work and that such training would equip him for work for which he is presently unskilled.

Formal decision

The AAT affirmed the decision under review.

[B.M.]

OATES and SECRETARY TO DSS

(No. 9773)

Decided: 7 October 1994 by H.E.Hallowes.

In January 1989 Oates injured his back in a non-work-related accident. He applied for disability support pension (DSP) on 2 June 1993. As this claim was rejected by the DSS and the SSAT, Oates applied to the AAT for review.

The issues

The DSS conceded that Oates satisfied s.94(1)(a) and (b) of the *Social Security Act 1991*. That is, the DSS conceded that Oates had a physical impairment which was rated at 20% under the Impairment Tables. The DSS also conceded that Oates satisfied s.94(2)(a) because his impairment prevented him from doing his usual work as a manual labourer. The DSS however contended that Oates had the capacity to undertake light work for which he was skilled as well as being able to undertake educational and vocational training.

Educational and work history

At the time of the hearing Oates was aged 40. He gave evidence that he had worked in heavy unskilled employment, requiring manual strength, for his whole life. He had completed his schooling in year 8 and had failed to achieve a pass level in year 9.

Ability to work

The DSS contended that Oates would be able to work in a position where he did not aggravate his existing back condition. Examples of this work included console operator at a self service garage, light assembly work or a manual assistant with Telecom. The Tribunal referred to *Secretary to Department of Social Security and Hamal* (1993) 75 *SSR* 1082 and commented that 'the realities of the modern workplace make it unlikely that the applicant would be able to sit or stand at a place of employment for at least 30 hours per week': Reasons, para.13.

The AAT also noted that there was no evidence with respect to Oates' ability to undertake supervisory work and that the work that the DSS had referred to as light work would:

> 'be likely to involve an expectation of an employer that the employee may assist with other tasks such as moving components after they have been assembled, placing goods for sale on shelves or checking self service bowsers.'

(Reasons, para.13)

The AAT accepted the report of Dr Miles, who had treated Oates for 6 years, and held that Oates' impairment prevented him from doing his usual work as well as other work for which he was skilled, thus satisfying s.94(2)(a) of the Act.

Ability to undertake educational or vocational training

Oates had attended a number of rehabilitation courses of short duration and had completed them at home in his own time. Oates had also undertaken courses in English and Mathematics but had not been able to achieve a pass standard. The AAT was satisfied that he had undertaken all training which had been offered to him. Evidence was also given by Oates' wife that he was unable to attend courses on 'bad days' and that it took him several hours to get going in the mornings. In May 1993 the Department of Community Services and Health had closed his file. The AAT heard that the Commonwealth Employment Service had also closed Oates' file on two occasions. The AAT acknowledged that this closure of files would cause Oates to be despondent about his future employment prospects.

Oates had received work training assistance from the SkillShare service in Portland. The manager reported that 'neither course was sufficient length to really position Roger [Oates] to gain employment in these fields'. The courses were 'designed as first steps in developing career options': Reasons, para.11. The AAT stated that when considering whether an applicant has a continuing inability to work, a decision maker is not to have regard to the availability of educational or vocational training. The training already undertaken by Oates would not increase his access to employment. The AAT found that there would be further training that Oates could undertake, but that training would be unlikely to equip him to do work for which he is presently unskilled within 2 years from the date of his claim.

Formal decision

The AAT set aside the decision under review and substituted a decision that Oates was qualified for DSP from the date he lodged his claim.

[B.M.].

Compensation payment: preclusion period for DSP

R.P. AND D.A. WHITE and SECRETARY TO DSS

(No. 9794)

Decided: 21 October 1994 by J. Handley.

Robert Peter White and Deborah Anne White were precluded from receiving a disability support pension (DSP) until 14 August 1998 according to the decision of an authorised review officer of the DSS. The Social Security Appeals Tribunal affirmed this decision and the applicants appealed to the AAT.

The facts

Robert White was seriously injured at work on 12 March 1985 when employed as a timber worker at Arbuthnot Sawmills in Victoria. His right leg was totally amputated and he had not worked since sustaining the injury. On 5 September 1990, the Supreme Court of Victoria awarded him damages of $607,164. The DSS initially decided that as a result of this damages award, White was precluded from receiving social security benefits until 16 March 2001. On review by the

authorised review officer, the period of preclusion was reduced to 400 weeks. It was clear on the facts that, apart from the period of preclusion, White was eligible to receive DSP.

The legislation

Section 1184 of the *Social Security Act* permits the Secretary to DSS to 'treat the whole or part of a compensation payment as not having been made . . . if the Secretary thinks it is appropriate to do so in the special circumstances of the case'. The Whites submitted that there were special circumstances in their case which warranted a reduction in the period of preclusion.

Special circumstances?

At the time when White was injured, the applicants and their 4 children were living in rented accommodation. At about the time of the accident, Mrs White purchased a home for approximately $40,000. When White received his award of damages, he paid off all debts owing, including the mortgage and invested the balance with GIO.

The Whites purchased a five acre block and built a house that ultimately cost $226,000. Initially, the investment with GIO returned interest of approximately $1000 a month. However, as their house was built, the capital eroded and by April 1994 their investment was spent. The only income received by the Whites was the family payment of $400 a fortnight which was not sufficient to meet their expenses. They had accrued debts of about $10,000.

White told the AAT that he and his family were required to move from their former home because it was in substantial need of repair. It needed new stumping and was damp and cold. It was largely inaccessible to White as it did not have ramps. A builder advised White that the costs of renovations were $100,000 and recommended against renovation.

The policy of the legislation

The preclusion period for people who receive compensation is to prevent 'double dipping' whereby people received a large amount of money and simultaneously received social security benefits. The AAT emphasised that this policy did not warrant a family living in poverty and not being able to provide basic care for their children. The Whites did not have enough money to meet their basic family needs.

The AAT's findings

The AAT concluded that there were special circumstances which warranted the Whites moving from their former home. However, the AAT was not satisfied that the sum of $280,000 which was spent on their new home was reasonably spent. The AAT found that the sum of $100,000 could have reasonably been spent on acquiring a habitable property. It is unclear on what basis the AAT arrived at this figure. On the basis of this finding however, the AAT decided that the sum of $100,000 compensation should be treated as not having been paid. Accordingly, the period of preclusion from social security benefits should be reduced from 400 weeks to 313 weeks.

Formal decision

The decision of the SSAT was varied so that the period of preclusion from receiving DSP should be reduced from 400 weeks to 313 weeks.

[H.B.]

[**Note:** The Reasons do not indicate the nature of Mrs White's social security entitlement affected by the compensation provisions.]

Disability support pension: educational and vocational training

WARNER and SECRETARY TO DSS

(No. 9711)

Decided: 2 September 1994 by T.E. Barnett, P. Staer and K.J. Taylor.

On 2 November 1993, the DSS rejected Warner's application for a disability support pension (DSP). On appeal, an authorised review officer and the SSAT affirmed the decision of the DSS. Warner appealed to the AAT.

The legislation

Section 94(1) of the *Social Security Act* specifies the qualifications for DSP. A person must have:

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

A continuing inability to work is defined by s.94(2). The 2 elements require that the impairment must not prevent a person from:

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

The facts

Warner had a physical impairment, namely congenital bilateral profound deafness. In addition, he had a psychiatric impairment, namely, long-standing immature personality disorder. Warner was not taught sign language during his primary school years. He was taught some signing skills in secondary school but left school at the age of 16 with very poor literary and communication skills.

He worked as a stablehand for two years and enjoyed this work. He left the job when he turned 21 as his employer refused to pay him an adult wage. He then worked in two cleaning jobs. Warner told the AAT in evidence that he felt isolated, lonely and depressed and did not enjoy cleaning work. He refused to accept future employment as a cleaner and wanted to be a policeman or a security guard.

Medical evidence

The AAT referred to a report written by Professor Blackmore dated 3 March 1994.

Professor Blackmore described Warner as having average intelligence but lacking fluency in sign language. His social involvement with others was said to be limited and his relationship with his family was severely strained. His parents found his aggressive behaviour and uncooperative attitude very difficult to deal with. Professor Blackmore found Warner's wish to be a policeman or security guard quite unrealistic. Although he was found to be of average intelligence, he functioned well below this level in comparison to other deaf adults of similar capacity. Professor Blackmore concluded that Warner's long-standing immature personality disorder