(2) that a temporary return to Australia was sufficient for (1). The DSS argued that s.1217 only acted to remove the disqualification, that it did not requalify the person, and to achieve requalification the former wife pensioner would have to reapply and comply with the claim requirements in ss.152 to 155 of the Act.

Section 155 stated that a claim for wife pension was not a proper claim unless the woman was an Australian resident and in Australia on the date of the claim. 'Australian resident' is defined in s.7(2) as a person who 'resides in Australia' and meets other criteria. Both parties agreed Srpcanski did not qualify as a resident as she did not reside in Australia when she returned and had no intention of remaining permanently.

The argument put for Srpcanski was that a temporary return to Australia was sufficient to reinstate the wife pension otherwise s.1217(2) would be redundant; that she was not required either to apply for a review of the cancellation nor to lodge a new claim to requalify.

The AAT decided that s.1217 operated to remove the disqualification and restore Srpcanski's eligibility to reapply for a pension rather than restore automatic entitlement to payment. Srpcanski reapplied but was unable to meet the residency requirements as her intention was a temporary visit. She did not qualify for consideration of the discretion in s.1220(3) to continue payment when she left Australia in September 1993 because her application for portability did not result from unforseen circumstances.

The formal decision

The AAT set aside the decision of the SSAT and decided that Srpcanski did not qualify for payment of wife pension from the date of cancellation.

[B.W.]

[**Editor's note:** This case has been appealed to the Federal Court.]

Disability support pension - departure certificate

SECRETARY TO DSS and OLGYAY

(No. 9156)

Decided: 3 December 1993 by J.R. Dwyer.

The DSS requested review of a SSAT decision which had set aside a delegate's decision to cancel payment of disability support pension (DSP) to Olgyay. Mrs Olgyay's wife pension had also been cancelled, and she requested review of that decision.

The facts

Olgyay was granted invalid pension from 23 June 1988 and his wife was granted wife pension. On 14 March 1992 they travelled to Czechoslovakia. The DSP and wife pension were cancelled on 3 December 1992 after Olgyay and his wife had been out of Australia 6 months.

Mrs Ogyay told the AAT that she had notified the DSS before she and her husband went overseas but no departure certificate was issued. Her evidence was that she had gone to the DSS and picked up the relevant papers. She completed the forms, including a copy form, and returned them to the DSS. Olgyay's daughter had told the SSAT that she found a partially completed form among her parents' papers when they were overseas, and she had subsequently lodged these papers with the DSS. The AAT pointed to a number of inconsistencies in Mrs Olgyay's evidence and found that it could not be satisfied that Mrs Olgyay had lodged the form with the DSS.

The departure certificate

Section 1218 of the *Social Security Act 1991* provides that if a person who is receiving a DSP or wife pension leaves Australia for more than 6 months without receiving a departure certificate, that person ceases to be qualified for a pension. Section 1219 sets out the requirements for the issue of a departure certificate. The Secretary must give a certificate if satisfied that the person is in Australia and qualified for the relevant pension. The person must notify the DSS of a proposed departure as required by a recipient notification notice.

This issue was considered by the AAT in *Gellin and Secretary to DSS* (1993) 76 *SSR* 1101. The AAT had decided that s.1218 operated independently of s.1219. Once the conditions specified in s.1218(1) were satisfied, the person ceased to be qualified for the pension.

On behalf of Olgyay it was submitted that s.1218 must be read together with s.1219. Section 1218 should only apply where the DSS has issued a valid recipient notification notice. If the recipient notification notice which had been issued was invalid, Olgyay did not have to notify the DSS that he was going overseas. The AAT rejected this argument saying that: 'Section 1218 is not expressed to apply only where the Department has not been at fault. Nor is it expressed to be read together with s.1219': Reasons, para.18.

It would not be appropriate to read into s.1218 that the section only applied where a person had received a valid recipient notification notice.

Even though it was not necessary for the AAT to consider whether the recipient notification notice was valid, it noted that it may be unnecessarily complicating social security legislation to insist that all the technical requirements specified in the *SSA* be complied with – especially where there was no injustice.

Formal decision

The AAT set aside the SSAT decisions and affirmed the DSS decisions cancelling the Olgyays' pensions.

[C.H.]

Disability support pension: continuing inability to work

HAOUCHAR and SECRETARY TO DSS

(No. 9224)

Decided: 24 December 1993 by J.R. Dwyer, C.G. Woodard and R.W. Webster.

Mr Haouchar was granted an invalid pension on 26 June 1990. From November 1991, when the disability support pension (DSP) was introduced, he received the DSP. On 3 August 1992, the DSS decided to cancel his DSP.

On review, the SSAT affirmed that decision and Haouchar appealed to the AAT.

The legislation

Section 94(1) of the *Social Security Act 1991* specifies the qualifications for a DSP. A person must have:

- a physical, intellectual or psychiatric impairment of 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 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 during the next 2 years which would be likely to equip the person within the next two years to do work for which the person is currently unskilled s.94(2)(b).

Impairment

The AAT found that Haouchar suffered from gout, hypertension, headaches, pain in the neck, back and knees and sciatica. His gout condition was assessed by the AAT according to Table 26 as having an impairment rating of 5%. This was because his gout attacks were prolonged (lasting more than 4 hours) and affected him more than 20 days a year.

His hypertension was assessed under Table 25 and he was given an impairment rating of 10% as he was undergoing intensive therapy and his condition was potentially life threatening. Haouchar's headaches were under Table 26 an 'Intermittent Impairment'. As his headaches were more than 4 hours in duration and occurred almost daily, he was given an impairment rating of 10%. His pain in the neck, back and knees was assessed according to Table 6 (joint pain, deep referred somatic pain or sciatica) and was rated at 10%.

In relation to Haouchar's claim that he suffered from sciatica the evidence disclosed that he had first complained of it to his general practitioner in March 1993. The AAT found that it should confine itself to determining his eligibility for a pension at the date of cancellation. As sciatica was not complained of at 3 August 1992, this was not taken into consideration. The AAT was bound by the Federal Court decision of *Freeman and the Secretary to DSS* (1988) 15 ALD 671.

Haouchar was found to have a total impairment of more than 20% in satisfaction of the requirements of s.94(1)(a) and (b).

Continuing inability to work

The DSS argued that although Haouchar might not be able to do his normal work, he was able to do work for which he was currently skilled. The DSS relied on the report of a disability support officer who concluded that he was capable of some employment such as process work, machine operating, or assembling work. The report indicated that most of this work would require on-the-job training and acknowledged that vocational training was not likely to equip Haouchar for work for which he was not currently skilled. The DSS accepted that on the basis of this opinion Haouchar was not likely to become equipped to do work in the next two years for which he was currently unskilled: s.94(2)(b).

The AAT found that it was highly unlikely that Haouchar would be able to do work for which he was currently skilled such as light, unskilled work. Haouchar suffers from chronic pain, hypertension, intermittent attacks of gout and frequent headaches, all of which make him virtually unemployable.

Formal decision

The decision of the SSAT was set aside and the decision that Haouchar was eligible for a DSP was reinstated.

[H.B.]

Compensation: one lump sum or two?

SECRETARY TO DSS and ABDELAHAD

(No. 9281)

Decided: 1 February 1994 by J.R. Dwyer, L.S.Rodopoulos and R.C. Gillham.

The AAT was asked to review a decision of the SSAT setting aside a DSS decision to preclude payment of job search allowance (JSA) to Abdelahad from 6 March 1993 to 17 September 1993. The DSS had calculated the preclusion period on a lump sum of $34,030. The SSAT directed that the calculation of the preclusion period be based on a lump sum of $4030.

The facts

Abdelahad injured his right shoulder at work in November 1989. He received weekly payments of compensation until 19 March 1993. Abdelahad commenced a common law claim for damages which settled on the 9 March 1993 for $30,000. The release signed by both parties clearly stated that the settlement was for non-pecuniary damages only.

On the same day Abdelahad signed a second release accepting $4030 in full settlement of any entitlement to future weekly payments of compensation in accordance with s.115A *Accident Compensation Act 1985* (Vic.). Abdelahad received weekly payments of compensation until 5 March 1993.

Ms Sdrinis, the solicitor who had represented Abdelahad in the above matters, gave evidence at the AAT hearing. She had advised Abdelahad to reject the offer of $30,000. However, when the possible costs penalty of going to trial was explained to Abdelahad, he had instructed her to accept the offer. At the same time an offer was made pursuant to s.115A which was the equivalent to 13 weeks compensation payments. Ms Sdrinis pointed out that Abdelahad would have been entitled to payments until 1 December 1993. She advised him to reject this offer too. Abdelahad instructed her to accept the offer because he wanted to get out of the compensation system. The AAT noted: 'Ms Sdrinis stresses that the two payments were negotiated separately and made separately': Reasons, para.12.

A cheque for $30,000 was sent by the solicitors for the insurer to Ms Sdrinis. The insurer sent the cheque for $4030 directly to Abdelahad.

The law

Section 1165(1), (2), (4) and (5) of the *Social Security Act 1991* provide that where a person has received a lump sum of compensation, the person is precluded from payment of JSA for the lump sum preclusion period. The lump sum preclusion period is calculated by dividing the compensation part of the lump sum by average weekly earnings. 'Compensation' is defined in s.17(2) as a payment of damages, or a payment under a scheme of insurance etc. made wholly or partly in respect of lost earnings or lost capacity to earn. The compensation part of a lump sum is 50% of the payment made in settlement of a claim.

Section 135A of the *Accident Compensation Act 1985* restricts damages payments at common law to non-pecuniary loss, and s.115A does not allow for payment of common law damages after paying out a claim for weekly payments.

Lump sum compensation payment

DSS submitted that as both payments, $30,000 and $4030, arose out of the one injury and are essentially the one claim, both payments can be treated as part of a lump sum compensation payment even if paid by separate cheques. It was conceded that the $30,000 payment did not include an amount for lost earnings or lost capacity to earn.