New President for the AAT

The President of the AAT, Justice D.F. O'Connor has been appointed the President of the federal Industrial Relations Commission. Justice O'Connor resigned from the AAT on the 25 March 1994. Justice D. Drummond is the acting President until the new President, Justice Jane Matthews, of the Supreme Court NSW, takes over in early July 1994.

Whilst Justice O'Connor has been President there have been some notable changes to the AAT's procedure. Mediation has been introduced to settle cases in a number of jurisdictions including social security. Many disability support pension appeals are settled this way. This has reduced the waiting period for cases to be heard by the AAT significantly, because of the reduction in the number of cases going to hearing.

[C.H.]

Federal Court decision

Invalid pension: incapacitated for work from birth

SECRETARY, DSS v RAIZENBERG
(Federal Court of Australia)
Decided: 17 December 1993 by Wilcox, Einfeld and Beazley JJ.

This was an appeal from the decision of the President of the AAT, O'Connor J, in *Raizenberg* (1992) 29 ALD 115; 71 *SSR* 1023.

That decision involved the question of a young person's entitlement to invalid pension under the *Social Security Act 1991* (during the period before invalid pension was replaced with disability support pension in November 1991), where the young person came to Australia as a child, suffering from a congenital and serious disability.

Raizenberg was born in Canada in 1973, suffering from cerebral palsy which left her severely disabled. She migrated to Australia with her parents in May 1988 and, upon turning 16 in November 1989, she lodged a claim for invalid pension.

The DSS rejected Raizenberg's claim on the ground that she was not an Australian resident at the time when she first became permanently incapacitated for work.

On appeal, the AAT decided that a child under 16 had no measurable capacity for work; so that a person who migrated to Australia as a child could not become incapacitated for work until her or his 16th birthday; and, if the person was an Australian resident on that birthday, he or she met the requirement expressed in s.94(1)(e)(i) of the *Social Security Act* – that she be an Australian resident at the time of first becoming permanently incapacitated for work.

The Secretary appealed to the Federal Court.

The legislation

Section 94(1)(e)(i) of the *Social Security Act 1991* fixed, as one of the qualifications for invalid pension, that the claimant be an Australian resident at the time when he or she first met the basic qualifications for invalid pension – in particular, at the time when he or she first became 'permanently incapacitated for work', as prescribed by s.94(1)(a) of the Act.

Alternatively, a claimant could satisfy s.94(1)(e)(ii), by accumulating 10 years qualifying Australian residence; or, if born outside Australia, the claimant could satisfy s.94(1)(e)(iii).

To satisfy s.94(1)(e)(iii) the claimant must, when he or she first met the basic qualifications for invalid pension:

- not be an Australian resident; and
- be a dependent child of an Australian resident;

and then become an Australian resident while a dependent child of an Australian resident.

(To be a 'dependent child' a young person must be below the age of 16 years: s.5(2).)

The court's decision

Wilcox and Beazley JJ held that a person would be classified as permanently incapacitated for work within s.94(1)(a) of the *Social Security Act 1991* when the person had a loss of earning capacity rather than an inability to engage in paid work.

That loss of earning capacity could be assessed before a person reached the age at which he or she could legally be employed, and before the age at which invalid pension was payable (16 years). Accordingly, it was not necessary, before a person could be classified as permanently incapacitated for work, that the person be at least 16 years of age.

In adopting this reading of the concept, 'permanent incapacity for work', Wilcox and Beazley JJ endorsed the analysis of Deputy President Gerber in *Re Secretary, DSS and Abaroa* (1991) 22 ALD 787.

Wilcox and Beazley JJ discussed the legislative history of invalid pension from 1908. They said that the history revealed that it had always been recognised that a child could be incapacitated for work.

The original *Invalid and Old-age Pensions Act 1908* (Cth) had dealt specifically with claimants born outside Australia and 'afflicted with a congenital defect': those claimants were to be treated, according to s.22(2) of the 1908 Act, as having become permanently incapacitated whilst in Australia if they had been brought into Australia before the age of 3 years or if they had resided continuously in Australia for 20 years.

The *Social Security Act 1947* had continued that provision; and other provisions (dealing with the children of Australian residents born overseas) had reinforced the assumption that a child could be permanently incapacitated for work.

Wilcox and Beazley JJ said that s.94(1)(e)(iii) of the 1991 Act worked against the argument that the age of 16 was a precondition of permanent incapacity for work. That provision allowed an alternative means of qualifying for invalid pension.

Where a claimant was born outside Australia and, when he or she first met the basic qualifications for invalid pension, was not an Australian resident but was the dependent child of an Australian resident, and later became an Australian resident while still a dependent child of an Australian resident, the claimant could qualify for invalid pension. To read s.94(1)(e)(i) as preventing a person being classified as permanently incapacitated for work until he or she turned 16 would render s.94(1)(e)(iii) otiose, Wilcox and Beazley JJ said.

The dissenting view

Einfeld J dissented. He held that a person could not be regarded as 'permanently incapacitated for work' unless the person had lost her or his capacity to earn wages; and a person who was under the legal working age had no such capacity to lose.

Formal decision

The Federal Court allowed the appeal, set aside the decision of the AAT and affirmed the decision of the Secretary's delegate, rejecting Raizenberg's claim for invalid pension.

[P.H.]