

Section 1213A provides that a recipient of disability support pension can continue to receive the payment if the person leaves Australia. Section 1213A(2) further provides that where the recipient is not severely disabled when leaving, the payment overseas will end after 12 months absence from Australia. In the case where a person ceases to be severely disabled after leaving Australia, while they continue to be absent, their entitlement to disability support pension ends 12 months after the Secretary has decided they are no longer severely disabled: s.1213A(3).

#### The facts

Tsakrios applied for disability support pension on 26 February 1992 when she was almost 50 years old. She was assessed as suffering from hypertension, low back pain, vertigo, migraines, right hip osteoarthritis and a bilateral breast cyst. The level of her impairment was assessed at 28%. She was educated to grade 6 level, had ceased working as a cook in 1988 and had no interest in retraining. Her incapacities were assessed as preventing her from returning to work or retraining within 2 years.

In January 1993 she informed the DSS that she was going to Greece and that she would be away for more than 12 months. A medical examination conducted at this time assessed her combined impairment as being at the level of 35%. She suffered from pain and restricted movement in her right hip, hypertension causing headaches and vertigo and pain and loss of movement in her right hand. The medical examiner concluded that she was capable of working at least 8 hours a week on a part-time basis in light semi-skilled or light unskilled work. It was also concluded that her impairment would not prevent her from undertaking training during the next 2 years. The DSS decided that she was not 'severely disabled'.

The AAT concluded that the respondent was not 'severely disabled'. It said:

'The section 37 statement contains many references to the fact that Mrs Tsakrios does not speak very good English and that she is poorly educated. Her lack of prospects for future employment seem to me to be dictated more by factors of age, poor education, poor English and the current employment situation than by her medical problems. There is no evidence that she has a psychiatric impairment. At the date of her departure from Australia her physical impairment was disabling enough to qualify for the disability support pension but was not so bad that she was totally unable to do part time work'

(Reasons, para.5)

#### Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that the respondent was not 'severely disabled' on the date she left Australia.

[B.S.]

[Note: Once again the increasingly international nature of modern social security provisions raise issues which have yet to be properly resolved within Australia. Section 1213A clearly contemplates that a decision that a person is no longer severely disabled can be made while the person is overseas. Yet the criteria against which that judgment is to be made seem grounded in the Australian context. While the respondent here was examined before she left Australia, there are still some difficulties in the operation of these provisions, which were hinted at by the comments of the AAT that the respondent's lack of English (even though she was moving to Greece) probably had more to do with her inability to attract work than her medical condition. Does this imply that one is to assess the person's ability to work or benefit from training under s.23(4B) as if the person were living in Australia even though the person is actually living in (or moving to) another country? Whether this is more or less favourable to the claimant must depend on the circumstances of particular cases and is likely to produce some inequities.

Another problem which seems to be relevant here is the ability of the claimant to present his or her case. In the above case the respondent was not present and was not represented. Although there may be a number of explanations for this, it seems important to question the extent to which an international appeal can be conducted on the same basis as a domestic one. Certainly, the likely inability (both in practical and financial terms) of claimants to instruct counsel by long distance will operate as a bar to their rights. In this case the DSS was the applicant so it is even more problematic as to whether the respondent was capable of putting her side of the matter. This matter needs some attention if these issues are to be properly argued before the AAT. B.S]

## Disability support pension: suspension

MALLOCH and SECRETARY TO DSS

(No. 9318)

Decided: 22 July 1993 by D.W.Muller.

Malloch asked the AAT to review a decision to suspend payment of disability support pension because he refused to provide a tax file number (TFN) or an authority to request a TFN.

#### The facts

Malloch had no tax file number. Following an accident in 1984 he was granted invalid pension in 1988. In May 1992 he returned an income review form to the DSS advising that he did not have a TFN. The DSS then asked him to provide a TFN or to complete a form requesting one. Malloch refused to apply for one on ideological grounds. In September 1992 the DSS decided to suspend payment of disability support pension because of Malloch's failure to supply a TFN.

In December 1992 Malloch wrote to the DSS in effect seeking exemption from having to provide a TFN. This was subsequently refused. In refusing the request for the exemption, the DSS officer who decided the matter had regard to the DSS guidelines which allowed for such exemptions in circumstances where the pensioner has no income. Para.16.6001 of the guidelines reads:

'The category is designed for clients who:

- have been in receipt of pension for 10 years or more;
- have had little or no income for the last three years;
- are not likely to receive greater income in the future.'

It was decided that although Malloch satisfied the last two points, because he had only been in receipt of pension for just over 4 years, he could not be given the exemption.

#### The legislation

Section 111 of the *Social Security Act 1991* provides that a claimant for disability support may be asked to supply a TFN to the DSS. Section 130 provides that disability support pension is not payable if the person has been required to provide a TFN under s.111 or s.130, and that after 28 days from the date of the request the person has either not provided the TFN, a declaration that

they do not know their TFN and that they authorise the Taxation Office to provide the TFN to the DSS, or a declaration that they have applied for a TFN and authorised the Taxation Office to tell the DSS if the TFN is issued what it is, or whether the application is refused or withdrawn.

#### No power to suspend

The Tribunal observed that the Act was silent on the matter of a person who was in Malloch's position of having no intention of applying for a TFN. It did not attempt to require people to apply for a TFN.

'The secretary is empowered to require the recipient of a disability support pension to give the secretary a written statement of the recipient's TFN or to authorise the Commissioner of Taxation to tell the Secretary the TFN. The Secretary has no power to require the recipient to supply a TFN which the recipient does not have and which the recipient has no intention of getting. The payment of Malloch's pension should never have been suspended.'

(Reasons, para. 5)

#### The DSS guidelines

The AAT also commented on the application of the DSS guidelines in this matter. In the view of the AAT Malloch should have been exempted under these guidelines in any event. It was noted that there was nothing in the guidelines which required all three points to be fulfilled. The disallowance of the exemption on the ground that he had not been in receipt of the pension for 10 years 'was not a balanced exercise of the discretion' according to the Tribunal.

#### Formal decision

The AAT set aside the decision under review to suspend payment of disability support pension.

[B.S.]

## Disability support pension: incapacity, whether condition diagnosed

CONWAY and SECRETARY TO DSS

(No. 9354)

**Decided:** 8 February 1994 by K.L. Beddoe, J. Billings and R.A. Joske.

On 27 March 1990, Conway applied for an invalid pension (now disability support pension) which was later granted by the DSS. In 1993, the DSS decided to cancel Conway's disability support pension. The decision was affirmed by the SSAT and Conway appealed to the AAT.

#### The legislation

Section 94(1) of the *Social Security Act 1991* specifies the qualifications for a disability support pension. As well as other requirements, the person must have:

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

#### The facts

Conway, had not been employed since 1980 and gave his occupation as labourer. He was in receipt of unemployment benefits from 1980 until he applied for an invalid pension in 1990. In considering his application, the DSS had regard to a report dated 27 February 1990 by Dr Clifford, a Commonwealth Medical Officer who rated Conway as having a 5% impairment of the left index finger and a 10% impairment for an undefined psychological problem.

The DSS decided to cancel Conway's pension on the basis of an assessment by Dr Thong who assessed his disability under s.94 and Schedule 1B of the Act. He concluded that there was a combined impairment of 5%.

Conway argued that the assessment of Dr Thong failed to take into account the psychological problem, referred to in the report of Dr Clifford. Conway was not psychologically assessed by the DSS when reviewing his entitlement. He indicated to both the SSAT and the

AAT that he would refuse an invitation to attend a psychological assessment. Accordingly, the AAT found that it was unable to take into account any psychological or psychiatric impairment Conway might have. The AAT also found that it was unable to take into consideration Dr Clifford's 1990 opinion in determining the level of impairment under the impairment tables. His opinion was not relied on as it was not based on any independent expert evidence and it was given without the benefit of investigation or diagnosis.

#### Formal decision

The AAT affirmed the decision of the SSAT that Conway's pension should be cancelled.

[H.B.]

## Disability support pension: educational or vocational training

RAAD and SECRETARY TO DSS  
(No. 9346)

**Decided:** 4 March 1994 by B.A. Barbour, G. Stanford and D. Coffey.

Raad sought review of a decision of the SSAT which rejected his claim for the disability support pension (DSP). The claim had been rejected under s.94 of the *Social Security Act 1991*.

#### The issues

The DSS conceded that Raad satisfied ss.94(1)(b), 94(2)(a)(i) and 94(2)(a)(ii). That is, the DSS considered Raad's impairment to be of 20% or more, and that this impairment was of itself sufficient to prevent him from doing his usual work as well as other work for which he was skilled.

In contention was whether or not Raad's impairment would prevent him from undertaking educational or vocational training during the next two years, or whether such training would be unlikely to equip him to do work for which he was currently unskilled (s.94(2)(b)).