

Administrative Appeals Tribunal decisions

Age pension: date at which claim is to be determined

**TUCKER and SECRETARY, DSS
(No. 10982)**

Decided: 3 June 1996

The Tuckers were refused age pension because of the application of the assets test. The decision was affirmed by the SSAT and the Tuckers sought review.

Background

The Tuckers claimed age pension on 4 July 1995. On that day both were qualified for age pension in that they had attained pension age and were Australian residents. However, age pension was not payable to them because they owned assets of \$1,082,841, and as at the date of claim, no age pension was payable where assets exceeded \$351,000. On 7 July a trust was established under which the Tuckers, their children and a sister were beneficiaries. They were also directors and shareholders of the trustee company for the trust, Sytron. The Tuckers sold land worth \$977,700 to Sytron, payable by way of a deposit of \$977,400 to be paid within 60 days and the balance within 5 years. On 10 July 1995 the Tuckers released Sytron from its obligation to pay them \$977,400.

The first pension payday following the date of the Tuckers' claims for age pension was 13 July 1995. Both claims were rejected on 29 August 1995.

The issues

It was conceded that as at the date of the claims no age pension was payable to the Tuckers because of the application of the assets test. However, it was argued on their behalf that their entitlement to age pension should not have been determined as at the date of their claims but as at the 13 July 1995. This was the first pension payday following the lodgement of their claims, after they had disposed of most of their assets, and the first day on which pension was 'payable'. This was so because, it was argued, age pension could not be 'payable' to a person until the first payday on which a full instalment is payable under s.42(2) of the *Social Security Act 1991* which provides in part:

'If a payday-based payment is payable to a person, the person will be paid a full instalment of the payment on each payday during the period during which the payment is payable to the person and will be paid nothing on a payday outside that period.'

It was also submitted that the disposal of assets was not caught by s.1125 of the Act because it did not occur within a pension year as defined under s.11(10). This was because the Tuckers were not receiving a pension at the time of the disposal, this having taken place after the date of claim but before pension became 'payable' on the 13 July 1995.

The first issue to be decided was therefore if it was appropriate for the delegate to determine whether age pension was payable to the Tuckers as at the date of the lodgement of their claims.

Date for determination of an age pension claim

The AAT considered that it was the intention of the Act that a claim be determined as at the date of lodgement. This interpretation was supported by s.48(2) of the Act which provides in effect that a claim is taken to have not been made if 'at the time when the claim is made' the claim cannot be granted because the person is not qualified for the pension. Moreover, s.45 of the Act provides that an age pension is not payable before a person's provisional commencement day, which, subject to certain specified exceptions, is identified under s.46 as the day on which the person claims the age pension. The Act sets out an exception to the general rule where a person is not of pension age when a claim is lodged but becomes of pension age within three months of that date. There is no similar provision covering a situation in which pension is not payable because a person's pension rate would be nil on the date of claim, but at a later date the rate would no longer be nil. In these circumstances the AAT was of the view that a further claim would need to be lodged.

The AAT did not accept the argument put on behalf of the Tuckers and based on s.42 of the Act that age pension is not payable to a person until the first payday on which the full instalment of pension is payable. The AAT considered that s.42 maintained a distinction between payday-based payments and period-based payments, which assumed 'that the period during which pension is payable may start before the first pension payday on which pension is payable to the person

and may finish after a pension payday'. This was 'consistent with the analysis that the period during which age pension is payable commences on the person's provisional commencement day, even if no payment can be made until the first fortnight payday after that date': Reasons, para. 22.

The AAT decided that the Secretary was entitled to determine the Tuckers claims as at the date of lodgement, at which time age pension was not payable to them.

Is there a discretion to determine a claim at a later date?

It had also been argued on behalf of the Tuckers, following the Federal Court decision of *Secretary, Department of Social Security v Goudge* (1989) 17 ALD 415 that there was a discretion under the Act enabling the Secretary to determine a claim and grant a pension from a date later than the date of lodgement. The AAT pointed out that *Goudge* related to a determination as to entitlement under the 1947 Act and doubted that such a discretion remained. Even if such a discretion was available, the AAT considered that it should not be exercised in favour of the Tuckers. The only change in circumstances following the date of their claims was the divestment of assets to a family investment trust, and the release of the obligation to pay all but a small amount of the purchase price. It was not a situation where the Act should be administered beneficially in recognition of the fact that it is welfare legislation.

In view of its decision as to the date of the determination of an age pension claim, the AAT did not go on to consider the issue of disposal of assets.

Formal decision

The AAT affirmed the decision under review.

[A.T.]