

## Disability support pension: illness separated couple

SECRETARY TO THE DSS and PORTER  
(No. 11804)

**Decided:** 24 April 1997 by S.D. Hotop.

Porter suffered a stroke in July 1992 following surgery to remove an aneurysm behind her right eye. She had been hospitalised since the stroke. In February 1993 Porter applied for and was granted DSP at the married rate. In June 1993, Porter was made a permanent patient at the Moora District Hospital. A staff member from the hospital wrote to the DSS advising that Porter would 'always be a nursing home patient'. Subsequently, Porter received DSP at the single rate plus rent assistance. In May 1995, her DSP rate was reduced because of her husband's income. In September 1996, Porter was transferred to 'the Lodge' for frail aged patients where her accommodation costs were \$363 a fortnight. The cost of her clothing, toiletries and other necessities was estimated at \$40 a fortnight. After her pension rate was reduced, Porter received \$277.30 a fortnight, considerably less than her living expenses.

Her husband underwent triple bypass heart surgery in January 1993 and subsequently developed a hernia on the surgery scar. He also had carpal tunnel syndrome. He told the AAT he still worked as a shearer. In the 1994-95 financial year, his taxable income was \$29,568. He gave evidence that his anticipated income for the 1995-96 and 1996-97 financial years would be roughly the same.

In a letter dated 23 May 1995, Porter requested that DSP be paid to her at the single rate. A delegate of the DSS decided in August 1995 that Porter was entitled to DSP at the single rate because she was a member of an illness-separated couple, but that the 'halving provisions' of the Act were applicable because of her husband's income. This decision was affirmed by an ARO. The SSAT set aside this decision and held that Porter was to be treated as not being a member of a couple for the purposes of calculating her rate of DSP.

Evidence at the AAT hearing established that the hospital accommodation fee for nursing home patients was calculated by the Health Department at 87.5% of the single rate of the age pension.

### The legislation

Section 4(2) of the *Social Security Act 1991* provides that a person is a member of a couple if the person is legally married and is not, in the Secretary's opinion living separately and apart on a permanent or indefinite basis. Section 4(7) of the Act provides that an illness-separated couple is one where they are unable to live together in the matrimonial home because of illness or infirmity of either or both of them, and their inability to live together results in their living expenses being greater than they would otherwise be, and that inability is likely to continue indefinitely. Section 24(1) of the Act provides that a legally married person may be treated as not a member of a couple where the Secretary is satisfied that special reasons exist.

### Submissions

The DSS conceded that the Porters were an illness-separated couple. However, it argued that the discretion conferred by s. 24(1) to treat a person as not being a member of a couple should not be exercised in the case of an illness-separated couple. In the alternative, it was submitted that in the event that the discretion conferred by s.24(1) was exercisable, there was no 'special reason' why Porter should be treated as not being a member of a couple.

Porter did not accept the DSS concession that she was a member of an illness-separated couple. It was argued that Porter was not to be treated as a member of a couple because of the SSAT decision that the discretion in s.24(1) applied. The main argument for Porter was that the discretion conferred in s.24(1) should be exercised because of her financial circumstances and her physical illness.

### Findings

The AAT did not accept the submission for the DSS that the discretion in s.24(1) was inapplicable to an illness-separated couple. Because her husband continued to be supportive of her both financially and emotionally, the AAT found that Porter was not living separately and apart from her husband on a permanent or indefinite basis. The AAT indicated that the discretion conferred in s.24(1) of the Act must be exercised for the purpose for which it was conferred, and having regard to the scope and object of the Act. The AAT said that the purpose of s.24(1) was to ensure that the welfare of a 'member of a couple' would be promoted rather than impaired in accordance with the general object of the Act.

### Special reasons

If Porter was treated as a member of a couple, her income would be approximately \$170 a fortnight, which was approximately \$234 less than her essential fortnightly expenditure. However, if the discretion in s.24(1) was exercised, Porter would receive approximately \$23 a fortnight more than her essential fortnightly expenditure. If Porter was treated as a member of an illness-separated couple Mr Porter would have to make up the shortfall between her income and her essential living expenditure. The AAT found that Mr Porter's income only marginally exceeded his own reasonable expenses and that making up the shortfall for his wife would impose a 'substantial financial burden' on him causing 'severe financial hardship': Reasons, para. 42.

The AAT indicated that having regard to the financial circumstances of both Porter and her husband, the rate payable to a member of an 'illness-separated couple' would be 'substantially inadequate and inappropriate, having regard to the scope and object of the Act': Reasons, para. 43. Accordingly, the AAT was satisfied there existed a 'special reason' why Porter should not be treated as being a member of a couple for the purposes of the Act.

### Formal decision

The AAT affirmed the SSAT decision.

[H.B.]

## Sole parent pension: special widow

SECRETARY TO THE DSS and DAGHER  
(No. 12329)

**Decided:** 23 October 1997 by G. Ettinger.

Dagher sought review of an SSAT decision which had set aside a DSS decision not to pay arrears of sole parent pension (SPP) for the period 22 September 1994 to 25 December 1995. The SSAT had found that Dagher was a 'special widow'.

### The facts

SPP was paid to Dagher from 6 July 1989. He travelled overseas on 29 September 1993 and was paid SPP until 22 September 1994 when it was cancelled. Dagher returned to Australia on 13 May 1996, and requested payment from the DSS of SPP from 22 September 1994