

Administrative Appeals Tribunal decisions

Carer's pension: 'severely handicapped person'; 'the home of the handicapped person'

DUNSTALL and SECRETARY TO THE DSS (No. 12583)

Decided: 4 February 1998 by J.A. Kiosoglous.

Dunstall sought payment of carer's pension in relation to the care of her mother, for the period 14 August 1996 to 9 July 1997. The DSS determined that she was not qualified for that pension and this decision was affirmed by the SSAT. Dunstall sought review of the decision by the AAT.

The issues

The DSS contended that during the relevant period, Dunstall's mother was not a severely handicapped person within s.198 of the *Social Security Act 1991* (the Act). Although she had a physical disability, namely blindness and other complaints, she did not require frequent care in connection with her bodily functions or constant supervision to prevent injury to herself or another person, as required by the legislation. In the alternative, even if she was a severely handicapped person, Dunstall could not satisfy s.198(1)(b) of the Act, which requires that the care be provided in the home of the handicapped person.

The evidence

Dunstall resided at a home in Semaphore Park, whilst her mother lived at Seaton, until 17 May 1997, when she commenced living with her daughter. Dunstall gave evidence that she did various tasks for her mother outside the home, such as shopping and banking. She also assisted in the home by cleaning, washing clothes and ironing. She would pick her mother up from Seaton most days and return with her mother to her own house in Semaphore Park. There she would need to administer all medications. Her mother was able to attend to her own

bathing and toileting requirements. Dunstall would take her mother with her in the car if she needed to go out, as she was concerned about leaving her alone.

The report from the medical practitioner from Health Services Australia concluded that Dunstall's mother required constant supervision outside the home, but that her peripheral vision was adequate for her to cope without assistance in her own home, although she would need help with cooking and food preparation. Reports from a treating general practitioner and an ophthalmologist, however, both suggested that Dunstall's mother would have a great deal of difficulty caring for herself. The general practitioner concluded that her impairments and the effects of medication might well cause errors of judgement such that she could be a danger to herself in daily activities.

Severely handicapped person

The AAT accepted that, although Dunstall supervised her mother whilst she bathed in case of falls, her mother did not require frequent care in connection with her bodily functions. It did, however, find that she required constant supervision to prevent injury to herself, on the basis of the evidence of the treating doctors and looking to the nature of the tasks undertaken by Dunstall for her mother. The AAT therefore found that the definition of 'severely handicapped person' within the meaning of s.198(3) of the Act was satisfied.

The home of the handicapped person

However, to be qualified for carer's pension Dunstall also had to satisfy s.198(1) of the Act which provides:

'A person (the "carer") is qualified for a carer's pension if:

...

(b) ... the care is provided in a private residence that is the home of the handicapped person ...'

The AAT considered previous decisions which had been made in relation to the equivalent provision set out at s.37 of the *Social Security Act 1947* (the 1947 Act). In particular, *Kinsey v Secretary to the DSS* (1990) 20 ALD 14 determined that it was possible for a recipient of carer's pension to have more than one home, as long as the recipient provided care for the severely handicapped person in a home which was the home of both.

The AAT accepted that it would be possible to find that, during the relevant period, Dunstall's mother had two

homes. However it was noted that the terms of s.37 of the 1947 Act and s.198(1) of the current Act were different. The 1947 Act referred to care provided in a home of the carer and the handicapped person, whereas the current Act provides that a carer is qualified for pension if the care is provided in *the* home of the handicapped person. The use of the singular term 'the home' suggests that only one home can be the home of the handicapped person for the purposes of the current Act. In the instant case, Dunstall's mother had her home at Seaton, her official residence, until 17 May 1997 when she moved to Semaphore Park. Dunstall was therefore ineligible for carer's pension for the period 14 August 1996 to 16 May 1997. She remained ineligible from 17 May 1997 to 9 July 1997, because her application for carer's pension was made over three months prior to the date on which she became qualified for that pension. Pursuant to s.201(3) of the Act, carer's pension was not payable to her in those circumstances.

Formal decision

The AAT affirmed the decision under review.

[A.T.]

Disability support pension: inability to work and unrated symptoms; Ménière's disease

SECRETARY TO THE DSS and BUSSTRA (No. 12484)

Decided: 10 December 1997 by K. Beddow.

The issue

The key issue for determination by the AAT was whether symptoms not rated for disability support pension (DSP) purposes were also 'impairments' and able to be considered in determining whether or not an applicant was fit for work or retraining.

The background

Busstra was granted invalid pension in 1988 and transferred to DSP in 1991. When granted originally, it was accepted that he suffered from a substantial hearing loss. When his impairment was reviewed in 1996 the medical opinion was that his impairment did not prevent him from undertaking an educational program, nor from working for at least 30 hours a week, and so his entitlement to pension ceased. This decision was affirmed by an Authorised Review Officer in December 1996, but set aside by the SSAT in March 1997.

The medical evidence

In 1987 Busstra was tested for Ménière's disease. He was diagnosed as suffering a moderate permanent hearing loss in his right ear and severe loss in the left. He was operated on unsuccessfully in 1988, and in November 1988 was formally diagnosed as having Ménière's disease. His medical assessment at the time indicated a 50% impairment for deafness. In the 1996 review, the only rated impairment was 'profound deafness', rated at 30% (later amended to 40%), but it was considered that Busstra was capable of a wide range of employment where communication was not required.

A specialist audiologist gave evidence that Busstra's hearing had been steadily worsening since 1988 but especially since 1995, and that he suffered from Ménière's disease, the symptoms of which included nausea, hearing loss, vertigo and tinnitus. Busstra himself reported vertigo episodes up to 3 times daily. The audiologist concluded that the combination of Busstra's hearing loss, tinnitus and vertigo meant there was only a highly restrictive list of occupations for which he was suited. The government medical assessment in September 1997 agreed with this, but considered Busstra could still work within the limitations of communication, noise exposure and safety.

Employment history

Busstra worked for 26 years in real estate after leaving school at 15 years. He obtained a real estate licence in 1965 and a Clinical Hydrotherapy Diploma in 1981. He ceased full time work in 1988 by which time his hearing loss had begun, but he did do some months of casual work as a furniture removal truck driver in 1992, and as a school cleaner. He had to cease both jobs due to the impact of his hearing loss. He also undertook minor occasional handyman tasks for friends and other members of his church, and had developed an interest in on-line computer use for bible study. Busstra had also

been a Volunteer Coast Guard from 1989 to 1995, but ceased this activity due to worsening hearing and consequential safety risks for other Coast Guards.

The law

The relevant legislation is contained in s.94 of the *Social Security Act 1991*. It was conceded that Busstra met all the requirements of this section, save for s.94(1)(c) which required consideration of whether he had a 'continuing inability to work'. This term is further defined in s.94(2) which requires that the person be unable, because of the impairment, to undertake any work, or educational or vocational training, or that such training would be unlikely to enable the person to do any work, in each case for the next two years.

The impairment

The AAT accepted that Busstra suffered from Ménière's disease, and that such a disease is usually associated with tinnitus, deafness and intermittent vertigo, with consequential implications for his own safety and that of others. The AAT accepted that the condition and its associated symptomatology severely restricted Busstra's ability to undertake both domestic and work activities, and had meant inability to continue previous work and recreational interests.

Noting that the impairment rating of 40% was in reference to Busstra's hearing loss and not to any other symptoms of Ménière's disease, the AAT considered whether the 'impairment' referred to in s.94(2) (regarding capacity to undertake educational or vocational training) should be the 'impairment' rated under the Impairment Tables in Schedule 1B of the Act. In Busstra's situation, only his deafness was rated under the Impairment Tables, yet the other unrated symptoms of his disease — tinnitus and vertigo — were also critical in his ability to work or to undertake training. The AAT concluded that for the purposes of s.94(2):

'... the whole person impairment should be considered where such whole person impairment may consist of a rated symptom of a disease which achieves the 20% threshold under s.94(1)(b) ... Where the disease is accepted then the other symptoms of that disease must come within the meaning of "impairment" ... a rated symptom of a disease cannot be looked at in isolation of the disease itself and in this respect "impairment" in [s.94(2)] refers to the unrated and rated aggregate symptoms of a disease where the threshold under [s.94(1)(b)] has already been achieved in respect of a rated symptom.'

(Reasons, para. 42)

The AAT concluded that Busstra's deafness, communication problems, nausea and vertigo would prevent him from undertaking any work for the next two years, and from the required atten-

dance at any course of training in that time. In addition, even if able to undertake training, the AAT was not satisfied that such training would overcome the effects of Ménière's disease to allow Busstra to engage in any paid work.

Formal decision

The AAT affirmed the earlier decision of the SSAT.

[P.A.S.]

Assets test: transfer of farm; disposal of asset

SECRETARY TO THE DSS and
MAY
(No. 12284)

Decided: 13 October 1997 by J. Dwyer.

The background

Mr and Mrs May lodged claims for age pension in August 1995. May advised the DSS that in April 1995 she had given a farm valued at \$260,000 to her daughter Dupleix. The DSS assessed the Mays' entitlement to age pension under the assets test on the basis that May had disposed of assets.

The issue

Was the transfer of the farm by May to her daughter Dupleix a disposal of an asset within the meaning of the *Social Security Act 1991* (the Act)?

The legislation

The relevant parts of s.1123(1) of the Act stated that a person *disposes* of assets if the person disposes of all or some of the person's assets, and the person receives no consideration in money or money's worth for the destruction, disposal or diminution.

Disposal of asset

The DSS submitted that May disposed of an asset and received no or inadequate consideration in money or money's worth for the disposal of the farm to her daughter Dupleix.

The AAT considered the Federal Court decision, *Frendo v Secretary, Department of Social Security* (1987) 13 ALD 681 in relation to the meaning of the words 'no consideration in money or money's worth'. The court found that a promise which was not legally enforce-