

Lump sum compensation payment: one or more injuries arising from the same event

SECRETARY TO THE DSS and THOMAS
(No. 13391)

Decided: 14 October 1998 by
W. J. F. Purcell.

Background

Thomas injured his left knee in the workplace on several occasions (1984, 1989 and 1991) and then his right knee in a workplace injury in 1995. The medical evidence in relation to the claim for the right knee injury suggested the right knee was a secondary disability, aggravated by excessive weight and a tendency to favour the left knee after its repeated injuries. Orthopaedic evidence stated that the right knee injury resolved itself over time but the left knee injury continued to be a limiting factor for Thomas' future work capacity.

After receiving periodical payments of compensation for a time, Thomas sought redemption of a lump sum under the relevant State *Compensation Act*. The lump sum settled upon was comprised of sums representing 10% loss of function for the right leg and 40% loss of function for the left leg. The ultimate determination of the DSS was that an 87 week preclusion period should be applied.

The SSAT decided that Thomas' loss of earning capacity was attributable solely to his left knee injury and that the compensation payment to be taken into account should not include the sum for the right knee injury. Disregarding the sum attributable in the lump sum to the right knee injury reduced the preclusion period to 77 weeks.

The SSAT found, however, that there were no special circumstances to warrant disregarding all or part of the payment under s.1184 of the *Social Security Act 1991* (the Act). It appears from the AAT's reasons that the SSAT simply excised the sum for the right knee on the basis that it did not fit within the statutory definition of 'compensation' lacking the connection between the payment and lost earning capacity.

The Secretary sought review of the SSAT's decision.

The law

Section 1165(1A) of the Act provides that where a person claims a 'compensation affected payment' and receives a lump sum compensation payment, pension will not be payable for the 'lump sum preclusion period,' a period worked out under the statutory formula found at s.1165(8) of the Act.

The term 'compensation' is defined in s.17(2) of the Act and includes:

- (b) a payment under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme;

...

- (e) made wholly or partly in respect of lost earnings or lost capacity to earn.'

Section 17(2B) provides where there is more than one lump sum payment:

17.(2B) For the purposes of this Act, if:

- (a) a person receives more than one lump sum payment, whether simultaneously or at different times, in relation to one or more injuries arising from the same event (see s.(5A)); and
- (b) at least one of the payments is made wholly or partly in respect of lost earnings or lost capacity to earn;

the person is taken to receive one lump sum compensation payment, made wholly or partly in respect of lost earnings or lost capacity to earn, of an amount equal to the sum of those lump sum payments.'

The payment of compensation

Evidence was given by the compensation consultant for the employer that Thomas' right leg claim had the same claim number as the left leg claim and it was considered in determining the claim that the injury was a sequelae to the left leg injury. This was the basis upon which liability was accepted. The AAT readily reached the conclusion that the payment under the State compensation legislation for the right knee was a payment in respect of loss of earning capacity and hence fell within s.17(2B) of the Act. The Tribunal said that it was satisfied that 'the respondent received more than one lump sum payment simultaneously in relation to one or more injuries arising from the same event': Reasons, para. 13. Thomas was, therefore, to be taken under the Act to have received a lump sum of compensation wholly or partly in respect of lost earnings or earning capacity equal to the sum of the lump sum payments.

Special circumstances

The AAT then turned its mind to the question of special circumstances. Whilst there was evidence of incomplete legal advice, and insufficient financial advice at the time the compensation was paid, coupled with evidence of financial difficulties and a marked deterioration in

Thomas' health, it was not considered that these circumstances were so unusual as to warrant the exercise of the discretion available under s.1184 of the Act to disregard the whole or a part of the compensation payment.

Formal decision

The AAT set aside the SSAT's decision and reinstated the original decision to impose an 87-week preclusion period.

[M.C.]

Wife pension: residency requirements

DIMITRIADIS and SECRETARY TO THE DFaCS
(No. 13426)

Decided: 4 November 1998 by
L. S. Rodopoulos.

On 2 July 1991, the DSS cancelled Dimitriadis' wife pension on the grounds that she had been absent from Australia for 12 months. This decision was affirmed by the SSAT on 7 February 1991. Dimitriadis returned to Australia on 11 December 1996 and, in a letter dated 18 July 1997 sought an explanation as to why her wife pension was cancelled.

The issue

The AAT had to determine whether Dimitriadis satisfied the residential requirements of the *Social Security Act 1991*. Had she been a resident of Australia for more than 10 years? If so, it was immaterial that she had been continuously absent from Australia for 12 months.

The legislation

Sections 1216B (1) and (2) provide that a woman's qualification for wife pension is not affected by her absence from Australia if she has been an Australian resident for at least 10 years. However, s.1216 provides that, otherwise, an Australian resident who has been outside Australia for a continuous period of 12 months is disqualified for wife pension.

Sections 7(2) and (3) list the factors to be considered in determining whether a person is an Australian resident. Regard must be had to the nature of accommodation in Australia, the nature and extent of family relationships in Australia, the nature and extent of employment, business or financial ties in Australia, the degree

of assets in Australia and the frequency and extent of travel outside Australia.

The facts

Dimitriadis, her husband and two children migrated to Australia from Greece on 31 October 1969. On 2 March 1979, she and her daughter Sofia left Australia for Greece.

Her application for payment of her invalid pension whilst overseas indicated she would return to Australia in a year. It was in dispute whether she had simply gone to Greece temporarily for a holiday or whether she had left Australia permanently. It was also disputed whether she had separated from her husband when she departed Australia. The applicant claimed she temporarily left for Greece to get her 15-year-old daughter away from an unsuitable relationship with a 38-year-old man. She also denied any marital difficulties or a separation. Her son and husband also maintained that the move to Greece was temporary and that there was no marital separation.

In September and October 1980, the applicant's husband completed two applications for pension payment whilst overseas, indicating that he intended to leave Australia for an indefinite period. On 1 October 1980, the DSS cancelled her husband's invalid pension, effective from 26 January 1981. He was notified that if he went overseas, his pension would cease as at his departure date. Medical reports obtained in support of his appeal against the cancellation of his pension referred to a 'dreadful marital situation', a separation, and an impotence problem which had caused marital discord.

On 9 December 1980, the family home was sold. However, the family continued to pay rent and live in that house until their departure for Greece. Dimitriadis' son, Thomas, gave evidence that they intended to buy a larger, brick home in Australia. However, he said in evidence that these plans were changed due to his father's deteriorating health.

On 11 January 1981, Dimitriadis and her daughter returned to Australia. Dimitriadis told the AAT she returned to Australia to help with her husband's appeal against the cancellation of his pension. His appeal was successful.

On 30 May 1981, the whole family returned to Greece. The family maintained they returned to Greece on medical advice due to Mr Dimitriadis' failing health. However, the AAT noted there was no medical evidence recommending a move to Greece. The evidence established that as at their departure in 1981, they had no real estate and no bank ac-

counts in Australia. On 23 April 1981, Mr Dimitriadis submitted an application for pension payment whilst overseas. A box next to the sentence 'expect not to return to Australia' was ticked. On the following day another copy of the same form was submitted stating that he intended to return to Australia in a few years and declaring his intention to sell the family home.

On 22 July 1981, Dimitriadis was informed by the DSS that her invalid pension had been cancelled and she had been transferred to the wife pension.

On 8 April 1984, Thomas Dimitriadis, the applicant's son returned to Australia, returning to Greece on 17 July 1984. His evidence to the AAT was that he returned to Australia to make preparations for his family's return. However, he developed a serious eye problem and returned to Greece where he had family support. The evidence of the Dimitriadis family was that they remained in Greece from 1984 to 1997 because of Thomas' eye condition, his seeking of medical treatment in Europe and his subsequent blindness.

Findings

The AAT referred to the evidence before it regarding the marital situation of Dimitriadis and her husband. The AAT concluded, on the balance of probabilities that the marriage was unsatisfactory, and that Dimitriadis' departure from Australia in 1979 was a temporary separation.

Similarly, the AAT found that Dimitriadis' return to Australia in 1981 was a temporary one for the sole purpose of helping her husband with his pension dispute. She was not to be regarded as returning from a holiday in Greece. The AAT also found that as at October 1980, her husband was planning to go to Greece for an indefinite period.

The AAT stated it placed little weight on the assertion that the family left Australia for Greece on medical advice, noting there was no supportive medical evidence that a change of climate would benefit Mr Dimitriadis.

The AAT found that the sale of the family home in 1980 indicated an intention that Mr Dimitriadis would return to Greece permanently. These plans were eventually fulfilled in May 1981, after his pension dispute was finalised.

The AAT was not convinced that Thomas Dimitriadis returned to Australia in 1984 in order to prepare for the return of his parents to Australia. It regarded his return to Greece following the serious deterioration in his eyesight as an indication that Greece was the family's home.

Did the two periods of residence in Australia constitute a ten-year residency?

From 1969 to 1979, Dimitriadis resided in Australia for 9 years, 4 months and 2 days. In 1981, she stayed in Australia for a further 4 months and 29 days. The AAT held that the 2 periods could not be 'rounded off' to meet a requirement of a 10-year residency.

Did Dimitriadis continue to be an Australian resident during her stay in Greece?

The AAT referred to the case of *Hafza v Director-General of Social Security* 26 SSR 277, where Wilcox J considered what constituted residency. Wilcox J indicated that residency required a 'physical presence in a particular place and the intention to treat that place as home'. He said 'the test is whether the person has retained a continuity of association with the place'.

The AAT considered the provisions of s.7(3) of the Act. In regard to s.7(3)(a), the accommodation requirements, the AAT noted that the family house was sold in 1980 and the family did not own property in Australia. In relation to the family relationship requirements of s.7(3)(b), the AAT noted that Dimitriadis had no extended family in Australia. The AAT found that none of the family was employed in Australia and, therefore, were not subject to a positive inference from s.7(3)(c) of the Act. The AAT said that as the family had no assets in Australia Dimitriadis was not helped by s.7(3)(d) of the Act. Having regard to s.7(3)(e) of the Act, the AAT held that from 1979 Dimitriadis only travelled outside Greece for brief periods of time.

All of these findings indicated a lack of a continual physical presence or association or intention of residing in Australia. Accordingly, the AAT held that Dimitriadis was not an Australian resident during the period she was in Greece.

Formal decision

The decision under review was affirmed. Dimitriadis was not entitled to wife pension.

[H.B.]