

to be a fully documented diagnosed condition which had been investigated, treated and stabilised. As a result, no impairment rating could be assigned.

The formal decision

The decision to reject the disability support pension claim was affirmed.

[K.deH.]

Disability support pension: inability to work; date of qualification

PRESTON and SECRETARY TO THE DFaCS
(No. 19990614)

Decided: 20 August 1999 by
B.J. McMahon.

Background

Preston worked underground in a colliery until 17 October 1997 when, only six months before he would have reached compulsory retirement age, he accepted a voluntary redundancy package. On 20 October 1997 he applied for newstart allowance (NSA), indicating in his application that he suffered from a heart condition and that he intended to apply for the disability support pension (DSP) although no DSP claim form was given to him at that time. His application for NSA was rejected due to the application of income maintenance provisions. He applied for a carer pension on 16 April 1998 and for the DSP on 19 August 1998.

The issue

The key issue was whether Preston had a continuing inability to work on 20 October 1997, the date he lodged his claim for NSA. The SSAT had found that Preston did have such an inability to work in April 1998 (subsequently conceded by the Department) but not on the date of his first application for income support.

The law

The qualification for DSP is set out in s.94 of the *Social Security Act 1991* (the Act). The only qualification requirement in dispute in this matter was that provided under s.94(1)(C)(i) that an applicant have 'a continuing inability to work' at the date of the relevant claim.

Under s.100(2) of the Act an initial claim for another pension may be treated

as a claim for DSP under limited conditions. That section provides:

100.(2) If:

- (a) a person makes a claim (in this subsection called the 'initial claim') for:
 - (i) a social security or service pension, a social security benefit or a parenting payment; or
 - (ii) a pension, allowance, benefit or other payment under another Act, or under a program administered by the Commonwealth, that is similar in character to a disability support pension; and
- (b) on the day on which the person makes the initial claim, the person is qualified for a disability support pension; and
- (c) the person subsequently makes a claim for a disability support pension; and
- (d) the Secretary is satisfied that it is reasonable for this subsection to apply to the person;

the person's provisional commencement day is the day on which the person made the initial claim.

The evidence

In his evidence, Preston stated that his work at the colliery was a 'sitting job', the 'easiest at the mine' and that he did not regard his work as heavy. He would have preferred to continue to work until retirement, but accepted the package as the money was 'right' and because of his health conditions.

Preston had suffered from a heart condition for many years, and underwent by-pass surgery in 1988. He had made an appointment to see his doctor on 20 October 1997 as he was experiencing chest pain and actually saw his doctor on the day he lodged his NSA claim. By April 1998 he had been referred for further tests and specialist treatment, although Preston told the Tribunal that he considered his symptoms were not at that time any more serious than when he ceased work at the colliery. The Department sought details of Preston's health from his general practitioner, who replied on 30 July 1998 and commented on Preston's health as at the date he had ceased work. His doctor noted that Preston suffered from several conditions including exertional chest pain, obesity, hypertension, dyspepsia, high frequency nerve loss, right median nerve compression, osteoarthritis of the right hand and paraesthesia of the left hand. The doctor concluded that these conditions prevented all manual work, and that clerical or light manual work would be impossible due to Preston's hearing and hand impairments. He added '... Despite the fact that he was employed (in labouring/manual work) in the coalmines, his long

association with the industry and workplace enabled him to tailor the type of work to prevent any adverse symptoms.'

Inability to work

The Tribunal accepted that there was clear and unequivocal medical evidence that Preston was unable to work at the date of his claim for NSA. Although he had continued to work until only a few days before this claim was lodged, the Tribunal concluded that the medical evidence was such that:

... It would have been a triumph of hope over experience and medical advice to express a desire to continue to work until his 60th birthday. An inability to work cannot mean an ability to pursue employment whilst suffering an unacceptable level of pain or impairment.

(Reasons, para. 17)

Applying s.100(2) of the Act, the Tribunal further accepted that Preston's claim for NSA should be treated as a claim for DSP.

Formal decision

The Tribunal set aside the decision under review and substituted the decision that Preston's provisional commencement date for DSP was 20 October 1997.

[P.A.S.]

Overpayment: special circumstances

HUSAR and SECRETARY TO THE DFaCS
(No. 19990616)

Decided: 20 August 1999 by
E.K. Christie.

Husar sought review of a decision of the SSAT, which affirmed the decision of an authorised review officer, that the amount of \$874.40 in sole parent pension paid to Husar between 10 July 1997 and 21 August 1997 had been overpaid and was recoverable from her.

The facts

The undisputed facts were that Husar had commenced work on 21 April 1997 and, on that day, she notified Centrelink accordingly. On 17 June 1997, Husar completed a review form in which she notified her earnings for the preceding six weeks. This form was received by Centrelink on 23 June 1997. On 7 July 1997, Centrelink sent Husar an advice letter. She did not notify Centrelink that