The DFaCS reassessed her entitlement to FP, calculating that she had been overpaid $3484.80. Couch requested review of this decision arguing the sale of their truck had resulted in an unexpected increase of income. Had the proceeds of sale not been included, their taxable income for 1996/97 would be $32,182.

The SSAT set aside the decision to raise and recover the debt on the grounds that the 1996/97 estimate of income did not form the actual basis for the calculation of her rate of FP. The SSAT decided that, as FP had been calculated on her previous year's income, the DFaCS had not 'had regard to' the estimated income for the current financial year.

DFaCS submissions

The DFaCS contended that FP is normally calculated on the taxable income of the previous financial year. Where a partner received NA, a dependent spouse does not have to satisfy an income test for FP. However, if the partner returns to work, the DFaCS must be notified. Section 1069-H18 of the *Social Security Act 1991* (the Act) provided that, following a notifiable event, a comparison between the previous financial year and the current one be made to determine which year's income should be used to calculate FP.

The DFaCS argued that it had 'had regard to' both her 1995/96 income and her estimated income for 1996/97 before deciding to pay her FP, based on the lower income for the earlier year. As her 'income free area' was calculated at $24,598 and 110% of that was $27,057, and as her estimated combined income was $17,500, the DFaCS decided to use the lower income figure for the previous year in calculating her FP.

It was submitted on behalf of the DFaCS that to 'have regard to' meant to consider, rather than to use that factor in making a decision. The DFaCS argued that, had Couch provided a better or higher estimate of income for 1996/97, then her FP rate would have been based on that estimate rather than her actual income for the previous year. Whilst she estimated her income for the 1996/97 financial year at $17,500, her actual income for that year was $58,260. The DFaCS argued that had she estimated her income at more than $27,057, being 110% of her 'income-free area' her rate of FP would have been based on that estimate, not her income for the previous year. The DFaCS said there were no special circumstances (other than financial hardship) warranting a waiver of the recovery of the whole or part of the debt.

Submissions for Couch

Couch relied on a written submission by the Welfare Rights Unit. It referred the AAT to *Stuart and Secretary, Department of Social Security* (1998) 3(4) *SSR* 42 and *Secretary, Department of Social Security and Pyke* (1998) 3(3) *SSR* 30.

In *Stuart*, Forgie said: 'In the context of family payments, it can only be said that regard has been paid to an estimate when it has formed the basis, or part of the basis, upon which the rate of payment has been assessed'. In contrast, the AAT in *Pyke* stated that to 'have regard to' 'in the context of s.885 is to take into account or to consider'. The Welfare Rights Unit submitted that the approach in *Stuart* was preferable as it was most likely to promote sound decision making.

In response, the DFaCS sought to distinguish *Stuart* on the basis that no recipient letter advising about 'notifiable events' was sent to Stuart. Thus in *Stuart* there was no 'notifiable event'. In contrast, in *Pyke*, the factual circumstances were identical as there was a notifiable event and the income for base year, rather than the estimate for the current year was used to calculate FP. As in this case, the estimate of income for the current year was also exceeded by 110%.

The DFaCS contended that *Pyke* should be followed, not *Stuart* as in the former, the facts were virtually the same.

Having 'regard to'

The AAT decided that the DFaCS 'had regard to' both the income of the base year and the estimated income of the current year, before electing to use the previous year to determine the rate of FP. The AAT followed *Pyke* not *Stuart*. The AAT found that although the estimated income was not used in calculating the rate of FP, regard was had to this estimate before the DFaCS elected to use the lower income of the previous financial year.

Debt owed?

As the income of Couch exceeded her estimated income for 1996/97 by 110%, the AAT found there was an overpayment and a debt due to the Commonwealth.

Write-off or waiver

The AAT referred to s.1236(1A)(b) of the Act, stating that the only basis for a write-off was if Couch had no capacity to repay the debt. The AAT said that Couch did have a capacity to repay the debt as she received income from the DFaCS and fortnightly deductions could be made. The AAT referred to s.1236(1C) of the Act stating that recovery by deductions would not cause severe financial hardship. The AAT decided a write-off was not appropriate.

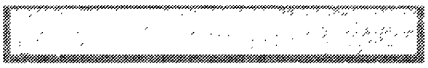
In relation to a waiver, the AAT considered whether there existed special circumstances warranting a waiver. The submission for Couch argued that a waiver was appropriate given that Couch had not knowingly caused the overpayment. Couch believed she was doing everything in her power to comply with the law. That her projected income varied considerably from her actual income for 1996/97 was due to circumstances beyond her control. The Welfare Rights Unit argued that Couch should not bear the brunt of anomalies in the law which produced unreasonably harsh results in her case. The truck business was sold as it was having an adverse impact on her family life, given her partner's excessive working hours. His working week left her with the sole care of three young children. The sale of the business caused further financial hardship as it led to a large unforeseen tax bill that their accountant had failed to anticipate.

Despite all this, the AAT decided there were no special circumstances warranting a write-off of the debt.

Formal decision

The AAT decided there was a debt to be repaid to the Commonwealth as neither write-off nor waiver was appropriate.

[H.B.]



Disability support pension

HUDSON and SECRETARY TO THE DFaCS (No. 2000/502)

Decided: 22 June 2000, by D.J. Campbell.

Hudson sought review of a decision of the SSAT which had affirmed the rejection of her claim for disability support pension.

The legislation

The relevant law was contained in ss.94, and 100(3) of the *Social Security Act*

1991 (the Act) and to the Schedule 1B Impairment Tables (pre 1 April 1998).

The facts/circumstances of the case

Hudson, who was born in 1951, was injured in a motor vehicle accident in September 1994. She was granted disability support pension from May 1995. In May 1997, she was granted compensation of $140,000 and a preclusion period was imposed from 25 September 1994 until 24 January 1998. Her disability support pension was cancelled during the preclusion period. She reapplied for disability support pension on 31 October 1997 and, on 29 January 1998, her claim was rejected because her combined impairment rating was less than 20%.

At the Tribunal hearing on 21 February 2000, Hudson's evidence was that she suffered from the following conditions:

- periodic abdominal pain and distension;
- hypertension (8 year history, significant and unstable);
- compromised Immune System (following spleen removal required as a result of injuries sustained in the motor vehicle accident and requiring period intravenous antibiotics);
- rheumatic Fever (childhood episode resulting in heart murmur associated with mild valve disease);
- inflamed and infected left great toe (now resolved);
- vaginal prolapse requiring surgical repair.

Hudson stated that as a consequence of these impairments, she was unable to mow lawns, garden or vacuum for more than 5-7 minutes. She had been experiencing shortness of breath over the past three years and experienced an episode of significant abdominal distension once a week.

The medical evidence as to her abdominal pain and distension indicated that, because of ongoing symptoms, she had had numerous hospital admissions, several operations and extensive investigations but no specific diagnosis had been reached. The Health Services Australia medical officer who examined her considered her abdominal condition was incompletely investigated and diagnosed and therefore, not fully treated and stabilised and that, because of this condition, she was temporarily unfit for work. The Department submitted that the abdominal condition could not be rated as it did not have the status of a permanent condition. Hudson submitted that, despite the absence of a confirmed diagnostic label, her clinical abdominal condition has been fully investigated, stabilised and treated and therefore was a permanent condition.

Hudson also submitted that the combined impairment rating for her permanent medical conditions was 20% or greater and that while she might have a capacity to some sedentary work for a period of time on her 'good' days, this capacity ceased when her abdominal condition exacerbated.

Prior to the motor vehicle accident, Hudson worked as a nurses aid, and as a part-time cleaner in government schools. She did not work at all following the accident.

Did Hudson have an impairment rating of at least 20%?

The Tribunal noted that issues of psychological attribution had been considered and made the observation that Hudson was an honest and reliable witness and that there was no suggestion that her clinical story had been contrived or exaggerated in any way.

The Tribunal noted that, as a matter of general principle, on hearing an appeal against rejection of disability support pension, it was required to deal with the applicant's permanent medical conditions and their consequences including the capacity to work, during the 'operative period; that is, at the date of application and for a period of three months thereafter (s.100A). New conditions and conditions which become permanent outside the operative period cannot be considered.

The Tribunal found that Hudson had the following impairments during the operative period: chronic abdominal condition, hypertension, mitral valve murmur, arthritis of the left great toe and vaginal prolapse.

In relation to Hudson's abdominal condition, the Tribunal noted that it was permanent, having existed for three years before and after the operative period. Despite the fact that the many specialists involved in treating her for this condition had been unable to agree on the exact nature of the underlying pathology, it is well documented that it has been extensively investigated, treated and stabilised. On the basis of the extensive medical evidence, the Tribunal concluded that Hudson had a 30% impairment for her chronic abdominal condition, considered under Table 26.

In relation to Hudson's other impairments, the Tribunal concluded that due to an absence of detail in the medical reports, a 'zero' rating under Table 25 applied to her hypertension and no assessment was made of her mitral valve murmur. The Tribunal considered that, on the recorded medical material, a 5% rating under Table 4 was appropriate for the left great toe condition. No impairment rating was made for Hudson's vaginal prolapse as she was on the waiting list for surgical repair.

Accordingly, the Tribunal found Hudson had a combined impairment rating of 35% using the combined values chart and, therefore, s.94(1)(b) was satisfied.

Did Hudson have a continuing inability to work?

The Tribunal was satisfied that Hudson had a continuing inability to work and that, because of her impairments, she would be unable to work within two years even if she was considered able to undertake vocational or on-the-job training (s.94(2)(a) and (b)). The Tribunal referred to conflicting medical evidence as to this issue, and found that the medical opinion to the contrary was unduly optimistic, incongruent with her recorded symptomatology and inconsistent with events prior to and subsequent to her application, which the Tribunal considered it could have regard to in so far as that assisted it to achieve a greater understanding of her clinical condition during the operative period.

Formal decision

The AAT set aside the decision under review and substituted its decision that Hudson was qualified for disability support pension from the date of her claim.

[S.L.]