bined with availability of only reduced hours of work from 1995 onwards, meant that she was forced to sell her home and to move twice to rented accommodation, thereby incurring removal fees and further rental and bond assurance costs.

Woods stated that since she received the net payout of $18,000 in August 2001, she had expended $11,000 on a number of items. In addition, in October 2001 she prepaid her rental to January 2002. She had outstanding credit card debts of $2500 and $3000, a total of $5500, and by 31 December 2001 her bank account balance was 31 cents.

Mental health

Woods said in evidence that at all times, until the SSAT handed down its decision on 3 January 2002, she had been convinced that Centrelink would take account of her submissions and reduce the preclusion period. Her application was unsuccessful, and she applied to the AAT for a review. On 21 February 2002 she attended a preliminary conference where the Departmental representative advised her to contact Welfare Rights who might be able to represent her. She subsequently took an overdose of her anti-depressant, Tryptanol.

Woods denied that this was a suicide attempt. She said, in effect, that she just 'snapped'. She felt 'closed in', and just wanted to 'go', and when she took the drug she felt a high and was very agitated. She thought the Tryptanol would enable her to have a sleep and forget everything. She suffered no ill effects, but consulted her treating General Practitioner, Dr Arnold, as soon as she could.

Dr Arnold gave evidence that he saw Woods on 26 February 2001. She had been using Tryptanol for a number of years to treat depression, and to assist in pain relief. He had taken her off Tryptanol. The 'drying out' period had finished, and he wanted to change the medication to Zoloft, which she was to commence within the next day or two. He considered that the stress she was suffering in relation to this matter was the major stressor, and that a change in medication, combined with the relief of Woods's present financial stress, would assist in her recovery. Dr Arnold said that when he saw her on 26 February 2002, she was in a distraught state and he referred her to the Acute Crisis Intervention Service at the Queen Elizabeth Hospital. He continued to have ongoing concerns about her mental health.

Discretion

Subsection 1184K(1) of the *Social Security Act 1991* (the Act) provides:

> For the purposes of this Part, the Secretary may treat the whole or part of a compensation payment as:
>
> (a) not having been made; or
>
> (b) not liable to be made;
>
> if the Secretary thinks it is appropriate to do so in the special circumstances of the case.

In the AAT's view, Woods was so worn down by the series of misfortunes that had befallen her, that by mid-February 2002 she was at the end of her tether. That is not to say that some of her present misery had not arisen from her clear inability to manage her meagre finances. The AAT considered, however, that the despair and hopelessness which had overcome her, and led to her taking an overdose were circumstances that, in accordance with the decision in *SDSS and Anderson* (AAT 11920, 30 May 1997), were sufficiently special for the discretion available in s.1184K(1) of the Act to be exercised in her favour.

Formal decision

The AAT set aside the decision under review, and substituted a decision to treat so much of the compensation payment as not having been made, as necessary to ensure the preclusion period was reduced to the period 2 August 2001 to 2 April 2002.

[K.deH.]

Newly arrived resident's waiting period: previously entered Australia

WELDEMICHAEL and SECRETARY TO THE DFaCS (No. 2002/309)

Decided: 3 May 2002 by M. Carstairs.

Background

Weldemichael applied to the AAT for review of two decisions. The first decision was to reject his claim for newstart allowance and the second decision was to reject his claim for a low-income health care card. The basis for both rejections was that Weldemichael was required to serve a two-year newly arrived resident's waiting period.

The facts

Weldemichael was granted permanent residence on 4 January 1994. He had been granted refugee status in Germany in 1980 and travelled to Australia for four weeks on a visitor's visa in 1991. He returned to Australia in May 1994 and left after a few weeks. Weldemichael returned to Australia four more times for short periods. He came to live in Australia on 15 December 1999 and claimed newstart allowance on 3 November 2000 and the health care card on 6 December 2000. Both claims were rejected by Centrelink and these decisions were affirmed by the SSAT.

The law

Subsection 623A(1) of the *Social Security Act 1991* (the Act) provides that a person who has entered Australia on or after 1 January 1993 and who has not been an Australian resident for 104 weeks prior to this date, is required to serve a waiting period for payment of newstart allowance. According to s.623A(5) the waiting period does not apply if:

> **623A.(5)** Subsection (1) does not apply to a person if:
>
> (a) the person is already subject to a newly arrived resident's waiting period; or
>
> (b) the person has already served a newly arrived resident's waiting period; or
>
> (c) the person:
>
> (i) has previously entered Australia before 1 Jauary 1993; and
>
> (ii) held a permanent entry permit granted under the Migration Act 1958 as then in force, or a permanent visa, before the person's last departure from Australia.

Previously entered Australia

There is no definition of 'entered' in the Act. There is, however, a definition of 'enter' and 'enter Australia' in the *Migration Act 1958*. 'Enter' includes 're-enter' and 'enter Australia' means entering Australia and its territories. The Guide to the *Migration Act* stated that a visa would allow a non-citizen to travel to and enter Australia for a defined period. The AAT then referred to two Federal Court decisions that had referred to 'enter' in the context of immigration law where it was decided that 'enter' meant when a person first comes to Australia. The Explanatory Memorandum to the *Social Security Act* states that a person would not be subject to a waiting period if they had entered Australia before 1 January 1993. The AAT concluded that 'enter' was not confined to the situation where a person is accepted as a permanent member of Australian society.

The AAT found that Weldemichael had first entered Australia before 1

January 1993 on a valid visitor's permit. As Weldemichael satisfied all the other requirements of s.623A(5) he was not required to serve the two-year waiting period.

Health care card

At the date of Weldemichael's claim, s.5BA of the *Health Insurance Act 1973* provided that a person who enters Australia after the commencement of the section, must serve a newly arrived residence waiting period of two years. Weldemichael entered Australia after the section commenced in 1997. He argued that he became a resident before that date and so was not subject to the waiting period. The AAT rejected this argument referring to s.7 of the Act, which defined Australian resident. Subsection 7(3) sets out the criteria the AAT can refer to when deciding whether a person is an Australian resident. The AAT concluded that Weldemichael's ties with Australia before 1997 had been of a *temporary and changing kind* (Reasons, para. 31). It was only after Weldemichael returned to Australia in 1999 that he demonstrated an intention to live in Australia permanently. He was not a refugee or exempt resident so he had to serve the two-year waiting period before being qualified for a health care card.

Formal decision

The AAT set aside the decision in relation to Weldemichael's claim for newstart allowance and decided that he did not have to serve a two-year waiting period. However, the AAT affirmed the decision that Weldemichael had to serve a waiting period in relation to his claim for a low income health care card.

[C.H.]

Age pension: portability; rate of payment

THI NHU THAI and SECRETARY TO THE DFaCS (No. 2002/322)

Decided: 8 May 2002 by J. D. Campbell.

Background

The applicant was granted age pension from 20 March 1997. The applicant had arrived in Australia on 25 July 1990 and left Australia for a visit to Vietnam on 3 September 2000.

The applicant advised Centrelink of her intention to travel and a s.1219 certificate was issued.

Whilst in Vietnam, the applicant was hospitalised because of an exacerbation of rheumatoid arthritis, diabetes and Parkinson's disease. The applicant's son advised Centrelink on 26 February 2001 that his mother planned to remain in Vietnam as her health had deteriorated and she was immobile.

The Department decided on 9 August 2001 that the applicant's age pension could not be extended for 12 months past the date of departure from Australia. This decision was affirmed by an authorised review officer and the Social Security Appeals Tribunal.

The issue

The issue in this appeal was whether age pension could continue to be paid beyond the period of 12 months from the date of departure from Australia.

The law

The provisions of the Act considered by the AAT were those relevant to portability.

These included:

- Section 1217 which deals with the meaning of 'maximum portability period';
- Section 1218 C. which deals with extension of a person's portability period;
- Various transitional provisions contained within schedule 1A of the Act in clauses 128 and 130; and
- Sections 1220A and B and 1221 A1, B1 and C1 which deal with rate calculation.

The legal submissions

The applicant's son submitted to the Tribunal that his mother intended to return to Australia when she left in September 2000, but because of deterioration in her health and her inability to travel she remained in Vietnam. These circumstances justified exercising discretion to continue to pay age pension beyond the period of 12 months from the date of departure.

The Department argued that the relevant portability provisions of the Act were amended and took effect from 20 September 2000 with transitional provisions dealing with departures prior to this date. Consequently age pension was portable for a period of 12 months. After this time the rate of payment was calculated by using a statutory formula which was based on a person's working life residence in Australia.

As the applicant arrived in Australia at the age of 61 her working life residence in Australia was nil and therefore the rate of pension payable to her after 12 months was nil.

Findings

The Tribunal accepted that the applicant's health had deteriorated whilst in Vietnam and this had affected her inability to return to Australia. However, the statutory framework was such that although the applicant's maximum portability period was unlimited as per s.1217 of the Act, after a period of 12 months the rate of pension must be calculated under s.1221 of the Act.

This subsection set out a formula based on, amongst other things, the person's working life residence. The applicant's working life residence in Australia was nil as she did not arrive in Australia until 1990. Applying the rate calculator therefore gave a rate of nil. Consequently under s.44(2) of the Act age pension was not payable.

The Tribunal also noted that s.1218C allows a discretion to extend a person's portability period based on a list of events, however, given that age pension has an unlimited portability period, this discretion was of no effect.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Age pension: portability; short residence

YEOMANS and SECRETARY TO THE DFaCS (No. 2002/346)

Decided: 15 May 2002 by N. Isenberg.

Background

The applicant left Australia in 1987 to live in United States near his wife's family. He and his wife subsequently separated, but he remained close to one of his brothers-in-law (Fortunato). Fortunato was diagnosed with cancer of the hip in 1994/5. The applicant took a significant role in providing care for him.

The applicant returned to Australia in 20 April 1995, believing that Fortunato