

# Administrative Appeals Tribunal

## **Disability support pension: whether medical condition fully treated and stabilised**

SOE and SECRETARY TO THE  
DFaCS  
(No. 2002/926)

**Decided:** 15 October 2002 by S.Webb.

### **Background**

Soe arrived in Australia from Myanmar (formerly Burma) on 22 November 1996 and was granted permanent residency status. He was diagnosed with Chronic Hepatitis C in September 1999. He commenced antiviral treatment for this condition at Concord Hospital in January 2000. Soe lodged a claim for disability support pension on 15 December 2000. Medical examinations were conducted on 1 December 2000, 15 January 2001, 29 January 2001, 3 May 2001, 7 May 2001 and 8 May 2001. Soe's claim was rejected in May 2001. A subsequent claim for disability support pension was granted in May 2002.

### **Issues**

The issue was whether Soe met the requirements of s.94 of the *Social Security Act 1991* (the Act) and qualified for disability support pension prior to May 2002.

### **Legislation**

The legislation setting out the qualifications for disability support pension is contained in s.94(1), (2), (3), (5) and (6) of the Act. Details of start day of payment are contained in Clauses 3 and 4 of Part 2 of Schedule 2 to the *Social Security (Administration) Act 1999* (the SSA Act).

### **Was the condition treated and stabilised?**

In 1999, Soe moved from Melbourne to Sydney for treatment. He was referred by his general practitioner to the Liver Clinic at Concord Hospital for treatment. He participated in a new treatment. He was advised that there may be strong side effects and there was no assurance of a cure: there was a 50:50 chance. The treatment program commenced in January 2000 for an initial period of six months.

There were significant side effects. The first period of treatment did not cure the disease, although the treating doctors told him that they thought the disease was responding to the treatment. Soe felt it was getting worse.

Treatment continued for a second six-month period. During this period of treatment his symptoms became worse and his beard turned white. Soe was dependent on a newstart allowance and it was necessary for him to obtain certificates from his doctors as he was being urged by Centrelink to seek employment and attend interviews. He could not work because of his condition, which was on-going and not responding to the treatment. His situation was made worse by the treatment, which had awful side effects and rendered him unable to look for work or even resume his studies. This was why he lodged a claim for DSP in December 2000.

Soe's treatment ceased for a period in early 2001. His doctors told him that there was still a chance that further treatment could be effective. The treatment recommenced for a third period of six months on 11 April 2001. This did not improve his condition and a fourth period of treatment ensued. However, he was unable to cope with the side effects as well as the symptoms of the disease, and so ceased the treatment two months later.

Soe submitted that this treatment was a trial. The doctors did not know if it would be effective or cure him. It had not. He acknowledged that the treating doctors had completed Centrelink reports indicating that his condition was improving or still being treated. This, he thought, reflected their hopes for the treatment. But his condition was not cured or improved. The treatment had not worked.

There was no dispute that Soe had chronic Hepatitis C. But there was conflicting medical evidence about the status of the disease and its prognosis especially in relation to Soe's ability to resume study or work. The Tribunal listed the detail of the various medical reports. The Tribunal also noted the Treatment Protocol.

Soe submitted that his illness may have been considered to be temporary at some time in the early stages but the passage of time had proved that the disease was not temporary. He argued that his

claim had been assessed on the information provided by doctors, some of whom had not even examined him or spoken with his treating doctors at the Concord Hospital. He further argued that the medical assessment of his condition required expertise in the treatment of Hepatitis C.

Soe submitted that during the relevant period he had already received treatment for more than 12 months. He agreed to participate in a second treatment program because he wanted to be cured, but this meant his treatment was prolonged with an uncertain prognosis and as a consequence his condition had been characterised as 'temporary'.

The Department submitted that Soe's condition during the relevant period was not sufficiently treated and stabilised to be diagnosed as a permanent condition. They referred to paragraphs 4, 5, and 6 of the Introduction to the Impairment Tables at Schedule 1B of the Act. For a condition to be deemed as permanent it must be fully diagnosed, treated and stabilised, with all reasonable treatment having been tried.

The Department submitted that unless the effect of the treatment is known, a condition cannot be considered permanent and assigned an impairment rating. Soe's condition was responding to treatment prior to and during the operative period, as confirmed by the contemporaneous medical reports. A condition that is responding to treatment cannot be considered fully treated or stabilised.

The Tribunal found that the relevant period under review was from when Soe lodged a claim for DSP on 15 December 2000 and for 13 weeks after (pursuant to subclause 4(1) at Part 2 of Schedule 2 of the SSA Act). The Tribunal found that Soe had a physical impairment (Chronic Hepatitis C).

The Tribunal found that Soe completed a 12-month treatment period on 27 January 2001. Soe subsequently agreed to participate in a second trial treatment program (commencing April 2001) and the Tribunal found that this program was an experimental study. Soe had been treated in accordance with the Treatment Protocol and therefore, for the purpose of the experimental study, was considered to be a 'naïve patient who has failed to respond to 24 weeks of standard therapy with interferon alfa-2b

with compassionate use of ribavirin' (Reasons, para. 40).

The Tribunal referred to paragraph 6 of the Introduction to the Impairment Tables set out at Schedule 1B of the Act.

The Tribunal finds that the Applicant has undergone treatment of a character and duration accepted by experts in the treatment of Chronic Hepatitis C as sufficient to effect a positive response in his condition and, in the absence of a suitable positive response, ceased that treatment.

(Reasons, para. 42)

The Tribunal noted that there was little evidence to support the proposition that Soe's condition was improving or responding positively to the treatment. The Tribunal found that the further treatment program was an experimental study and that a substantial improvement could not reliably be expected and that the planned treatment was not of a type regularly undertaken or performed with a high success rate and a low risk to the patient. From 27 January 2001 significant functional improvement could not be expected to result from Soe's planned participation in an experimental study. The Tribunal noted the medical evidence and found that from this date it is reasonable to consider his condition stabilised. Soe's condition was not improving or responding positively to treatment during the relevant period and it was more likely than not that the condition would persist for more than two years without significant functional improvement. Soe's Chronic Hepatitis C condition was considered permanent at the cessation of treatment on 27 January 2001.

The Tribunal then referred to Table 11.1 under the Tables for the Assessment of Work-related Impairment for disability support pension at Schedule 1B of the Act. The Tribunal found an impairment rating of 20 points to be appropriate and that Soe satisfied the requirements of s.94(1)(b) of the Act.

The Tribunal considered Soe's continuing inability to work and noted that:

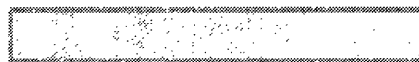
The temporary character of [Soe]'s unfitness for work, and the likely period within which he may have been able to return to work, as recorded in the medical evidence, appears to reflect the expected duration of the treatment [Soe] was undergoing for his condition and the possibility that such treatment may have a positive effect upon his condition. The Tribunal has found that the treatment of [Soe]'s condition under the Treatment Protocol ceased on 27 January 2001 and, thereupon, [Soe]'s condition is considered permanent. The Tribunal has also found that it was more likely than not that [Soe]'s condition would persist for more than two years without significant functional improvement.

The Tribunal found that Soe's impairment was of itself sufficient to prevent him from doing any work or training for two years commencing on 27 January 2001 and he had a continuing inability to work pursuant to s.94(2) of the Act and, therefore, satisfied the requirements of s.94(1)(c) of the Act.

#### Formal decision

The Tribunal set aside the decision under review and in substitution therefore decided that the applicant qualified for and was entitled to a disability support pension from 27 January 2001.

[M.A.N.]



## **Disability support pension: whether medical condition fully treated and stabilised**

**NEWMAN and SECRETARY TO THE DFaCS (No. 2002/917)**

**Decided:** 11 October 2002 by M.Carstairs.

#### Background

Newman, a 25 year old, was injured in a motor vehicle accident in 1996. On 5 December 2000 he lodged a claim for disability support pension. The claim was rejected on the basis that although Newman had an impairment rating of 20 points he was suitable for retraining. The SSAT obtained a report from an occupational physician. It decided that Newman did not have a *fully documented condition, which had been investigated, treated and stabilised* and therefore the condition could not be said to be permanent within the meaning of the legislation.

#### Issues

The issue was whether Newman met the requirements of s.94 of the *Social Security Act 1991* (the Act) to qualify for disability support pension.

#### Legislation

The legislation setting out the qualifications for disability support pension is contained in s.94(1), (2), (3), (5) and (6) of the Act. Details of start day of payment are contained in Clauses 3 and 4 of Part 2 of Schedule 2 to the *Social Security (Administration) Act 1999* (the SSA Act).

#### Was the condition treated and stabilised?

Newman submitted that he had seen 20 doctors who all agreed he should be granted disability support pension. The number of medical certificates that said he was unfit for work outweighed the single adverse report of the occupational physician. Newman submitted that he suffered from arthrosis, which he described as a condition in which enzymes collect around damaged nerve tissue and was diagnosed through magnetic resonance imaging (MRI) dated 28 February 2001.

Newman described his limited lifestyle, the consequences of his condition and his medications. He had numerous hospitalisations when his pain was unbearable. Newman indicated he had worked since the accident in 1996 but had not done so recently, after finding problems with insurance and the unpredictable onset of back pain. He was recently referred to a Pain Management Clinic and he acknowledged that his treating doctors had previously recommended attendance at a pain clinic.

Newman submitted that there was no further reasonable treatment available and he had learned those things that he could do to improve his back. He submitted that *treatment implies* some cure. However, his arthrosis was not going to go away and it was argued that pain management was not *treatment*.

The Department submitted that the question of qualification for disability support pension must be determined at the date of claim, December 2000, and that qualification for disability support pension requires that there be a permanent condition, which is not likely to change. The Department referred to the Introduction to the Tables for the Assessment of Work-Related Impairment for Disability Support Pension which states that the condition has to be a '... fully documented diagnosed condition which has been investigated, treated and stabilised and is likely to persist for at least two years'.

The Tribunal referred to the cases of *Tlonan and Secretary Department of Social Security* (1997) 24 AAR 467 and *Secretary, Department of Social Security and Dyer* (1998) 51 ALD 190 which considered the issue of whether a condition is temporary or permanent.

The Tribunal noted that qualification for disability support pension must be established within three months of a claim (clauses 3 and 4 of Schedule 2 of the SSA Act).

The Tribunal considered that numerous medical certificates stating