the Tribunal noted that the legislation which allowed for the distribution of benefit in the present case was aimed at assisting drought-affected farms during a period of crisis which, hopefully was only temporary. Therefore, there was no point in compelling the applicant to sell the 'unprofitable part' of his business when the object of the legislation was to give assistance to farmers so that they would not be compelled to walk away from their farms.

The Tribunal concluded that the applicant was entitled to off-set the losses of the farming part of the business enterprise against the profits from the pump part of the business.

Formal decision

The decision under review was set aside and in substitution the Tribunal decided that:

- The applicant and his wife conducted one business activity which had a farming enterprise as one limb and a pump enterprise as another limb;
- The losses of the farm enterprise could be offset against the net income of the pump enterprise for the purpose of calculating 'income' pursuant to the provisions of the *Social Security Act 1991*;
- The matter was remitted to the respondent for the purpose of recalculating benefits payable to the applicant and his wife, or the overpayment made to them, as the case may be.

[G.B.]

Mobility allowance: whether claim made; jurisdiction to review a decision

TAYLOR and SECRETARY TO THE DFaCS (No. 2002/989)

Decided: 23 October 2002 by M. Carstairs.

Background

The applicant claimed mobility allowance on 27 September 2001. Although the claim was rejected by Centrelink and that decision was then affirmed by an authorised review officer, the applicant's appeal to the SSAT was successful. The SSAT decided that the applicant was to be paid mobility allowance from the date of her claim, 27 September 2001.

During the review process, the applicant had indicated that she was also seeking arrears of payment on the basis that she had made claims for mobility allowance seven years previously and twelve years previously. Having conducted a search of Centrelink records, a Centrelink delegate made a decision on 21 March 2002 that there was no evidence of claims for mobility allowance made at either of those earlier times (there had been two claims for disability support pension, however). When the applicant sought review of that decision, an authorised review officer decided that, as there was no decision concerning mobility allowance at those earlier times, he had no jurisdiction to review the claim for arrears of mobility allowance. When the applicant sought review with the SSAT, the Tribunal also reached the conclusion, that as there had been no decision regarding mobility allowance before 27 September 2001, the SSAT had no jurisdiction to review the claim for arrears of mobility allowance.

Jurisdiction

On the question of jurisdiction, the AAT noted the comments of the Federal Court in the case of *Ward v Nicholls* (1988) 20 FCR 18 that, 'it would be a very odd situation if ... the Administrative Appeals Tribunal ... was then precluded from considering for itself whether that Board in fact had jurisdiction and, if so, what decision it should have made'. The AAT then referred to the case of *Brian Lawlor Automotive Pty Ltd and Collector of Customs* (1978) 1 ALD 167 noting that, where 'decision' is referred to in the Administrative Appeals Tribunal Act, it is a reference to a decision made in fact, and not to the effect which the decision may have had under the power in the intended exercise of which it was made.

Applying these principles, the AAT found that both the authorised review officer and the SSAT made substantive decisions while ostensibly declining jurisdiction. More importantly, the AAT noted that there had been a primary decision, amenable to review, namely that of a Centrelink delegate which stated: '... I am writing in regard to your conversation ... in which you stated that you lodged claims for Mobility Allowance 7 and 12 years ago. Examination of departmental records fail to support your claims and I am unable to consider you eligible for any payment for this time.' The authorised review officer and the SSAT had also made decisions. The decision of the authorised review officer being framed in these terms, 'I cannot locate any evidence of a mobility claim being lodged during this time' (a reference to the seven to twelve-year period before) whilst the SSAT had made a finding of fact in the following terms: There is no record of any claim for mobility allowance before 27 September 2001.

Having decided, that it had jurisdiction to deal with the substantive issue, the Tribunal considered the factual evidence. After reviewing the factual evidence the Tribunal concluded that it was satisfied on the basis of the extensive searches conducted through files and computer records that the respondent and its agents had received no earlier claims and therefore because no formal claim was made, no payment of mobility allowance could be made.

Formal decision

The AAT set aside the decision that there was no jurisdiction and affirmed the decision of the Centrelink delegate that there was no claim for mobility allowance and therefore, under Part 2.2 of the *Social Security Act 1991*, mobility allowance was not payable.

[G.B.]