Administrative Appeals Tribunal

Disability support pension: injuries not treated and stabilised

VIDOVIC and SECRETARY TO THE DFaCS (No. 2004/1062)

Decided: 12 October 2004 by J. Handley.

Background

Vidovic qualified for disability support pension (DSP) in 2000 but payment of that pension was cancelled in 2002 upon review. Vidovic made a new application for DSP in May 2003 which was rejected. Subsequent to the cancellation of the DSP he was in receipt of parenting payment at the single rate. His wife was in receipt of DSP.

Issues

Was Vidovic qualified to receive disability support pension? Were his conditions treated or stabilised, such as to be classified as permanent? The relevant legislation is discussed in *Fanous and Secretary to the DFaCS*, also reported on this page.

Illnesses treated and stabilised?

Vidovic told the Tribunal he suffered from back pain, depression, nightmares and alcoholism which had worsened since he had previously qualified for DSP. He submitted he should again qualify for DSP. His treating psychiatrist and general practitioner had advised him that he should not undertake any employment in the next two years. He had no specific treatment plan or program for his alcoholism. Surgery had been suggested for his back injury but he had rejected it as his doctors could not guarantee that he would become pain free.

Vidovic had been employed as a process worker with a car parts manufacturer. He suffered a back injury at work and ultimately lost that employment. He had been unsuccessful in attempts to get other work. He obtained a truck licence in 1999 but found that repeated periods of sitting caused an exacerbation of his back pain.

Vidovic came to Australia from Bosnia where, as a civilian, he was exposed to civil conflict, was beaten and abused. He suffered from recurring nightmares two or three times a week which woke him up and he was scared. He often slept during the day because he was tired. Vidovic acknowledged he was addicted to alcohol and had not attempted to reduce or eliminate consumption of alcohol despite the recommendations of his treating psychiatrist.

The Department relied on two medical assessments that had assessed Vidovic as attracting five impairment points under Table 5.2 of the Impairment Tables for the back pain and 10 points under Table 6 with respect to the depression. As the total of the impairment points was less than 20 the Department submitted that Vidovic did not qualify under the first limb of s.94 of the Act. The Department submitted that Vidovic did not attract any impairment points with respect to his alcoholism because it was a condition which had not been treated nor could it be said to be stabilised and therefore it was not a permanent injury.

The Tribunal noted the medical reports from Vidovic's treating doctors that indicated Vidovic suffered from 'a major depressive illness' manifested by recurring nightmares, back pain, concern as to his father's health and his alcoholism and that he was a chronic alcoholic who did not comply with a medication regime and who had refused detoxification treatment.

The Tribunal considered the assessments from both the Commonwealth doctors. It noted that the Commonwealth doctors had not obtained a history of the back injury and 'additionally — and probably with more concern — there would not appear to have been any adequate treatment of his back pain and the referred pain into both legs' (Reasons, para. 19). The Tribunal considered the doctors could either suggest a form of treatment or, in the event it was believed that the back injury was causing the low back pain and the referred pain was permanent, that more than five impairment points would be found.

In relation to the 'psychiatric impairment' and the relevant impairment table, the Tribunal considered it would not be hard to envisage in Vidovic's present state that the combined effects of his illnesses and symptoms would have more than a 'minor effect on work attendance' but would also suggest that with adequate treatment he may well improve and regain his capacity for employment.

The Tribunal found that it was not satisfied that the depression could be regarded as being a permanent injury and/or incapable of being treated to the extent of lessening its effect.

In relation to Vidovic's alcoholism, the Tribunal found there had not been appropriate treatment and it could not in the circumstances find that it was a permanent illness. Such a finding could only be made if there had been an attempt at treatment which had been found to have been unsuccessful.

The Tribunal noted that Vidovic would probably be unable to afford the cost of private treatment. It made several suggestions for treatment in the public system and recommended that a Departmental social worker assist Vidovic. The Tribunal considered that assistance should be made available to Vidovic to either treat the illnesses from which he suffered or to provide documented evidence of a quality and type which would demonstrate (if the conditions could not be treated) that he was qualified for DSP.

The Tribunal found that in the absence of appropriate treatment for Vidovic's illnesses it could not find that those conditions had stabilised and therefore become permanent. Vidovic did not attract 20 impairment points and in those circumstances it was not necessary to consider whether he had a continuing inability to work.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Disability support pension: entitlement at time of claim and refusal to seek treatment

FANOUS and SECRETARY TO THE DFaCS (No. 2004/1094)

Decided: 18 October 2004 by J. Handley.

Background

In March 2004, the SSAT decided to affirm a decision previously made by the Department to reject a claim by Fanous for

disability support pension (DSP). Fanous made a further claim in late August or early September 2004 which was granted.

Issues

Did Fanous, at the time of her claim in October 2003, or within 13 weeks, have an impairment of 20 points or more under the Impairment Tables and, if so did she have a continuing inability to work? Was her condition diagnosed, treated and stabilised and could it be regarded as permanent?

The legislation

Section 94 of the *Social Security Act 1991* ('the Act') sets out the qualification criteria for DSP. The Tribunal also referred to the introductory chapter to the Impairment Tables found at Schedule 1B of the Act (para. 5) which states that a condition 'must be considered to be permanent'. Permanence shall be found only when a condition 'has been diagnosed, treated and stabilised' and when 'it is more likely than not that it will persist for the foreseeable future. This will be taken as lasting for more than two years'.

Generally, a person claiming a social security entitlement must meet the qualification criteria for that payment at the time of claim or within 13 weeks (see Sch 2, Part 2, s.4 of the *Social Security (Administration) Act 1999)*.

Entitlement at time of claim

Fanous told the Tribunal that she suffered from severe back and knee pain, depression, and anaemia and recently had nasal surgery and gall bladder surgery. She had suffered the back and knee pain for three or four years continuously. Fanous had an 'extra bone' at or about her right ankle which had been present for six or seven years and caused her severe discomfort when she stood or placed weight on her right foot. Fanous continued to be employed as a casual domestic attendant in a hospital one to two days per week. Fanous agreed that two doctors had suggested she be referred to a psychiatrist but she had refused.

When asked by the Tribunal to compare the extent of her injuries at October 2003 to the present time, Fanous said that there was no change except she felt that as she was older there may have been some deterioration with increased severity of pain.

The Department submitted that, at October 2003 and within 13 weeks of that date, Fanous did not qualify under s.94 of the Act.

The Tribunal noted a recent finding by the Department that Fanous had qualified for DSP on the basis of contemporary medical evidence indicating the conditions suffered by Fanous were permanent. The Tribunal found that Fanous did have a physical, intellectual or psychiatric impairment but the focus of this review was whether at October 2003 Fanous had an impairment of 20 points or more.

The Tribunal reviewed the medical evidence available from 1 July 2003 to November 2003. The Tribunal was satisfied that at October 2003 it was appropriate to assess Fanous' back injury under Table 5.2 at 10 impairment points. In relation to the relevant psychiatric impairment the Tribunal was not satisfied that the condition could be found to be permanent.

The Tribunal noted that refusal to receive medical treatment in some circumstances did not necessarily negate a finding that the relevant conditions still attract impairment points (*Tlonan and Secretary, Department of Social Security* (AAT 11595, 6 February 1997); *Dragojlovic v Director-General of Social Security* (1984) 52 ALR 157). The Tribunal accepted that Fanous did not attend the appointment to see a psychiatrist seemingly due to embarrassment and fear which may have been related to cultural reasons. But the problem remained that, at the date of claim and 13 weeks afterward, it could not be said her depression was permanent. Failing to see the psychiatrist may not preclude an attraction of impairment points but in this case points could not be assigned as it could not be found at the date of claim nor 13 weeks afterward that the condition was permanent.

The Tribunal concluded that Fanous would not have been able to demonstrate 20 impairment points at October 2003. She would not then or within 13 weeks of that date have been able to demonstrate qualification for DSP.

Formal decision

The decision of the SSAT was affirmed.

[M.A.N.]

Overpayment of family tax benefit: residence and contact arrangements; temporary absences from care

KEEN and SECRETARY TO THE DFaCS
(No 2004/312)

Decided: 18 March 2004 by R.P. Handley.

Background

Keen and Ross had had an informal mutual arrangement that their son, Elliott, resided with Keen. There had been no formal family law arrangements regarding residence or contact. On 9 October 2002, Elliott went with Ross and her partner to spend the remainder of the October school holidays with her. Keen was expecting Elliott to be returned on 13 October 2002 in time to resume school. Elliott did not return at the end of the school holidays and Keen was not able to contact Ross to find out when Elliott would be returning.

Keen was receiving parenting payment (single) (PPS) and family tax benefit (FTB) for Elliott, but he did not inform Centrelink that his son was no longer in his care. He continued to receive PPS during the period 9 October 2002 to 4 November 2002 and FTB during the period 9 October 2002 to 11 November 2002.

On 21 October 2002, Centrelink had sent a notice to Keen advising him of his PPS and FTB in respect of Elliott. The letter also advised of his responsibility to inform Centrelink of any change in circumstances, including if the child for whom he was being paid benefits stopped living with him or could no longer be considered his dependent.

On 30 October 2002, Ross informed Centrelink that Elliott had been living in her care since 9 October 2002 and requested that records be amended to reflect this. On 6 November 2002, Centrelink cancelled Keen's PPS, backdated to 9 October 2002. On the same day, Ross lodged an application for FTB for Elliott.

On 13 November 2002 Centrelink wrote to Keen requesting that he complete a questionnaire as to the children currently living with him, the full name and address of the person with whom Elliott was living and whether there was a registered parenting agreement or order in respect of Elliott. He did not return this to Centrelink.