her husband until December 1983, when he came to the house to see the children. She asked him to pay maintenance and he agreed to pay $60 a fortnight. She advised the DSS of this maintenance agreement.

Milas said her husband stayed for a couple of days over Christmas, and returned for a few days in the New Year period. She did not resume any relationship with him nor did they sleep together. He bought Christmas presents for the children but not her and she bought no gift for him. She said she let him stay to avoid arguments and possible violence.

Subsequently, her husband called at the house at 3-5 monthly intervals and the longest he stayed was one day, possibly two. There had been no sexual or other relationship between them and he called only to see the children.

In late 1984 her husband obtained work and a house in another town. He asked the applicant to join him there but she refused, as in her view the marriage was over. Since then he had called to see the children and Milas, 'being afraid of him', let him enter the house. The last time she heard of him prior to the hearing of this application was April 1988 when he came to the house drunk and violent. The police were called and he left.

The Tribunal heard that Milas' husband had called at her home on about 12 occasions between March 1983 and April 1988. On some of these occasions she had done his washing as she was afraid of him. He did not eat any of the food she cooked because he did not like her cooking. (He told the AAT he was afraid of being poisoned by her.) She had not applied for divorce as she had no intention of marrying again. Although there was a joint bank account prior to separation which still existed, it had only $3 in it and Milas said she has not operated it since the separation in 1983.

Her parents saw her and her husband as being separated. Their friends also accept them as being separated. Milas' husband gave evidence which corroborated that of his wife. He described the marriage as 'horrible', blaming her family and said he now lived by himself.

Legislation

Section 3(1) of the *Social Security Act* defines a 'married person' to exclude a legally married person living separately and apart from the spouse on a permanent basis. The issue before the AAT was whether Mrs Milas was an unmarried person within the meaning of s.53(1) which states:

> 'In this Part, unless the contrary intention appears . . . "unmarried person" means . . . a married person who is living separately and apart from his or her spouse.'

The nature of the relationship

The Tribunal had to determine whether or not the applicant was living with Mr Milas on a *bona fide* domestic basis despite their being geographically apart due to his work situation, or whether she was a supporting parent within the meaning of s.53(1).

It discussed the factors enumerated in the case of *Tang* (1981) 2 *SSR* 15, and looked at these under the following headings: exclusiveness, resource pooling, expense sharing, parties holding themselves out to be married, perception of relationship, whether joint parents of children, sexual relationship, social life and obligation (emotive or supportive care).

It was satisfied that Mr and Mrs Milas had not been living together as man and wife on a *bona fide* domestic basis and, pursuant to s.53(1), the applicant was an unmarried person living separately and apart from her spouse and was entitled to receive supporting parent's benefit.

[B.W.]

Compensation recovery: going behind an award

LITTLEJOHN and SECRETARY TO DSS
(No. V88/746)
Decided: 14 April 1989
by R.I. Thompson.

Littlejohn applied to the AAT for review of a decision to recover the full amount of sickness benefit paid to him for the period from 2 July 1984 to 15 February 1985, a total of $5346.70. The DSS sought recovery because Littlejohn later received a worker's compensation lump sum.

The legislation

The DSS acted under the old s.115B(3) of the *Social Security Act*, which authorised recovery where a person had received sickness benefit and a 'payment by way of compensation' in respect of the same incapacity. The relevant parts of the s.115(2) definition of a 'payment by way of compensation' were: a payment under a State compensation scheme, a settlement of a claim under such a scheme and any other payment in the nature of compensation or damages.

The facts

The applicant ceased work in May 1984 because of an injured shoulder. His claim for weekly payments from 25 May 1984 and medical expenses under the *Workers' Compensation Act* (Vic.) was initially refused but was then settled and on 4 December 1985 a consent award was made by the Accident Compensation Tribunal. Under that award the applicant's medical expenses to date were to be paid but 'all other claims to past compensation and future medical and like expenses' were dismissed. He was also to be paid $20 000 'in full settlement of all other forms of future compensation'.

The sickness benefit paid to Littlejohn for the period in question was paid for incapacity for work arising out of the injury which formed the basis of the workers' compensation claim.

The AAT also found as fact that Littlejohn had not engaged in paid employment since may 1984 because of his injury and that he was totally incapacitated for work.

Can the AAT go behind an award?

It was argued for Littlejohn that *Cocks'* case (1989) 48 *SSR* 662, where it was decided that the AAT could go behind an award, was inconsistent with other AAT decisions such as *Cristallo* (1988) 46 *SSR* 597, *Krzywak* (1988) 45 *SSR* 580, and *Walsh* (1989) 48 *SSR* 623, and with the Full Federal Court's decision in *Siviero* (1986) 68 ALR 147, and should not be followed.

The AAT noted that the Tribunal's President had sat on *Cocks'* case in order to resolve different views within the AAT on this particular question of law; and commented that, while *Cocks* 'is not binding on the Tribunal in future proceedings, it is nevertheless very highly persuasive': (Reasons, para. 9).

The AAT also concluded that the decision in *Siviero* did not prevent the DSS from going behind an award and

that *Cocks* was not inconsistent with *Siviero*.

When can the AAT go behind an award?

The AAT then proceeded to state that

> 'It does not follow that . . . the Secretary is free, when he considers that an award should have been different, to form an opinion under s.115B of the Act that the payment made as a result of it is a payment by way of compensation in respect of an incapacity other than that stated in it.'

(Reasons, para. 14)

According to the AAT, the Secretary could go behind an award in the following circumstances:

> 'If on the face of the award it appears that the payment was . . . made (under a scheme of compensation) but it is established that there was no factual basis for the award to be made under the scheme, so that the tribunal which purported to make it could not properly have done so, the Secretary can . . . "go behind" it and form an opinion that it was some other payment of compensation. He can then further examine the facts and form an opinion as to what the incapacity was in respect of which it was made.'

(Reasons, para. 16)

> 'But, if on the face of the award it was made under a scheme of compensation provided by a law of a State and the facts known at the time when it was made provided a basis on which it could have been made under the scheme, the Secretary cannot investigate the merits of the award and, in effect, substitute his own terms for those of the actual award.'

(Reasons, para. 17)

The AAT added that the Secretary could go behind a settlement —

> 'Only if payment under it was not permitted by the scheme or the settlement did not relate to a claim made under the scheme.'

(Reasons, para. 21)

Should the AAT go behind the award in this case?

The AAT noted that, under s.9(2) of the *Workers' Compensation Act*, an award could be made for the payment of a lump sum in redemption of the employer's liability for future weekly payments.

The AAT looked at medical reports available to the parties at the time of the award and other evidence, and concluded that —

> 'There was evidence on which the [Accident Compensation] Tribunal could reasonably have made an award of future weekly compensation.'

(Reasons, para. 15)

Decision

The AAT concluded that it was not possible to form an opinion under s.115B(3) that the sickness benefit received by Littlejohn was in respect of the same incapacity as the compensation payment.

In coming to this conclusion reliance was placed in *Piatkowski* (1987) 12 ALD 291, where it was said that the compensation and sickness benefit had to be for incapacity during the same period.

Formal decision

The AAT set aside the decision under review and substituted the decision that Littlejohn was not required to pay any amount pursuant to s.115B(3).

[D.M.]

Invalid pension: impairment

KADIR and SECRETARY TO DSS (No. 5021)

Decided: 12 April 1989

by R.A. Balmford.

Tahir Kadir migrated to Australia from Cyprus in 1963, when he was 15 years of age. Following industrial injuries in 1978 and 1982, he was granted an invalid pension from March 1983.

The DSS reviewed Kadir's eligibility after the qualifications for invalid pension were amended in July 1987 and decided to cancel his pension. Kadir asked the AAT to review that decision.

The legislation

Section 28 of the *Social Security Act* provides that a person is eligible for invalid pension if the person is 'permanently incapacitated for work'.

Section 27, which came into operation on 1 July 1987, provides that a person is permanently incapacitated for work if —

> '(a) the degree of the person's permanent incapacity for work is not less than 85%; and (b) that permanent incapacity, or at least 50% of that permanent incapacity is directly caused by a permanent physical or mental impairment of the person.'

The evidence

Kadir was 40 years of age, illiterate, with limited work skills and experience (he had worked as a labourer and a forklift driver) and had made a successful worker's compensation claim following a back injury in 1978.

According to the medical evidence, Kadir now had no physical abnormality in his back, but he suffered from a psychiatric illness, diagnosed as anxiety/depression. He had not worked since 1982.

Kadir's treating psychiatrist told the Tribunal that, because of his psychiatric illness, Kadir could not hold down any significant job for any significant length of time.

Permanently incapacitated for work

The AAT noted that the essential qualification for invalid pension continued to be that the claimant be 'permanently incapacitated for work'. It should be assumed that this phrase continued to have the meaning which was given to it in a series of AAT and Federal Court decisions prior to its re-enactment in July 1987.

Adopting the approach to 'permanent incapacity for work' from *Panke* (1981) 2 *SSR* 9, the AAT decided that Kadir was permanently incapacitated for work. Because of a combination of factors, including Kadir's psychiatric illness, his lack of education, training, skill in English, his limited work history and successful worker's compensation claim, his absence from the workforce for 7 years and his lack of motivation and adoption of an invalid role, it was likely that Kadir did not have the 'ability to attract an employer who is prepared to engage and to remunerate' him, to adopt the words of Davies J in *Panke*.

Moreover, the AAT said, this situation was permanent, in that it was likely to persist for the foreseeable future, as the Federal Court had expressed it in *McDonald* (1984) 18 *SSR* 188.

Impairment

The AAT said that the word 'impairment', used in s.27(b) appeared to describe —

> 'a changing for the worse, diminishing in value, or deterioration from a previous unimpaired or less impaired state. That being so, I would have serious doubts as to whether that word is appropriate to describe a congenital physical or mental condition, however directly that condition may cause the person suffering from it to be permanently incapacitated for work. That is not, however, the situation with which I am here concerned.'

(Reasons, para. 26.)

Subject to that qualification, the AAT said, the expression 'mental impairment' was capable of including