

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

the concepts of 'psychiatric illness' and 'intellectual handicap' — 'and more': Reasons, para. 28.

The AAT accepted that Kadir's psychiatric illness was a 'mental impairment'. It also considered that there was a strong argument for finding that Kadir's adoption of the invalid role and his lack of motivation constituted a 'mental impairment'. On this point, the Tribunal noted the comment in *Vranesic* (1982) 10 SSR 95, to the effect that 'a person's perception of himself (rightly or wrongly) as an invalid incapable of work may become so entrenched and so ineradicable as to itself constitute a psychological condition which destroys the person's capacity for work': Reasons, para. 30.

However, the AAT found that, in the present case, less than 50% of Kadir's incapacity for work was directly caused by his mental impairment. Although no specific evidence had been given in this matter about Kadir's employability, evidence given in other cases showed that a person whose work experience was limited to labouring jobs and who had successfully claimed worker's compensation for a back injury was unlikely to find employment. That limited work history and successful compensation claim would be major factors in Kadir's inability to find employment.

Other factors, such as his lack of education or training, lack of skill in English, absence from the workforce for 7 years and his complaints of back pain (for which there was no physical basis) were also likely to be significant impediments to his obtaining work. None of these factors constituted a 'permanent physical or mental impairment'.

#### Formal decision

The AAT affirmed the decision under review.

[P.H.]



## Family allowance supplement: whether repaid benefit 'received'

SECRETARY TO DSS and JESSOP (No. 4993)

**Decided:** 30 March 1989

by B.J. McMahon.

In April 1988, Cheryle Jessop claimed family allowance supplement (FAS) for her children. The DSS rejected that claim because Jessop's husband was then receiving special benefit.

Jessop's husband subsequently recovered worker's compensation and was obliged to refund the special benefit to the DSS. Jessop then renewed her claim for FAS and, when the DSS refused to pay her for the period when her husband had been receiving special benefit, she appealed to the SSAT.

The SSAT allowed Jessop's appeal and decided that she should be paid FAS for the period in dispute. The Secretary to the DSS then exercised the right of appeal in s.207 of the *Social Security Act* and appealed to the AAT.

#### The legislation

Section 73 of the *Social Security Act* provides that FAS is only payable to a person who 'is not receiving, and whose spouse is not receiving' one of several payments under the Act, including a benefit under Part XIII. Part XIII provided for payment of unemployment, sickness, and special benefits.

Section 153(2) provides that, where a person has received a compensation payment and 'the person received payments of pension during the lump sum payment period', the person may be required to repay the pension. The term 'pension' is defined so as to include special benefit.

#### 'Receiving' special benefit

The SSAT had read the word 'receiving' in s.73(a) as referring to the obtaining of a benefit which did not have to be returned to the DSS. That Tribunal had said that, because Jessop's husband had been obliged to refund the special benefit to the DSS he could not, in retrospect, be regarded as 'receiving' that benefit during the relevant period,

thereby removing the bar to Jessop qualifying for FAS in that period.

However, the AAT disagreed with this approach. It could not see any reason to depart from the ordinary meaning of the word 'receiving'. In particular, this was not a case in which s.15AA of the *Acts Interpretation Act* 1901 should be applied. That provision directed that when, in interpreting legislation, the construction that would promote the purpose or object of an Act was to be preferred to a construction that would not promote that purpose or object.

Section 15AA, the AAT said, was intended to provide assistance in interpreting legislation where the meaning of the legislation was not clear; but 'nothing could be clearer than the meaning of the words used in s.73': Reasons, para. 13. The Tribunal said that the ordinary meaning of the word 'receive' referred to the physical act of taking something into one's possession. At the time when Jessop applied for FAS, the AAT said, her husband was receiving a relevant benefit which disqualified her from FAS:

'It is not possible to look at this retrospectively... There is nothing in the Act which deems entitlement to exist or not to have existed depending upon the outcome of external unrelated events in the future.'

(Reasons, para. 14).

The Tribunal also rejected an argument that to adopt the plain meaning of 'receiving' and to prevent Jessop from qualifying for FAS during the relevant period would amount to an injustice. The AAT said that the purpose of FAS was 'to make additional provision for children in low income families'. The rate of special benefit paid to Jessop's husband and the worker's compensation payments paid to him had included additional payments for the children:

'At all relevant times, therefore, ... financial provision has been made from the public purse for the children of the respondent and her husband. Social security payments are designed to relieve need at the time they are applied for and paid. They are not intended to create a vested interest in a capital sum redeemable upon some future event. At the time the respondent applied for FAS her family was in fact being supported and the children for whose benefit FAS was designed were already the object of income support from the public sector. There is thus no injustice.'

(Reasons, para. 21).

#### Formal decision

The AAT set aside the decision of the SSAT and affirmed the primary decision of the Secretary.

[P.H.]