unhappy marriages held them back from committing themselves permanently until W proposed marriage in January 1987.

Formal decision

The decision was set aside with a direction that from 1 September 1984 until 3 January 1987 Tomlin was not living with W as his spouse on a *bona fide* domestic basis.

[B.W.]

Invalid pension: RSI

RILEY and SECRETARY TO DSS (No. 2101)
Decided: 1 February 1990 by R.K. Todd, N.J. Attwood and D.B. Travers.

The Tribunal *affirmed* a DSS decision that Riley's claim for invalid pension be rejected and that he should remain on sickness benefit and be referred to the Commonwealth Rehabilitation Service for assessment. Riley applied for invalid pension on the basis of incapacity for work due to 'RSI both hands' and 'anxiety/stress'.

The facts

Riley first experienced pain in his arms and hands during his apprenticeship as a fitter and turner. He later joined the RAAF, desiring a trade as an instrument fitter. This work was lighter and he completed the physical training but was discharged from the RAAF. He soon gained work as an installation fitter and said his arms did cause problems but he kept working and did not see a doctor.

He moved to Canberra and started a building business with his brother-in-law. His work was mainly in carpentry and supervision. His arms continued to give him trouble but he sought no medical treatment. Two years later, financial problems caused the dissolution of the partnership and he obtained work at the Royal Australian Mint. The work alternated between very heavy and very light. When he commenced there his arms were 'quite good'.

The pain increased in severity and Riley sought medical treatment. In 1985 he was redeployed to light duties as a clerk but the writing caused problems so he was moved to the maintenance store. In 1986 he was moved again to the job of security marshal. He disliked the tedious nature of the job and about this time anxiety and depression became a problem. He was being teased by workmates about his redeployment and absences and he became angry and cranky at home. On one occasion, he was violent to his wife, who left him for a short time.

Riley lodged a claim for worker's compensation and liability was found in 1985 in relation to the pain in his arms. In late 1986 he amended his claim to include anxiety and depression and was off work on compensation from October 1986 until January 1987. He returned to work in 1987 but resigned in August 1987 for health reasons.

At the time of the appeal, Riley was a Level 1 track and field coach and was attending the Commonwealth Rehabilitation Service for counselling. The physical effort involved in the coaching was minimal. He enjoyed the work and planned to make a new career of it. He was virtually pain free because he was not using his arms. His mental problems were also less but Riley felt they might resume if he went back to work. Riley's daughter suffered severe epilepsy and spent most of her life in hospital and his wife suffered severe arthritis and psoriasis.

Medical evidence

Riley's treating doctor gave evidence of 'right-sided lateral epicondylitis and flexor and extensor tendonitis'. He felt that Riley could get back to work, after retraining and counselling, as a skilled technician doing non-repetitive tasks. Although Riley was fit for light work in terms of a physical capacity, this could, if it involved him in demeaning tasks, bring back his anxiety. Evidence was also given by another doctor, who agreed that inappropriate redeployment can aggravate a person's feelings of low esteem.

The DSS also called medical evidence. The Senior Medical Officer had diagnosed 'painful upper limbs' and 'anxiety/depression' in 1988. He regarded the psychiatric condition as only mildly incapacitating. He regarded the condition as a reflection of a personality type rather than an actual illness. He could find no evidence of abnormality or epicondylitis after examining Riley's neck, shoulders and upper limbs. He gave a combined impairment assessment of 5%, the whole of which was attributable to anxiety and depression. He did not accept there was an entity 'RSI' or 'occupational overuse syndrome', both of which suggest a relationship to work practices when such a connection was not, in his opinion, scientifically valid. He preferred the term 'regional pain syndrome'.

A consultant psychiatrist stated that concomitants of current neurotic illness were absent and there was nothing to warrant a diagnosis of anxiety. She said there was a difference between clinical depression and unhappiness about a symptom. She was of the opinion that Riley's complaints of physical symptoms were a result of 'somatising'. This is when a person's emotional problems present as physical problems. His stress, she said, was as a result of his family problems, not of his work.

A neurosurgeon stated that an examination in 1989 showed no abnormality and the disabilities lay in the psychiatric emotional sphere. Although the examination revealed no evidence of epicondylitis, the surgeon agreed it may have been absent due to rest over the past few years.

A rheumatologist was of the opinion that any musculo-skeletal aches Riley might have felt were as a result of fatigue and strain from heavy work but these should have cleared up leaving no sequelae. He could find no evidence of disease or injury. He found Riley to be fit for any form of work commensurate with his skill, training and physical ability. In response to the claim that Riley's hand pain began during his apprenticeship when he was doing fine handwork he said the concept of fine movements causing pain, but of heavy movements not doing so, was nonsense. He was cross-examined about his attitude to 'RSI'. He regarded the term as misleading.

The issues

The Tribunal followed *Panke* (1981) 2 *SSR* 9 and *Kadir* (1989) 49 *SSR* 638 in determining what is an incapacity for work. It said the term denotes an incapacity to engage in remunerative employment, a lack of capacity for earning and an ability to attract an employer who is prepared to engage and remunerate the disabled person.

The decision

In a physical sense Riley's incapacity was found to exclude him only from heavy work. The range of employment is limited but possibilities include coaching. Factors other than his physical capacity also had to be considered. His reluctance to undertake occupations which are unskilled and demeaning, and his compensation history, also diminish his employability.

On the issue of permanency the Tribunal followed *McDonald* (1984) 18 *SSR* 188 as to the test of whether an incapacity is likely to persist into the foreseeable future. All the medical evidence, and Riley's own evidence, indicated that he would eventually return to some sort of employment. Therefore the incapacity, if it existed, would not continue into the foreseeable future.

The Tribunal also examined whether at least 50% of the permanent incapacity (if it had existed) would be directly caused by Riley's physical or mental impairment. It concluded that at all relevant times the physical impairment was mild only. During retraining the stress and anxiety improved and the major factor preventing Riley from obtaining paid work was his desire to keep on training. Neither the community nor Riley would benefit from a finding of invalid pension eligibility. He had the capacity to make something of his life and retraining should be encouraged. The Tribunal noted that its decision did not prevent consideration of whether Riley was eligible for a rehabilitation allowance under s.150 of the *Social Security Act*.

Formal decision

The AAT affirmed the decision under review.

[B.W.]

Blind pensioners: income test

RURAK and SECRETARY TO DSS (No. 5703)
Decided: 12 February 1990 by G.L. McDonald, M. Allen and J. Billings.

Alberta Rurak asked the AAT to review a decision originally made by the Department on 4 August 1988, varying her rate of invalid pension from $318.10 to $284.10 per week as a result of the application of the income test.

The facts

Rurak received an invalid pension as a result of being permanently blind, but also qualified for invalid pension on the basis of other conditions that permanently incapacitated her for work. She was unmarried, supported two dependent children aged 16 and 13 years and received $35 per week maintenance.

The legislation

Under s.33(6)(a) of the *Social Security Act* 1947, a blind person cannot receive additional pension for children under s.33(4) or guardian's allowance under s.33(3) unless she could qualify for an invalid pension if she was not permanently blind and was permanently incapacitated for work.

Section 33(6)(b) then purports to apply the income and maintenance income tests to these additional pension payments by stating that the person's pension '... shall not be increased by an amount under sub-section (3), or ... (4) ... that exceeds that amount that would, if the person were not permanently blind be the amount ... of the increase by virtue of sub-section (3), or ... (4) ... that comprises the annual rate of the person's age or invalid pension as reduced in accordance with sub-section (12)'.

Section 33(12) applies the income and maintenance income tests to 'a pension under this Part payable to a person (other than a person who is permanently blind and who is qualified to receive an age or invalid pension) ...'

[Section 33(10) is also relevant to the application of the income test to blind pensioners with children but was not referred to by the AAT.]

Conflict between s.33(6) and s.33(12)?

The AAT considered the wording of s.33(6)(b) and the exemption for blind persons from the operation of s.33(12), noting that the exemption in s.33(12) was amended by Act No. 130 of 1987 from 'other than a person who is currently blind' to its current wording set out above, which contains the additional words 'and who is qualified to receive an age or invalid pension'.

[Editor's note: These words were added because Act No. 130 of 1987 extended the operation of s.33 beyond age and invalid pensions to also cover wife's and carer's pension. Unfortunately the AAT did not seem to appreciate this.]

The AAT then said:

> 'It seems to the Tribunal that the closing words of [sub-section] 6 and the exception created by [sub-section] 12 are inconsistent and are unable to stand together. In those circumstances the maxim *leges posteriores contraris abrogant* applies and the section in the Act later in time is deemed to repeal the inconsistent earlier section ... In those circumstances the exemption from reduction provided for in s.33(12) must prevail in cases where a pensioner is both blind and otherwise entitled to an age or invalid pension. The applicant is therefore entitled to the receipt of her pension with guardian and other allowances not subject to reduction.'

(Reasons, p.5)

[The AAT did not clearly state why they thought there was an inconsistency nor why s.33(12) was regarded as the later in time. Perhaps the amendment by Act No. 130 of 1987 explains the latter.]

Formal decision

The AAT set aside the decision under review and remitted it with a direction that the applicant qualifies for the receipt of guardian and other allowances pursuant to the provisions of s.33(3) and (4) and that pursuant to the provisions of s.33(12) guardian and other allowances are not subject to reduction.

[D.M.]

Maintenance income test: transitional provision preserving 'total income'

JAKOVLJEVIC and SECRETARY TO DSS (No. 5384)
Decided: 13 September 1989 by J. Handley.

Ljubica Jakovljevic sought review of decisions by the DSS which (1) failed to increase her rate of widow's pension on 23 June 1988 in line with the general indexation increases of pensions and (2) reduced her pension from 13 October 1988 following an increase in maintenance paid to her by her former husband.

The legislation

This review was determined by the application of the savings provision in s.21(4) of the *Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Act* 1988. That Act introduced into the *Social Security Act* 1947 the maintenance income test, which commenced operation on 17 June 1988. Under s.21(4) of the amend-