Payment of rent

A further qualifying condition for payment of rent assistance is that the person pays, or is liable to pay, rent: s.1066-D1(b). The evidence was inconclusive as to whether Reyes had in fact paid rent since the registered agreement, but he could qualify on the alternate ground that he was liable to pay rent under the terms of the registered agreement.

Formal decision

The AAT set aside the decision and substituted a decision that the applicant qualified for rent assistance from 10 December 1992.

[P.O'C.]

Disability support pension: cancellation

PALIOGIANNIS and SECRETARY TO DSS

(No. 9091)

Decided: 1 November 1993 by J.R. Dwyer, D.L. Elsum and B.H. Pascoe.

Mr Paliogiannis had been granted an invalid pension in May 1988. After disability support pension (DSP) was introduced in November 1991, Mr Paliogiannis' entitlement was reviewed and DSS decided to cancel his pension. P asked the AAT to review the decision which had been affirmed by the SSAT.

The issues

The two issues in this case were:

- whether P had a continuing inability to work as defined in s.94(2); and
- whether the principles in *McDonald v Director-General of Social Security* (1984) 18 *SSR* 188 relating to the cancellation of invalid pension are applicable across the change to DSP.

The DSS's concession that P had an impairment of 20% under the Impairment Tables was accepted, with reservations, by the AAT.

Continuing inability to work

This issue required consideration of whether P's impairment was of itself sufficient to prevent him doing his usual work; and work for which he was currently skilled for at least two years (s.94(2)). To decide the question the AAT said it needed to know: what P's impairment was; how it affected his work capacity; what his his usual work was; and for what work he was currently skilled.

The AAT was satisfied that P had limited movement of his neck and back but, due to matters being unresolved by evidence, found it impossible to state definitively what impairments P suffered from as it seemed possible there might also be impairments from joint pain, problems with his hands, possible organic brain damage and psychological, intellectual and psychiatric matters.

The AAT stated that without first knowing the extent of the impairment it was not possible to to decide the effects of the impairment, but was able to say that he was unable to do heavy lifting and lacked the mental skills to work as a ticket seller or mail sorter. As P was aged 55, the AAT was able to consider whether educational or vocational training was likely to equip him to do work having regard to the likely availability of work in his locally accessible labour market (s.94(4)) and decided it was not.

On the evidence of his work history, which included work for friends which had not been on a full-time basis since the 1970s, the AAT was not satisfied that P ever worked for award wages for more than 30 hours a week (s.94(5)), and could not make findings concerning his usual work. It found that the only work for which he may have been currently skilled was as a presser and his neck and back impairments prevented him doing that work.

Application of McDonald's case

The AAT referred to cl.33 of Schedule 1A of the *Social Security Act* 1991 in rejecting the DSS submission that because there were significant differences between the qualifications for invalid pension and DSP it could not be assumed that a person who was granted invalid pension qualifies for DSP. Clause 33, a transitional provision, stated that if a determination granting a claim for invalid pension was in force immediately before 12 November 1991, the determination has effect from 12 November 1991 as if it were a determination granting a claim for DSP. P had been in receipt of DSP since 12 November 1991 so *McDonald* applied. The AAT stated that s.146 of the 1991 Act, like s.46 of the *Social Security Act* 1947 considered by the Federal Court in *McDonald*, makes it clear that DSP is only to be cancelled (under that section) if the Secretary is satisfied that it is being paid to a person to whom it is not payable. As the evidence in this case left the AAT unsatisfied on many points, it could not be satisfied that DSP was not payable to P, particularly if the evidence raised a real possibility that there might be other relevant conditions which have not yet been fully investigated.

Formal decision

The decision under review was set aside and the matter remitted to the Secretary for reconsideration in accordance with the direction that P continued to be entitled to payment of DSP.

[B.W.]

Disability support pension: continuing inability to work

GRIGORIAN and SECRETARY TO DSS

(No. 9194)

Decided: 20 December 1993 by G. Ettinger, H.D. Browne, and D.D. Coffey.

Grigorian sought review of the SSAT decision cancelling payment of the disability support pension (DSP) to Grigorian.

The legislation

Section 94(1) sets out the qualifications for DSP as:

> 'A person is qualified for disability support pension if:
>
> (a) the person has a physical, intellectual or psychiatric impairment; and
>
> (b) the person's impairment is 20% or more under the Impairment Tables; and
>
> (c) the person has a continuing inability to work ...'

The facts

Grigorian was born in Iran in 1941. He attended a tertiary college for Armenian studies and then worked as a teacher. He migrated to Australia in 1971 and worked for 16 years as a storeman and cleaner and occasionally as a part-time salesman. In 1985 Grigorian was injured at work. His injury affected his neck, back and arms. He eventually lost his job when his employer went into liquidation.

Grigorian applied for and was granted the invalid pension in 1990. In June 1992 he applied to the DSS for his pension to be paid overseas for a short period. The DSS then reviewed his

entitlement to DSP.

The medical evidence was provided by Grigorian's treating doctor, 3 Commonwealth medical officers, an occupational physician, and a rehabilitation counsellor. Grigorian was diagnosed as suffering from neck, arm and back pain (cervical spine degeneration), peptic ulcer, right inguinal hernia, diabetes and allergic rhinitis.

It was agreed by most doctors that Grigorian could not do his usual work as a cleaner or storeman. The Commonwealth medical officers stated that Grigorian could undertake light duties.

Grigorian argued that he was not able to do clerical work because his English was not good enough.

Continuing inability to work

It was not in dispute that Grigorian had a physical impairment and so satified s.94(1)(a). At the hearing the DSS accepted that Grigorian had an impairment rating of 20%, and so satisfied s.94(1)(b). The issue for the AAT was whether Grigorian had a continuing inability to work.

To meet this condition the AAT had to be satisfied that Grigorian's impairment would prevent him undertaking his usual work and work for which he was currently skilled, for at least 2 years. The AAT would also have to be satisfied that Grigorian's impairment prevented him undertaking educational or vocational training during the next 2 years, or that the training would be unlikely to equip Grigorian within the next 2 years to do work for which he was currently unskilled (s.94(2)).

The AAT decided that Grigorian's 'usual work' was the work he had performed since coming to Australia. It followed the definition of 'usual' set out in *Hamal* (1993) 75 *SSR* 1082 and *Chami* (1993) 74 *SSR* 1073, namely the dictionary meaning.

The AAT accepted the medical evidence which indicated that Grigorian was not fit for his usual work as a cleaner or storeman because of pain to the back, neck and arms. The AAT found that the diabetes and rhinitis were controlled. The peptic ulcer has healed and the hernia was not a problem. However, it found that Grigorian was not able to to do work which involved heavy lifting, bending or repetitive tasks.

Grigorian held a fork lift driver's licence and was a teacher of the Armenian language. The AAT was not satified that Grigorian was prevented from participating in vocational or educational training during the next 2 years because of his impairment. In the past Grigorian had successfully completed a TAFE course and attended a film course. He represented himself before the AAT without an interpreter. The AAT found Grigorian was fit for light unskilled or semi-skilled work, and that he would not be prevented from undertaking educational or vocational training during the next 2 years because of his impairment.

Formal decision

The AAT affirmed the SSAT decision to cancel payment of the disability support pension.

[C.H.]

Job search allowance: homeless person

SECRETARY TO DSS and SELKE (No. 9077)

Decided: 27 October 1993 by S.A. Forgie.

The applicant was in receipt of job search allowance (JSA). In May 1993 the DSS had decided that she was not eligible for the higher rate of the allowance payable to a homeless person. The SSAT subsequently decided that she was entitled to this rate. The DSS asked the AAT to review the decision.

Was the respondent a homeless person?

Section 5(1) of the *Social Security Act* 1991 defines as a homeless person a person who is not a member of a couple, has no dependent children, is not receiving financial support from a parent or guardian and is not in receipt of income support other than a social security benefit. In addition, s.5(1)(c) requires that the person:

> '(i) does not live, and for a continuous period of at least 2 weeks has not lived, at a home of the parents, or of a parent, of the person because the parents are not, or neither parent is, prepared to allow the person to live at such a home; or
>
> (ii) does not live at a home of the parent, or of a parent, of the person because domestic violence, incestuous harassment or other exceptional circumstances make it unreasonable to expect the person to live at such a home.'

The respondent was 16 when she first claimed JSA. At that time she lived with her parents in a location just north of Cooktown and over 350 kilometres north of Cairns. Cooktown is only accessible during the wet season by using a four-wheel drive vehicle. The respondent lived at a location where there were only two houses. She lived with her parents and eight of her eleven siblings. The respondent's opportunities were limited in this place and she decided to move to Cairns in March 1993 where she lived in a youth hostel and began a full-time course at a TAFE college. While there she applied for a young homeless allowance (YHA) which led to the present appeal.

The DSS argument

The DSS submitted that the respondent was not a homeless person as it could not be said that her parents were not prepared to allow her to live at home. The DSS view was that she had made a voluntary decision to leave home. It was also argued that she was not unable to live at home because of 'domestic violence, incestuous harassment or other exceptional circumstances'. There was no claim of domestic violence or incestuous harassment in this case. Thus there would need to be exceptional circumstances for the respondent to qualify. According to the DSS

> 'these exceptional circumstances had to fall within a narrow compass so that only those who were "genuinely homeless" came within the definition. A more generous interpretation might be seen by the community as providing a financial incentive to young people to leave home.'

(Reasons, para.8)

The DSS referred to its *Guide to the Administration of the Social Security Act* which explained what constitute 'exceptional circumstances' for the purposes of s.5(1). The Guide stated at para. 12.21300 that '[i]t is unreasonable to expect the claimant to live in the parental home where sexual abuse, domestic violence or exceptional circumstances of a comparable nature exist'. 'Other exceptional circumstances', said the *Guide*, 'referred to problems which pose a threat to the claimant's physical or psychological well-being.'

Finally, the DSS argued that the *ejusdem generis* rule should be applied to the words of s.5(1)(c)(ii). By the application of this rule, the words 'exceptional circumstances' should be