Administrative Appeals Tribunal Decisions

Unrealisable asset: deeming provisions

SECRETARY, DFaCS and SELF (No. 20000118)

Decided: 18 February 2000 by B.H. Pascoe.

Background

Mr and Mrs Self's age pension claims had been rejected [presumably due to the level of their assets] on 19 March 1997. After a determination that a loan by Mr Self of $749,425 to the Self Trust was an unrealisable asset, they applied for consideration under the financial hardship rules.

It was common ground that s.1129 of the Social Security Act 1991 (the Act) allowed the financial hardship rules to apply. The issue was the application of s.1130 in calculating the rate payable under those rules. The relevant subsections provide:

> **1130.(1)** If s.1129 applies to a person, the value of:
>
> (a) any unrealisable asset of the person; and
>
> (b) any unrealisable asset of the person's partner;
>
> is to be disregarded in working out the person's social security pension rate.
>
> **1130.(2)** If section 1129 applies to a person, there is to be deducted from the person's social security pension maximum payment rate an amount equal to the person's adjusted annual rate of ordinary income.
>
> **1130.(3)** A person's **adjusted annual rate of ordinary income** is an amount per year equal to the sum of:
>
> (a) the person's annual rate of ordinary income (other than income from assets); and
>
> (b) the person's annual rate of ordinary income from assets that are not assets tested; and
>
> (c) either:
>
> (i)
>
> the person's annual rate of ordinary income from unrealisable assets; or
>
> (ii) the person's notional annual rate of ordinary income from unrealisable assets;
>
> whichever is the greater; and
>
> (d) an amount per year equal to $19.50 for each $250 of the value of the person's assets (other than disregarded assets).
>
> **1130.(4)** For the purposes of subsection (3), an asset is not assets tested if the value of the asset is to be disregarded under subsection 1118(1).
>
> **1130.(5)** A person's **notional annual rate of ordinary income** from unrealisable assets is:
>
> (a) the amount per year equal to 2.5% of the value of the person's and the person's partner's unrealisable assets; or
>
> (b) the amount per year that could reasonably be expected to be obtained from a purely commercial application of the person's and the person's partner's unrealisable assets;
>
> whichever is the less.

It was not in dispute that s.1130(2) requires the adjusted annual rate of ordinary income to be deducted from the maximum rate, and that s.1130(3) sets out how to calculate the adjusted annual rate of ordinary income.

Applicant's case

The original decision, which had been set aside by the SSAT, was that no pension was payable to Mr and Mrs Self. This was because the unrealisable asset in this case was a 'financial asset' as defined in s.9 of the Act and, as such, the annual rate of ordinary income referred to s.1130(3)(c)(i) is required to be calculated pursuant to the deeming provisions at s.1077 of the Act. The deemed annual income was calculated as $36,459 being 3% of the first $50,600 of the loan plus 5% on the balance.

The AAT agreed with the SSAT's decision and reasons. It remarked that it appears anomalous to accept that the value of an unrealisable asset, such as the loan by Mr Self, which is not capable of realisation and not capable of earning income, is to be disregarded for the purposes of the assets test, but is included as a financial asset at face value for the purpose of calculating a deemed income.

Section 1130(1) clearly and unequivocally requires the value of any unrealisable asset to be disregarded in working out the pension rate.

> Section 1130 has its own deemed income provision for unrealisable assets in subsection (5). Consequently, the correct approach is to deduct from the maximum pension rate under the assets test, after excluding unrealisable assets, the greater of the actual ordinary income derived from unrealisable assets or the notional or deemed rate of income under subsection (5). This latter amount is the lesser of 2.5% of the value of the unrealisable asset or the amount that could reasonably be expected to be obtained from a purely commercial application of those assets. In this case, no amount could be expected to be obtained from a commercial application of the loan to the Trust. It is incapable of being repaid, not transferable for value and the Trust is incapable of paying interest on the loan. The notional rate of ordinary income is, therefore, nil and the ordinary income is nil.

(Reasons, para. 11)

Therefore, the deduction due to s.1130(3)(c) is nil.

Formal decision

The AAT affirmed the SSAT's decision.

[K.deH.]

Child disability allowance: recognised disability

SECRETARY TO THE DFaCS and ROE (No. 20000017)

Decided: 19 January 2000 by J.A. Kiosoglous.

The Secretary to the DFaCS sought review of a decision made by the Social Security Appeals Tribunal that Roe was qualified to receive child disability allowance.

Roe's daughter at the time of the claim was under six months of age and diagnosed with cystic fibrosis. Roe claimed child disability allowance soon after her daughter's birth. The claim was rejected by the Department. The SSAT however decided that Roe was qualified because her daughter had a 'recognised disability'.

It was not disputed by the Department that Roe's daughter had a disability and that she was likely to suffer the disability permanently. What was in issue was the question of whether she achieved a score of 1 under the Child Disability Assessment Tool (the Tool), or in the alternative, whether cystic fibrosis fitted within one of the 'recognised disability categories'.

The legislation

At the time relevant to the review the provision in the *Social Security Act 1991* (the

Act) that dealt with qualification for child disability allowance read as follows:

> Subject to section 953, a young person is a disabled child if:
>
> (a) the young person
>
> (i) has a physical, intellectual or psychiatric disability;
>
> (ii) and is likely to suffer from that disability permanently or for an extended period and
>
> (b) a determination of the Secretary under section 952A is in force and one of the following conditions applies:
>
> (i) under the determination, the disability is declared to be recognised disability for the purposes of this section;
>
> (ii) the young person has been assessed and rated under the Child Disability Assessment Tool and has been given a positive score of not less than 1.

Section 952(b) makes reference to a determination by the Secretary that a medical condition is 'a recognised disability' as one basis for establishing qualification. An alternative basis under s.952(b)(ii) is achieving a positive score under the Tool.

The basis for the SSAT's decision granting child disability allowance to Roe was that cystic fibrosis fitted within the Child Disability Assessment Determination 1998 which declared, amongst other things, at Number 9 of Schedule 3 of the Determination, a condition which met the description:

> severe multiple or physical disability (including uncontrolled seizures) requiring constant care and attention where the young person is less than six months of age

was a 'recognised disability' within the meaning of s.952(b)(i).

Constant care and attention

Roe gave evidence of the additional care entailed in managing the condition, and dietary and other precautions needed to avoid any infection. Evidence was given of a regime of medication repeated through the day and special food preparation in accordance with the high fat high protein diet required by cystic fibrotic children. Roe was able to offer evidence of the different level of care and attention accorded to her older child, without the condition, in the first six months of his life.

On the medical evidence, the child did not achieve a score of 1 on the Tool. The Tool is used to measure a child's functional ability, emotional state, behaviour and special care needs. The various abilities are assessed in relation to a number of age-related milestones and will attract a positive score if there is significant disability.

The AAT then looked at the question of a 'recognised disability', within the Determination by the Secretary made under s.952A. The Department accepted that the child had a 'severe physical disability', so the question for the AAT was whether cystic fibrosis was a condition that required 'constant care and attention'.

The AAT referred to *Mrs M and Director General of Social Security* (1983) 5 ALD N365 for the following:

> The expression 'constant care and attention' is not a technical expression and the word 'constant' is not a word having a medical or other relevant technical meaning. In the context in which that expression appears in Part VIB we think that 'constant care and attention' encompasses care and attention which is continually recurring. Nevertheless, 'constant' denotes more regularity or periodicity than 'spasmodic'.

On Roe's evidence and on the basis of medical reports the AAT found that constant care and attention was needed. Roe gave attention to her child on a regular basis that was 'significantly over and above the norm' (Reasons, para. 22). The AAT pointed out that the child suffered a life threatening illness and her life could be extended through proper care.

Formal decision

The decision of the SSAT was affirmed.

[M.C.]

Newstart allowance: unsuitable work

SECRETARY TO THE DFaCS and NOBLE (No. 20000010)

Decided: 14 January 2000 by J. Handley.

Background

Noble's claim for newstart allowance was rejected on the basis that he was not prepared to travel 90 minutes a day to and from work. He was living in Maffra and it was suggested that he was more likely to obtain employment in Yallourn or Traralgon. Noble refused to travel this distance.

The SSAT set aside this decision with directions that Noble satisfied the activity test and had done since claiming newstart allowance.

The issue and legislation

The issue in this case was whether Noble was actively seeking and willing to undertake paid work, other than paid work that is unsuitable.

Section 601(2A) of the *Social Security Act 1991* (the Act) states that particular paid work is unsuitable if:

> (g) commuting between the person's home and the place of work would be unreasonably difficult; or
>
> ...
>
> (j) for any other reason, the work is unsuitable for the person.

Section 601(2B) of the Act then states that commuting is not unreasonably difficult for the purposes of s.601(2A)(g) if:

> (a) the sole or principle reasons for the difficulty is that the commuting involves a journey, either from the person's home to the place of work or from the place of work to the person's home, that does not normally exceed 90 minutes in duration; or
>
> (b) in the Secretary's opinion, a substantial number of people living in the same area as the person regularly commute to their places of work in circumstances similar to those of the person.

The submissions

The submission of Noble was that there was not a substantial number of people commuting between Maffra and the La Trobe Valley. He had conducted a survey of 100 people within 5 kilometres of his home — three of these people worked outside Maffra and none worked in the La Trobe Valley.

He also stated that the costs of transport would be more than 10% of his gross pay and that given his general financial circumstances he could not afford to travel to work in Yallourn or Traralgon. The distance to Yallourn was 80 km (55 minutes travel) and to Traralgon was 70 km (45 minutes travel).

The Department argued that there was a 'substantial' number of people commuting between Maffra and the La Trobe Valley — an estimate of more than 20 people was provided.

Findings

The Tribunal spent some time stressing that the cost of the travel was not a relevant factor, despite the fact that the Policy Guide made reference to this and that that the SSAT had based its decision on this point.

The Tribunal also concluded that Yallourn and Traralgon are within 90 minutes travel of Maffra. There was some discussion that country driving