side Australia, and the only remaining issue was the rate of payment.

**Rate of payment**

By virtue of s.61, the rate payable to her overseas was to be determined in accordance with s.61(3) unless her circumstances fell within s.61(5). That subsection provided that proportional rates do not apply where a person becomes qualified to receive her invalid pension by becoming permanently incapacitated for work while she was an Australian resident.

The applicant submitted that she became qualified to receive invalid pension at birth because, having been born with the condition of cerebral palsy, she became permanently incapacitated for work at that time. She relied on *Secretary to DSS and Abaroa* (1991) 13 AAR 359 where the AAT held that a claimant had become permanently incapacitated for work at birth while an Australian resident.

However, two other decisions of the AAT on this issue did not support that argument. In *Secretary to DSS and Mancer* (1989) 53 *SSR* 703 the AAT held that the applicant's incapacity for work did not arise until she reached the age at which she could legally enter the labour market (viz 15 years). And, in the recent decision of the President in *Secretary to DSS and Raizenberg* (1993) 71 *SSR* 1023, a similar approach to the interpretation of the phrase 'incapacity for work' was adopted, i.e. that a person became incapacitated for work at the time when her incapacity (or impairment) affected her economically, i.e. at the age of 16.

The AAT pointed out that the approach taken in *Mancer* and *Raizenberg* to ss.27, 28 and 30 of the 1947 Act was perhaps even more readily applicable to s.61(5)(c) of the 1947 Act. This is because that paragraph refers not to a person who 'became permanently incapacitated for work . . . while the person was an Australian resident' but rather to a 'person who is receiving an invalid pension that the person became qualified to receive by reason of becoming permanently incapacitated for work . . . while the person was an Australian resident'.

> 'Clearly a person does not become qualified to receive invalid pension in terms of s.28 of the 1947 Act unless he or she is above the age of 16 years, and is, inter alia, permanently incapacitated for work. In the context of s.61(5)(c) of the 1947 Act this must be a reference to a person's incapacity lawfully to engage in paid work.'

(Reasons, para. 21)

Applying this approach, Viskovich's circumstances do not fall within s.61(5)(c) of the 1947 Act because she became qualified to receive invalid pension in 1986 (when she turned 16) at which time she was not an Australian resident. It follows that by virtue of s.61(1), the annual rate payable to her is the rate calculated in accordance with the formula prescribed by s.61(3).

The AAT went on to note some doubt about the original decision to grant invalid pension to her, given her residence, but pointed out that that was not the decision under review.

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration in accordance with the direction that Viskovich be paid invalid pension in respect of the period 15 June 1991 to 14 June 1992 at the annual rate that would be payable apart from s.61, and thereafter at an annual rate calculated in accordance with the formula prescribed by s.61(3).

**[R.G.]**

# Disability support pension: continuing inability to work

**CHAMI and SECRETARY TO DSS**

**(No. 2887)**

**Decided**: 3 June 1993 by M.T. Lewis, H.D. Browne and T.R. Russell.

Chami had been receiving invalid pension and then disability support pension since May 1987 when, following a review, his pension was cancelled from 7 February 1992 on the ground that he no longer satisfied s.94(1)(c) *Social Security Act* 1991. The decision of the DSS was affirmed by the SSAT and Chami applied to the AAT for review.

**Legislation**

In order to qualify for disability support pension, s.94(1)(c) requires that the person have a 'continuing inability to work'. That term is relevantly defined in s.94(2), (3) and (5):

> '(2) A person has a continuing inability to work if the Secretary is satisfied that:
>
> (a) the person's impairment is of itself sufficient to prevent the person from doing:
>
> (i) the person's usual work; and
>
> (ii) work for which the person is currently skilled;
>
> for at least 2 years; and
>
> (b) either:
>
> (i) the person's impairment is of itself sufficient to prevent the person from undertaking educational or vocational training during the next 2 years; or
>
> (ii) the person's impairment does not prevent the person from undertaking educational or vocational training but such training is not likely to equip the person, within the next 2 years, to do work for which the person is currently unskilled.
>
> (3) In deciding whether or not a person has a continuing inability to work under subsection (2), the Secretary is not to have regard to:
>
> (a) the availability to the person of work in the person's locally accessible labour market (unless subsection (4) applies to the person); or
>
> (b) the availability to the person of educational or vocational training.
>
> (4) . . .
>
> (5) In this section:
>
> 'educational or vocational training' does not include a program designed specifically for people with physical, intellectual or psychiatric impairments;
>
> 'work' means work:
>
> (a) that is for at least 30 hours per week at award wages or above; and
>
> (b) that exists in Australia, even if not within the person's locally accessible labour market.'

It was not in dispute that the applicant had a 'physical, intellectual or psychiatric impairment' of 20% or more under the Impairment Tables, as required by s.94(1)(a) and (b).

The applicant, who was born in Lebanon in 1950, was injured in a car accident in 1982. He suffered an ankle injury and fracture of his left hand, and had not worked since.

**Extent of the impairment**

The AAT found that Chami's complaints of disabling pain were genuine. It also found that he suffered from chronic pain behaviour, which was at least partly psychological in origin. Because of his disability and lack of motivation to undertake rehabilitation, he was unlikely to respond to attempts to rehabilitate him. The AAT found that Chami's poor motivation arose directly from his abnormal illness

behaviour resulting from his injury, and therefore formed part of his 'physical, intellectual or psychiatric impairment'.

**Work**

The AAT consulted a dictionary to establish the meaning of 'usual' work. 'Usual' was taken to mean 'commonly observed or practised, current, prevalent; of persons: commonly employed or serving in a particular capacity'. The AAT found that Chami's usual work was that of a labourer, that being the work in which he was commonly employed. He was unable to perform his usual work because of his impairment.

He was found to be 'currently skilled' for a variety of jobs that he had in fact never performed, such as storeman, guard and liftman. He could not perform those jobs nor undertake a course of educational or vocational training unless he could first successfully complete a rehabilitation program designed to overcome his abnormal illness behaviour. Since his inability to conclude a rehabilitation program resulted from his impairment, it followed that he was prevented by the impairment itself from undertaking work for which he was 'currently skilled' and from undertaking educational or vocational training in the next two years.

The AAT rejected an argument advanced by the DSS, referring to *Drake and the Minister for Immigration and Ethnic Affairs* (No 20 (1979) 2 ALD 634, that the Tribunal should be wary of departing from government policy. That statement did not refer to the application of provisions such as s.94 which set out specific statutory criteria for a person to qualify for a pension. Also, there was no statement of government policy concerning s.94 in any of the parliamentary papers accompanying the passage of the Act.

**The decision**

The AAT set aside the decision under review and determined that Chami continued to be eligible for payment of disability support pension on and from the date of cancellation.

**[P. O'C.]**

# Marriage-like relationship: a different approach to older people

**NEEDER and SECRETARY TO DSS**

**(No. 8648)**

**Decided:** 6 April 1993 by D.W. Muller.

Miss Needer (aged 61 years) sought review of an SSAT decision that she had been living in a 'marriage-like relationship' with Mr H (aged 53 years).

**The legislation**

Section 4(3) of the *Social Security Act* 1991 sets out criteria which a decision-maker 'is to have regard to' when deciding whether two people are living in a 'marriage-like relationship'. These are in five groups: financial aspects, nature of the household, social aspects, sexual relationship and commitment to each other.

**Facts**

N and H had been living in the same residence for ten years, initially in a rented flat with another man and since 1985 in a jointly owned house. They had purchased the house and a car in joint names because they were better able to get finance jointly than individually. They also purchased another house which was rented to N's invalid son, who it was anticipated would take over the loan with which they bought it. Apart from these purchases and loans they did not pool financial resources.

N and H were found to be good friends who lived fairly separate lives apart from sometimes engaging in joint social activities and holidays. Their initial casual sexual relationship had 'fizzled out'.

**Not a marriage-like relationship**

Before proceeding to analyse the relationship in terms of the s.4(3) criteria, the AAT made the following interesting comments:

> 'Both of these people have lived in marriage situations before they met and they were at pains to point out that their current situation is nothing like their previous lives with their respective spouses. I accept that there is a difference and I also accept that the difference is hard to define. I believe that the criteria set out [in s.4(3)] are more appropriately applied to younger couples. It seems to me that when single people are in their mid to late fifties and beyond they are looking for security, companionship and living accommodation which they will be able to afford for the years ahead of them. They avoid, if they can, mingling their finances, pooling their resources (other than in obtaining accommodation), and consulting each other on a day to day basis about everyday affairs. They wish to be independent so far as they are able.'

(Reasons, para. 6)

The AAT regarded a '"tick-list" approach to these cases' as inappropriate but thought that such an approach to the s.4(3) criteria would probably have led to a decision that N and H were not living in a marriage-like relationship anyway. The AAT decided their relationship was one of good friends who were quite independent of each other.

**Formal decision**

The AAT set aside the SSAT's decision and decided that N was not living in a marriage-like relationship with H.

**[D.M.]**

# Overpayment of sole parent's pension: appeal after conviction

**ANDERSON and SECRETARY TO DSS**

**(No. 8261A)**

**Decided:** 4 June 1993 by P.W. Johnston, S.D. Hotop and R.D. Sayle.

Anderson was granted sole parent pension from 12 May 1987. After forming an opinion that Anderson had 'reconciled' with her husband, the DSS decided to cancel her sole parent pension and to recover from her an overpayment. Following internal review, the Authorised Review Officer (ARO) affirmed the decision to cancel, and decided that the overpayment period was from 12 April 1990 to 2 August 1990. The amount of the overpayment to be recovered was $4172.90.

On 17 September 1991 Anderson was convicted, in the Midland Court of Petty Sessions, of eight offences of