to be a fully documented diagnosed condition which had been investigated, treated and stabilised. As a result, no impairment rating could be assigned.

The formal decision

The decision to reject the disability support pension claim was affirmed.

[K.deH.]

Disability support pension: inability to work; date of qualification

PRESTON and SECRETARY TO THE DFaCS
(No. 19990614)

Decided: 20 August 1999 by B.J. McMahon.

Background

Preston worked underground in a colliery until 17 October 1997 when, only six months before he would have reached compulsory retirement age, he accepted a voluntary redundancy package. On 20 October 1997 he applied for newstart allowance (NSA), indicating in his application that he suffered from a heart condition and that he intended to apply for the disability support pension (DSP) although no DSP claim form was given to him at that time. His application for NSA was rejected due to the application of income maintenance provisions. He applied for a carer pension on 16 April 1998 and for the DSP on 19 August 1998.

The issue

The key issue was whether Preston had a continuing inability to work on 20 October 1997, the date he lodged his claim for NSA. The SSAT had found that Preston did have such an inability to work in April 1998 (subsequently conceded by the Department) but not on the date of his first application for income support.

The law

The qualification for DSP is set out in s.94 of the *Social Security Act 1991* (the Act). The only qualification requirement in dispute in this matter was that provided under s.94(1)(C)(i) that an applicant have 'a continuing inability to work' at the date of the relevant claim.

Under s.100(2) of the Act an initial claim for another pension may be treated as a claim for DSP under limited conditions. That section provides:

> **100.(2)** If:
>
> (a) a person makes a claim (in this subsection called the **'initial claim'**) for:
>
> (i) a social security or service pension, a social security benefit or a parenting payment; or
>
> (ii) a pension, allowance, benefit or other payment under another Act, or under a program administered by the Commonwealth, that is similar in character to a disability support pension; and
>
> (b) on the day on which the person makes the initial claim, the person is qualified for a disability support pension; and
>
> (c) the person subsequently makes a claim for a disability support pension; and
>
> (d) the Secretary is satisfied that it is reasonable for this subsection to apply to the person;
>
> the person's provisional commencement day is the day on which the person made the initial claim.

The evidence

In his evidence, Preston stated that his work at the colliery was a 'sitting job', the 'easiest at the mine' and that he did not regard his work as heavy. He would have preferred to continue to work until retirement, but accepted the package as the money was 'right' and because of his health conditions.

Preston had suffered form a heart condition for many years, and underwent by-pass surgery in 1988. He had made an appointment to see his doctor on 20 October 1997 as he was experiencing chest pain and actually saw his doctor on the day he lodged his NSA claim. By April 1998 he had been referred for further tests and specialist treatment, although Preston told the Tribunal that he considered his symptoms were not at that time any more serious than when he ceased work at the colliery. The Department sought details of Preston's health from his general practitioner, who replied on 30 July 1998 and commented on Preston's health as at the date he had ceased work. His doctor noted that Preston suffered from several conditions including exertional chest pain, obesity, hypertension, dyspepsia, high frequency nerve loss, right median nerve compression, osteoarthritis of the right hand and paraesthesia of the left hand. The doctor concluded that these conditions prevented all manual work, and that clerical or light manual work would be impossible due to Preston's hearing and hand impairments. He added '... Despite the fact that he was employed (in labouring/manual work) in the coalmines, his long association with the industry and workplace enabled him to tailor the type of work to prevent any adverse symptoms.'

Inability to work

The Tribunal accepted that there was clear and unequivocal medical evidence that Preston was unable to work at the date of his claim for NSA. Although he had continued to work until only a few days before this claim was lodged, the Tribunal concluded that the medical evidence was such that:

> ... It would have been a triumph of hope over experience and medical advice to express a desire to continue to work until his 60th birthday. An inability to work cannot mean an ability to pursue employment whilst suffering an unacceptable level of pain or impairment.

(Reasons, para. 17)

Applying s.100(2) of the Act, the Tribunal further accepted that Preston's claim for NSA should be treated as a claim for DSP.

Formal decision

The Tribunal set aside the decision under review and substituted the decision that Preston's provisional commencement date for DSP was 20 October 1997.

[P.A.S.]

Overpayment: special circumstances

HUSAR and SECRETARY TO THE DFaCS
(No. 19990616)

Decided: 20 August 1999 by E.K. Christie.

Husar sought review of a decision of the SSAT, which affirmed the decision of an authorised review officer, that the amount of $874.40 in sole parent pension paid to Husar between 10 July 1997 and 21 August 1997 had been overpaid and was recoverable from her.

The facts

The undisputed facts were that Husar had commenced work on 21 April 1997 and, on that day, she notified Centrelink accordingly. On 17 June 1997, Husar completed a review form in which she notified her earnings for the preceding six weeks. This form was received by Centrelink on 23 June 1997. On 7 July 1997, Centrelink sent Husar an advice letter. She did not notify Centrelink that

the details of her annual assessed income specified in the advice and used to calculate her rate of pension were incorrect.

The evidence

At the time she received sole parent pension, Husar had two children aged 8 and 17. Husar suffers from Krohn's disease. Centrelink commenced recovery of the debt by instalments varying from $50 to $15 a fortnight. At the date of the hearing, the balance remaining was $361.90.

On the sole parent review form she completed on 17 June 1997, Husar notified earnings in excess of $500 for the three consecutive preceding fortnights. As her hours of part-time work varied, it was difficult for her to estimate her average wage.

The reverse side of the advice letter from Centrelink dated 7 July 1999 specified her total annual income to be $3.64. Husar stated she was uncertain as to whether she had read the reverse side of the letter and acknowledged that the amount was incorrect. However, she maintained she had always been honest with Centrelink and had assumed that Centrelink would make the appropriate recalculation of her pension entitlement following the lodgment of her sole parent pension review form.

Centrelink did not action the review form until 28 August 1997. It was conceded the delay was regrettable, however it was asserted that it was inevitable that such errors could occur in a large organisation such as Centrelink.

The legislation

The sole issue was whether the overpayment could be waived in part, or in full. Section 1237 provides for circumstances where a debt may be waived. Section 1237AAD refers to waiver in special circumstances.

Administrative error or special circumstances?

The Tribunal dealt first with the issue of whether paragraph (b) of s.1237AAD was satisfied; that is, whether there were 'special circumstances (other than financial hardship alone) that make it desirable to waive' the right to recover all or part of the debt. Centrelink conceded that the debt 'did not result wholly or partly from the debtor or another person knowingly making a false statement or representation, or failing or omitting to comply with a provision of the Act' (para. (a) of s.1237AAD).

The Tribunal referred to the decision in *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1, noting it had 'become an oft-quoted benchmark as to the interpretation of special circumstances.' This definition emphasised the impossibility of precise and exhaustive definition and the importance of assessing the particular case for circumstances which are unusual, uncommon or exceptional. The Tribunal noted that the ***Guide to the Social Security Act*** referred to the subjective nature of the task of assessing a set of circumstances. The Tribunal also noted that the ***Guide*** obliged Centrelink to examine sole parent review forms to 'ensure customers are receiving their correct entitlement' and directed staff to take care when examining the forms to ensure all questions had been answered and ensure that discrepancies are clarified, either by reference to the customer's file or contact with the customer ...'

The Tribunal concluded that in Husar's case, the circumstances were consistent with the interpretation of 'special circumstances' in *Beadle's Case*. Her pattern of part-time work was extremely irregular and made estimating an average wage difficult. She remained in contact with Centrelink prior to and during the period she was in work. Centrelink received a sole parent review form from Husar disclosing her income from employment over a six-week period on 23 June 1997 but the income information she provided was not actioned until 28 August 1997. Centrelink had received correct information from Husar's sole parent review form 14 days before sending out the advice letter dated 7 July 1997. Husar had been receiving full entitlement as she had not been employed. There was a reasonable expectation for her to believe that the review form she had completed would 'trigger' Centrelink to clarify her income details.

The Tribunal concluded that there were 'special circumstances' in Husar's situation which warrant the description of 'uncommon'. Accordingly the Tribunal considered the overpayment should be waived given that it was satisfied it was more appropriate to waive than to write-off the debt.

Formal decision

The AAT set aside the decision under review.

[S.L.]

Newstart allowance debt: waiver and administrative error

STEWART and SECRETARY TO THE DFaCS (No. 19990552)

Decided: 28 July 1999 by J.A. Kiosoglous.

Background

This was an appeal by Stewart against an SSAT decision affirming a decision of an authorised review officer to raise and recover a debt of newstart allowance (NSA) for the period 1 October 1997 to 31 March 1998.

The facts

On 1 September 1997 Stewart lodged an application for NSA. This was approved, and he was in receipt of NSA from 1 October 1997 to 31 March 1998. Stewart's wife obtained employment about the time he commenced receiving NSA. (On 10 October 1997 she signed an employment declaration form.)

In order to be paid NSA Stewart was required to lodge forms fortnightly with details of income earned by himself and his wife. On each 'Application for Payment of Newstart Allowance' form, at question 6 Stewart declared an income amount from his wife's employment, and the dates that she worked.

The Department wrote to Mrs Stewart's employer, and in early December 1997 obtained details of her employment and wages, which showed that Stewart had been under declaring the income earned by his wife, and the dates she worked. Despite having this information, the Department did not act on it until 11 June 1998. A debt of $3345.85, representing NSA paid between 1 October 1997 and 31 March 1998 was then raised.

The issues for the AAT were whether there was a debt owed to the Commonwealth, and if so, whether there were any grounds for waiving such a debt under s.1237A or 1237AAD of the Act.

Stewart agreed that he had put the wrong amounts on the notices, but stated he was confused by the forms, which provided six spaces for dates, leading him to believe he was being asked for weekly earnings, not fortnightly. He further stated that his wife's employer had made the Department aware of his wife's earnings. He also stated that he had