[2012] AATA 594

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2011/2601 |
| Re | Maria Fera |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Ms A F Cunningham (Senior Member)** |
| Date | **5 September 2012** |
| Place | **Hobart** |

The decision under review is affirmed.

[Sgd Ms A F Cunningham]

**Senior Member**

SOCIAL SECURITY – overseas pension – applicant resides in Italy – International Agreements Act – claim for wife pension – qualification provisions not satisfied – decision under review affirmed

Social Security Act 1991, ss 146V, 147, 315, 362, 408AA, 408BA

Social Security (Administration) Act 1999, ss 11, 16

Social Security (International Agreements) Act 1999, Article 5 Clause 1

# REASONS FOR DECISION

**Ms A F Cunningham (Senior Member)**

**5 September 2012**

1. The applicant, Maria Fera seeks the review of a decision made by the Social Security Appeals Tribunal (SSAT) which affirmed a decision of Centrelink rejecting the applicant's claim for wife pension. The applicant claims that she is entitled to an Australian widow’s pension because she had resided in Australia for five years.
2. The issue for the Tribunal to determine is whether the applicant is qualified to receive wife pension or any other payment covered by the International Agreement between Australia and Italy.
3. The parties requested that the Tribunal determine the appeal on the basis of the written material before it.
4. The Tribunal received the applicant’s application for review of the decision of the SSAT on 1 July 2011. The application was dismissed by the Tribunal when the applicant failed to appear at a directions hearing and a conference because she had not provided the Tribunal with a contact telephone number. At the applicant’s request her application for review was subsequently reinstated by the Tribunal on 30 May 2012. Reinstatement was not opposed by the respondent.
5. The Tribunal has before it the T Documents filed pursuant to section 37 of the A*dministrative Appeals Tribunal Act* 1975. The applicant has not filed any additional material in support of her request for review.

# Background

1. The applicant resided in Australia from 13 May 1971 until 9 January 1975, a total period of three years, seven months and 28 days. She had not returned to Australia since departing on 13 May 1971.
2. The applicant lodged a claim for a benefit under the Social Security Agreement between Italy and Australia. The type of pension identified in the application was "widow’s pension". The claim was rejected on the basis that no new claims were permitted under the law after 20 March 1997.
3. The applicant’s husband, Giuseppe Fera had previously lodged a claim for a disability support pension in 1994. Mr Fera had indicated that he had separated from his wife in 1982. Mr Fera died on 2 March 2009.

# Legislation

1. The relevant legislation is the *Social Security Act* 1991 (the Act), the *Social Security (Administration) Act* 1999 (Administration Act) and the *Social Security (International Agreements) Act* 1999 (International Agreements Act).
2. Section 11 of the *Administration Act* states that if a person wants to be granted a social security payment the person must make a claim for the payment. Section 16 provides that a person makes a claim by lodging a written claim or by making a claim in accordance with subsection 7.
3. The applicant states that she was not aware as to whether her former husband had made an application for an Australian pension on her behalf. Mr Fera‘s Claim for Benefit under the Agreement between Italy and Australia received in 1994 does not disclose any claim for benefit made on behalf of the applicant. In response to the question “Has your spouse claimed a benefit under the Australia/Italy Reciprocal Agreement?” - Mr Fera responded “No” (T4 page 12). In the absence of any evidence of any other claims for pension benefits made by the applicant on any earlier dates, her entitlements to pension benefits will be assessed on the basis of the application received by Centrelink in August 2009.
4. The type of pension identified by the applicant in her Claim for Benefit under the Social Security Agreement between Italy and Australia dated 18 August 2009 is a widow’s pension. The other benefits potentially payable under the International Agreement with Italy include wife pension and bereavement allowance.

# Wife pension

1. The qualification requirements are set out in section 147 of the Act. The provisions require that the person be a member of a couple and that the person’s partner be in receipt of age pension or disability support pension. These provisions have no application in the current case as at the date of the application, the applicant’s husband was deceased.
2. Subsection 1 of section 146V of the Act requires that the claim for pension be lodged on or before 30 June 1995 and that a woman be qualified for the pension on or before that date. The exception provisions have no application in this case. This is a mandatory provision which the applicant fails to satisfy.

# Bereavement allowance

1. The qualification provisions for the payment of a bereavement allowance are set out in section 315 of the Act. The applicant fails to satisfy the requirement that she make an application for bereavement allowance within a period of 14 days from the death of her partner. The death certificate contained in the T Documents discloses that Mr Fera died on 2 March 2009 whereas the applicant’s claim for benefit was made on 18 August 2009 which is more than 14 weeks after Mr Fera’s death. Nor was the applicant a member of a couple at the relevant time.

# Widow b pension

1. This pension is not payable under the International Agreement but pursuant to the provisions of the Act. Under section 362A, a widow B pension cannot be granted unless the claim for pension is lodged before 20 March 1997 and the woman is qualified for the pension before that day. The applicant fails to meet this mandatory requirement. There is no provision under the International Agreement for payment of a widow B pension or an applicant fails to meet the qualification provisions of the act.

# Widow allowance

1. Under section 408AA of the Act, new grants of this pension benefit are only to be made from 1 July 2005 to women who were born on or before 1 July 1955. The applicant’s date of birth was 20 January 1951. This pension is also not available under the International Agreement.
2. The qualification provisions are set out in section 408BA of the Act which appear below:

“408BA Qualification for widow allowance

(2) Subject to section 408BB, a woman is qualified for widow allowance in respect of a period if:

 (a) she has turned 50; and

 (b) she was a member of a couple and since turning 40:

 (i) her partner died; or

 (ii) she separated from her partner; or

 (iii) she divorced from her husband; and

(c) she satisfies the Secretary that she has no recent workforce experience on the day when she makes her claim for the allowance; and

 (d) at least one of the following is satisfied:

(i) if the woman entered Australia before 1 April 1996—the woman has been an Australian resident for a continuous period of at least 26 weeks immediately before the day she lodged the claim for the allowance; or

(ia) if the woman entered Australia on or after 1 April 1996 and before the commencement day—the woman has been an Australian resident for a period of, or periods totalling, 104 weeks before the day she lodged the claim for the allowance; or

(ib) if the woman entered Australia on or after the commencement day—the woman has been an Australian resident and in Australia for a period of, or periods totalling, 104 weeks before the day she lodged the claim for the allowance; or

 (ii) she has 10 years qualifying Australian residence; or

 (iii) she has a qualifying residence exemption for widow allowance; or

(iv) both the woman and her partner were Australian residents at the time when the qualifying event under paragraph (b) occurred; and

 (e) throughout the period, she:

 (i) is not a member of a couple; and

 (ii) is an Australian resident.

Note 1: For recent workforce experience see subsection (3).

Note 2: For Australian resident and qualifying residence exemption see section 7.

Note 4: For member of a couple see section 4”

1. The applicant fails to meet a number of the mandatory requirements of section 408AA. Firstly, the applicant did not separate from her husband after turning 40. The evidence is that they separated in 1982 at which time she would have been 31 years of age. Secondly, the applicant was not at the date of her claim, an Australian resident as required by section 408BA(2)(e). She has been a resident of Italy since January 1975.
2. The applicant entered Australia before 1 April 1996 however she fails to satisfy the requirement that she was an Australian resident for a continuous period of at least 26 weeks immediately before the date she lodged her claim. The applicant also fails to satisfy the requirement in subsection (e) that throughout the period she was an Australian resident. The provisions of the International Agreement deem a person present in Italy to be an Australian resident and present in Australia for the purposes of lodging a claim (Article 5 Clause 1).
3. A widow allowance is not payable to the applicant because she fails to meet a number of the qualification provisions. Firstly, she did not separate from her husband or divorce after turning 40 years of age. Secondly, she was not an Australian resident immediately before lodging her claim. Nor does she have 10 years qualifying residence or satisfy any of the remaining provisions in subsection (d).
4. There is no discretion to pay the applicant any of the benefits referred to above in the absence of her satisfying the relevant legislative qualification provisions. For the reasons outlined the applicant fails to meet these qualification provisions in a number of respects. Accordingly the decision of the Tribunal is to affirm the decision under review.

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| I certify that the preceding 22 (twenty -two) paragraphs are a true copy of the reasons for the decision herein of Ms A F Cunningham (Senior Member) |

 [Sgd]

Dated

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| Date(s) of hearing | **Hearing on the papers** |