[2014] AATA 263

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2012/5861 |
| Re | Mahir Girgs |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Professor T Sourdin, Member** |
| Date | **2 May 2014** |
| Place | **Sydney** |

The decision under review is set aside and in substitution the Tribunal decides that the Applicant qualified for payment of disability support pension at the time of application.

....................[sgd]................................................

**Professor T Sourdin, Member**

# Catchwords

SOCIAL SECURITY – pensions – disability support pension – time at which continuing inability to work commenced – decision set aside

# Legislation

Social Security Act 1991 s 94

Social Security (Administration) Act 1999

# Cases

Re Hanna and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2013] AATA 697

Re Krivoshev and Secretary, Department of Social Services [2014] AATA 132

# REASONS FOR DECISION

**Professor T Sourdin, Member**

**2 May 2014**

# Introduction

1. The matter to be determined is whether the Applicant, Mahir Girgs, is qualified for disability support pension (DSP).

# Prior Decisions

1. The Applicant made a claim for DSP on 2 March 2011. Centrelink rejected the Applicant’s claim for DSP on 13 April 2011 on the basis that Mr Girgs did not meet the residency requirements. An authorised review officer affirmed the Centrelink decision on 18 September 2012. An application for review of the matter was made to the SSAT and on 23 November 2012 the decision under the review was affirmed. The SSAT decision is less than two pages in length and the decision was based on Mr Girgs not being residentially qualified for the disability pension because he had not been resident in Australia for the required residency period of ten years (at the time that his application was made on 2 March 2011).
2. The various decisions made and referred to above were focussed on whether Mr Girgs met the 10 year Australian residency requirement or whether his disability arose at an earlier time whilst he was resident in Australia (in the late 1990s). In the SSAT decision, there was no consideration of whether Mr Girgs’ continuing inability to work (CITW) arose after he arrived back in Australia on 2 November 2010 (although the decision contained the acknowledgement that if a person’s CITW occurred at the time the claimant was resident in Australia the person was not required to meet the 10 year residency requirement). This focus is probably due to the fact that Mr Girgs speaks little English, was either self represented or was assisted by Reverend Father Tadros El-Bakhoumi (who acted as his friend in the proceedings) and because he may not have appreciated that this later period was important to consider in the context of the legislation relating to DSP eligibility. At the hearing at this Tribunal, Mr Girgs was represented, and much of the hearing was focussed on this later period from 2 November 2010.

# The Issue

1. The issue that the Tribunal is required to determine was whether the Applicant was a resident at the time when his CITW arose.

# The legislation

1. The legislation that was considered is set out below. A number of issues were not contentious. There is no dispute that Mr Girgs met the requirement under the *Social Security Act 1991* (the Act) that he had impairments which were rated 20 points or more under the Impairment Tables at the time that he made his application on 2 March 2011. Those impairments are: neck disorder (rated 5 impairment points), spinal disorder (rated 10 impairment points), depression (rated 10 impairment points) and osteoarthritis (rated 10 impairment points). Mr Girgs also has Hepatitis C which was rated nil impairment points. There was no dispute that the 10 year qualifying Australian residency requirement was not met. A Job Capacity Assessment (JCA) report dated 13 April 2011 found, and it is not disputed, that Mr Girgs has a CITW. The issue in dispute is whether Mr Girgs’ CITW, according to the legislative definition, arose following his arrival back in Australia on 2 November 2010 (which would mean that he qualified for the DSP as he did not need to meet the 10 year Australian residency requirement) or whether his CITW arose prior to that time (which would mean that he did not qualify for the DSP as he did not meet the residency requirement).
2. The legislation provides that to be eligible for the DSP you must be an Australian resident at the time that the CITW applied or have 10 years qualifying Australian residence. The version of section 94 that applied in respect of Mr Girgs’ application is set out below (this legislation was amended after that date):

**94 Qualification for disability support pension**

(1) 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 of 20 points or more under the Impairment Tables; and

(c) one of the following applies:

(i) the person has a continuing inability to work;

(ii) the Health Secretary has informed the Secretary that the person is participating in the supported wage system administered by the Health Department, stating the period for which the person is to participate in the system; and

(d) the person has turned 16; and

(e) the person either:

(i) is an Australian resident at the time when the person first satisfies paragraph (c); or

(ii) has 10 years qualifying Australian residence, or has a qualifying residence exemption for a disability support pension; or

(iii) is born outside Australia and, at the time when the person first satisfies paragraph (c) the person:

(A) is not an Australian resident; and

(B) is a dependent child of an Australian resident;

and the person becomes an Australian resident while a dependent child of an Australian resident; and

(f) the person is not qualified for disability support pension under section 94A.

Note 1: For Australian resident, qualifying Australian residence and qualifying residence exemption see section 7.

Note 2: for Impairment Tables see section 23(1) and Schedule 1B.

(2) A person has a **continuing inability to work** because of an impairment if the Secretary is satisfied that:

(a) the impairment is of itself sufficient to prevent the person from doing any work independently of a program of support within the next 2 years; and

(b) either:

(i) the impairment is of itself sufficient to prevent the person from undertaking a training activity during the next 2 years; or

(ii) if the impairment does not prevent the person from undertaking a training activity—such activity is unlikely (because of the impairment) to enable the person to do any work independently of a program of support within the next 2 years.

Note: For **work** see subsection (5).

(3) In deciding whether or not a person has a **continuing inability to work** because of an impairment, the Secretary is not to have regard to:

(a) the availability to the person of a training activity; or

(b) the availability to the person of work in the person’s locally accessible labour market.

(4) A person is treated as doing work **independently of a program of support** if the Secretary is satisfied that to do the work the person:

(a) is unlikely to need a program of support that:

(i) is designed to assist the person to prepare for, find or maintain work; and

(ii) is funded (wholly or partly) by the Commonwealth or is of a type that the Secretary considers is similar to a program of support that is funded (wholly or partly) by the Commonwealth; or

(b) is likely to need such a program of support provided occasionally; or

(c) is likely to need such a program of support that is not ongoing.

(5) In this section:

**training activity** means one or more of the following activities, whether or not the activity is designed specifically for people with physical, intellectual or psychiatric impairments:

(a) education;

(b) pre‑vocational training;

(c) vocational training;

(d) vocational rehabilitation;

(e) work‑related training (including on‑the‑job training).

**work** means work:

(a) that is for at least 15 hours per week on wages that are at or above the relevant minimum wage; and

(b) that exists in Australia, even if not within the person’s locally accessible labour market.

Person not qualified in certain circumstances

(6) A person is not qualified for a disability support pension on the basis of a continuing inability to work if the person brought about the inability with a view to obtaining a disability support pension or a sickness allowance or with a view to obtaining an exemption, because of the person’s incapacity, from the requirement to satisfy the activity test for the purposes of job search allowance, newstart allowance, youth training allowance, youth allowance or austudy payment.

# History

1. A detailed history is set out below as a critical issue in respect of this application is when Mr Girgs’ incapacity became such that he was “unable to work” in accordance with the legislative requirements. There was detailed evidence given about this which is summarised below. The evidence was important because the Secretary contended that the incapacity and CITW arose whilst Mr Girgs was in Egypt and prior to his arrival in Australia in November 2010.
2. Mr Girgs was born in Egypt in 1958. He studied at a college in Egypt and after receiving his qualification, he was employed by the Department of Education in Egypt. He did some voluntary work while in Egypt to assist in repairing a church and at that time he met Reverend Father Tadros who he later made contact with in Australia. Mr Girgs speaks little English and an interpreter assisted him at the Tribunal hearing.
3. On 2 November 1996 the Applicant came to Australia. During his time in Australia he worked as a casual cleaner. While in Australia, he contracted Hepatitis C that was diagnosed on 26 September 1997. The evidence was that this infection arose as a result of a needlestick injury while working as a cleaner. Mr Girgs made a claim for DSP that was rejected on 12 June 1998 as the treating doctor considered that Mr Girgs had a temporary incapacity. Mr Girgs was then injured in a motor vehicle accident on 25 August 1998 and suffered from fractured ribs, a sternum and a right forearm.
4. At this time, Mr Girgs was married, however the marriage broke down in later years. During this time spent in Australia up to 1999, and upon his return to Australia in 2010, Mr Girgs was also involved in the Coptic Church and had regular contact with Reverend Father Tadros who gave evidence at the Tribunal hearing.
5. Reverend Father Tadros who is a priest of the Egyptian Coptic Church is involved in parish work and assists parishioners with government liaison and immigration work and has done so since 1996. He is also a Justice of the Peace and a prison visitor. He assists parishioners and was awarded the Australian Medal of Honour for his community service in 2000. He deals with hundreds of matters and assists with paperwork across his community for non-English speakers in Australia. He was originally an aeronautical engineer.
6. Reverend Father Tadros has known Mr Girgs since 1976 as Mr Girgs’ elder brother was one of the first monks at a monastery that Reverend Father Tadros managed and renovated in Egypt. Mr Girgs was involved in rebuilding the monastery after work and on the weekend. Reverend Father Tadros knew that Mr Girgs was working as a cleaner on his arrival in Australia. He said he was working very hard until his two accidents. Reverend Father Tadros said that he had been a very hard worker who became depressed after he was unable to work.
7. Mr Girgs left Australia to return to Egypt on 24 February 1999. The evidence of Mr Girgs and Reverend Father Tadros was that the primary reason for his return to Egypt was related to the ill health of his mother. The Applicant’s mother was paralysed following a stroke and his sister was looking after his mother, however this had placed a burden on her own family and as he was the only available son (the others are all in the Church) he needed to return to Egypt from Australia to assist his sister. Mr Girgs returned to a job at the Department of Education in Egypt shortly after his arrival back in Egypt. Initially, the job offer was on a full time basis, however it was changed to a part time position on his commencement as a result of his medical conditions.
8. The conditions were described in the evidence. Briefly, they included the residual issues from the motor vehicle and from the Hepatitis C infection. Mr Girgs gave evidence and provided some material that suggested that the issues arising from his Hepatitis C infection were largely under control by 2002, after treatment with the drug “Interferon” in Egypt.
9. It was conceded, however, that Mr Girgs remained unwell and was not operating at his full capacity while in Egypt where he remained until 2010. However, sickness and some disability does not mean that someone has a CITW within the meaning of the legislation. Many people are able to work while “sick” and many who are unwell do not meet the CITW test. The critical issue in this matter, is when that functional CITW was manifested. There was evidence from Reverend Father Tadros and Mr Girgs about the period of time spent in Egypt to determine whether the CITW first occurred while he was in Egypt.
10. Reverend Father Tadros said that when the Applicant left for Egypt in 1999 his health was not good and he was not feeling well because of his Hepatitis C infection. However in Egypt he was appointed as a Deputy Principal with the Education Department as a result of his past work in Egypt. He asked for part time work to enable him to care for his mother and this was not available unless he was unwell. He was treated in 2001 in respect of his Hepatitis with Interferon (exhibit A3) and he gave evidence that at that time he was in better health (although ill) but he remained in part time work so that he could care for his mother. Reverend Father Tadros indicated in his evidence that Mr Girgs had an incapacity for work when he arrived in Egypt but he had improved once he had treatment with Interferon.
11. This evidence that was given orally was somewhat inconsistent with correspondence and some, but not all, of the material in the T documents. One critical issue related to how many hours per day Mr Girgs worked in paid work in Egypt. For example, at ST16-201 (exhibit R2) a translated document showed that his clerical work was limited to two hours, three days a week. Another translated document (ST15-197) suggested that it was three hours’ work on two days a week. It had also been suggested in a letter dated 25 March 2013 from Reverend Father Tadros to the AAT Conference Registrar that his work in Egypt was limited and he had a disability that arose from the injuries that Mr Girgs sustained in 1997 and 1998. Material at T14-76 (a translation) also suggested that his work was limited as a result of his health problems.
12. The Departmental record of a conversation with Reverend Father Tadros suggested that Mr Girgs was working five hours a day. Despite this potentially benefitting the Applicant’s case, Reverend Father Tadros thought that this material was probably incorrect and that the Centrelink record reflected a conversation where he was on the phone from overseas with limited connectivity and reception.
13. These inconsistencies were explored in detail when oral evidence was given. Reverend Father Tadros indicated that his view of what an “incapacity” is was informed by a layman’s understanding and that he had considered that in comparison with Mr Girgs’ previous health, he was incapacitated. In addition, Reverend Father Tadros indicated that it may be that the Applicant was suffering from an incapacity relating to his Hepatitis C in 1999 and 2000, but that this was reduced in impact with the Interferon treatment that was received. The Applicant’s evidence was that after Interferon injections in 1999 and 2000 his medical condition improved so that he only required regular check-ups every three months. The finding of this initial incapacity within Egypt suited his circumstances as it meant that he could continue to work part time and this enabled the Applicant to continue in some work whilst caring for his mother. It is for this reason that the Applicant said that the official work record reflects a continuing incapacity as he did not ever return to full time work while in Egypt.
14. I accept that the Applicant worked part time in Egypt in the period from February 1999 to 2010 and spent much of his time caring for his mother. It seems that the Applicant was “sick” at this time, however this did not appear to constitute a CITW as the Applicant was able to work part time and care for his mother. The work in Egypt involved dealing with administration and paperwork. The amount of time that he spent caring for his mother appears to have varied over this period. Again, there were some inconsistencies between oral evidence and written material. For example, material at T1-4 suggested that the role that Mr Girgs had in caring for his mother was limited.
15. In evidence, the Applicant indicated that the written material (his statement at T1-3 and 4) was not accurate and had been translated by Reverend Father Tadros. He could not remember if the letter had been read to him. When he became aware of the issue, the Applicant indicated that he may have raised this issue with Reverend Father Tadros, but he was not sure when this happened. In his view, the comments may have been applicable to his first year in Egypt and before his mother’s health worsened significantly. He also indicated that at the time that the statement was prepared he was depressed and in poor health and he could not understand the English translation. The Applicant also noted that there were other inaccuracies in the letter, for example, his statement referred to care of his sick mother by his “sisters” when he had only one sister.
16. In terms of the caring responsibilities for his mother in Egypt, the Applicant indicated that initially both he and his sister jointly cared for his mother who was paralysed. This work involved feeding, toileting, washing and other duties such as taking her to doctors and giving her medicine. Mr Girgs’ sister returned to her own home in 2001-2002 and the evidence was that after that time, when he was the only person living with his mother his carer responsibilities increased. Medical advice about the treatment with Interferon was explored in evidence and it was said (with reference to exhibit A3 at p. 3) that by 2006 his condition had stabilised.
17. The evidence was that in the period that Mr Girgs was in Egypt until his mother passed away in 2010 he was caring for his mother continuously and also working part time. Any initial incapacity as a result of his Hepatitis C infection appears to have stabilised whilst he was in Egypt and the evidence about this stabilisation is also consistent with the later impairment rating (nil points) that was made in Australia in 2011 in respect of this condition. Following the death of his mother in 2010 and after observing the traditional mourning period the Applicant returned to Australia on 2 November 2010.
18. If the Applicant did not have a CITW whilst he was in Egypt (as was found by the SSAT), the issue is when did his CITW arise? The primary question is whether the CITW arose after his arrival in Australia on 2 November 2010 which would mean that section 94(1)(e)(i) may apply.
19. In order to determine whether the CITW arose after 2 November 2010 a number of documents were referred to in evidence. In addition, oral evidence was given. The Applicant’s evidence was that he started working in a petrol station and worked for a month in November 2010 but the work was too physically hard and this exacerbated his condition.
20. A letter dated 21 January 2014 from Mr Amir Riad, director of Riad Petroleum Pty Ltd, indicated that Mr Girgs was employed, on a casual basis, by Budget Petrol as a driveway attendant from 3 November 2010 until 29 November 2010. His duties included cleaning toilets, mopping floors, stacking goods on shelves and receiving goods as well as manning the cash register. In this letter Mr Girgs is said to have worked “at least 8 hours on each day he was required to come into the service station to work”. Mr Girgs said that he received $1,000 in payment from Mr Riad for this work although he understood that this work was “training” and that if it worked out, he would be employed over the busy Christmas period. Mr Girgs also applied for Newstart as he did not know whether the work would be permanent or ongoing.
21. The work in the service station was described as hard, physical work. It was different to the work undertaken in Egypt which was largely administrative. Initially, this work appeared be undertaken with limited impact and Mr Girgs was able to do this work although he found it to be physically tiring.
22. This evidence of his ability to work is also consistent with the medical records that show that he contacted his doctor on 12 November 2010 for a routine check-up in relation to his Hepatitis C treatment. At that time he appeared to be able to work. At the time of a further appointment with his doctor on 26 November 2010 his doctor found that he was ill and unable to work. At that time, his treating doctor referred him for more tests. A medical certificate of 26 November 2010 (T17-122) noted that Mr Girgs had three conditions: acute neck and back pain; Hepatitis C infection; and marked depression and anxiety. The treating doctor considered that the prognosis for the anxiety and depression was “uncertain” and “likely to show considerable improvement within 2 years”.
23. A JCA report of 11 November 2010 (ST14) assessed Mr Girgs with “… an assessed work capacity of 30+ hours as medical conditions could not be confirmed as permanent and ongoing due to the absence of medical verification.”
24. Mr Girgs treating doctor referred him to a consultant orthopaedic surgeon (T7) and at that point the doctor appears to have considered that the anxiety and depression had worsened (see medical certificate at T17-121). A medical report of 23 December 2010 of Dr Younan (a consultant psychiatrist) at T5 indicated that at that time he was suffering from major depression and traumatic anxiety. Dr Younan recorded that Mr Girgs had experienced a series of traumatic events that had included the “sudden departure of his then wife” and a break in that resulted in the theft of belongings from his house.
25. Mr Girgs had various symptoms in respect of his depression and these included tiredness (fatigue), loss of interest, and poor concentration. According to the medical report submitted in support of his DSP application on 24 January 2011 and 21 February 2011, Mr Girgs had colonoscopic investigations (T8-51). These investigations revealed that the Applicant had colon cancer and surgery in relation to the colon cancer was undertaken prior to 1 April 2011. Whilst the colon cancer diagnosis is not relevant in the context of the CITW, it seems likely that this diagnosis and the underlying conditions that Mr Girgs noted in his DSP application could have been affected by this diagnosis and this may have meant that his depression and anxiety worsened.
26. Evidence was given on three separate short hearing days. “Short” hearing days with early start times were used at the Tribunal to ensure that Mr Girgs could understand the process and give coherent evidence in view of his health and medical conditions. There was also written evidence that often involved translation and at times the past translation material was unclear or incomplete. The Respondent submitted in a short submission lodged on 8 April 2014 that:

In the period 25 February 1999 to 2 November 2010, he developed a psychological condition, and his physical and psychological conditions deteriorated during that period so that he had a CITW during a later stage of his employment in Egypt, namely during the period 25 February 1999 to before 2 November 2010.

1. In contrast, the Applicant submitted that the evidence showed that Mr Girgs was able to work when he returned to Australia and that this was borne out by oral evidence, the evidence of his treating doctor and related documentation as well as a JCA Report dated 11 November 2010 and Mr Riad’s letter describing Mr Girgs’ duties at Budget Petrol.
2. The JCA Report was the subject of submissions by both the Applicant and the Respondent. The Applicant noted that:

2.2 The evidence that the Applicant had a CITW that arose after his return to Australia was later produced by the Respondent in the form of the JCA Report dated 11 November 2010 (page 190 of the T documents), which was conducted 9 days after the Applicant had returned to Australia the second time.

2.3 The 2010 JCA Report notes that the Applicant’s baseline current work capacity and his future work capacity within 2 years with intervention as being 30+ hours per week.

2.4 The author of the 2010 JCA Report made contemporaneous observations throughout the assessment interview as to the Applicant’s physical health, and noted that despite the Applicant noting his continuing back problems over the past three years, he could:

2.4.1 “Sit: 2 hours, stand: 2 hours, walk “ok” lift/carry: 10-15kg, climb three flights of stairs without reliance in [sic] furniture, squat to ground level without reliance on furniture and ability to catch public transport independently. The client was observed to sit for 30 minutes during the assessment interview, raise from sit to stand without reliance on furniture and walk without an interrupted gait or restriction.”

2.5 The author of the 2010 JCA Report also notes:

2.5.1 “JCA’s services were discussed, but client declined a referral to JCA’s services, advising lower back pain has little impact on daily function”

2.6 The author’s contemporaneous observations of the Applicants [sic] physical health was sufficient enough to reveal that the Applicant was able and willing to work 30+ hours, and that despite his complaints of back problems over the previous 3 year period, he was ready, willing and able to work on a full time basis.

1. The Respondent indicated that their JCA Report of 11 November 2010 could not be used to support a view that at that time the Applicant had an ability to work. The Respondent said:

The JCA report dated 11 November 2010 at page 190 of the T documents refers to Mr Girgs’ baseline work capacity and his work capacity within two years with intervention, as 30+ hours per week. However, the JCA report must be viewed in its proper context, which was an assessment for Mr Girgs’ application for the Newstart Allowance (NSA), and not an assessment for the purpose of his DSP application. In particular, the author of the JCA report did not have the benefit of the documentary medical evidence before the Tribunal.

1. There was other evidence from this important period in November 2010 from Mr Girgs, Reverend Father Tadros, the treating doctor and a letter from his employer. The Applicant and Respondent explored this period from 2 November 2010 to March 2011 in some detail in an effort to explore whether the CITW arose after Mr Girgs arrived in Australia on 2 November 2010.
2. The Applicant noted that:

2.7 The Applicant was sufficiently forthright to mention to the author of the 2010 JCA report that he suffered from back injury, but of some significant importance, he did not present any of the symptoms of the Severe Depression as mentioned in the Applicant’s Psychiatrist, Dr Monis Younan’s report dated 23 December 2010 (T5 page 12) which notes that the Applicant:

2.7.1 “revealed symptoms and signs of major depression… crying spells, depressed mood most of the time, loss of interest and motivation, joylessness, feeling that life is not worth living, death wishes, poor concentration, fatigue and self-reproach. He also has poor appetite and presented loss of 5kg of weight over the past few months. He has withdrawn from social contract [sic] … I diagnose him with major depression, plus symptoms’s [sic] of traumatic anxiety.”

2.8 Dr Younan’s observations of the Applicant are in stark contrast with the 2010 JCA Report that noted the Applicant’s willingness to enter the workforce, and his eagerness to undertake manual and menial laborious task [sic] despite his complaint of a back problem over the previous 3 years.

2.9 Dr Younan’s observations of the Applicant are furthermore consistent with the Applicants [sic] oral evidence given at [sic] Tribunal and elicited under intense cross examination over several days by the Respondent’s solicitors. In his oral evidence, the Applicant stated that he suffered from various medical ailments after his second entry in Australia which led him to lodge an application for a Disability Support Pension which included:

2.9.1 Being diagnosed with cancer of the large bowels [sic] as affirmed by the oral evidence of Dr Dimitri and his letter dated 9 January 2014;

2.9.2 Having worked strenuously in manual tasks and on a full time basis for the organisation Budget Petrol and having seriously and permanently exacerbated his lower back injury and neck injury;

1. In respect of the Budget Petrol work that was undertaken by Mr Girgs in the period from 3 November 2010 to 29 November 2010, the primary evidence was in the form of a letter dated 21 January 2014 from Mr Riad. The Respondent contended that this period of work did not demonstrate that there was an ability to work and noted that:

(a) Mr Girgs was attending Mr Riad’s service station on the same unpaid basis that Mr Girgs had been at a service station during a period before 20 January 1999 (page 176 of T documents) on work experience , when Mr Girgs was free to socialise and “pick up a bit of work experience”;

(b) Working with Mr Riad on any other basis was inconsistent with Mr Girgs receiving the NSA on and from 3 November 2010, as explained in Ms Schuster’s statement dated 23 January 2014 (Exhibit R6);

(c) Mr Girgs was not employed by Mr Riad at any time, in accordance with the High Court’s indicia for employment in Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16, and Hollis v Vabu Pty Ltd (2001) 207 CLR 21.

(d) Mr Girgs was therefore not subject to Mr Riad’s control and direction as an employer, and Mr Girgs could work at his own pace in order to test his capacity for work; and

(e) There is no evidence of any injury at the workplace or elsewhere , or other trauma that Mr Girgs suffered in the period 3 November 2010 to 29 November 2010, and Mr Girgs does not contend that he suffered any such injury in that period.

1. The Applicant submitted that the letter together with the evidence of the Applicant showed that:

5.2 From the oral evidence provided by the Applicant, it was clear that the Applicant was assigned strenuous and exhaustive duties that he was required to carry out at Budget Petrol.

5.3 The letter of Mr Amir Riad dated 21 January 2014 states at the first paragraph that he had to review the wages book to determine the period of time that the Applicant was employed at Budget Petrol. Considering that the proprietor of Budget Petrol considered the Applicant as a paid employee is conclusive that any remuneration provided to the Applicant by Budget Petrol was for his services as an employee of the company .

5.4 Mr Riad outlines a list of duties that the Applicant was required to undertake as part of his employment at Budget Petrol, which without quoting exhaustively from the list include:

5.4.1 receiving/loading/unloading stock of various weights varying from 10kg to 15kg;

5.4.2 standing and operating the cashier for 5 hrs to 6 hrs a day;

5.4.3. cleaning duties for the entire service station.

5.5 We submit that the Applicants [sic] employment was undertaken on a fulltime basis under the direction and control of Mr Riad. Mr Riad states in his letter to the Tribunal that the Applicant ‘was required to work as cashier’, ‘was required to clean the toilet’, ‘was required to come into the service station to work ‘ at certain hours. This mirrors the requirements established in Stevens v Brodribb and Hollis v Vabu in determining the nature of the working relationship, establishing that the Applicant was in an employee/employer relationship.

1. A job capacity assessment interview was undertaken on 31 March 2011 and in the report of 13 April 2011 (T10) it seems clear that at that time Mr Girgs had a CITW.

# Consideration

1. The legislation provides that, as a general rule, a person qualifies for disability support pension, or DSP, if that person is an Australian resident, meets the CITW requirement and their impairments are rated at least 20 points under the Impairment Tables. There are, however, some exceptions to this general approach in that there is a 10 year qualifying residential requirement if the CITW did not first arise at a time when the person was a resident of Australia.
2. The legislation states that the applicant must be an Australian resident “when the person first satisfies paragraph (c)” or must meet the 10 year qualifying Australian residence requirement. In this matter there is no dispute that Mr Girgs does not meet the 10 year residential qualifying period. The question is, whether Mr Girgs was an Australian resident when he satisfied section 94(1)(c), that is, when it could be said that “the person has a continuing inability to [work](http://www.austlii.edu.au/au/legis/cth/consol_act/ssa1991186/s94.html#work).” Put another way, did the CITW arise after Mr Girgs arrived in Australia on 2 November 2010? If it did, then Mr Girgs qualifies for the DSP having met all the other requirements set out in the legislation.
3. In considering this issue, it is necessary to consider evidence given at the hearing and other written material. That evidence supports the conclusion that Mr Girgs had some longstanding health issues that impacted on his ability to work from the late 1990s when he was originally resident in Australia. However, both the Respondent and Mr Girgs agreed that these were not sufficient to meet the CITW requirements.
4. The Respondent submitted that the CITW arose during the period whilst Mr Girgs was in Egypt. The question is whether his health issues were such that his CITW arose prior to or after 2 November 2010?
5. The evidence suggests that the health issues prior to 2010 were not sufficient to prevent Mr Girgs from working and that he did not have a “continuing inability to work”. He may have had some temporary inability until around 2002, however the evidence is that from 2002 until his arrival in Australia in November 2010 he was able to work part time at the Department of Education and that he also worked as a full time carer for his mother who had been paralysed with a stroke until her death in 2010.
6. On his arrival back in Australia, the evidence was that he was working although “on trial” and with uncertain remuneration. The medical evidence of his treating doctor, supported by the JCA, was that he had some incapacity, but this did not equate to a “continuing inability to work”.
7. The meaning of “continuing inability to work” has been explored on a number of occasions by the SSAT, AAT and Federal Court. Under the *Social Security (Administration) Act* *1999* the role of the AAT is to decide whether the Applicant establishes a case for a pension as at the time of the DSP application or in the 13 week period thereafter, that is, during the relevant period.
8. The cases and legislation dealing with CITW establish that CITW is linked to an impairment being “permanent”. As Senior Member Letcher noted in *Re Krivoshev and Secretary, Department of Social Services* [2014] AATA 132 the Tribunal:

must be satisfied that the impairment is of itself sufficient to prevent the person from doing any work or training activity independently of a program of support within the next two years. However, for the purpose of determining whether a person has a CITW the assessor is required to disregard the effect of any impairment that has not been assigned a rating. That is, unless a condition is “permanent” (as defined above), it will not be taken into account when assessing CITW.

1. In addition, a CITW is not demonstrated by an inability to find work or to find paid work. In past decisions such as *Re Hanna and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2013] AATA 697 the Tribunal has noted that:

The concept of continuing inability to work is not confined to a claimant’s ability to undertake work for which they are trained and skilled, but rather their capacity to undertake any work. It involves consideration of whether the claimant has an impairment which of itself prevents the person from undertaking any work or which prevents the person from undertaking educational or vocational training for a period of two years (and, if such training is not prevented by the impairment, whether such training would be likely to enable a person to undertake any work for the next two years). See also, Re Watts and Secretary, Department of Family and Community Services [2003] AATA 632 and Re Crossland and Secretary, Department of Family and Community Services [2004] AATA 864.

1. The Respondent submitted that the CITW arose during the period whilst Mr Girgs was in Egypt. There was much evidence about the Applicant’s work in Egypt. Although the paid work was part time, I accept the Applicant’s evidence that it was undertaken on this basis so that he could care for his mother. The fact that the work was part time does not of itself indicate that there was a CITW. The other activities and, in particular, the onerous carer responsibilities need to be considered. The evidence relating to these responsibilities was that the Applicant was involved in feeding and caring for his mother over a lengthy period of time while he continued to work part time for the Department of Education in Egypt. For this period, the Applicant’s health issues caused him some difficulties which were more pronounced until 2002, however after this time, his capacity to undertake full time work or more part time work appears to have been limited by his carer responsibilities rather than his health issues.
2. The Applicant submitted that the CITW arose following his return to Australia and his work at the petrol station in November 2010. Having considered the evidence of his treating doctor (Dr Dimitri), the Applicant and the totality of the evidence presented including the JCA reports I find that the Applicant had some medical issues on his return to Australia, however the impairments were not sufficient to constitute a CITW until shortly before his DSP application was lodged on 2 March 2011. In particular, some of his conditions appeared to be “temporary” or not permanent on his arrival back in Australia and it may be that the work he undertook in November 2010 had an impact on these conditions. It also seems logical that his cancer diagnosis and bowel surgery in March 2011 may also have contributed to his depression and may have meant that his incapacity in respect of depression became “permanent” (although this condition cannot be considered specifically in the context of the impairments).
3. Given the finding, that the Applicant’s CITW arose in the period following his arrival in Australia on 2 November, the Tribunal decides that the Applicant was qualified for DSP at the time of his application.

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| I certify that the preceding 52 (fifty-two) paragraphs are a true copy of the reasons for the decision herein of Professor T Sourdin, Member |

...........[sgd]........................................................

Dated 2

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| Dates of hearing | **18 December 2013, 23 January 2014, 5 March 2014, 17 March 2014** |
| Date final submission received | **9 April 2014** |
| Solicitor for the Applicant | **Mr G Hanna, GMH Legal** |
| Solicitor for the Respondent | **Dr S Thompson, Sparke Helmore** |