[2015] AATA 22

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/3462-3 |
| Re | Sandor Zalka |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Ms A F Cunningham (Senior Member)** |
| Date | **16 January 2015** |
| Place | **Hobart** |

The decision under review is affirmed.

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

# Catchwords

Social Security - disability support pension - overseas applicant - not Australian resident - impairment rating of 20 points not met - no portability - decision under review affirmed

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# Legislation

Administrative Appeals Tribunal Act 1975

Social Security Act 1991 (the Act) sections 94 (1) (a) to (e), 1236

Employment and Workplace Relations Legislative Amendment Act (Welfare to Work) Act 2005 (no. 154 of 2005)

**CASES**

**SECONDARY MATERIALS**

# REASONS FOR DECISION

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

1. The applicant, Sandor Zalka seeks the review of a decision of the Social Security Appeals Tribunal (SSAT) of 2 June 2014 which affirmed Centrelink’s decision to cancel his disability support pension (DSP).
2. The hearing was conducted by telephone link to Mr Zalka who resides in Hungary. Mr Zalka represented himself and gave oral evidence. Mr Sparkes appeared on behalf of the Secretary and tendered the T documents pursuant to section 37 of the *Administrative Appeals Tribunal Act 1975.*

# Issues

1. In its consideration of whether the decision to cancel Mr Zalka’s DSP was correct, the Tribunal must determine the following issues:
2. Was the applicant an Australian resident?
3. Did the applicant meet the qualification provisions for DSP and in particular did he have 20 points of impairment?
4. If so, what was the applicant’s portability entitlement?
5. Was the applicant overpaid and is the debt recoverable?

# Applicant’s case

1. Mr Zalka disputes the finding of the SSAT that his scoliosis condition does not attract an impairment rating of 20 points. He contends that his condition has not improved since the impairment assessment undertaken in 1994 when it was assessed at 20 points. Mr Zalka contends that he suffers “severe spinal damage” which will worsen over time. In support he refers to a report from Dr Andrew Eklund of 22 August 1994 who states that Mr Zalka’s”….prognosis is not good. The adjacent spinal areas will undergo degenerative changes, while intermittent symptoms will recur frequently and more severely as time goes on.” Dr Eklund goes on to state that he does not consider that the departmental Impairment Tables are appropriate for Mr Zalka’s condition and doing his best, he assessed a rating under Table 5 of 10 points for the cervical spine and 10 points for thoracolumbar spine of 15 points; and 10 points under Table 6 for chronic pain, giving a total rating of the 35 points.
2. Included in the T documents were a number of x-ray, MRI and other radiological reports some of which dated back to 1992. Two more recent reports of Dr Vana were included. In his report dated 12 December 2013 Dr Vana reports that in his opinion, it is unlikely that Mr Zalka’s spinal condition will significantly improve even with treatments that are reasonably available to him. He goes on to state that he considers that Mr Zalka’s medical conditions and impairments are significantly influencing his working capacity but is unable to say whether the conditions would prevent him from working in any job available in the open market in Australia for two hours or more per week within the next five years. Dr Vana states that such a decision should be made by the Job Capacity Assessment Provider or by a panel of specialists.
3. Mr Zalka disputes some of the findings of the SSAT in their decision dated 2 June 2014. He submits that the SSAT gave undue weight to the care that he provides for his son who is not physically but rather mentally ill.
4. In a written submission addressed to the SSAT Mr Zalka contends that he had advised Centrelink prior to departing Australia that he did not intend to return and therefore disputes that he should have to repay the DSP paid to him following his departure. Mr Zalka maintains that he cannot and will not return to Australia irrespective of the Tribunal’s decision. He intends to live out his remaining years in Hungary with his wife and relatives. He feels that he has been unfairly penalised for having left Australia.

# Respondent’s case

1. The respondent maintains that the decision under review to cancel Mr Zalka’s DSP from 15 December 2013 was the correct decision for a number of reasons. It is contended that Mr Zalka was not entitled to DSP because he was not an Australian resident as required by section 94 (1)(e) of the *Social Security Act 1991* (the Act) and nor did he have the required 20 impairment points to qualify for indefinite portability.
2. It is conceded that Mr Zalka satisfies the qualification requirements of a physical impairment and a continuing inability to work. The threshold for a continuing inability to work (CITW) was changed in 2005 by the *Employment and Workplace Relations* *Legislative Amendment Act* *(Welfare to Work) Act 2005* (no. 154 of 2005) from 30 hours a week to 15 hours a week. The savings provisions provide that people who are receiving DSP on 10 May 2005 would not be affected by the changes to DSP qualification. Mr Zalka first became qualified for DSP in 1993 and is accordingly subject to the savings provisions.
3. Mr Zalka’s ability to work was assessed by a Job Capacity Assessment (JCA) on 31 May 2013.

# Qualification for DSP

1. The law governing the payment of pension benefits outside of Australia is contained in the Act. As the International Agreement between Australia and Hungary only applies to the age pension, Mr Zalka’s qualification for DSP is to be considered in accordance with the provisions of the Act.
2. The qualification provisions for DSP are contained in section 94 of the Act. The requirements set out in subsection 94 (1) are conjunctive and a failure to satisfy any one will result in a failure to qualify. I accept the respondent’s concession that Mr Zalka satisfies subsections (1) (a) physical impairment; (c) continuing inability to work; (d) has turned 16; (e) Australian residency at the time of satisfying subparagraph (c).
3. What remains in issue are the provisions of subsections (1) (b), an impairment rating of 20 points or more under the Impairment Tables and (ea) which reads:

 “(ea) one of the following applies:

1. the person is an Australian resident;

(ia) the person is absent from Australia and the Secretary has made a determination in relation to the person under subsection 1218AAA(1);

1. the person is absent from Australia and all the circumstances described in paragraphs 1218AA(1) (a), (b), (c),(d) and (e) exist in relation to the person.”
2. A person’s impairment is assessed in accordance with the Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination (the Determination), a legislative instrument determined under subsection 26 (1) of the Act.
3. The Determination contains the Tables in Part 3 and the rules for applying the Tables in Part 2. It provides, inter alia, that an impairment rating can only be assigned if the condition causing the impairment is permanent and the impairment that results from that condition is more likely than not to persist for more than two years (Part 2 clause 6 (3)).
4. A condition is permanent if it has been fully diagnosed by an appropriately qualified medical practitioner and is fully treated and stabilised and the condition is likely to persist for more than two years (Part 2 clause 6 (4)).
5. In determining whether a condition has been fully diagnosed and treated the Determination provides that consideration be given to any corroborating evidence of the condition, whether treatment or rehabilitation has occurred and whether treatment is continuing or is planned in the next two years; (Part 2 clause (6) (5)).
6. The Tables also provide that self reporting of symptoms alone is insufficient and that there must be corroborating evidence of the person’s impairment generally from a person’s treating doctor or a medical specialist. Under Table 5 - Mental Health Function, the Introduction provides that the diagnosis must be made by an appropriately qualified medical practitioner which includes a psychiatrist or evidence from a clinical psychologist. This suggests that a diagnosis by a general practitioner is insufficient for the allocation of an impairment rating for a mental health function condition.

# Consideration and findings

1. Mr Zalka‘s various impairments were comprehensively considered by the SSAT which included a medical member. There was no further evidence presented to this Tribunal regarding Mr Zalka’s hypertension and hypercholestoralaemia, early osteoarthritis of his knees, pontine caveroma, bilateral epicondylitis, anxiety and depression and scoliosis.I have no reason to reconsider the reasoning of the SSAT and concur with their findings.
2. The only condition that was assessed by the SSAT as a permanent condition in that it was diagnosed, fully treated and stabilised such as to attract an impairment rating under the Impairment Tables was scoliosis. The Job Capacity Assessor in her report of 20 September 2013 undertook an assessment for the condition of “chronic pain” with respect to Mr Zalka’s chronic backaches and neck aches related to thoracic scoliosis and degenerative changes in cervical spine. She recommended an impairment rating of 20 points on the basis of severe functional impact on activities requiring physical exertional stamina.
3. The Authorised Review Officer (ARO) however, after accepting that an impairment rating could be assigned to the effects of Mr Zalka’s spinal condition, considered that it was appropriately assessed under Table 4 - spinal function, at 10 points. The ARO took account of the care and support that Mr Zalka has provided to his son since 27 April 2009 when he claimed carer support. The ARO also stated that the evidence supports his difficulty in sustaining overhead activities but noted that there was no evidence that Mr Zalka is unable to move his head to look in all directions or unable to bend forward or that he needs assistance to get out of a chair.
4. The relevant descriptors under Table 4 – Spinal Function are as follows :

10 “There is a **moderate** functional impact on activities involving spinal function.

1. The person is able to sit in or drive a car for at least 30 minutes, and at least one of the following applies:
2. The person is unable to sustain overhead activities (e.g. accessing items over head height); or
3. The person has difficulty moving their head to look in all directions (e.g. turning their head to look over their shoulder); or
4. The person is unable to bend forward to pick up a light object placed at knee height; or
5. The person needs assistance to get up out of a chair (if not independently mobile in a wheelchair).

20 There is **severe** functional impact on activities involving spinal function.

 (1) The person is unable to:

 (a) perform any overhead activities; or

 (b) turn their head, or bend their neck, without moving their trunk; or

 *(c)bend forward to pick up a light object from a desk or table; or*

 *(d) remain seated for at least 10 minutes.”*

1. The SSAT stated in their decision that Mr Zalka had not submitted evidence and nor was there any objective medical evidence that suggested that he suffered severe functional impact in accordance with the criteria for a 20 point impairment rating. The SSAT concluded that 10 points adequately described the functional limitations of Mr Zalka’s spinal function.
2. In answer to questions posed by Mr Sparkes at the hearing, Mr Zalka said that whilst he can bend and turn his head it is very painful to do so. He said that he experiences pain in getting a cup from an overhead cupboard and cannot sit in a car for 30 minutes due to the swelling in his legs and ankles. Whilst he does not require the use of a wheelchair, walking frame or stick, Mr Zalka said that his wife helps with his mobility. Mr Zalka confirmed that he uses public transport from time to time.
3. As the Introduction to Table 4 states, self reporting of symptoms alone is insufficient and there must be corroborating evidence of the person’s impairment. In my view, the overall evidence regarding the limitations to Mr Zalka’s activities as a result of his scoliosis suggests that there is a moderate functional impact on activities rather than a severe functional impact. Whilst Mr Zalka claims that pain limits his ability to access items over head height, move his head to look in all directions and bend forward to pick up light objects and that at times, he requires assistance to get up out of the chair, there is no corroborative evidence to support a finding of a severe functional impact on activities such as to attract an impairment rating of 20 points.
4. For the reasons set out above, Mr Zalka does not meet the qualification requirement of 20 impairment points for DSP under subsection 94 (1) (b) of the Act on the date of cancellation, namely 15 December 2013. Subsection 94 (1) (ea) requires that the person be an Australian resident at the relevant time unless a determination has been made in relation to subsection 1218 AAA (1). This provision does not apply in Mr Zalka’s case because his impairment has not been assessed as a severe impairment within the meaning of subsection 94 (3) (b) which requires an impairment rating of 20 points or more under a single Impairment Table. The impairment rating for his scoliosis has been assessed at 10 points under Table 4.
5. It was Mr Zalka’s own evidence that at the time he departed Australia on 15 December 2013, he intended to live permanently in Hungary and had no intention of returning to reside in Australia. He maintained that he had advised Centrelink accordingly. There is therefore no issue that Mr Zalka was an Australian resident on 15 December 2013 when he permanently left Australia and when his DSP was cancelled.
6. As Mr Zalka was not qualified for DSP on 15 December 2013, the issue of portability does not arise for consideration. The Tribunal concludes that Mr Zalka’s DSP was correctly cancelled on 15 December 2013 and any payments of DSP made from that date constitute a debt owed to the Commonwealth.
7. Whilst no submissions were made regarding recovery of the debt, the Tribunal recommends that the debt be written off pursuant to the provisions of section 1236 of the Act for reasons that Mr Zalka would have little capacity to repay the debt and that it would not be cost-effective for the Commonwealth to take action to recover the debt.
8. The decision of the Tribunal is to affirm the decision under review.

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| I certify that the preceding 30 (thirty) paragraphs are a true copy of the reasons for the decision herein of Ms A F Cunningham (Senior Member) |

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Dated

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| Date(s) of hearing | **17 November 2014** |
| Applicant | **In person** |
| Solicitors for the Respondent | **Mr Brian Sparkes, Program Litigation and Review Branch** |