Ioannou and Secretary, Department of Social Services (Social services second review) [2015] AATA (6 November 2015)

|  |  |
| --- | --- |
| Division |  |
| File Number | 2014/6048 |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

|  |  |
| --- | --- |
| Tribunal | **Senior Member R W Dunne** |
| Date | **6 November 2015** |
| Date of written reasons | **22 December 2015** |
| Place | **Adelaide** |

The Tribunal affirms the two decisions under review.

.........................[Sgd]...............................................

Senior Member R W Dunne

# Catchwords

SOCIAL SECURITY – pensions, benefits and allowances – disability support pension –

 maximum portability period – illness overseas – suspension and cancellation of disability support pension – further claim for disability support pension – physical, intellectual or psychiatric impairment – whether impairment rating of 20 points or more existed under the Impairment Tables – reports of medical practitioners considered – Job Capacity Assessment conducted – decisions under review affirmed.

# Legislation

Social Security Act 1991 (Cth), ss 94, 1217, 1218C

Social Security (Administration) 1999 (Cth), s 42, Schedule 2, Clauses 3 and 4(1)

# Cases

Re Secretary, Department of Social Services and Anwar [2015] AATA 413

Re Young and Secretary, Department of Family and Community Services [2004] AATA 392, (2004) 84 ALD 540

Drake v Minister for Immigration and Ethnic Affairs (No2) (1979) 2 ALD 634

Hneidi v Minister for Immigration and Citizenship [2010] FCAFC 20

Re Bobera and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2012] AATA 922

Harris v Secretary, Department of Employment and workplace Relations [2007] FCA 404

# Secondary Materials

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011

# REASONS FOR DECISION

**Senior Member R W Dunne**

**22 December 2015**

# INTRODUCTION

1. The applicant, Mark Ioannou, has requested written reasons for my decision which I delivered orally at the conclusion of the hearing of this matter. The following is an edited version of my reasons. However, in order to put my conclusion and findings in context, I will now supplement my oral reasons by referring to certain background facts that were not in contention, and to the relevant legislation.
2. On 10 October 2014, the Social Security Appeals Tribunal (“SSAT”) affirmed an earlier decision made by an Authorised Review Officer (“ARO”) of the respondent on 12 August 2014 to suspend (on 31 July 2013) and then cancel (on 30 October 2013) his disability support pension (“DSP”). The applicant has applied to this Tribunal for review of that decision of the SSAT.
3. On 24 January 2014, the applicant made a subsequent claim for DSP which was rejected on 26 February 2014. When the ARO decided to affirm the rejection, on 12 August 2014, which was also affirmed by the SSAT on 10 October 2014, the applicant applied to this Tribunal for review of that decision of the SSAT.
4. At the hearing, Mr Ioannou was self-represented and the respondent was represented by Mr A Hay (from the Program Litigation and Review Branch, Department of Human Services). I admitted into evidence the T Documents,[[1]](#footnote-1) pursuant to s 37 of the *Administrative Appeals Tribunal Act 1975*.

# ISSUES FOR THE TRIBUNAL

1. The issues for the Tribunal are:
	1. Whether the decisions made on 31 July 2013 and 30 October 2013 to suspend and then cancel the applicant’s disability support pension were correct.
	2. Whether the decision on 26 February 2014 to reject the applicant’s further claim for disability support pension was correct.

# LEGISLATION

1. The legislation that is relevant in this case is contained in the:
	1. *Social Security Act 1991* (“Act”);
	2. *Social Security (Administration) Act 1999* (“Administration Act”)*;* and
	3. *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (“Determination”)*.*

## DSP Portability

1. Part 4.2 of the Act provides for overseas portability. Portability refers to whether a social security payment can continue to be paid while a recipient is outside of Australia. Section 1217 of the Act sets out the maximum portability period for various payments, including DSP. Where portability is not unlimited the allowable period is usually six weeks. The Table at the end of s 1217 sets out the portability period and, to the extent it is presently relevant, it appears below:

|  |
| --- |
| Portability of social security payments |
| Column 1Item | Column 2Payment | Column 3Person | Column 4Absence | Colum 5Maximum portability period |
| … |  |  |  |  |
| 2 | Disability Support pension | Australian resident disability support pensioner | Any temporary absence | 6 weeks (but see also sections 1218AAA, 1218AA, 1218AB and 1218) |
| 2A | Disability Support pension | Severely impaired disability support pensioner | Any absence | Unlimited period |
| 3 | Disability Support pension | Terminally ill overseas disability support pensioner | Any absence | Unlimited period |

1. Section 1218C(1) of the Act provides some limited reasons which allow for the portability of a payment to be extended. These reasons include: serious accident involving the recipient or a family member of the recipient, a serious illness of the recipient or a family member of the recipient, or the hospitalisation of the recipient or a family member of the recipient, amongst others.
2. Section 1218C(2) provides that the respondent must not extend the recipient’s portability period under subs 1218C(1) unless the event occurred or began during the period of absence overseas.

## DSP Qualification

1. The legislative criteria for the grant of DSP are set out in the provisions of s 94 of the Act, which relevantly read:

### “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 Secretary is satisfied that the person is participating in the program administered by the Commonwealth known as the supported wage system; and

(d) the person has turned 16; and

(da) in a case where the following apply:

(i) the person is under 35 years of age;

(ii) the Secretary is satisfied that the person is able to do work that is for at least 8 hours per week on wages at or above the relevant minimum wage and that exists in Australia, even if not within the person’s locally accessible labour market;

(iii) if the person has one or more dependent children--the youngest dependent child is 6 years of age or over;

the person meets any participation requirements that apply to the person under section 94A; 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

(ea) one of the following applies:

(i) 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);

(ii) 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.

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

Note 2: For **Impairment Tables** see subsection 23(1) and sections 26 and 27.

Continuing inability to work

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

(aa) in a case where the person’s impairment is not a severe impairment within the meaning of subsection (3B) -- the person has actively participated in a program of support within the meaning of subsection (3C); and

(a) in all cases -- 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) in all cases --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.

(3A) If:

1. a person is receiving disability support pension; and
2. the Secretary gives the person a notice under subsection 63(2) or (4) of the Administration Act in relation to assessing the person’s qualification for that pension;

then paragraph (2)(aa) of this section does not apply in relation to that assessment.

Severe impairment

(3B) A person’s impairment is a **severe impairment** if the person’s impairment is of 20 points or more under the Impairment Tables, of which 20 points or more are under a single Impairment Table.

Example 1: A person’s impairment is of 30 points under the Impairment Tables, made up of 20 points under one Impairment Table and 10 points under another Impairment Table. The person has a severe impairment.

Example 2: A person’s impairment is of 40 points under the Impairment Tables, made up of 20 points under one Impairment Table and 20 points under another Impairment Table. The person has a severe impairment.

Example 3: A person’s impairment is of 20 points under the Impairment Tables, made up of 10 points each under 2 separate Impairment Tables. The person does not have a severe impairment.

Active participation in a program of support

(3C) A person has **actively participated** in a program of support if the person has satisfied the requirements specified in a legislative instrument made by the Minister for the purposes of this subsection.

(3D) The Secretary must comply with any guidelines in force under subsection (3E) in deciding whether the Secretary is satisfied as mentioned in paragraph (2)(aa).

(3E) The Minister may, by legislative instrument, make guidelines for the purposes of subsection (3D).

Doing work independently of a program of support

(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; or

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

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

Other definitions

(5) In this section:

 **program of support** means a program that:

1. is designed to assist persons to prepare for, find or maintain work; and
2. either:

(i) is funded(wholly or partly) by the Commonwealth; or

(ii) is of a type that the Secretary considers is similar to a program that is designed to assist persons to prepare for, find or maintain work and that is funded (wholly or partly) by the Commonwealth.

 **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.

…”

1. Also relevant in this case is s 42 of, and clauses 3 and 4(1) of Schedule 2 to, the Administration Act. Where a person makes a claim for DSP, cl 3 in Schedule 2 provides the general rule for a start date as the day on which the claim is made. Otherwise, a person’s qualification for DSP is to be considered during the ensuing 13 weeks from the date when the claim is made, in accordance with cl 4(1) in Schedule 2 to the Administration Act. The period covered from the date the claim is made and the ensuing 13 weeks thereafter is the “Relevant Period”. Clause 4(1) reads:

**“4 Start day—early claim**

(1) If:

(a) a person (other than a detained person) makes a claim for a relevant social security payment; and

(b) the person is not, on the day on which the claim is made, qualified for the payment; and

(c) assuming the person does not sooner die, the person will, because of the passage of time or the occurrence of an event, become qualified for the payment within the period of 13 weeks after the day on which the claim is made; and

(d) the person becomes so qualified within that period;

the claim is taken to be made on the first day on which the person is qualified for the social security payment.

…”

1. The Relevant Period for assessing Mr Ioannou’s entitlement to DSP for the purpose of these proceedings is the 13 week period from 24 January 2014 to 25 April 2014.

# social security (tables for the assessment of work-related impairment for disability support pension) determination 2011 (“Determination”)

1. The Impairment Tables relating to the assessment of work-related impairment for DSP were previously set out in Schedule 1B to the Act. The Determination, under s 26(1) of the Act, commenced on 1 January 2012. In the Determination, the Rules for applying the Tables relevantly read:

**“6. Applying the Tables**

Assessing functional capacity

1. The impairment of a person must be assessed on the basis of what the person can, or could do, not on the basis of what the person choses to do or what others do for the person.

Applying the Tables

1. The Tables may only be applied to a person’s impairment after the person’s medical history, in relation to the condition causing the impairment, has been considered.

Note: For additional information that must be taken into account in applying the Tables see section 7.

Impairment ratings

1. An impairment rating can only be assigned to an impairment if:
2. the person’s condition causing that impairment is permanent; and

Note: For **permanent** see subsection 6(4).

1. the impairment that results from that condition is more likely than not, in light of available evidence, to persist for more than 2 years.

Example: A condition may last for more than 2 years, but the impairment resulting from that condition may be assessed as likely to improve or cease within 2 years – if this is the case, an impairment rating under the Tables cannot be assigned to the impairment.

Permanency of conditions

1. For the purposes of paragraph 6(3)(a) a condition is permanent if:
2. the condition has been fully diagnosed by an appropriately qualified medical practitioner; and
3. the condition has been fully treated; and

Note: For **fully diagnosed** and **fully treated** see subsection 6(5).

1. the condition has been fully stabilised; and

Note: For **fully stabilised** see subsection 6(6).

1. the condition is more likely than not, in light of available evidence, to persist for more than 2 years.

Fully diagnosed and fully treated

1. In determining whether a condition has been fully diagnosed by an appropriately qualified medical practitioner and whether it has been fully treated for the purposes of paragraphs 6(4)(a) and (b), the following is to be considered:
2. whether there is corroborating evidence of the condition; and
3. what treatment or rehabilitation has occurred in relation to the condition; and
4. whether treatment is continuing or is planned in the next 2 years.

Fully stabilised

1. For the purposes of paragraph 6(4)(c) and subsection 11(4) a condition is fully stabilised if:
2. either the person has undertaken reasonable treatment for the condition and any further reasonable treatment is unlikely to result in significant functional improvement to a level enabling the person to undertake work in the next 2 years; or
3. the person has not undertaken reasonable treatment for the condition and:

(i) significant functional improvement to a level enabling the person to undertake work in the next 2 years is not expected to result, even if the person undertakes reasonable treatment; or

(ii) there is a medical or other compelling reason for the person not to undertake reasonable treatment.

Note: For **reasonable treatment** see subsection 6(7).

Reasonable treatment

1. For the purposes of subsection 6(6), reasonable treatment is treatment that:
2. is available at a location reasonably accessible to the person; and
3. is at a reasonable cost; and
4. can reliably be expected to result in a substantial improvement in functional capacity; and
5. is regularly undertaken or performed; and
6. has a high success rate; and
7. carries a low risk to the person.

Impairment has no functional impact

1. The presence of a diagnosed condition does not necessarily mean that there will be an impairment to which an impairment rating may be assigned.

Example: A person may be diagnosed with hypertension but with appropriate treatment the impairment resulting from this condition may not result in any functional impact.

Assessing functional impact of pain

1. There is no Table dealing specifically with pain and when assessing pain the following must be considered:
2. acute pain is a symptom which may result in short term loss of functional capacity in more than one area of the body; and
3. chronic pain is a condition and, where it has been diagnosed, any resulting impairment should be assessed using the Table relevant to the area of function affected; and
4. whether the condition causing pain has been fully diagnosed, fully treated and fully stabilised for the purposes of subsections 6(5) and (6).

…

**8 Information that must be not be taken into account in applying the Tables**

(1) Symptoms reported by a person in relation to their condition can only be taken into account where there is corroborating evidence.

Note: Examples of the corroborating evidence that may be taken into account are set out in the Introduction of each Table in Part 3 of this Determination.

(2) Unless required under the Tables, the impact of non-medical factors when assessing a person’s impairment must not be taken into account.

Example: Unless specifically referred to by a descriptor in a Table, the following must not be taken into account in assessing an impairment: the availability of suitable work in the person’s local community; English language competence; age; gender; level of education; numeracy and literacy skills; level of work skills and experience; social or domestic situation; level of personal motivation; or religious or cultural factors.

***9 Use of aids, equipment and assistive technology***

A person’s impairment is to be assessed when the person is using or wearing any aids, equipment or assistive technology that the person has and usually uses.

**10 Selecting the applicable Table and assessing impairments**

Selection steps

(1) Table selection is to be made by applying the following steps:

(a) identify the loss of function; then

(b) refer to the Table related to the function affected; then

(c) identify the correct impairment rating.

(2) The Table specific to the impairment being rated must always be applied to that impairment unless the instructions in a Table specify otherwise.

Single condition causing multiple impairments

(3) Where a single condition causes multiple impairments, each impairment should be assessed under the relevant Table.

 Example: A stroke may affect different functions, thus resulting in multiple impairments which could be assessed under a number of different Tables including: upper and lower limb function (Tables 2 and 3); brain function (Table 7); communication function (Table 8); and visual function (Table 12).

(4) When using more than one Table to assess multiple impairments resulting from a single condition, impairment ratings for the same impairment must not be assigned under more than one Table.

Multiple conditions causing a common impairment

(5) Where two or more conditions cause a common or combined impairment, a single rating should be assigned in relation to that common or combined impairment under a single Table.

(6) Where a common or combined impairment resulting from two or more conditions is assessed in accordance with subsection 10(5), it is inappropriate to assign a separate impairment rating for each condition as this would result in the same impairment being assessed more than once.

Example: The presence of both heart disease and chronic lung disease may each result in breathing difficulties. The overall impact on function requiring physical exertion and stamina would be a combined or common effect. In this case a single impairment rating should be assigned using Table 1.

**11 Assigning an impairment rating**

(1) In assigning an impairment rating:

 (a) an impairment rating can only be assigned in accordance with the rating points in each Table; and

 (b) a rating cannot be assigned between consecutive impairment ratings; and

Example: A rating of 15 cannot be assigned between 10 and 20.

(c) if an impairment is considered as falling between 2 impairment ratings, the lower of the 2 ratings is to be assigned and the higher rating must not be assigned unless all the descriptors for that level of impairment are satisfied; and

(d) a rating cannot be assigned in excess of the maximum rating specified in each Table.

(2) In deciding whether an impairment has no, mild, moderate, severe or extreme functional impact upon a person, the relative descriptors for each impairment rating in a Table should be compared to determine which impairment rating is to be applied.

Descriptors involving performing activities

(3) When determining whether a descriptor applies that involves a person performing an activity, the descriptor applies if that person can do the activity normally and on a repetitive or habitual basis and not only once or rarely.

Example: If, under Table 2, a person is being assessed as to whether they can unscrew a lid of a soft drink bottle, the relevant impairment rating can only be assigned where the person is generally able to do that activity whenever they attempt it.

Episodic and fluctuating conditions

(4) When assessing impairments caused by conditions that have stabilised as episodic or fluctuating a rating must be assigned, which reflects the overall functional impact of those impairments, taking into account the severity, duration and frequency of the episodes or fluctuations as appropriate.

No impairment resulting from a condition

(5) To avoid doubt, where a person’s diagnosed condition results in no impairment, the impairment should be assessed as having no functional impact and a zero rating must be assigned.”

# BACKGROUND facts

1. The background facts in this case are not in dispute and are largely extracted from the respondent’s statement of facts and contentions.
2. In relation to the portability issue, the applicant had previously been in receipt of DSP from 5 November 2011. He contacted the respondent on 11 June 2013 to advise his intention to leave Australia from 19 June 2013 and to return between 31 July 2013 and 18 September 2013.[[2]](#footnote-2) On 11 June 2013 the applicant was sent a notice about the effect of his travel plans on his DSP.[[3]](#footnote-3) On 31 July 2013, the applicant’s DSP was suspended as he had continued to remain overseas for more than six weeks.[[4]](#footnote-4) On 30 October 2013, the applicant’s DSP was cancelled as he had then continued overseas for a further 13 weeks.[[5]](#footnote-5) On 25 November 2013, the applicant returned to Australia.[[6]](#footnote-6) The applicant claimed and received Newstart Allowance from 26 November 2013.[[7]](#footnote-7)
3. The applicant also claimed DSP from 24 January 2014. As part of this claim, he lodged a “Medical Report – Disability Support Pension” form completed by Dr Kerry and signed on 16 January 2014. This Report said that the applicant suffered from “bilateral hip osteoarthritis” and “deep vein thrombosis of right calf”. He also lodged a “Medical Report – Disability Support Pension” form completed by Dr Spriggins, purportedly signed on 11 February 2014. This Report also said that he suffered from “osteoarthritis left hip” and “right hip replacement”. A Job Capacity Assessment (“JCA”) report was completed on 25 February 2014[[8]](#footnote-8) to assess the applicant’s qualification for DSP. In addition to the medical conditions already mentioned, the JCA report said that the applicant suffered from “lower limb deficiency of the right 5th metatarsal”. The JCA report found that the applicant’s bilateral hip osteoarthritis condition was fully diagnosed, but not fully treated and stabilised and could not be assigned an impairment rating under the Impairment Tables. The report also found that the applicant’s lower limb deficiency (metatarsal condition) was reported by Dr Kerry to be a condition causing limited or minimal functional impact. There was insufficient information to assess whether the condition was fully diagnosed, fully treated and fully stabilised and the condition could not be assigned an impairment rating under the Impairment Tables.
4. Before the SSAT, the member considered the applicant’s impairment rating for his hip condition under Table 3 – Lower Limb Function. The member found that the applicant had a moderate functional impact on activities using lower limbs and assigned 10 impairment points for this condition. However, the member could not allocate 20 points for the condition as the applicant was able to walk from the car park into a shopping centre or supermarket without assistance. As to the claim for deep vein thrombosis and the right foot condition, the member agreed that these conditions did not attract impairment ratings under the Impairment Tables.

# evidence

1. In giving his evidence, the applicant said that he telephoned Centrelink to advise that he planned to leave Australia for Cyprus on 19 June 2013. The return date was not confirmed because of a matter involving Housing SA, but he said he had an itinerary to return on 23 October 2013. On 31 July 2013, Centrelink wrote to him to advise that his DSP had been suspended because he was still overseas. The Centrelink letter was not forwarded to him. He said he wrote to Centrelink on 1 September 2013 regarding the inability to book a flight back to Australia, because no seats were available until the date he had booked, being 23 October 2013. When Centrelink advised him that his DSP had been cancelled, he was still overseas because the deep vein thrombosis condition arose and he cancelled the flight on 23 October 2013. After calling the airline, the best travel date was 24 November 2013 because the airline had no available seats until then.
2. In relation to the applicant’s further DSP claim made on 24 January 2014, he said he was still taking Warfarin due to his deep vein thrombosis. His doctor was reluctant to operate while he was on this medication. He may need further surgery on his left hip. He preferred walking to driving, as he found it difficult to get in and out of the car. He also found public transport difficult to get on and off buses. Once on a bus, it could not move until he sat down.
3. The applicant said that he had no argument with the decision to suspend his DSP after 6 weeks when the portability period ended. He contended that his DSP should not have been cancelled and the respondent should have continued the suspension until he returned to Australia. He referred to the decision of Senior Member Toohey in *Re Secretary, Department of Social Services and Anwar* [2015] AATA 413*,* which was dated 12 June 2015.

# CONSIDERATION

## Were the decisions made on 31 July 2013 and 30 October 2013 to suspend and then cancel the applicant’s DSP correct?

1. The portability of a payment, that is the amount of time a payment may be paid while overseas, is governed by the provisions of Part 4.2 of the Act. The general provisions are contained in s 1217 of the Act and provide that the maximum portability period for a person to receive DSP while overseas is limited to 6 weeks, unless the person is severely impaired or has a terminal illness.
2. In giving his evidence and in making his closing submissions, it seemed that the applicant was arguing that he was a “severely impaired disability support pensioner” within the meaning of Item 2A of Column 1 in the Table appearing at the end of s 1217 of the Act. However, there is no evidence that, at the time, he was severely impaired.
3. It was not contended by the applicant that either of these situations applied to him. His contention was that he was aware that his DSP would be suspended after 6 weeks, but that he had planned to return to Australia prior to the subsequent 13 week period which could result in cancellation of his DSP. He said he had an itinerary to return to Australia on 23 October 2013. It was the result of the medical condition of deep vein thrombosis that caused him to be unable to return, prior to the 13 week period. Section 1218C(2) provides that the person’s portability period should not be extended under subsection (1) unless the illness or event occurred or began during the period of absence. According to the applicant, his deep vein thrombosis had a date of onset of 24 October 2013. Even though this falls outside the 6 week portability period, he was seeking the application of s 1218C as the onset occurred while he was away. There are letters in the T documents[[9]](#footnote-9) from two surgeons in Cyprus that indicate the applicant suffered deep vein thrombosis in October 2013. However, the diagnosis of the deep vein thrombosis does not appear to have occurred until 6 November 2013, which was after the 13 week period. Notwithstanding this, even if the deep vein thrombosis occurred prior to 30 October 2013, it was after the initial portability period of 6 weeks had expired. In the SSAT decision, the member referred to the decision of Senior Member Imlach in *Re Young and Secretary, Department of Family and Community Services.[[10]](#footnote-10)* In that case, the Senior Member found that a medical condition occurring after the initial period of portability had expired could not be used to extend the period of portability.
4. The SSAT member also referred to the Social Security Guide which contains policy about the application of s 1218C. At 7.1.2.10 in the Guide, dealing with *General Rules of Portability,* the Tribunal must apply policy unless there is good reason not to do so (*Drake and Minister for Immigration and Ethnic Affairs (No2)).[[11]](#footnote-11)* The application of policy ensures that like situations are treated alike. However, the Tribunal’s task is to arrive at the “correct or preferable” decision after considering the policy, rather than making a passive decision about how the circumstances of the case conform (or not) to the policy guidelines. It must make an independent assessment (see *Hneidi v Minister for Immigration and Citizenship).[[12]](#footnote-12)* The SSAT member maintained that the Guide states that the event preventing the person’s return to Australia must be extreme or of an emergency nature and must have occurred or begun during the allowable portability period.
5. Given the applicant’s circumstances, the SSAT member found that the respondent had correctly suspended and then cancelled the applicant’s DSP. I agree with the SSAT member’s finding.

## Is the decision on 26 February 2014 to reject the applicant’s further claim for disability support pension correct?

1. I now turn to consider whether the applicant’s DSP claim made on 24 January 2014 should have been granted.
2. In paragraph 11 of these reasons, I refer to s 42 of, and clause 4(1) of Schedule 2 to, the Administration Act. I am required to determine the applicant’s eligibility for DSP on the date he lodged his claim, namely 24 January 2014, and within 13 weeks thereafter, that is, before 25 April 2014.
3. There have been decisions of Courts and Tribunals involving an applicant’s qualification for DSP within the relevant claim period (the Relevant Period). In *Re Bobera and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs,[[13]](#footnote-13)* the Tribunal there said:

“In the Tribunal’s consideration as to whether a condition has been stabilised and is likely to persist for the foreseeable future, the Tribunal must look at the situation as it was, and the evidence that was available, at the time of the application for DSP (and the subsequent 13 weeks). Any subsequent evolution of a particular condition might be relevant to any weight the Tribunal places on competing prognostications or on an assessment of the quality of the medical reports provided (most notably where evidence indicates that the creator of a medical report may not have had access to all relevant information or may not have turned his or her mind to all the relevant issues). …”

1. Gyles J of the Federal Court in *Re Harris v Secretary, Department of Employment and Workplace Relations* [2007] FCA 404 stated at[1];

“… the applicant’s entitlement to the pension must be considered as at the date of her claim, namely, 3 May 2004 and a period of 13 weeks thereafter. Any subsequent change in her health is irrelevant to the questions which arise in this proceeding except insofar as it may cast light on the position at the relevant time.”

1. The evidence of his treating doctor, Dr J C Kerry, says that the applicant has the following medical conditions:
	1. osteoarthritis (bilateral hip);
	2. deep vein thrombosis; and
	3. lower limb deficiency (pin in fifth metatarsal on right foot following fracture).

The JCA report agrees that these conditions are present and this is not disputed by the respondent.

1. In relation to the applicant’s hip condition, the report of Dr Kerry states that the condition results in the applicant being unable to climb stairs or steps or stand for too long. He has significant loss of range of movement in both hips and he may need further surgery on both hips. In the report of Dr Spriggins dated 11 February 2014[[14]](#footnote-14) he states that the applicant needs a total left hip replacement and he expects the applicant’s function to deteriorate over the next two years.[[15]](#footnote-15) In his further report dated 26 March 2014,[[16]](#footnote-16) Dr Spriggins confirmed that the applicant will need a left total hip replacement as well as the right total hip replacement he has had. The ARO found that the hip condition was not fully treated and stabilised because surgery for the left hip was intended. As such, an impairment rating was not allocated. In the SSAT, the member did not agree with this assessment. As the applicant had a bilateral condition, the member considered an impairment rating under Table 3 – lower limb function. As the applicant was unable to use stairs or steps without assistance, the member found that the applicant had a moderate functional impact on activities using lower limbs and assigned 10 impairment points for the condition. For the respondent, Mr Hay submitted that the SSAT had erred in finding that the hip condition was fully diagnosed, fully treated and fully stabilised and could be assigned an impairment rating of 10 points under Table 3. Mr Hay submitted that, on the medical evidence, the applicant did not have a moderate impairment of the lower limbs as he did not satisfy any of the descriptors in paragraphs (1)(a), (b) or (c) of Table 3 for a 10 point rating. In particular, it was contended that the applicant did not satisfy descriptor (1)(b), that “the person is unable to use stairs or steps without assistance”. Although Mr Hay’s submission has merit, I do not think it is necessary for me to reach a decision on the issue.
2. In relation to the deep vein thrombosis, the evidence of Dr Kerry and the ARO’s finding that the condition was not fully treated and stabilised, the SSAT member agreed and decided that an impairment rating for the condition could not be allocated. I agree with the SSAT member’s decision.
3. In relation to the lower limb (metatarsal) condition, Dr Kerry said that the condition caused minimal or limited impact on ability to function. In these circumstances, the ARO found that the condition did not attract a rating under the Impairment Tables. I also agree with the ARO’s finding.
4. Even if the SSAT member’s finding is correct and that 10 impairment points can be allocated for the hip condition under Table 3, the applicant’s conditions do not attract at least 20 points under the Impairment Tables as required for the grant of a disability support pension.
5. As I am not satisfied that the applicant had an impairment or a combination if impairments attracting a rating of at least 20 points under the Impairment Tables, it is not necessary for me consider whether or not he had a “continuing inability to work” within the meaning of s 94(1)(c) of the Act. In these circumstances, it is also not necessary for me to consider whether he had actively participated in a Program of Support.
6. It follows that the decision on 26 February 2014 to reject the applicant’s claim for disability support pension is correct.

# DECISION

1. For the reasons outlined above, the Tribunal affirms the two decisions under review.

|  |
| --- |
| I certify that the preceding 37 (thirty -seven) paragraphs are a true copy of the reasons for the decision herein of Senior Member R W Dunne |

.........................[Sgd]...............................................

Dated

|  |  |
| --- | --- |
| Date(s) of hearing | **13 October 2015 and 16 November 2015** |
| Applicant | **In person** |
| Advocate for the Respondent | **Mr A Hay** |
| Solicitors for the Respondent | **Department of Human Services** |

1. Exhibit R1. [↑](#footnote-ref-1)
2. Exhibit R1, pages 199-200. [↑](#footnote-ref-2)
3. Exhibit R1, pages 69-70. [↑](#footnote-ref-3)
4. Exhibit R1, pages 71-72. [↑](#footnote-ref-4)
5. Exhibit R1, page 74. [↑](#footnote-ref-5)
6. Exhibit R1, page 162. [↑](#footnote-ref-6)
7. Exhibit R1, page 191. [↑](#footnote-ref-7)
8. Exhibit R1, pages 146-152. [↑](#footnote-ref-8)
9. Exhibit R1, page 77-78. [↑](#footnote-ref-9)
10. [2004] AATA 392. [↑](#footnote-ref-10)
11. (1979) 2 ALD 634. [↑](#footnote-ref-11)
12. [2010] FCAFC 20. [↑](#footnote-ref-12)
13. [2012] AATA 922. [↑](#footnote-ref-13)
14. Exhibit R1, page 139. [↑](#footnote-ref-14)
15. Exhibit R1, page 140. [↑](#footnote-ref-15)
16. Exhibit R1, page 155. [↑](#footnote-ref-16)