Upon Dalziell conceding that this was an 'accruing return investment' within the meaning of s.12B(1) [see now s.3(1)] of the *Social Security Act*, the AAT decided that a rate of return in respect of this investment had been correctly taken into account in reducing the rate of unemployment benefit payable to him and affirmed the decision under review.

The AAT described Dalziell's arguments about the unfairness of the investment income rules as 'worthy of consideration in connection with any proposed changes in the relevant legislation'. It had been submitted on behalf of Dalziell that his roll-over bond should not be taken into account as continuing income, because it was intended for use upon retirement and not for immediate financial gain. The current legislation was discriminatory, unfair and inconsistent with the constant reminders to the public to prepare for old age by preserving eligible termination payments, it was submitted.

[D.M.]

Income test: pension payable only in India

MENON and REPATRIATION COMMISSION
(No. 6098)
Decided: 1 August 1990 by I.R. Thompson.

Mr Menon had resided in Australia in 1969. He was eligible for a service pension under the *Veterans' Entitlements Act*.

In calculating the rate of his service pension, the Repatriation Commission treated as 'income' a retirement pension granted to Menon by the Government of India.

Menon asked the AAT to review that decision.

The legislation

Section 35(1) of the *Veterans' Entitlements Act* defines 'income' in terms which are substantially identical to the definition in s.3(1) of the *Social Security Act* – as moneys –

> 'earned derived or received by [a] person for his or her own use or benefit by any means from any source whatsoever, within or outside Australia . . .'

Pension not available in Australia

Menon's Indian pension was payable in Indian rupees into his bank account in India. The funds in that account could not be transferred out of India nor could they be converted into any other currency. The Indian Government had prohibited the use of the moneys in the applicant's bank account for purchasing goods to be taken out of India or for the purchase of services in India by Menon.

Menon told the AAT that it was not feasible for him to travel regularly to India because of the cost of fares and the poor health of his wife; and this latter factor had removed any prospect of them residing in India.

Pension 'derived . . . outside Australia'

The AAT noted that a similar pension had been considered by the Tribunal in *Hoogewerf* (1988) 45 *SSR* 577. In that case, the Tribunal had decided that, because there was only a remote prospect of the applicant having the use of an Indian pension, no income should be treated as derived from the pension.

However, in the present case the AAT said that it was obliged, because of the Federal Court's decision in *Rose* (1990) 54 *SSR* 727, to treat the Indian pension as derived by Menon upon its payment into his Indian bank account.

The AAT noted that, in *Rose*, the Federal Court had said that pension payments made to a person in the German Democratic Republic were moneys 'received' by that person and that it was not to the point that the moneys were received outside Australia; nor did the construction and application of the definition of 'income' depend on the fact that a person might choose to live in Australia or in another country.

The AAT said that it regretted that it was obliged to conclude that Menon's Indian pension had the effect of reducing his service pension, because this –

> 'defeats what would appear to be the purpose of taking a pensioner's other income into account in determining the rate of his pension, that is to say that the rate of the pension should be related to his needs. If payments are made to him in another country and neither the money nor money's worth can be transferred to Australia and he cannot reasonably be expected to travel to the other country to reside for a period each year to utilise those moneys for his support, his needs are not in fact reduced in any way by the receipt or derivation of those moneys in that other country.'

(Reasons, para.13)

This was a situation, the AAT observed, calling for urgent consideration of possible amendment of the *Veterans' Entitlements Act* and the *Social Security Act* in order to prevent hardship to pensioners who were in the applicant's situation.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Investment income: entry and management fees

HAWLEY and REPATRIATION COMMISSION
(No. N89/1021)
Decided: 13 June 1990 by C.J. Bannon, T.R. Russell and J. Maher.

Bruce Hawley held a service pension under the *Veterans' Entitlements Act*. The Repatriation Commission calculated the rate of that pension by reference to his income from a managed investment fund, but refused to deduct certain fees paid by Hawley to the managers of the fund.

Hawley asked the AAT to review that decision.

The legislation

The AAT referred to s.37H of the *Veterans' Entitlements Act*, which allowed for the deduction, from investment returns, of entry or establishment fees paid to an investment fund after 9 September 1988.

[The equivalent provision in the *Social Security Act* is s.12K, considered in *Bate*, noted in this issue of the *Reporter*.]

Management fees

The fund in question charged a quarterly management fee, at 2% per annum, of the value of the investment. The AAT decided that any management fees paid to the fund should be allowed as a proper deduction against the income from the investment fund, regardless of when those fees were paid.

Establishment fees

Once s.37H came into operation on 9 September 1988, reasonable entry fees paid to the fund after that date would be deductible from the return on the investment.

But, prior to that date, the AAT said, the establishment fee (of 4% of the amount invested) paid by Hawley to the fund was 'of a capital nature' and not available as a deduction against the return on the investment. This view was adopted by analogy with the approach taken under income tax law.

Formal decision
The AAT directed that the establishment fees charged by the fund were not allowable deductions; that the management fees charged by the fund were allowable deductions; and that any reasonable fee charged by the fund as a condition of joining the fund on or after 9 September 1988 should be allowed as a deduction from income.

[P.H.]

Staying the decision under review

SECRETARY TO DSS and GUNER (No. 6118)
Decided: 24 July 1990 by H.E. Hallowes.

In June 1989 the DSS rejected Turgut Guner's claim for invalid pension. In the same month the DSS also cancelled his sickness benefit. An appeal to the SSAT was determined in March 1990. The SSAT decided that Guner was entitled to invalid pension and that he was not qualified to receive sickness benefit because his incapacity was not of a temporary nature.

The DSS lodged an appeal to the AAT and sought a stay of the SSAT decision. In June 1990, the AAT made such an order with the consent of both parties. Guner consented on the basis that he was in receipt of sickness benefit and would continue to receive that payment. The decision to grant sickness benefit had been made by the DSS in April 1990.

On 13 July 1990, Guner was advised by the DSS that, in view of the decision of the SSAT, payment of sickness benefit would cease on 16 July. Guner then asked the AAT to remove the stay order on the SSAT decision.

Effect of staying the SSAT decision
Section 41(1) of the *AAT Act* 1975 provides that:

> '. . . the making of an application to the Tribunal for a review of a decision does not affect the operation of the decision or prevent the taking of action to implement the decision.'

Section 41(2) of the *AAT Act* gives the Tribunal power to stay the operation of a decision, pending review of that decision, 'for the purpose of securing the effectiveness of the hearing and determination of the application for review'.

The AAT noted that, if the SSAT decision had not been stayed in June, Guner would have been entitled to arrears of invalid pension as well as payment of invalid pension after the cessation of his sickness benefit in July.

The DSS was concerned that if the SSAT decision was not stayed Guner might return to his country of origin and apply for portability of his pension. The DSS argued that this would place the Department 'in a difficult position with respect to the application for review'.

The AAT considered the effect of staying or not staying the SSAT decision. If the stay remained and Guner did not lodge a claim for any benefit or pension, his spouse would receive an increase in the rate of her invalid pension to the full married rate. If he did lodge a claim and received a pension or benefit to which he was qualified, then he would receive half the married rate. On the other hand if the AAT removed the stay order, then the Tribunal concluded:

> 'Even were the applicant correct in its contention that the respondent is not qualified for invalid pension under ss.27 and 28 of the Act; and if the respondent lodges a claim for a benefit, the applicant would not be paying out money over and above that to which the respondent would be entitled under the Act, assuming he is qualified for either sickness benefit or unemployment benefit. If the only reason he is not qualified for a benefit is that he is qualified for invalid pension, he should not be denied support while that issue is decided.'

(Reasons, para.10)

Criteria for staying a decision
The Tribunal also commented on the considerations relevant to determining whether an order to stay a decision should be made under section 41:

> 'As was pointed out in *Re Repatriation Commission and Delkou* (1985) 8 ALD 454, it is appropriate to recall at the outset that the primary rule established by sub-section 41(1) of the *Tribunal Act* is that the making of an application to the Tribunal does [not] affect the operation of the decision, or prevent the taking of action to implement it. The interests of any person who may be affected by the application for review must be taken into account. Orders made under sub-section 41(2) are "for the purpose of securing the effectiveness of the hearing and determination of the application for review", and in particular to ensure that the right of review is not rendered nugatory. Although there should not be a preliminary trial of the issues in deciding whether or not to order a stay of the operation or implementation of a decision, it is relevant for the Tribunal to consider whether there are facts and circumstances which would provide a basis for the applicant's success in the application.'

(Reasons, para.11)

In the present case the Tribunal considered the medical evidence that supported Guner's claim and the fact that the amount of money paid to him would not be greatly affected by the making of a stay order, because he was entitled to income support either under the SSAT decision or under a claim for the correct benefit if the SSAT decision was set aside. If Guner went overseas, the AAT said, the DSS could seek a further variation of the order. The conclusion was not to stay the part of the SSAT decision granting Guner invalid pension from the date his sickness benefit ceased to be paid.

Formal decision
The AAT varied the order of 12 June 1990 and ordered that, until the application for review was heard or until further order, the implementation and operation of that part of the SSAT decision which set aside the decision that Guner was not permanently incapacitated for work be not stayed.

[B.S.]

Child disability allowance

DITTON and SECRETARY TO DSS (No. 6150)
Decided: 24 August 1990 by J. Handley.
The applicant asked the AAT to review a decision of the SSAT to affirm a DSS decision that she did not qualify for receipt of child disability allowance.

The facts
Ditton's daughter was a full-time student aged 16 who suffered from diabetes. She was not totally dependent on other persons and was able to bathe, toilet and dress herself. She had no intellectual disability.

However, her parents closely scrutinised the administration of insulin and her diet. It was noted by the Tribunal that unstable diabetes can cause vision problems, including blindness, kidney failure, heart disease and limb amputation. These risks had caused stress for Ditton's family as had the failure of her daughter fully to comprehend the risks of unstable diabetes.

Although Ditton's daughter was able to administer the required insulin and generally regulate her diet, Ditton still supervised these matters. This was particularly required as the daughter had rebelled against the restrictions imposed by her condition and had consumed food which adversely affected her blood sugar level. Such resentment of the restrictions also required the provision of emotional support by Ditton and her husband.