Relating to Benefit Qualifying — Unlawful to adjudicate to make nil award (RB 155 p10)

CG/1479/1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. In the matter of an application for leave to appeal against the decision of the Leeds social security appeal tribunal dated 14 January 1999, leave to appeal is granted. With the consent of both parties, I go on to treat the application as the appeal and to determine the appeal (Social Security Commissioners Procedure Regulations 1999, regulation 11).

2. The claimant's appeal is allowed. The decision of the appeal tribunal is erroneous in point of law, for the reasons given below, and I set it aside. I am able to substitute a decision on the claimant's appeal against the adjudication officer's decision issued on 2 November 1998 (Social Security Administration Act 1992, section 23(7)(a)(ii)). My decision is that the adjudication officer's decision issued on 10 February 1997 falls to be reviewed on the ground that it was erroneous in point of law (Social Security Administration Act 1992, section 25(2)) and that the revised decision on review is that the claimant is entitled to invalid care allowance for the period from 31 March 1997 to 28 June 1998 (entitlement already having been awarded from and including 29 June 1998).

3. I directed an oral hearing of the application. The claimant was not able to attend. The adjudication officer was represented by Mr Jeremy Heath of the Office of the Solicitor to the Department of Social Security. I am grateful to Mr Heath for his assistance and for his concern that all points which could legitimately be raised on behalf of the claimant should be considered. At the hearing, consent was given on behalf of the adjudication officer, if I granted leave to appeal, for me to treat the application as the appeal and to determine the appeal. I take the claimant's reply to the notice of the oral hearing, returning all of his case-papers, as consent to my taking that course.

4. The claimant made his first claim for invalid care allowance (ICA) on 10 February 1997, stating that he wished to claim from 10 January 1997 and had not worked for an employer since the week before that date. His wife had made a claim for disability living allowance (DLA) from that date, but had not then heard anything. The claim form, and apparently the leaflet accompanying it, stressed that a claim for ICA should be made as soon as a claim for DLA was made, although the result of the DLA claim was not known. The claimant spent at least 35 hours a week looking after his wife. A telephone call was made to the DLA Unit, which produced the answer that no decision was expected to be made on the DLA claim for at least four weeks.

5. On 10 February 1997 an adjudication officer gave the decision that the claimant was not entitled to ICA from 10

January 1997. The Departmental records show that a letter in form DS1384 was to be sent to the claimant. A copy of the actual letter is not in the papers, but a blank specimen letter, in the form apparently current from November 1996, is. The letter explained that ICA could not be paid for the period specified because the disabled person did not receive the highest or middle rate of the care component of DLA, or any other qualifying benefit. There was a section at the end of the letter with the following heading: "IF THE PERSON YOU ARE LOOKING AFTER HAS NOW BEEN AWARDED AA/CAA/DLA PLEASE COMPLETE THE BOTTOM PART OF THIS LETTER WITH YOUR DETAILS AND WE WILL REVIEW YOUR CLAIM TO INVALID CARE ALLOWANCE".

6. On 18 August 1997 the claimant's wife was awarded the highest rate of both components of DLA from and including 26 March 1997. The claimant took no action about ICA. It was not until he went to the local authority's welfare rights department for help with some DLA forms that he was told that he could have been receiving ICA and was advised to claim again. The claimant completed another claim form, which was received on 23 September 1998. On the form he ticked no to the question, "Have you claimed Invalid Care Allowance before?" But immediately before that he stated that he wished to claim from 13 January 1997.

7. The adjudication officer's decision issued on 2 November 1998 was to award the claimant ICA from and including 29 June 1998, but to disallow entitlement before that date, because of the rules that no-one could be entitled to ICA for a period more than three months before the date of claim and that entitlement could not start until a Monday. The claimant appealed, saying that he had not been told that he should re-apply for ICA when his wife was awarded DLA.

8. The claimant opted for a "paper hearing". The appeal tribunal disallowed the appeal. On the decision notice, described by the chairman as a full decision, the grounds were given as follows:

> "The onus is upon the appellant to acquaint [himself] with his rights and entitlements including the dates claims should be made on. Accordingly appellant is not entitled to Invalid Care Allowance from 13/1/97 to 22/6/98 (inclusive). This is because claim was made on 23/9/98 and no person is entitled to benefit for a period more than 3 months before date of claim. Further there is no entitlement to Invalid Care allowance from 23/6/98 to 28/6/98 inclusive as if entitlement does not begin on the first day of the benefit week there can be no entitlement to payability for any days before the first day of the following benefit week."

9. The claimant was refused leave to appeal by the chairman. His application to the Commissioner for leave now comes before me.

10. I can say at the outset that I would not have granted leave to appeal if the only concern was with the decision on the new claim made on 23 September 1998. It may be, as Mr Heath suggested, that the appeal tribunal should have given some more explanation of its decision. There had been a very significant change in the time-limits for claims made by amending regulations coming into force on 7 April 1997. Down to that date, a person had 12 months from any day in which to claim ICA (Social Security (Claims and Payments) Regulations 1987, as then in force, regulation 19(6)(b)). That was the rule stated on the claim form received on 10 February 1997, and still (inaccurately) on the claim form received on 23 September 1998. From 7 April 1997, that limit was reduced to three months (Claims and Payments Regulations, regulation 19(2) and (3)(d)). From the same date, a new provision was introduced into the regulations about the date of claim (regulation 6(21) to (23)) which applies where a first claim for ICA is disallowed because a pending claim for DLA by the disabled person has not been determined. If a second claim for ICA is made within three months of DLA being awarded it is treated as made on the date of the first claim or on the date from which DLA is awarded, whichever is the later. I shall refer later to the process by which those new provisions came to be enacted. It is arguable that, in view of those changes, the appeal tribunal should, first, have explained the source of the three-month limit in more detail and, second, have dealt with regulation 6(21) to (23) of the Claims and Payments Regulations (which regrettably was not specifically mentioned in the adjudication officer's written submission to the appeal tribunal). However, as the three-month limits under regulations 6(21) to (23) and 19(2) and (3)(d) are absolute, with no possibility of any extension for any reason, there was only one result which was legally open to the appeal tribunal on the claim, which was to confirm the adjudication officer's decision. In those circumstances, the claimant could gain nothing by being given leave to appeal.

11. There is, though, a more serious shortcoming in the appeal tribunal's approach, which requires the grant of leave to appeal. This is that the appeal tribunal should have looked at the claim form received on 23 September 1998 not only as a new claim for ICA, but also as an application for review of the adjudication officer's decision of 10 February 1997. In paragraph 17(iii) of the Tribunal of Commissioners' decision R(SB) 9/84 it was said:

> "In general, in the case of a fresh claim made after a previous refusal and raising a question of prior entitlement such a claim may be treated as including a request for back-dating of the claim or an application for review as may be appropriate, bearing in mind the conditions applicable to each and the period of underlying past entitlement which may be established."

It seems to me that those words precisely cover the claimant's situation in the present case, as in his second claim for ICA,

despite saying that he had not claimed ICA before, he made it clear that he was raising the question of his entitlement to ICA from 13 January 1997. Mr Heath suggested that it might not be appropriate to treat the second claim as an application for review, but I think that that question depends on whether a ground of review could be made out which would give some practical advantage to the claimant over a back-dated claim. Mr Heath submitted that the position on payment of benefit for past periods was established by the new rules on the back-dating of claims and that review would not be appropriate where that might allow payment for a period going back further than those rules allowed. I reject that submission, which would undermine the whole basis of having alternative routes available to a claimant.

12. The case for the claimant does, though, run into difficulty at this point. The potential grounds of review are set out in section 25(1) and (2) of the Social Security Administration Act 1992. None of the five grounds in section 25(1) are made out. Paragraphs (c), (d) and (e) are not relevant and I do not need to deal with them. Under paragraph (a), the decision of 10 February 1997 was not given in ignorance of or under a mistake as to any material fact. At that date, DLA was not payable to the claimant's wife, so that she was not a "severely disabled person" as defined in section 70(2) of the Social Security Contributions and Benefits Act 1992. Even if the later decision on DLA had made the highest rate of the care component payable on or before 10 February 1997 that could not have brought the ICA decision within this category (see the decision of the Court of Session in Chief Adjudication Officer v Coombe, 19 June 1997). Under paragraph (b), the DLA decision was not a relevant change of circumstances. That is because the records show that the award of DLA to the claimant's wife was made with effect from 26 March 1997. It is not shown in the papers before me why DLA was only awarded from that date, and not from the date of the claim, but it might be because of the rule that the medical conditions have to be satisfied for three months before entitlement can start. The ICA decision of 10 February 1997 only covered the period down to that date, so that the DLA decision did not show that anything had changed in relation to that period (see Commissioners' decisions R(A) 2/81 and CIS/767/1994). Even if DLA had been awarded with effect from a date earlier than 10 February 1997, there would still have been difficulties because of the regulations on how far back before the date of the application for review benefit can be paid on a relevant change of circumstances.

13. Could the adjudication officer's decision of 10 February 1997, though, be said to be erroneous in point of law, so that the ground of review in section 25(2) of the Social Security Administration Act 1992 is made out? I have concluded, contrary to Mr Heath's submission, that it could. The decision was erroneous in point of law because there was a breach of section 21(1) of the Social Security Administration Act 1992 in the adjudication officer's determining the ICA claim before the result of the claimant's wife's claim for DLA was known. To reach

that conclusion, it is necessary to look at sections 20 and 21 of the Social Security Administration Act 1992 and at the principles laid down by the Court of Appeal in the case of R v Secretary of State for Social Services, ex parte Child Poverty Action Group [1990] 2 QB 540. If the ground of review of error of law is made out on that basis, then under regulations 57(3) and 59(3)(a) of the Social Security (Adjudication) Regulations 1995 the revised decision on review could take effect from whatever is the appropriate date, free of any limits.

14. Section 20(1) of the Social Security Administration Act 1992 requires the Secretary of State to submit any claim for benefit "forthwith to an adjudication officer for determination". Section 21(1) provides:

> "(1) An adjudication officer to whom a claim or question is submitted under section 20 above ... shall take it into consideration and, so far as practicable, dispose of it, in accordance with this section, and with procedure regulations under section 59 below, within 14 days of its submission to him."

15. In the CPAG case the Court of Appeal was concerned with a challenge by way of judicial review to delays in the handling of claims for supplementary benefit, and with the provisions of the Social Security Act 1975 which have now become sections 20 and 21 of the 1992 Act. I shall refer to the 1992 Act. The applicants had argued that under section 20(1) the Secretary of State's department was not entitled to carry out extensive investigations before referring a claim to the adjudication officer. Woolf LJ, giving the judgment of the court, said (at page 552E and 553A):

> "In deciding what, if any, investigation is permitted, we would stress that section [20] provides that the claim is to be submitted forthwith to an adjudication officer for 'determination'. As was pointed out by Russell LJ in the course of argument, those words provide the key to the resolution of this question. In our view, they indicate that what the department is required to do is to submit the claim when it is in a fit state for determination albeit this is after the date on which it is treated as being made for the purposes of the regulations. The fact that a claim is to be submitted 'forthwith' does not require a claim to be submitted for determination which is incapable of being determined. ... We conclude that the duty to submit the claim 'forthwith' does not arise until the department is in possession not only of the claim form but the basic information which is required to enable the claim to be determined, and it is therefore in order for the department to take the steps which are necessary to obtain that information before submitting the claim. The department is not, however, entitled to delay submitting a claim once that information is available."

16. Although what Woolf LJ said there is coloured by the context of a case in which the challenge was to delays, it seems to me to imply that the Secretary of State should not submit a claim to an adjudication officer when it is incapable of being determined, because some basic information (as opposed to some matter of mere verification) is not available. And it is also implied that a claim is incapable of being determined when it is incapable of being determined properly in a substantive sense. I consider that the present case is one in which the first ICA claim should not have been submitted to an adjudication officer for determination. A central part of the necessary information for determining the claim was missing, not from any failure or delay by the claimant, but in the nature of the process for determining DLA claims. The ICA claim was incapable of being determined properly before the outcome of the DLA claim was known. However, the claim was in fact submitted to the adjudication officer for determination, on the very day that it was received by the Secretary of State. I have no power to give any ruling about the propriety of that action. I must concentrate on the duties of the adjudication officer in those circumstances.

17. The applicants in the CPAG case had argued that once a claim had been taken into consideration by an adjudication officer under section 21(1) the only matters which could render it impracticable to dispose of the claim within 14 days were internal matters arising from the process of consideration, such as the need for further investigation or supporting evidence. In particular, it was argued that a shortage in the numbers of adjudication officers available was irrelevant. Woolf LJ said this at page 554D in rejecting that argument:

> "There is nothing in the language of section [21(1)] which means that it is not permissible to look at factors other than those involved in an individual claim in deciding whether it was practicable to come to a decision within 14 days."

Earlier, in discussing the duty of the Secretary of State under section 20(1) and the distinction between basic information and verification, it was said (at page 553C):

> "If verification is to delay the determination, it is the responsibility of the adjudication officer to put in motion such further inquiries as are required for that purpose."

18. It is plain that the Court of Appeal accepted that the carrying out of the responsibility of the adjudication officer to put in motion further inquiries, both to verify information and to obtain additional necessary information, could make it impracticable for a decision to be made within 14 days of the submission. As in relation to section 20(1), it seems to me that it was implied that an adjudication officer should not make a decision when it was impracticable to do so properly. That is not inconsistent in any way with what was said in Commissioners'

decisions R(SB) 29/83 and R(IS) 4/93 about the adjudication officer (or the predecessor, the benefit officer) being obliged at some stage to give a decision on a claim, even though there was insufficient evidence. In paragraph 13 of R(SB) 29/83 it was said:

> "The time when [the benefit officer] should decide a claim will depend on the nature of the information he requires and allowing a reasonable time for it to be obtained and given by the claimant. I agree with [the representative of the benefit officer's] submission that a benefit officer should give a decision, indeed, I would say must give a decision on a claim. In view of the way in which the regulations have been drafted that is the only fair way to bring in issue a question as to whether or not a benefit officer has sufficient information and whether, having regard to the information which he has, the decision he has given is correct."

19. There must be a fairly large margin of appreciation available to the adjudication officer in deciding at what stage it is right to give a decision on a claim. It would clearly have been a proper exercise of discretion in the present case for the adjudication officer to have delayed making a decision on the ICA claim until the claimant's wife's DLA claim had been decided. However, it is taking a very significant further step to say that it was an error of law for the adjudication officer to decide the ICA claim on 10 February 1997. Mr Heath submitted that the CPAG case and the Commissioners' decisions were concerned with establishing a limit within which the adjudication officer was required to give a decision on a claim, and that there could be no breach of the adjudication officer's duty under section 21(1) in giving a decision before the expiry of that limit, at least if the giving of the decision was not irrational or Wednesbury unreasonable (a reference to the test in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). He submitted that it was perfectly reasonable, especially in the light of the needs of administrative efficiency, to take the view that an ICA claim should not remain undetermined for a long time while a DLA decision was awaited. Sometimes the investigations and medical examinations necessary to determine the DLA claim could take many months. Mr Heath also pointed to the evidence of the practical working of the system given in the report of the Social Security Advisory Committee (SSAC) on the proposals to make the amending regulations which came into force on 7 April 1997 (Cm 3586, March 1997).

20. The draft amending regulations were referred to the SSAC on 4 December 1996. The SSAC expressed concern about the reduction in the allowable period for back-dating ICA claims from 12 months to three months. It said in paragraphs 70 and 71 of its report to the Secretary of State:

> "At present if an ICA claim is received before Attendance Allowance/Disability Living Allowance (AA/DLA) is awarded to the disabled person, it is disallowed and the claimant advised to make a repeat claim when the AA/DLA is settled. That repeat ICA claim is treated in exactly the same way as other ICA claims and attracts a maximum backdating limit of 12 months. AA/DLA claims can take some considerable time to process, especially if reviews/appeals are involved. (4 years to Commissioner stage is not unknown.) We accept that 12 months is usually long enough to cover most AA/DLA claims and ICA claimants do not usually lose out.
>
> The current proposals would protect people who claim ICA, but through no fault of their own had their claim held up whilst AA/DLA was decided. Only where a claim has been made would the proposals allow a repeat claim to be treated as if it had been made at the date of the first claim."

The SSAC recommended, particularly to protect those who did not realise the need to claim ICA at the same time or shortly after the AA/DLA claim, that the back-dating limit for ICA should remain at 12 months.

21. The Government rejected that recommendation. The Secretary of State said this in paragraph 32 of his response to the SSAC:

> "The Government does not accept that a special provision should apply on claims to Invalid Care Allowance (ICA), in addition to the exception already proposed on passported benefits. This provision will enable ICA claimants, among others, to be awarded backdating to the date of their original claim, where there is a delay in awarding their benefit because of a delay in determining the claim of another person. It will protect the position of carers who claim benefit promptly when they start caring for someone, as they are advised to do by the Benefits Agency, which is more generous than a maximum of twelve months backdating. The Government believes that the Committee's proposal of further special treatment for ICA claimants would mean that carers who fail to claim benefit promptly will be more favourably treated than other groups. It would also mean lessening the degree of alignment which the new rules aim to achieve and therefore reducing the potential for administrative efficiency."

22. Mr Heath of course drew attention to the acceptance of the disallowance of claims for ICA while the DLA decision is pending as part of a rational and sensible system for administering benefits where entitlement to ICA depends on the disabled person's entitlement to DLA. That might possibly be so if all that one was looking at was administrative efficiency in a narrow sense (although even then I am not sure what was so efficient in the pre-April 1997 system in encouraging ICA claimants to claim as soon as DLA was claimed, only for the ICA claim inevitably to

be rejected, making a further claim necessary later). However, in exercising the discretion whether to make an immediate decision or to wait for the outcome of the DLA claim, an adjudication officer would be required to consider all relevant factors, including the interests of the ICA claimant and the disabled person as well as administrative efficiency.

23. The position in the present case as I see it is as set out in paragraph 16 above: the ICA claim was incapable of being determined on 10 February 1997. In some circumstances, an adjudication officer would be required to give a decision on a claim which is incapable of being determined in that sense, in accordance with the principles of R(SB) 29/83 and R(IS) 4/93. But that would be in a case such as where the claimant has failed after a reasonable opportunity to come forward with some evidence within his control which is crucial to the claim, or there was some other good reason for giving a decision. In the present case, the missing vital element in the evidence was not within the claimant's control at all, but stemmed from the nature and structure of the benefits concerned. In such circumstances, I conclude, drawing on the decision of the Court of Appeal in the CPAG case, that it was a breach of the adjudication officer's duty under section 21(1) of the Social Security Administration Act 1992 to decide the ICA claim on 10 February 1997.

24. I need to explain carefully why I have concluded that the circumstances of the present case take it outside the margin of appreciation available to the adjudication officer. I can see no rational point in making the decision on 10 February 1997 rather than delaying until the outcome of the DLA claim was known and the ICA claim was capable of determination. There would have been no disadvantage to the claimant in that course. On any footing, he could not have been paid any ICA before his wife was awarded entitlement to the care component of DLA at the necessary rate. There would have been scarcely any disadvantage, if any, to the Benefits Agency. The claimant had made his prompt claim as instructed, giving the information on the claim form. If information relevant to a later date was required, that could be asked for. The disadvantage would be to undertake the burden of keeping the file on the claim alive and asking the DLA Unit to inform the ICA adjudication officer of the result of the DLA claim.

25. On the other hand, there seems to have been no advantage at all to the claimant in the adjudication officer's making an immediate decision. He was thereby exposed to the burden of having to make a fresh claim for ICA (having not in the present case been expressly advised to make a fresh claim as soon as his wife had been awarded DLA), to the risk that long delay in the DLA process might take him beyond the 12-month limit (as it then was) for back-dating ICA claims and to the risk that some misunderstanding or forgetfulness or other factor might cause a delay in the making of the fresh claim for ICA and the loss of benefit. The advantage for the Benefits Agency (putting aside

what would be an improper motive of avoiding paying benefit to the claimant which might otherwise have become payable) was of not having to keep the file alive, but was balanced by the disadvantage of possibly having to process a fresh claim in the future and link it to the first claim form. The balancing up of the relevant factors is overwhelmingly in favour of delaying the making of the ICA decision and falls a very long way short of providing circumstances in which the adjudication officer would be empowered to decide the ICA claim when it was not capable of proper determination.

26. Thus, the decision of the adjudication officer on 10 February 1997 was erroneous in point of law, in the sense that there was either a breach of section 21(1) of the Social Security Administration Act 1992 in making the decision.

27. However, there is a further question whether an error of law of that kind falls within the ground of review in section 25(2) of the Social Security Administration Act 1992. No doubt the primary case in which a decision will be erroneous in point of law within section 25(2) is where the decision on entitlement to benefit is wrong in law, in the sense that on the evidence before the adjudication officer a wrong legal rule about entitlement was applied or the decision was one which could only have been reached by applying a wrong legal rule. However, I do not see why section 25(2) must be restricted to such a case. The words "erroneous in point of law" are very general ones and there is nothing in section 25(2) to restrict the general meaning. I am satisfied that the decision of 10 February 1997 was erroneous in point of law within section 25(2) for the reasons given in paragraphs 23 to 25 above, even though no wrong rule of law was applied to the question of entitlement to ICA as at that date on the evidence before the adjudication officer.

26. Accordingly, the decision of 10 February 1997 falls to be reviewed. In considering the revised decision to be given, the whole period from 10 January 1997 down to 28 June 1998, the day before the start of the award of entitlement made by the adjudication officer's decision issued on 2 November 1998, must be looked at. If there were no limits on payment of ICA for past periods on review, the revised decision would be that the claimant is entitled to ICA from 31 March 1997 (the first Monday following the first day of his wife's entitlement to the highest rate of the care component of DLA) to 28 June 1998. ICA benefit weeks begin on Mondays and the appeal tribunal explained why entitlement cannot start before the beginning of a benefit week. The seems to be no dispute that the other conditions of entitlement to ICA were satisfied from 31 March 1997 as they were from 29 June 1998 onwards.

28. Regulation 59(1) of the Adjudication Regulations would limit the effect of the decision on the review to one month before the date of the application for review (23 September 1998). However, under regulation 59(3)(a) that limit does not apply where

regulation 57 applies. Under regulation 57(3), the review is under section 25(2) of the Social Security Administration Act 1992 on the ground of error of law. I am satisfied that the adjudication officer, when giving the decision of 10 February 1997, misconstrued section 21(1) of the Social Security Administration Act 1992. The decision could only have been given on that date if a legally wrong view was taken of that provision. Thus regulation 57(3)(a) applies and the one-month limit is lifted. It is not necessary to consider whether, if the adjudication officer had applied section 21(1) properly, that would have resulted in an award of benefit, because that condition is confined to regulation 57(3)(b) and the overlooking or misconstruction of some decision of the Commissioner or the court. No other limit applies, so that the proper revised decision on review can have effect from the earliest day of entitlement to ICA.

29. For the reasons given above, the appeal tribunal erred in law in failing to consider the ICA claim form received on 23 September 1998 as an application for review and to carry out a review on the ground of error of law. Its decision must be set aside. I am able to substitute the decision on the claimant's appeal against the adjudication officer's decision issued on 2 November 1998, giving effect to the reasoning above. That decision is set out formally in paragraph 2 above.

(Signed) J Mesher
Commissioner

Date: 31 August 1999