



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No.: CIB/2345/2006

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR DEPUTY COMMISSIONER POYNTER

<i>Appellant:</i>	██
<i>Respondent:</i>	Secretary of State
<i>Tribunal:</i>	Newcastle-upon-Tyne Appeal Tribunal
<i>Tribunal hearing date:</i>	11 April 2006
<i>Tribunal Case No.:</i>	U/44/228/2005/03861

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision

1 The claimant's appeal succeeds. The decision of Newcastle-upon-Tyne appeal tribunal given on 11 April 2006 under reference U/44/228/2005/03861 is wrong in law. I set it aside and I give the decision that the tribunal should have given which is that any overpayment of incapacity benefit that may have been made to the appellant at any time between 2 February 2002 and 8 April 2005 because his wife had weekly earnings in excess of the earnings limit for increases in respect of an adult dependant is not recoverable from him.

The facts.

2 The facts are no longer seriously in dispute:

- (a) The appellant worked as a gardener for the local authority in whose area he lives from the age of 16. In 1992, he suffered an accident at work and his health subsequently deteriorated to such an extent that during the summer of 1997 (the precise date is unclear from the papers) he became incapable of work.
- (b) Following a spell on statutory sick pay, he claimed and was awarded incapacity benefit with effect from 14 March 1998.
- (c) The appellant lives with his wife and two daughters and the rate at which he was paid incapacity benefit always included an increase for an adult dependant in respect of his wife. That increase was paid under section 86A of the Social Security Contributions and Benefits Act 1992 ("SSCBA") and was subject to an earnings rule that is set out in regulation 10 of the Social Security (Incapacity Benefit – Increases for Dependants) Regulations 1994 ("the 1994 Regulations").
- (d) As it applies to the appellant, the earnings rule says that the increase "shall not be payable" for the benefit week immediately following any benefit week in which his wife has earnings that exceed the basic personal allowance for a person aged over 25 used to calculate entitlement to jobseeker's allowance.
- (e) The appellant's wife appears to have worked throughout the period of her husband's claim:
 - i) When he first claimed, she was working for T Limited and earning £19.40 per week.
 - ii) In February 2002, the appellant completed a review form and, at that time, his wife was working for M Limited and earning £38.00 per week.
 - iii) Subsequently, on 21 January 2002, she began to work for F Limited. It appears that she was contracted to work for 10 hours a week at an hourly wage of £4.85. However, the figures provided by her employer show that she consistently worked

more hours than that and therefore earned more than her basic wage of £48.50 per week.

- (f) As a result, for most weeks during the period from 20 January 2002 to 26 February 2005, her earnings exceeded the limit specified in regulation 10 (which, during that period, was set at various levels between £53.05 per week and £55.65 per week).
- (g) The appellant did not on any occasion inform the Department that his wife's earnings for the preceding week exceeded the earnings limit.
- (h) On 8 April 2005, once the true position had come to light, an officer acting on behalf of the Secretary of State superseded the decision awarding the appellant incapacity benefit and substituted a decision that, in respect of certain specified periods, incapacity benefit was payable at a rate that did not include a dependant's increase in respect of the appellant's wife.
- (i) That decision created an overpayment and, on 10 May 2005, a different decision maker decided that the overpayment was recoverable from the appellant.
- (j) Both those decisions were subsequently revised on 16 November 2005. The revised decision changed the periods in respect of which the dependant's increase was not payable and increased the overpayment said to be recoverable from the appellant to £3,982.83.

The appeal to the tribunal

3 The appellant's appeal against that decision was received on 23 November 2005. The original grounds for appeal were that the appellant's wife did not earn more than the earnings limit during the period specified by the decision maker. However, that ground appears to have been abandoned and, even if it has not, it is plainly unsustainable given the undisputed evidence from the wife's employers. By the time that the appeal reached the tribunal, the appellant was relying upon a technical argument about the date on which a decision that supersedes an earlier decision is to take effect.

4 The argument was as follows:

"4. In order for section 71 of the Social Security Administration Act 1992 to apply, there must be a valid supersession (s71(5) SSAA [a typographical error for s.71(5A)]).

5. Document 69 [i.e., of the appeal papers] appears to be a supersession decision by the DWP, and they purport to use regulation 6 & 7 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. However, they do not state which sub-paragraph of regulation 7 they use

6. I submit that supersessions made under sub-paragraph 2(c)(ii) only apply to changes of circumstances that are related to an incapacity determination. Then, the date of the supersession decision takes effect from the date of change.
7. In this case, the circumstances that have changed, I submit, relate to the earnings of his wife and do not in any way relate to an incapacity determination. Hence, sub-paragraph 2(c)(ii) does not apply.”

5 If that argument is correct then only that part of the overpayment that related to periods on or after 8 April 2005 would be recoverable. And, as the whole of the alleged overpayment in this case related to periods before 8 April 2005, that in turn would mean that the overpayment was not recoverable at all. The reason for that conclusion lies in section 71(5A) of the Social Security Administration Act 1992, which requires that, before an overpayment can be recoverable, the decision under which it was paid must have been (in this case) superseded under section 10 of the Social Security Act 1998.

6 The Secretary of State, by contrast, argued that supersession should take place with effect from the date upon which the change occurred (i.e., in this case, the beginning of the benefit week in January 2002 immediately following the benefit week in which the appellant’s wife earned more than the earnings limit) under regulation 7(2)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (“the Decisions and Appeals Regulations”)

The tribunal’s decision.

7 The tribunal did not accept either of those arguments.

8 He correctly rejected the submission of the Secretary of State because regulation 7(2)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 only applies where the change in circumstances on which the superseding decision is based is advantageous to the claimant. The tribunal, not unreasonably, took the view that having his entitlement to an increase in respect of his wife ended and being required to repay an overpayment of nearly £4,000 could only be regarded as disadvantageous to the appellant.

9 The tribunal also disagreed with the appellant who had submitted that none of the heads of regulation 7 applied with the result that the matter was governed by section 10(5) of the Social Security Act 1998 and held that the governing provision was regulation 7(2)(c) of the Decisions and Appeals Regulations. The tribunal went on to hold that the facts came within regulation 7(2)(c)(ii) and that therefore, the Secretary of State had been correct to supersede the earlier decision with effect from the date on which the change in circumstances occurred.

The appeal to the Commissioner.

10 The appellant now appeals to the Commissioner against that decision with the leave of Mr Commissioner Levenson. The grounds of appeal are essentially that the tribunal was wrong to reject the appellant’s submission that the matter was governed by section 10(5).

11 The Secretary of State does not support the appeal however, it is no longer argued that the decision is one that was advantageous to the claimant. But rather that the adult dependant’s

increase was the subject of a separate claim and a separate award and was therefore not an incapacity benefit decision and was therefore covered by regulation 7(2)(c)(iii) of the Decisions and Appeals Regulations.

Reasons for the Commissioner's decision

12 I have, with some reluctance, concluded that the appellant's submissions are correct. To explain why, I must first set out the applicable law.

The law: supersession

13 The starting point for any consideration of the procedures by which one decision may supersede an earlier decision must be section 10 of the Social Security Act 1998 which is in the following terms:

"Decisions superseding earlier decisions.

10.—(1) subject to subsection (3) and section 36(3) below, the following, namely—

- (a) any decision of the Secretary of State made under section 8 above or this section, whether as originally made or as revised under section 9 above; and
 - (b) any decision under this Chapter of an appeal tribunal or a Commissioner, may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative.
- (2) ...
- (3) Regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this section.
- (4) [Repealed].
- (5) Subject to subsection (6) and section 27 below, a decision under this section shall take effect as from the date on which it is made or, where applicable the date on which the application was made.
- (6) Regulations may provide that, in prescribed cases or circumstances, a decision under this section shall take effect as from such other date as may be prescribed."

14 Section 36 of the 1998 Act relates to payments from the social fund and section 27 contains what is known colloquially as the “anti test case rule”. Neither is relevant to what I have to decide.

15 In those circumstances, the general rule, in paragraph (5) of section 10 is that where, as here, no application has been made, the superseding decision takes effect from the date on which it is made. That rule is subject to any exceptions that may be prescribed in regulations made under paragraph (6) but, if any particular factual situation is not covered by those regulations then the default rule in paragraph (5) continues to apply.

16 Under regulation 6(2)(a)(i) of the Decisions and Appeals Regulations:

“a decision under section 10 may be made on the Secretary of State’s ... own initiative ... on the basis that the decision to be superseded ... is one in respect of which ... there has been a relevant change of circumstances”.

17 The regulation making power in section 10(6) was exercised to make regulation 7 of the decision an appeals regulation. During the period that I have to consider, and so far as is relevant, that regulation was in the following terms:

“Date from which a decision superseded under section 10 takes effect.

7.—(1) This regulation—

(a) ...

(b) contains exceptions to the provisions of section 10(5) as to the date from which a decision under section 10 which supersedes an earlier decision is to take effect.

(2) Where a decision under section 10 is made on the ground that there has been, or it is anticipated that there will be, a relevant change of circumstances since the decision was made, the decision under section 10 shall take effect—

(a)-(b) ...

(c) where the decision is not advantageous to the claimant

(i) [repealed]

(ii) in the case of a disability benefit decision, or an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision, where the Secretary of State is satisfied that in relation to a disability determination embodied in or necessary to the disability benefit decision, or the incapacity

determination, the claimant or payee failed to notify an appropriate office of a change of circumstances which regulations under the Administration Act required him to notify, and the claimant or payee, as the case may be, knew or could reasonably have been expected to know that the change of circumstances should have been notified,

- (aa) from the date on which the claimant or payee, as the case may be, ought to have notified the change of circumstances, or
- (bb) if more than one change has taken place between the date from which the decision to be superseded took effect and the date of the superseding decision, from the date on which the first change ought to have been notified, or
- (iii) in any other case, except in the case of a decision which supersedes a disability benefit decision, or an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision) from the date of the change.”

18 A number of the terms used in regulation 7(2)(c) are defined by regulation 7A of the Decisions and Appeals Regulations. So far as is relevant, that regulation is in the following terms:

“Definitions for the purposes of regulations ... 7(2)(c) and ancillary provisions.

7A.—(1) for the purposes of regulations ... 7(2)(c)—

‘Disability benefit decision’ means a decision to award a relevant benefit embodied in or necessary to which is a disability determination,

‘Disability determination’ means –

- (a) in the case of a decision as to an award of an attendance allowance or a disability living allowance, whether the person satisfies any of the conditions in section 64, 72(1) or 73(1) to (3), as the case may be, of the Contributions and Benefits Act,
- (b) in the case of a decision as to an award of severe disablement allowance, whether the person is disabled for the purpose of section 68 of the Contributions and Benefits Act, or

- (c) in the case of a decision as to an award of industrial injuries benefit, whether the existence or extent of any disablement is sufficient for the purposes of section 103 or 108 of the Contributions and Benefits Act or for the benefit to be paid at the rate which was in payment immediately prior to that decision;

‘incapacity benefit decision’ means a decision to award a relevant benefit embodied in or necessary to which is a determination that a person is or is to be treated as incapable of work under Part XIIA of the Contributions and Benefits Act;

‘incapacity determination’ means a determination whether a person is incapable of work by applying the personal capability assessment in regulation 24 of the Social Security (Incapacity for Work) (General) Regulations 1995 or whether a person is to be treated as incapable of work in accordance with regulation 10 (certain persons with a severe condition to be treated as incapable of work) or 27 (exceptional circumstances) of those Regulations, and

‘payee’ means a person to whom a benefit referred to in paragraph (a), (b) or (c) of the definition of ‘disability determination, or a benefit referred to in the definition of incapacity benefit decision’ is payable.”

19 It follows that whether regulation 7(2)(c) applies depends upon whether the decision to be superseded is either a “disability benefit decision” or “an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision)”.

20 It is clear that the decision to be superseded in this case is not a “disability benefit decision” because it does not relate to attendance allowance, disability living allowance, severe disablement allowance or industrial injuries benefit.

21 It is equally clear that a decision to award incapacity benefit is a “incapacity benefit decision” within the definition in regulation 7A:

- (a) The words “relevant benefit” in that definition are further defined by section 39(1) and 8(3) of the Social Security Act 1998 as being “a benefit under Parts II to V of the Contributions and Benefits Act”. Incapacity benefit is paid under sections 30A to 30E in Part II of that Act;
- (b) In addition, even if I were to accept (which I do not) that the increase the appellant received for his wife was a separate benefit, that increase is paid under section 86A which is in Part IV of the Act.
- (c) Under section 30A, it is a condition of entitlement to that benefit that a “period of incapacity for work, should have begun for the claimant and by section 30C such a period is defined as meaning a period of “four or more consecutive days, each of which is a day of incapacity for work”;

- (d) By virtue of section 30C(1)(a) “a day of incapacity for work means a day on which a person is incapable of work”.

It is thus a condition of entitlement to incapacity benefit that it should have been determined that the claimant is either incapable of work or to be treated as incapable of work. For that reason, such a determination is “necessary” to every decision to award incapacity benefit.

22 I am also satisfied that there must have been an “incapacity determination” in this case. When someone first claims incapacity benefit they are normally treated as incapable of work under regulation 28 of the Incapacity for Work Regulations pending a formal assessment under regulation 24. Such assessments are carried out on a regular basis. The appellant has been on incapacity benefit since 14 March 1998. It is inconceivable that for the period from that date to 8 April 2005, when the superseding decision was made, the appellant was permitted to continue to receive incapacity benefit without his medical condition being formally assessed. It is therefore inevitable (although no evidence of the decision actually appears in the papers) that the appellant must, at some point during that period either have satisfied the personal capability assessment or been treated as incapable of work under either regulation 10 or regulation 27 of the Incapacity for Work Regulations.

23 For those reasons, this is a case in which there is “an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision)”. It follows from the express words of regulation 7(2)(c)(iii) that it does not apply.

24 Therefore, if regulation 7(2)(c) is to apply at all in this case it can only be by virtue of head (ii) of that regulation. The tribunal held that regulation 7(2)(c)(ii) did apply. What it said was as follows:

“There is no dispute as confirmed by [the appellant’s representative] that an incapacity determination was made in that the claimant attended at [the local medical examination centre] for an examination in respect of his claim for incapacity benefit. But [the representative] contends that regulation 7(2)(c)(ii) cannot apply in this appeal because he submits that the decision was not made about the claimant’s award of incapacity but to his wife’s earnings. If that were the case he submitted that only section 10 of the Social Security Act 1998 should apply resulting in the supersession decision taking effect from the date on which it was made.

I do not agree with [the representative’s] submission. The submission [an obvious typographical error for “decision”] was very much concerned with the claimant’s award of incapacity benefit albeit that it was affected by his wife’s income. Regulation 7(2)(c)(ii) does therefore apply in this appeal and therefore I confirm the Secretary of State’s decision and disallow this appeal.”

25 Unfortunately, I am unable to agree with that reasoning. I accept that in this case there has been a change of circumstances (or, more accurately, changes in circumstances) which ought to have been notified to the Secretary of State and which the appellant has failed to notify. However, as was pointed out by Mr Turnbull in *CIB/763/2004* (at paragraph 44), regulation 7(2)(c)(ii) only applies in the case of a failure to notify a change of circumstances “in relation to

the incapacity determination”. In my judgment, regulation 7 and 7A both draw a clear distinction between the “incapacity benefit decision”, i.e., the decision to award incapacity benefit, and the underlying determination that the claimant is, or is to be treated as being, incapable of work. It is only changes in circumstance that relate to the underlying determination that bring regulation 7(2)(c)(ii) into play.

26 In this case, it is impossible to regard a change of circumstances that concerns the earnings of the appellant’s wife as having occurred “in relation to” a determination that the appellant is incapable of work. The change of circumstances is one that is “in relation to” the “incapacity benefit decision” only.

27 In those circumstances, I am forced to conclude that neither head of regulation 7(2)(c) applies on the facts of this case. As there is no other regulation made by virtue of section 10(6) that is relevant to the facts of this appeal, it must follow that the appellant’s representative is correct and that the date on which the superseding decision takes effect is governed by the general rule in section 10(5).

28 Therefore, in this case, the superseding decision made on 8 April 2005 can only have effect from that date onwards. For periods before that date there was a valid—and unchanged—decision awarding the appellant incapacity benefit at the rate at which it was actually paid to him. He was therefore entitled to the benefit he received by virtue of that decision and, even if he had not been, the effect of section 71(5A) of the Administration Act would be that any overpayment would not be recoverable.

29 I reach that conclusion without any enthusiasm at all. I note that regulation 7 was further amended with effect from 6 April 2006 and that the likely effect of that amendment will be to remove the anomaly revealed by this case.

Is the adult dependant’s increase separate from incapacity benefit.

30 In her submission, the Secretary of State’s representative states as follows:

“4. I submit that a dependency increase is treated as a separate claim to benefit (see Social Security Claims and Payments Regulations 1987 regulation 2(3)). In the case of an ADI linked to an award of IB the only determination that applies to both the benefit award and the additional award is the question of contribution conditions. Once there is entitlement to IB for the claimant then a separate claim to ADI is required and this is decided by the decision maker as a separate matter: it does not require a second incapacity determination. In this case the original claim form ... includes a section dedicated to ‘claiming extra incapacity benefit for another adult or children’ ... the change in the claimant’s wife’s employment/earnings has been reported ... on a form that makes no enquiry about the claimant’s individual circumstances or incapacity.

5. Consequently, I submit that a supersession of an award of ADI is not a supersession of an incapacity benefit decision where there has been an incapacity determination. Therefore, in accordance with D and A Regulations 7(2)(c)(iii), supersession is effective from the date of change – the date the claimant’s wife’s

earnings exceeded the prescribed limit. This is the legislation the decision maker has not identified in sufficient detail in the decision ... Regulation 7(2)(c)(iii) was replaced by regulation 7(2)(c)(v) from 10/04/06 (but not to affect the decision in this instance) and so it may be considered reasonable to suggest it should have been to the forefront of the tribunal's thoughts at the hearing on 11/04/06."

31 I am unable to accept those submissions for the following reasons:

(a) It is not the case that dependants' increases are separate benefits. The contributory benefits that form part of the Social Security system are listed in section 20 of the Social Security Contributions and Benefits Act 1992. The first such benefit listed is

'Incapacity benefit, comprising –

(i) short term incapacity benefit, and

(ii) long term incapacity benefit;'"

The dependant's increase for incapacity benefit is not listed as a separate benefit, neither is any dependant's increase for any other benefit.

(b) This is unsurprising because section 86A of the Act is in the following terms:

"Incapacity benefit – increases for adult dependants.

86A.—(1) The weekly rates of short term and long term incapacity benefit shall, in such circumstances as may be prescribed, be increased for adult dependants by the appropriate amounts specified in relation to benefit of that description in Schedule 4, Part IV, column (3)."

In other words, the increase is expressly an increase in the weekly rate of incapacity benefit and therefore forms part of that benefit. That conclusion is further confirmed by regulation 9(1) of the 1994 Regulations where it is stated that, subject to certain conditions, "a beneficiary shall be entitled to an *increase of incapacity benefit* under section 86A(1)".

(c) I acknowledge that under regulation 2(3) of the Social Security (Claims and Payments) Regulations 1987:

"every increase of benefit under the Social Security Act 1975 [now the Contributions and Benefits Act] shall be treated as a separate benefit"

However, that provision is a deeming provision. Its effect is to treat increases of benefit as separate benefits even though they are not in fact separate benefits. If they were separate benefits, the provision would be unnecessary. Moreover, regulation 2(3) only applies "for the purposes of the provision of these Regulations [i.e. the Claims and Payments Regulations] relating to the making of claims." It does not even apply for those

purposes of the Claims and Payments Regulations that relate to the payment of benefit far less to issues arising under the Decisions and Appeals Regulations, which contain no equivalent provision.

- (d) The position is therefore that, even though, as a matter of administrative convenience, a separate claim is required for the dependant's increase, when a decision is made to award such an increase what is being awarded is incapacity benefit. As I explained at paragraph 21 above it is "necessary" to every decision awarding incapacity benefit that there should have been a determination that the claimant is, or is to be treated as being, incapable of work. A decision to award an increase of incapacity benefit for an adult dependant is therefore an "incapacity benefit decision" within regulation 7(2)(c).

32 I am similarly unpersuaded by the Secretary of State's second point about the amendment of the regulations. I very much doubt whether the tribunal on 11 April 2006 would even have been aware that the law to be considered had changed the previous day but, even if it was, there is no reason why the tribunal should have had that amendment "to the forefront of [its] thoughts" when what it was dealing with was a decision made almost exactly a year previously and when it was operating in the context of section 12(8)(b) of the 1998 Act which prevented it from taking into account any change in circumstances that had occurred since then.

33 Moreover, if one were to take the amendment into account, it seems to me to strengthen the appellant's case and weaken that of the Secretary of State. The new regulation 7(2)(c)(v) is not in the same terms as the former regulation 7(2)(c)(iii). Specifically, it omits the words "or an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision)" which prevented that provision from applying to the advantage of the Secretary of State in this appeal. The fact that that amendment was made may be taken as indicating that it was necessary in order to remove the potential for the type of anomaly that is revealed by Mr Turnbull's decision in *CIB/763/2004* and my decision in this case.

34 For those reasons, my decision is as set out in paragraph 1 above.

(Signed on the original)

Richard Poynter
Deputy Commissioner

23 January 2007

Corrected 12 June 2007