

CIS/367/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I find that the decision of the appeal tribunal ("the tribunal"), given on 21 August 2002, erred in point of law. I allow the claimant's appeal. Under the provisions of section 14(8)(a) of the Social Security Act 1998, I set aside the tribunal's decision, and substitute my own decision as follows:

"The claimant is entitled to the carer premium under paragraph 14ZA(1) of Schedule 2 to the Income Support (General) Regulations 1987 from 3 April 2000 when Statutory Instrument 681/2000 came into effect."

2. The claimant is a woman who had been in receipt of income support, together with invalid care allowance in respect of caring for her disabled daughter. She reached the age of 60 on 17 May 1988 following which she was in receipt of retirement pension, and her payment of invalid care allowance ceased. On 1 October 1990, a carer premium became available to persons in receipt of income support, and invalid care allowance was also introduced. In June 1992, it came to the attention of the Income Support Section that the claimant had in fact continued to have an underlying entitlement to receive invalid care allowance from 1988. The Citizens Advice Bureau, which was then advising the claimant, requested that the claimant should be entitled to the carer premium backdated to October 1990. This was accepted, and arrears calculated from 1 October 1990 were issued to the claimant in July 1992, and thereafter an allowance for the carer premium was subsequently included in her weekly income support assessment.

3. On 8 October 2001, the Income Support Section received notification of possible overpayments of benefit from the Invalid Care Allowance Unit. The form stated that, during 1995, the Invalid Care Allowance Unit had examined invalid care allowance claims made by women between January 1984 and January 1989 where the claimants were aged between 60 and 65 and had been refused invalid care allowance on age grounds. Where underlying entitlement to invalid care allowance had been established, income support/minimum income guarantee sections had been notified, so that consideration could be given to awarding carer premiums to those claimants. However, the carer premium should not have been awarded on some of these cases as they related to claims which had been made before 1 October 1990, the date of introduction of carer premium; claims made before that date were subject to a cut-off provision. Cases were therefore being investigated where:

- (a) there was an underlying invalid care allowance entitlement;
- (b) invalid care allowance had not been in payment since 1 October 1990 and
- (c) invalid care allowance had been claimed before 1 October 1990.

The form continued with advice on dealing with any such cases.

4. On 11 December 2001, the Invalid Care Allowance Unit confirmed that invalid care allowance had ceased to be paid to the claimant before 1 October 1990 because another benefit was in payment, in this case retirement pension, to which the provisions of the Social

Security (Overlapping Benefits) Regulations 1979 applied. Although there remained an underlying entitlement, there was no entitlement to receive a carer premium. The claimant had been in receipt of invalid care allowance until she reached 60 in May 1998, when her entitlement had ceased because of the overlapping benefit of her retirement pension.

5. On 8 January 2002, the decision maker determined that the claimant did not satisfy the qualifying conditions for the carer premium from 1 October 1990, and the premium was removed from her income support assessment. The decision that she had no entitlement to carer premium was issued to the claimant on that day.

6. On 24 January 2002, a representative from the Citizens Advice Bureau appealed against the decision on behalf of the claimant, stating:

"I would argue that the intention of the new rules in October 1990 [was] not to deny people who are already entitled to invalid care allowance the carer premium, and that she should be treated as having made a claim for invalid care allowance on or after October 1990 as she was claiming invalid care allowance at that time."

The decision was reconsidered, but not revised, and the appeal proceeded.

7. The tribunal, consisting of the chairman sitting alone, was held on 21 August 2002. The claimant was not present. The tribunal refused the appeal and confirmed the decision issued on 8 January 2002, that from 1 October 1990 the claimant was not entitled to a carer premium as part of her award of income support.

8. At this stage, the Child Poverty Action Group took over the conduct of the claimant's case, and made a late application for leave to appeal. This was refused as the Statement of Material Facts and Reasons had been issued on 6 November 2002, but the application had not been received until 9 December 2002. However, for reasons that are not shown on the file, the same legally qualified panel member thereafter gave leave to appeal on 16 January 2003 on the same grounds of appeal, stating that "an arguable point of law is raised upon which an authoritative decision of a Commissioner would be valuable". The grounds of appeal were, essentially, that the tribunal had erred by accepting the submission on behalf of the Secretary of State that the relevant legislation was paragraph 14ZA(2) of Schedule 2 of the Income Support (General) Regulations 1987 because the terms of sub-paragraph (1) alone provided the answer to this appeal and in failing to apply those terms to the claimant's case, the decision maker and the appeal tribunal had erred in law. It may be helpful if I set out the relevant parts of paragraph 14ZA here (as they were at the date of the supersession of 8 January 2002), which are as follows:

"14ZA(1) [subject to sub-paragraphs (3) and (4),] the condition is that the claimant or his partner is, or both of them are, [entitled to an invalid care allowance under section 70 of the Contributions and Benefits Act].

(2) If a claimant or his partner, or both of them, would be in receipt of invalid care allowance but for the provisions of the Social Security (Overlapping Benefits) Regulations 1979, where –

(a) the claim for that allowance was made on or after 1 October 1990, and

- (b) the person or persons in respect of whose care the allowance has been claimed remains or remain in receipt of attendance allowance [or the care component of disability living allowance at the highest or middle rate prescribed in accordance with section 37ZB(3) of the Social Security Act [SSCBA section 72(3)]]

he or his partner, or both of them as the case may be, shall be treated for the purposes of sub-paragraph (1) as being [entitled to an invalid care allowance]."

The underlined words were added by regulation 4 of SI 681/2000, which came into operation from 3 April 2000. The amendment changed the wording in sub-paragraphs (1) and (2) from "in receipt of" to "entitled to an invalid care allowance".

9. There is little doubt that the claimant could not satisfy the terms of the regulation up to 2 April 2000, as she was not in *receipt* of invalid care allowance. However, her underlying entitlement to that benefit had remained throughout, and the reason she was not in receipt to benefit was because of the overlapping provisions which applied to her retirement pension. Once the legislation changed with effect from 3 April 2000, to provide that the qualifying condition for entitlement to carer premium is an *entitlement* to invalid care allowance, then the claimant satisfied that condition.

10. It was argued before the tribunal on behalf of the Secretary of State that the claimant had made her claim for invalid care allowance before 1 October 1990 and could not therefore bring herself within paragraph 14ZA(2) and that this was fatal to her entitlement. Her representative at that stage argued, on the contrary, that the wording in sub-paragraph (2) should be construed as encompassing a *continuing* claim for invalid care allowance which was in existence at 1 October 1990.

11. In the grounds for appeal, it is confirmed that it has already been determined that the overpayment is not to be recovered from the claimant. The claimant's representative points out that sub-paragraph (1) is not subject to anything which is said in sub-paragraph (2). For the purposes of the claimant's entitlement to the carer premium from 3 April 2000, it is sub-paragraph (1) which applies; sub-paragraph (2) can be seen as being irrelevant. The submission suggests that sub-paragraph (2) is, arguably, irrelevant altogether from 3 April 2000 – as there is no purpose in treating someone as being entitled to the benefit under sub-paragraph (1) if s/he is already entitled under sub-paragraph (1) itself. The tribunal should have considered only sub-paragraph (1).

12. The Secretary of State supports the appeal. He submits that the claimant failed to satisfy the provisions of paragraph 14ZA prior to 3 April 2000, and the carer premium was therefore incorrectly awarded and paid from 1 October 1990 to 2 April 2000. (It is confirmed that it has already been determined that the overpayment is not to be recovered from the claimant.) He supports the submission that as from 3 April 2000 the claimant is entitled to the carer premium and that payment should be reinstated from the date she last received it. Further, this issue has been brought to the attention of the Department for Work and Pensions so that similar cases can be identified.

13. I accept both submissions as to the effect of sub-paragraph (1). The claimant remained *entitled* to invalid care allowance from the date she ceased to be in receipt of any payment of it, because she became entitled to her pension and the overlapping provisions took effect. That being established, she is entitled to an award of carer premium from the date of the change in the legislation on 3 April 2000. As the submission on behalf of the claimant points out, the tribunal did not consider sub-paragraph (1), and made its finding solely in respect of sub-paragraph (2) and was thus in error.

14. The present drafting of sub-paragraph (2) sits uncasily with sub-paragraph (1) and almost certainly results from the legislation having been amended without full consideration of the effects of the amendment on the paragraph as a whole. I also agree with the submission on behalf of the claimant as to the possible irrelevance of sub-paragraph (2) from 3 April 2000.

15. For the reasons given, the claimant's appeal succeeds. My substituted decision is given in paragraph 1 above.

(Signed on the original)

E A Jupp
Commissioner

(Date)

7 July 2003