

*Repayment of Overpayment - Failure to Disclose
Must Have Caused the Overpayment*

HL/CW/1

Commissioner's File: CS/11700/96

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: David Sidebottom

Social Security Appeal Tribunal: Warrington

Case No: 610/95/09248

1. For the reasons given below, I set aside the decision of the social security appeal tribunal given on 5 October 1995. In accordance with section 23(7)(a)(ii) of the Social Security Administration Act 1992 my decision is that in this case there is no recoverable overpayment.

2. The basic facts in this case are not in dispute. The tribunal found the facts as set out in paragraph 5 of the adjudication officer's original submission to the tribunal, and I am content to do the same. Accordingly, I find the following facts:-

"On 15.5.92, the claimant completed form BF225 to claim an increase of invalidity pension for his wife. He confirmed that he wished to claim the additional pension from 25.5.92. On form BF225, he confirmed that his wife was not in receipt of any other benefit, pension or allowance and his invalidity pension, paid to him since 23.7.91, at the personal rate only, was increased from and including 25.5.92 by the amount of the adult dependency increase of £32.55 per week.

On 17.9.92, he completed review forms BF85A and BG225 confirming that there had been no change in his circumstances or those of his wife.

On 28.10.92 the claimant's wife completed form SDA1 to claim Severe Disablement Allowance, in her own right, from 24.11.92.

On that form, she answered "no" to the question "is anyone receiving any extra money for you, added onto any other benefit or allowance, such as Retirement Pension or Income Support."

Severe Disablement Allowance was subsequently awarded to her in her own right, from and including 20.1.93 and arrears of benefit from 20.1.93 to 10.5.93 (both dates included) were paid to her on 13.5.93.

On 27.3.95, a letter was received from the claimant notifying the Department that he appeared to be claiming benefit for his wife incorrectly as she was receiving "Severe Disablement Allowance in her own right."

The claimant also returned his order book for adjustment and his benefit was downrated with effect from 23.3.95."

3. On 3 May 1995, on the basis that there had been a change of circumstances, the adjudication officer quite properly reviewed the question of entitlement to the increase of invalidity benefit. The adjudication officer decided, again, correctly, that an increase of invalidity benefit was not payable to the claimant in respect of his wife from and including 20 January 1993 because Severe Disablement Allowance had been awarded to her with effect from that date. The adjudication officer went on to decide that there had been an overpayment of invalidity benefit from 20 January 1993 to 22 March 1995 amounting to £3,838.93. This calculation has not been challenged by any of the parties. There was an overpayment, and I am content to find that this was the correctly calculated amount of the overpayment. The adjudication officer then went on to decide that this amount was recoverable from the claimant. It was conceded by the adjudication officer who prepared the submission for the tribunal, and has also been agreed by the adjudication officer now concerned with the matter, that the amount of overpayment recoverable was limited to £3,308.10 paid in respect of the period 13 May 1993 to 22 March 1995. The contested issue before the tribunal, and now before me, is whether that amount was recoverable.

4. The claimant appealed to the social security appeal tribunal which, on 22 May 1995, decided by a majority that that amount was recoverable. On 28 November 1995 the chairman of the tribunal gave written leave to appeal, and the appeal is supported by the adjudication officer now concerned with the matter who has asked me to refer this case to a differently constituted tribunal. However the credibility of the evidence before me has not been challenged and there is

adequate evidence on which to make necessary findings of fact. The issue really turns on a point of law, and it is expedient that I make the further findings of fact which the tribunal failed to make, and determine the matter myself.

5. Section 71 of the Social Security Administration Act 1992 provides as follows:-

"Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence, of the misrepresentation or failure -

- (a) a payment has been made in respect of a benefit to which this section applies; or
- (b)

The Secretary of State shall be entitled to recover the amount of any payment which he would not have made....but for the misrepresentation or failure to disclose.

In R(SB) 54/83, the Commissioner held that, in order to recover expenditure on the ground of failure to disclose a material fact, it must be shown that:

- 1. "there was a failure to disclose";
- 2. "the failure related to a material fact";
- 3. "it was reasonable to expect disclosure by the person concerned";
- 4. "the expenditure by the relevant Secretary of State was incurred in consequence of the failure"; and
- 5. "the person from whom it is sought to recover the expenditure knew the material fact".

6. There is no question in this case of any misrepresentation by the claimant. The issue is whether there was such a failure to disclose by him as rendered the overpayment recoverable. The first contentious question here is whether it was reasonable to expect disclosure by the claimant. The adjudication officer's submission to the tribunal referred to instructions given in the order book and in form BF228 on page 3 of which the claimant was advised to tell the department "if anyone you are getting extra money for starts to get any benefit or allowance from the State". The submission to the tribunal on behalf of the claimant, and the tribunal's decision, both seem to confuse the issue of what it would have been reasonable for the claimant to do and whether

the overpayment was made in consequence of any failure to disclose. Thus, in its reasons the tribunal states,

"Albeit that the Department should have been aware of the 2 claims for an unusual name, this does not absolve the claimant of his obligation to disclose the award of severe disablement allowance to his wife..."

Although it is implicit in the tribunal's decision that they were of the opinion that it was reasonable to expect that the claimant would have made the necessary disclosure, they would have been less likely to fall into error had they given separate consideration to each of the issues identified in R(SB)54/83 as referred to above. This is because it might be the case that a claimant has acted wholly unreasonably, but nevertheless it is not his unreasonable failure to disclose that has had the consequence of there being an overpayment.

7. In arguments before both the tribunal and the Commissioner, the claimant's representative has relied on CIS/159/1990. In that case a claimant was in receipt of supplementary benefit and applied for child benefit in respect of her son born on 31 July 1987. The application form was obtained from the local office. In mid October 1987 she was sent an order book to include payment of child benefit in respect of this child but she did not tell the local office of this. The local office continued to pay her supplementary benefit without taking into account the award of child benefit for this child. Meanwhile, on 7 October 1987 the child benefit centre had actually notified the local office that arrears of child benefit were due and that an order book including child benefit for this child had been sent out for payment from 19 October 1987. The local office failed to act on this notification. In that case, allowing the claimant's appeal and deciding that there was no recoverable overpayment, the Commissioner said:-

"In my view in this case the overpayment was not in consequence of any failure to disclose on the part of the claimant."

He distinguished that case from cases where the child benefit centre has failed to notify the local office.

8. The claimant's representative gave his own written evidence to the tribunal, which was not and has not been contested. He stated:-

"I rang the D.S.S. in Leigh on Monday of this week, the local office dealing with this claim, to ask as to the administrative procedures for claims to S.D.A. and I.V.B. As Wigan office deal with some matters, I first asked would it be the same office who would deal with the claims to S.D.A. and I.V.B. They confirmed that it would

be the same office (Leigh). I then asked would it be the same Department. Again, this was confirmed. I then asked if two people had the same surname, for example a couple, would it likely to be that the same person would deal with both claims even they were different benefits? This again was confirmed. Indeed, not only would it be likely, but it would certain.

I find this to be a true statement, and that the information given to the representative as reported in that statement was accurate. However, the tribunal failed to make explicit findings on whether they accepted this evidence. That failure was a breach of the requirements of regulation 23(2) of the Social Security (Adjudication) Regulations 1995, the version of which then in force required the chairman of the tribunal to include in the written record the tribunal's findings on questions of material fact.

9. The evidence from the representative referred to above is highly material, since, in my view, it brings this case squarely within the principle of CIS/159/1990. The tribunal sought to distinguish the present case from that case although they did not really explain on what basis they had done this. However, in my view, there is no difference in principle between a situation where the local office knows that income support is being paid on one basis but also has information to show that this basis is wrong, and the present case where the local office knows that invalidity benefit is being paid on one basis, but also has information to show that that basis is wrong. It might be argued that the 2 cases can be distinguished on the basis that CIS/159/1990 concerned 2 payments made to the same person whereas as the present case concerns payments made separately to the claimant and to his wife. However, the evidence is that the claimant and his wife live at the same address, this is a relatively uncommon name and the payments were being administered by the same person in the local office.

(Signed)

H Levenson
Deputy Commissioner

(Date)

14 FEB 1997