

S 27 recovery of o/payment. - being appealed to
CA of A probably (Povey)

CPAG



48/93

RFMH/SH/8

Commissioner's File: CIS/457/1992

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 23 January 1992 is not erroneous in point of law. As a result this appeal fails.

2. This appeal on behalf of the claimant is against the decision of the social security appeal tribunal of 23 January 1992, leave having been granted by the tribunal chairman. I directed an oral hearing of the appeal. The claimant was represented by Miss H Winfield from the Wolverhampton Welfare Advice Centre. The adjudication officer was represented by Mr N Hewitt from the Central Adjudication Service.

3. At the material time the claimant, a widow then aged 81, lived alone in privately rented accommodation. The claimant's daughter, Mrs Povey, was appointed the claimant's appointee. The claimant was in receipt of income support from 9 March 1989. Prior to this her late husband had claimed for them both. Severe disability premium was paid to the claimant from 16 March 1989 and she was also in receipt of retirement and attendance allowance from 20 March 1989.

4. On 12 July 1990 Mrs Povey informed the local office of the Department that she had received invalid care allowance in respect of the claimant and that it had been backdated to 20 March 1989. In reply to further enquiries Mrs Povey stated that invalid care allowance arrears were paid to her on 16 July 1990. She was notified of the award in a letter dated

4 July 1990 from the Invalid Care Allowance Unit. As a result the severe disability premium was removed from the claimant's income support on 19 July 1990.

5. In the light of the evidence the adjudication officer reviewed his decision awarding income support to the claimant for the inclusive period from 16 March 1989 to 18 July 1990 because he was satisfied that the decision was given in ignorance of a material fact. This was that Mrs Povey had been awarded invalid care allowance in respect of caring for the claimant. His revised decision was to the effect that income support was payable at a reduced rate because Mrs Povey was in receipt of invalid care allowance in respect of caring for the claimant. In accordance with the relevant regulations receipt of this allowance had been taken into account in calculating the claimant's applicable amount and it had been determined that the claimant was not entitled to severe disablement premium for the relevant period. As a result an overpayment of income support had been made amounting to £1,679.50 and this amount was recoverable from the claimant under section 27 of the Social Security Act 1986 ("the Act"). Thereupon Mrs Povey appealed against that decision on behalf of the claimant.

6. In his written observations on the claimant's appeal the adjudication officer invited the tribunal to amend the amount of recoverable overpayment from £1,679.50 to £1,781.60 and he submitted a schedule to show how the overpayment was calculated.

7. Mrs Povey and Miss Winfield, her representative, attended the hearing of the appeal before the tribunal on 23 January 1992. In the event the tribunal dismissed the appeal.

8. Section 104(1)(a) of the Social Security Act 1975 as amended provides that the decision of the adjudication officer can be reviewed at any time if the decision was given in ignorance of a material fact. In the present case the adjudication officer was not aware that Mrs Povey had been awarded invalid care allowance in respect of caring for the claimant. This was a material fact and the conditions for review were satisfied.

9. Section 27 of the Act provides, so far as relevant:-

" 27. - (1) Where -

- (a) a payment by way of prescribed income is made after the date which is the prescribed date in relation to the payment; and
- (b) it is determined that an amount which has been paid by way of income support would not have been paid if the payment had been made on the prescribed date,

the Secretary of State shall be entitled to

recover that amount from the person to whom it was paid.

(2) Where -

- (a) a prescribed payment which apart from this subsection falls to be made from public funds in the United Kingdom or under the law of any other Member State is not made on or before the date which is the prescribed date in relation to the payment; and
- (b) it is determined that an amount ("the relevant amount") has been paid by way of income support that would not have been paid if the payment mentioned in paragraph (a) above had been made on the prescribed date,

then -

- (i) in the case of a payment from public funds in the United Kingdom, the authority responsible for making it may abate it by the relevant amount; and
- (ii) in the case of any other payment, the Secretary of State shall be entitled to receive the relevant amount out of the payment.

(3) ...

(4) Where an amount could have been recovered by abatement by virtue of subsection (2) or (3) above but has not been so recovered, the Secretary of State may recover it otherwise than by abatement -

- (a) in the case of that amount which could have been recovered by virtue of subsection (2) above, from the person to whom it was paid; and
- (b) in the case of an amount which could have been recovered by virtue of subsection (3) above, from the person to whom the prescribed benefit in question was paid.

(5)"

10. Regulation 8 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1987 ("Payments on Account Regulations") provides so far as material:-

" 8. - (1) For the purposes of section 27(2) of the Act (recovery of amount of benefit awarded because prescribed payment not made on prescribed date), the payment of any of the following is a prescribed payment:-

(a) any benefit under the Social Security Act 1975 other than any grant or gratuity or a widow's payment;

(b)-(g) ...

(2) The prescribed date, in relation to any payment prescribed by paragraph (1) is the date by which receipt of or entitlement to that benefit would have to be notified to the Secretary of State if it were to be taken into account in determining, whether on review or otherwise, the amount of or entitlement to income support."

11. Paragraph 13(2)(a)(iii) of Schedule 2 to the Income Support (General) Regulations 1987 ("the General Regulations") provides that severe disability premium is not payable if invalid care allowance is in payment to anyone in respect of caring for the claimant. It is not in dispute that invalid care allowance under regulation 8(1)(a) of the Payments Regulations is a prescribed payment for the purposes of section 27(2) of the Act and that the payment of invalid care allowance was not made on the prescribed date. The crucial question for determination by the tribunal was whether overpayment of income support amounting to £1,781.60 paid to the claimant during the inclusive period from 16 March 1989 to 18 July 1990 was recoverable from the claimant under the provisions of section 27(4) of the Act.

12. Section 27(4) of the Act operates where the conditions for recovery under section 27(2) are satisfied but not implemented. Miss Winfield strongly argued that section 27(2) was not applicable on the facts of the present case. This was because the prescribed payment under section 27(2)(a) had been made to Mrs Povey whereas the "relevant amount" paid by way of income support under section 27(2)(b) had been made to the claimant. In her view section 27(2) did not apply if a person entitled to the prescribed payment was a person other than the one to whom the "relevant amount" by way of income support had been paid. At no time did Mrs Povey's requirements and resources fall to be aggregated with those of the claimant. In other words abatement under section 27(2) could only be sought where the prescribed payment had not been made timeously to the income support recipient or to a member of her family whose requirements and resources were aggregated with the claimant's for the purposes

of income support. Miss Winfield referred me to section 27(3) which specifically provided for recovery where payments had been made to two different persons. No such provision was expressed under section 27(2) or (4).

13. The tribunal rejected Miss Winfield's argument and concluded that "it was open to the responsible authority to abate the invalid care allowance by the relevant amount .." I see no error of law on this ground. There is nothing to indicate that the provisions of section 27(2)(a) and (b) are limited to where the prescribed payment and "the relevant amount" have been paid to the same person or to a member of the claimant's family whose resources and requirements fell to be aggregated. In the present case the authority responsible for making prescribed payment had the power to abate it by the relevant amount under the provisions of section 27(2)(b)(i). The fact that the power of abatement existed against Mrs Povey as opposed to the claimant does not in my view preclude the application of sub-paragraph (4). The crucial factor was that the power of abatement existed.

14. I should add for completeness that in her grounds of appeal to me Miss Winfield found further support for her argument that section 27(2) only applied where the recipient of the prescribed payment and the relevant amount were the same person, because regulation 8(2) of the Payments Regulations referred to the prescribed date of a prescribed payment as being "the date by which receipt of or entitlement to that benefit would have been notified to the Secretary of State if it were to be taken into account in determining, whether on review or otherwise the amount of or entitlement to income support". She submitted that the words "into account" were restricted to the calculation of the claimant's resources and requirements, I reject this submission and agree with Mr Hewitt that the words "into account" should be given a wide interpretation and in the context include "take notice of".

15. I now turn to the application of section 27(4) of the Act. Miss Winfield submitted that even if the power of abatement existed under the provisions of section 27(2), paragraph 4 was not applicable on the facts of the present case. This was because in her view the words "in the case of an amount" in sub-paragraph (a) referred to the amount of invalid care allowance. This had been paid to Mrs Povey and therefore was not recoverable from the claimant as "the person to whom it was paid". I reject this argument and agree with Mr Hewitt that in the context of section 27 the words "an amount" refers to a payment by way of income support. As a result the tribunal did not err in law in concluding that although the arrears of invalid care allowance had been paid in full to Mrs Povey the mechanism enabled the Secretary of State to recover the excess from the income support recipient under the provisions of section 27(4).

16. The tribunal chairman completed the relevant Form AT3 in an exemplary manner which complied with the requirements of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986.

17. Following the oral hearing of the appeal before me on 5 May 1993, the adjudication officer now concerned submitted a further short written submission, which was received on 10 May 1993. She raised a completely new point of law which was not mentioned in her earlier written submission dated 8 September 1992 and in Mr Hewitt's submission to me. Such a practice is to be deplored. The adjudication officer now concerned had ample time to prepare the appeal and notice of the date of the oral hearing was given on 6 April 1993. I accepted the further written submission in fairness to the claimant because it was in her favour. Paragraph 13(1) of Schedule 2 to the General Regulations provide that severe disability premium is payable upon the condition "that the claimant is a severely disabled person". Paragraph 13(2) provides:-

" (2) For the purposes of sub-paragraph (1), a claimant shall be treated as being a severely disabled person if, and only if -

(a) in the case of a single claimant or a loan parent -

(i) he is in receipt of attendance allowance, and

(ii) subject to sub-paragraph (3), he has no non-dependents aged 18 or over residing with him, and

(iii) an invalid care allowance under section 37 of the Social Security Act is not in payment to anyone in respect of caring for him;"

18. The conditions contained in paragraph 13(2) are cumulative and not in the alternative. It is common ground that the claimant satisfied the provisions of sub-paragraphs (i) and (ii). The adjudication officer now concerned and Miss Winfield in her reply submitted that the effect of sub-paragraph (3) is that the claimant was entitled to severe disability premium throughout the inclusive period from 16 March 1989 to 15 July 1990 because invalid care allowance was not "in payment" to Mrs Povey until 16 July 1990. As a result section 27 of the Act did not apply. I reject the submissions.

19. The argument is misconceived because it is based on the premise that the words "in payment" mean timeously in payment. I have not been referred to any authority in support of this contention nor can I find any. Mrs Povey claimed invalid care allowance on 20 March 1989 and on 16 July 1990 received payment of the benefit for the inclusive period from 16 March 1989 to 15 July 1990. In other words invalid care was "in payment" for the whole of the period in issue. The fact that the payment was

not made timeously is not relevant. To decide otherwise would defeat the purpose of section 27 of the Act.

20. As stated in paragraph 11 above, invalid care allowance is a prescribed payment for the purposes of section 27 of the Act and payment of invalid care allowance was not made on the prescribed date. The claimant received an amount of income support which would not have been paid if invalid care allowance had been paid on the prescribed date. Section 27 envisages this precise position and provides for recovery in such circumstances.

21. For the reasons stated above the claimant's appeal is dismissed.

(Signed) R.F.M. Heggs
Commissioner

(Date) 18 June 1993