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Commissioner's File: CSIS/76/91

SOCIAL SECURITY ADMINISTRATION ACT 1992

**APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY
APPEAL TRIBUNAL UPON A QUESTION OF LAW**

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:



1. This adjudication officer's appeal succeeds. I hold the decision of the appeal tribunal dated 13 February 1991 to be erroneous in law and accordingly set it aside. Because I think it appropriate so to do I give in its place the decision which the tribunal should have given.

2. That decision is to hold the claimant entitled on a review to a severe disability premium from 27 June 1989 to 8 October 1989 but, in respect of any period subsequent to the last mentioned date, to adjourn for fuller evidence and submissions.

3. I should first note that this is one of a number of cases which have been materially delayed by successive appeals in Foster v Chief Adjudication Officer and Another, decided by the House of Lords on 28 January 1993. Thereafter two other cases were decided by a Tribunal of Commissioners in regard to the possible relevance and use of certain Scots law doctrine. The decision of the Tribunal is on files CSIS/28 and 40/92 and was issued in July 1993. The Tribunal's reasoning was recorded in an Appendix (hereinafter referred to as "the Appendix"). These decisions have all been circulated to parties and so I need not rehearse them further herein.

4. On 27 June 1990 the claimant, by his appointee, requested that his income support be reviewed and a severe disability premium (SDP) added to it with effect from April 1988. The adjudication officer determined that the claimant was entitled to the premium only from 29 June 1989 and only until late October 1989. The claimant appealed to the tribunal who unanimously found the claimant entitled to an SDP from the commencement of income support in April 1988 down to 8 October 1989 and, secondly, from 9 October 1989 onwards. The adjudication officer now appeals, with leave of the chairman. In his submission on the appeal the adjudication officer refers to the fact that the tribunal made an award more than 12 months prior to the date of request for review and submits that they have failed to explain how the limitation imposed by regulation 69 of the Social Security (Adjudication) Regulations 1986 has not been applied. In particular he submits that the conditions for relief therefrom imposed by adjudication regulation 72 have not been satisfied nor explained as to how they were satisfied. It is enough for present purposes to say that I entirely accept that submission. Other matters have been raised but have been superseded by the principle decisions referred to in paragraph 3 above.

5. I should next note that this is one of a number of such cases in which, in the interests of

expedition, decisions were offered to parties without reasons subject to their consent in terms of regulation 22(2) of the Social Security Commissioners Procedure Regulations 1987. In this case the claimant has not responded to that offer and so it has become necessary for a full decision to be given. I mention that to explain both the further delay and the limited reasoning which follows.

6. I suspect from the submissions now before me that the remaining issue in the case is only as to why the claimant should not be awarded an SDP from April 1988 until June 1989. The reason for that is primarily the limitation imposed by adjudication regulation 69. Adjudication regulation 72 can only be applied in relief if the conditions set out in paragraph (1) thereof are made out. As noted, the tribunal do not appear to have considered that provision and I need not myself deal with it because there is an overriding disapplication of it by paragraph (2). That disapplies the regulation to any -

"... review of a decision by an adjudication officer ... where the ground for review is that the decision was erroneous in point of law by virtue of a determination by a Commissioner ... given subsequent to the decision."

The decision sought to be reviewed was, of course, the original awarding decision of income support which, for practical purposes in this case, must be taken to have been given at the inception of the income support system in April 1988. At that time the prevailing view of the law was that claimants like the present residing with his parents could not qualify for the premium because he fell to be held to have non-dependants aged over 18 residing with him and so failed to qualify under paragraph 13(2)(a)(ii) of Part III of Schedule 2 to the Income Support (General) Regulations 1986 ("the ISG regulations") and regulation 17. In turn that was because ISG regulation 3 defined, in paragraph (1), a non-dependant as any person who normally resided with a claimant. That would, of course, include his parents. Exceptions were provided in paragraph (2) and, at sub-paragraph (c) there was an exception for any person -

"... who jointly occupies the claimant's dwelling"

and "jointly occupies" was understood to connote a legal concept. By decision on file CIS/180/89 dated 17 May 1990 a Commissioner upset that view and thereafter the authoritative view, based on that decision, was that the phrase "jointly occupies" fell to be determined on a purely factual basis. Inevitably by the date of the request for review in this case the claimant was seeking to say that the adjudication officer had incorrectly applied the law as at April 1988 by not then adding the premium to his income support. Whether he knew it or not that contention was inevitably based upon the Commissioner's decision altering the perceived legal position. Accordingly the original decision by an adjudication officer was being reviewed, by the tribunal in due course, upon the basis that that decision had been erroneous in point of law *by virtue of* said determination of a Commissioner, which determination was necessarily given subsequent to the original awarding decision. That means that adjudication regulation 72(2) could not be satisfied and so the limitation upon an award in arrears on the review imposed by regulation 69 was absolute. Hence in this case my award in place of that by the tribunal, and endorsing that by the original adjudication officer, starts from 12 months prior to the date of request, namely from 27 June 1989. This view is supported by the decisions on files CIS/11/91 and CIS/595/90 with which I agree.

7. My decision, again like the original adjudication officer's decision, does not proceed beyond 8 October 1989, reserving to the tribunal resuming their consideration of the case

following the notional adjournment the subsequent period. That is because the crucial definition allowing for exception from the definition of "non-dependant" has varied, and the first change was effected from and after 1 October 1990.

8. The new tribunal will, however, and before entering upon consideration of any of the subsequent amendments, require to determine whether this claimant is capax or incapax. That is important because unless he is found to be incapax the Scots law doctrines referred to in paragraph 3 above will not be applicable and the case will have to be resolved under reference to the usual rules about contract where one is sought to be set up during a litigation. I note that the adjudication officer most recently concerned concedes that the claimant falls to be regarded as incapax because he has an appointee - paragraph 9 of the submission dated 11 August 1993. That however is not of itself necessarily sufficient. It is enough that I draw attention to paragraph 23 of the Appendix which gives adequate guidance to a tribunal determining the issues. If the claimant is judged to be capax, then, whereas the final version discussed in the Appendix, namely that in force from and after 11 November 1991 barred close relatives such as parents from exemption from the definition of "non-dependant", there may yet require to be considered the then in force regulation 3(2B) and (2C) and indeed regulation 4, in particular paragraphs (7) and (8), of the Income Support (General) Amendment No 6 Regulations 1991.

9. The remainder of this decision is designed to afford some guidance to the new tribunal in the event of their determining the claimant to be incapax. Primarily, however, that guidance is to be found in paragraph 24 onwards of the Appendix. Dealing with the first period with which they will be concerned, namely that from 9 October 1989 to 1 October 1990, it is then that the question of "liability" becomes important and so leads to possible application of the Scots law doctrines recompense and *negotiorum gestio*. In that event paragraphs 30 and 31 of the Appendix will probably be of particular importance.

10. From 1 October 1990 to 11 November 1991 the important addition is that such liability should be adjudged to have been "on a commercial basis". In that regard paragraphs 32 and in particular 33 of the Appendix will provide the appropriate guidance on determining the financial extent of the liability, as opposed to its legal imposition.

11. Finally I should add that the information in the papers at present indicates that only the parents resided in the same house as the claimant. If liability to make the relevant payments is established to one parent then the other will equally escape from the definition of "non-dependant" by reason of being that parent's partner - I draw attention to the crucial wording -

"Any person ... to whom or to whose partner the claimant .. is liable to make payments (eg ISG regulation 3(2)(d) between October 1989 and October 1990)."

But if there have been other persons "normally residing" with the claimant during any of the relevant periods, or any part or parts thereof, then it will be also necessary that they be excluded in the same way as the parents before the tribunal can make an award in the claimant's favour. That is particularly important during the period from October 1989 to October 1990. Thereafter, until November 1991, I would draw attention to regulation 3(2)(db). To the extent that the claimant cannot satisfy the tribunal, the onus being on him, that all such persons fall, one way or the other, to be excluded from the definition of "non-dependant" then for the appropriate period, or part thereof, the premium cannot be awarded. I need perhaps hardly add that persons transiently or temporarily residing with the claimant will not be regarded as "normally residing": the question is an intensely practical one for the tribunal to answer in light of their own common

sense. The tribunal may wish also to consider the guidance on this matter provided in the last paragraph of CSIS/66/91 which is now with the papers.

(signed)

W M WALKER
Commissioner
Date: 16 May 1994