Benefit Disability Living Allowance

Name

NINO

1. On , the tribunal was adjourned with directions for the Secretary of State to respond to the legal arguments made out in the submission of representative as they had been only recently received by the Tribunal and Secretary of State.

2. representative make two submissions, Submissions A and B

3. **Submission A**, if understood correctly, is that a change in accommodation status from a care home does not affect entitlement to DLA but whether DLA is payable. Furthermore such decisions are not supersessions under Section 10 of the 1998 Social Security Act but are decisions under Section 8(1)(c) of that Act and that decisions under Section 8(1)(c) are not subject to rules relating to effective dates for supersession.

4. Section 8(1)(c) of the 1998 Act states

   "(1) Subject to the provisions of this Chapter, it shall be for the Secretary of State—

   (a) to decide any claim for a relevant benefit;
   ...
   (c) ... to make any decision that falls to be made under or by virtue of a relevant enactment..."

5. **Submission B**, if understood correctly, is that if it is accepted that the decision was supersession then is should only have been a suspension and as such was an official error which can be corrected as an "any time review" by the tribunal.

6. At part 4 of their submission representative state what they believe is agreed between the parties and goes on to list that which they describe as being agreed.

7. The Secretary of State believes it only fair to allow the Secretary of State the opportunity to state if that list is or is not agreed.

   4.1. lived in accommodation that counts as a care home from 08/04/2002 [Document 36]

Documents 34 – 36 shows a decision was made that DLA care component was not payable from 08/05/2002 because by that date would have been in a care home, the funding for which would be wholly or partly paid for out of public funds, for more than 28 days. This would accord with representative's submission that it is agreed lived in accommodation that counts as a care home from 08/04/2002

4.2. The Secretary of State on 23/11/2001 made a decision that DLA was therefore not payable from and including 08/05/2002. The Secretary of State was acting under the view that this decision was a supersession [Document 35, Part 4 – Decision].

Documents 34 – 36 are copies of the Secretary of State's decision dated 23/11/2002 which re-stated that entitlement to DLA existed from and including 06/04/1992 but also stated that it was not payable from and including 08/05/2002. Thus far this accords with representative's submission.

However, the Secretary of State contends that this decision WAS a supersession under Section 10 of the 1998 Social Security Act

4.3 The Decision Maker determines that the DLA Care component is not payable from and including 08/05/2002 because the client is in certain accommodation. Change in law means the LA (Local Authority) must pay for stay in residential care from 08/04/02: DLA care suspended from 08/05/02 (see boxes ticked by Decision Maker under Part 4 – continues and Part 6 – Reasons for decision [Document 36])

As above, documents 34 – 36 shows a decision was made that DLA care component was not payable from 08/05/2002 because by that date would have been in a care home, the funding for which would be wholly or partly paid for out of public funds, for more than 28 days. This was a substantive decision of the Secretary of State not merely an administrative suspension.

4.4 The Decision Maker has used C&B Act 72 (8) DLA Regs (9 & 10 (cert accom) (See boxes ticked by Decision Maker Part 7 – Law (Sec 50, Health and Social Care Act 2001 at [36]).

Because of the effect of Sec 50 of the Health and Social Care Act 2001 the Secretary of State has applied C&B Act 72 (8) DLA Regs (9 & 10 (cert accom) and decided using Section 10 of the 1998 Social Security Act to supersede the previous decision and state that the care component is not payable from and including 08/05/2002. Again this is a substantive decision and not an administrative suspension.

4.5. On 23/11/2010, the Secretary of State made a decision that DLA was payable from 13/10/2010. Again the Secretary of State was acting under the

view that what he was doing was superseding his previous decision, "I have superseded the decision dated 23/11/2001" [Document 19]

Following the notification on 13/10/2010 (Document 15) that was no longer in residential care following the de-registration of the address she lived in as a care home on 31/08/2004 (Document 16) the Secretary of State made a decision that DLA was payable from 13/10/2010.

However, the Secretary of State was not acting under the view that this was a supersession it is contended that this WAS a supersession and as such can only be effective from the date that the change was first notified.

Response to Submission A:

The decision of 23/11/2001 was a supersession made under Section 10 of the 1998 Act.

8. When a person is found to have moved into accommodation in circumstances in which any of the costs of any qualifying services provided for him are borne out of public or local funds under a specified enactment **and** there is no doubt as to whether the decision as to an award of a relevant benefit should be revised under Section 9 or superseded under section 10 then the Secretary of State will and indeed must supersede (or revise) the decision.

9. Following the enactment of the Health and Social Care Act 2001 Local Authorities became responsible for payment of a qualifying service out of local funds and as such, and in case, there was no doubt that the awarding decision should be superseded.

10. The decision of 23/11/2001 was and had to be a supersession under Section 10 of the 1998 Act.

11. To support this assertion the Secretary of State would ask the tribunal to consider a situation, which whilst not , is one where the absolute necessity of a decision under Section 10 is required. It is intended to demonstrate that, unlike her representative's assertions that such decisions are made under Section 8(1)(c), ALL such decisions must be supersessions.

12. Please consider this scenario.

13. In some cases the Secretary of State will not be notified, as he should be, when a person moves into residential accommodation or of the change in status when the funding for extant residential care changes such as happened for in 2001/2. When, some time later, it is discovered that such a failure to notify has occurred it can be decided that the effective date of the supersession should be an earlier date than the notification of the change because the person failing in their duty to notify (the Secretary of State) knew this would affect benefit. (**For the avoidance of doubt it is not suggested that this is the case for**).

14. Such a supersession will inevitably lead to an overpayment of benefit and potentially a second decision that that overpayment is recoverable from the person or persons who are found to have failed to notify a change in circumstances.

15. Section 71 (5A) of the Social Security Administration Act states

> *Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) or under regulations under subsection (4) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under section 9 or superseded under Section 10 of the Social Secirity Act 1998.*

16. Were representatives correct in their assertions there would never be a situation where any overpayment could be recoverable. They would have the tribunal accept that all such decisions (to cease payment under Sect 72(8) of C&B Act 92) are made, or should be made under Section 8(1)(c) of the 1998 Act and Section 71 (5A) of the Social Security Administration Act 1992 would therefore have no effect.

17. This can clearly not be the case. In case, the decision is recorded at page 36 - Part 3 as a "Decision" and Part 4 as a "Decision on Supersession" and on page 37 as a SUPERSESSION - SofS (line 4).

18. The decision of 13/10/2001 was a supersession under Section 10 of the 1998 Act which could only and was later altered by another supersession.

The decision of 23/11/2010 was also a supersession made under Section 10 of the 1998 Act.

19. In addition representative seeks to establish that the decision to reinstate payment was also made under Section 8(1)(c) of the 1998 Act and that because it was that the restrictions placed upon backdating of the payment imposed by Regulation 7 of the Decisions and Appeals regulations does not apply.

20. In itself this is a more compelling argument than stating the decision of 23/11/2001 was not a supersession. Indeed this is the stance taken in the case of Adams (reported as R(G) 1/03 copy enclosed) which representative seeks to rely upon.

21. However, the Secretary of State would argue that Adams does not apply, in this case, as it concerned itself with a single question. "...*whether the decision to resume payment of Mr Adams' invalid care allowance was a supersession decision under Section 10 or a decision under section 8 either on a claim for benefit or under of by virtue of a relevant enactment.*" (para 16).

22. In reaching their decision in that case conclusions were drawn regarding the making of decisions under Section 8(1) (c) as opposed to Section 10.

23. These conclusions were addressed in the Adams judgement at paragraph 20. (emphasis added)

> *20. There are two other reasons why it seems to me right to allocate the decision to resume payments of Mr Adams' invalid care allowance to section 8 rather than section 10.* ***Regulation 4 of the Overlapping Benefits Regulations is an accounting provision*** *designed to ensure that parallel entitlements do not result in excessive payment. It does not deal with entitlement,* ***and its operation involves no judgment or fact-finding of any description.*** ***Secondly****, the result of* ***allocating a decision to resume payment*** *of Mr Adams' invalid care* ***allowance to section 10 is to penalise him****, by denying him the possibility of backdating the decision,* ***for the Department's failure*** *to readjust the payments according to law upon its decision to terminate his incapacity benefit, and places upon him an onus which cannot be found in the legislation. To do this would tend to defeat the objectives which Parliament and the rule-maker can be seen to have had in mind when assembling the present scheme.*

24. Significant differences occur between the case of Adams and that of

25. In Mr Adams' the initial decision was noted by their Lordships at Paragraph 3 of their Judgement as.

> *3. The notification sent to Mr Adams by the Department's invalid care allowance section on 9 February 1996, written in attractively clear English, included the following:*

- *"The adjudication officer has decided you cannot be paid ICA at the moment even though you are entitled to it."*
- *"This is because you are getting [incapacity] benefit which is the same as, or more than ICA."*
- *"If the incapacity benefit stops you should tell us straightaway. The adjudication officer may look at your claim again because you are not getting benefit. As long as you satisfy all the other conditions you may be entitled to ICA."*

> *"Adjudication officer's decision*
>
> *Mr S. Adam [sic] is entitled to Invalid Care Allowance at the weekly rate of £35.35 from and including 20/06/95 ...*
>
> *Invalid Care Allowance is not payable from and including 20/06/95. This is because Mr S. Adams is recieving [sic] Incapacity Benefit at the weekly rate of £52.50 .... And that rate is more than or equal to the weekly rate of Invalid Care Allowance which would otherwise be payable."*

26. Mr Drabble QC for Mr Adams suggested that this could be expressed as (para 14) "*The amount of your ICA is adjusted to nil for as long as you are receiving incapacity*

benefit." Further suggesting that "*If it had been, the decision would have been a formality and would have operated from the date of cessation of incapacity benefit*".

27. In Adams their Lordships stated that (para 17) "*Everything in the phraseology of the initial decision letter cited in paragraph 3 above indicates that, if a time were to come when Mr Adams' incapacity benefit ceased, the invalid care allowance to which he was entitled would become payable.*"

28. In case her notification told her that because the local authority had started paying toward her stay in the care home she could not be paid DLA personal care because it cannot be paid for more than 28 days after the local authority started paying. She was also told to tell the Secretary of State straight away if this changed.

29. What differs is that in Mr Adams' case it was a decision of the Secretary of State that Mr Adams was no longer entitled to Incapacity Benefit) that meant the legal impediment to payment of Invalid Care Allowance would have ceased and payment of ICA could and should have restarted. The Secretary of State could not disclaim knowledge of his own decision or claim that there was a duty on Mr Adams to notify a change of circumstances that he (the Secretary of State) had created by his decision.

30. In case the decision to de-register the home she was living in was not one that the Secretary of State was responsible for or aware of. He could only become aware if he was told; which he was not until 2010.

31. It is suggested that in Adams it was decided that a process requiring no judgement or fact-finding demonstrates that a decision was made under Section 8(1)(c). The Secretary of State would suggest that this is because Section 8(1)(c) allows the Secretary of State to rely upon the judgement and fact finding of another body (the decision maker in respect of Incapacity Benefit) when determining payability in ICA.

32. It is contended that when the Secretary of State makes a decision regarding payability of DLA it IS necessary to use judgement and fact finding as it has not been exercised before. It is necessary to determine who is paying for that accommodation, if it is paid for under a specific enactment, and even if there is an intention at some point to pay back that money.

33. Secondly, it is suggested that in Adams it was further decided that where the Secretary of State has made a decision that would lead him to know that another benefit will be affected then he should make a second decision in respect of that (second) benefit and could do so using Section 8(1)(c) without the need for further judgement or fact-finding or obligation on the claimant to notify a change of circumstances that the Secretary of State would have created.

34. It is contended that it was impossible for the Secretary of State to change the decision stopping payment in case in the manner as decided in Adams (using Section 8(1)(c)) until he was informed that circumstances had changed. This is because he had not created that change. The onus thus fell on the

claimant and her appointee to notify the Secretary of State of any change and allow the Secretary of State to make the required decision.

35. This decision can only be made as a supersession under Section 10 of the 1998 Act and is subject to the limitations laid down by Regulation 7 of the Decisions and Appeals regulations.

Response to submission B

36. representative suggests that the decision made in November 2001 was an official error and should have been a suspension (grounds given by representative previously made this argument under Regulation 16(3)(a)(i) of the Decisions and Appeals Regulations 1999 (page 27)).

37. That regulation states that

16-(1) Subject to paragraph (2), the Secretary of State may suspend payment of a relevant benefit, in whole or in part, in the circumstances prescribed in paragraph (3).

(3) The prescribed circumstances are that—

(a) it appears to the Secretary of State that—

(i) an issue arises whether the conditions for entitlement to a relevant benefit are or were fulfilled;

(ii) an issue arises whether a decision as to an award of a relevant benefit should be revised under section 9 or superseded under section 10;

(iii) an issue arises whether any amount paid or payable to a person by way of, or in connection with a claim for, a relevant benefit is recoverable under section 71 (overpayments), 71A (recovery of jobseeker's allowance: severe hardship cases(1)) or 74 (income support and other payments) of the Administration Act or regulations made under any of those sections; or

(iv) the last address notified to him of a person who is in receipt of a relevant benefit is not the address at which that person is residing;...

38. Although representatives previously relied upon under Regulation 16(3)(a)(i) it is felt that under Regulation 16(3)(a)(ii) would be what was intended. However, for the avoidance of doubt all sub headings will be addressed.

39. Regulation 16(3)(a)(i). Is not considered to apply as there were no issues arising in respect of entitlement.

40. Regulation 16(3)(a)(ii). Whilst it is believed this is what was intended as grounds it is not considered to apply as there were not considered to be any issues arising whether the decision should be revised or superseded. Where there was uncertainty or further enquiries to be made then a suspension might be considered appropriate but only ever to the conclusion of those enquiries. The fact finding had been done in advance of the introduction of the Local Authority assuming responsibility and the Secretary of State was certain that a supersession was required.

41. Regulation 16(3)(a)(iii) and (iv) are not considered to apply.

Section

Room

Site