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SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

Claimant:

Social Security Appeal Tribunal: Liverpool



Case No: 6/06/94/2832

1. This appeal, brought with leave of the tribunal chairman but not supported by the adjudication officer now concerned, succeeds in the sense that the decision of the Social Security Appeal Tribunal on 22 9 95 was erroneous in point of law, as explained below. However, in the exercise of my powers under s23(7)(a)(i) of the Social Security Administration Act 1992, I give the decision the tribunal should have given on the undisputed facts before it and the law in force at that time. This is that the appellant was not entitled to the carer premium as part of his income support applicable amount for any period earlier than 26 4 93. This is a largely academic point in two ways: there will be no question of the arrears paid to the appellant in accordance with the tribunal's decision being recovered, and in paragraphs 23 and 24 below I suggest a way in which the appellant may try to recover arrears of carer premium for the "missing" period 1 10 90 to 6 9 91.

2. The appellant had received income support since 17 5 90, which had included disability premium since 30 8 90. On and from 1 10 90 he was a carer for his brother. On the same date, pursuant to an amendment to Schedule 2, paragraph 6 of the Income Support (General) Regulations 1987, it became possible for a person receiving disability premium as part of his income support also to receive carer premium under paragraph 14ZA if he was in receipt of Invalid Care Allowance for looking after someone else.

3. It seems the appellant did not claim Invalid Care Allowance (ICA) until spring 1994. Notification dated 11 5 94 of the award of ICA was sent to the local office administering the appellant's income support (page T1E). This showed

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backdating to 26 4 93, though the award was not to start regular payment until 20 6 94. The appellant's income support entitlement was therefore reviewed on 6 6 94 under s25(1)(b) of the Social Security Administration Act 1992 on the ground of change of circumstances, and revised to include the carer premium from 26 4 93.

4. By a notification dated 7 11 94 (page T3) the ICA unit notified the local office that ICA had been backdated to 1 10 90. The appellant also wrote a letter received on 21 11 94 asking for a review of his income support to take into account this backdating. On the same day, the adjudication officer reviewed the decision of 6 6 94 for a further change of circumstances and backdated entitlement to the carer premium to 1 10 90. But he refused to pay any further arrears because the then regulation 69 of the Social Security (Adjudication) Regulations 1995 prohibited payment of arrears for a period more than 12 months before the date of review, except (regulation 64A(2)) where that review was based on ignorance of, or mistake as to, a material fact under s25(1)(a) of the Administration Act. Arrears back to 26 4 93 had already been paid. The adjudication officer who conducted the review on 21 11 94 did so under s25(1)(b) (further change of circumstances) and not under s25(1)(a), as the decision of 6 6 94 had not been made in ignorance of any material fact which existed at that date.

5. The appellant could not see why he should not receive carer premium back to 1 10 90, and appealed the decision of 21 11 94 to the tribunal. At the hearing the presenting officer submitted that the tribunal need not confine itself to the decision of 21 11 94 but might go back and review an earlier decision on the appellant's claim. He may thereby, as an adjudication officer, have been referring that earlier decision to the tribunal for it to exercise its own review powers under s25. Alternatively he may have contemplated the tribunal dealing with the earlier decision as a question first arising on appeal, under s36 of the Administration Act. The tribunal's note of evidence suggests the latter, since it refers to the presenting officer indicating that it might be open to the appellant to argue for review of the earlier decision. The presenting officer invoked regulation 64A(2)(c) of the Adjudication Regulations. (By the date of the tribunal hearing the numbering of these Regulations had changed, regulation 64A becoming regulation 57 and regulation 69 becoming regulation 63. However, the tribunal used the old numbering and for clarity I shall do the same.) Regulation 64A(2)(c) provides that where a decision is reviewed as having

been made in ignorance of, or under a mistake as to, a material fact, then where the evidence on which the tribunal relies in revising that decision did not exist and could not have been obtained at the time of that decision but has been produced as soon as it became available (as here), the revised award may take effect from such earlier date as the adjudication officer could have awarded benefit had he had that evidence. The presenting officer submitted the tribunal could look back to the earliest income support decision made after the beginning of the ICA award on 1 10 90 and review that decision as having been made in ignorance of (or under a mistake as to) the material fact of entitlement under the (later) backdated ICA award. The presenting officer had checked and discovered the first income support decision after 1 10 90 was on 7 9 92. At that date, by virtue of paragraph 14B of Schedule 2 to the Income Support Regulations, the appellant was to be regarded as being in receipt of ICA because, as a result of the backdating decision, it was "being paid" in respect of him. The presenting officer therefore invited the tribunal to review the decision of 7 9 92, and award further arrears.

6. This submission as to the effect of regulation 64A(2)(c) was in accordance with then DSS practice. The view was taken that where there was a subsequent award of benefit backdated to cover the date of the decision to be reviewed, the adjudication officer who made that decision could be taken to have done so under a mistake as to the entitlement subsequently conferred and without the evidence of that entitlement which only later became available. As will be seen, in my view this was a misconception of the law.

7. However, the presenting officer seem to have considered that arrears could not be awarded for the whole period back to 1 10 90. He thought regulation 69 of the Adjudication Regulations precluded an award of arrears for any period earlier than 12 months before the date of the decision under review. He therefore submitted that arrears could not be awarded further back than 7 9 91.

8. In this it seems to me that, within the logic of the DSS practice, he was wrong. Regulation 69(1) expressly disapplied itself where regulation 64A(2) applied, ie where the review was for ignorance or mistake of fact. It is clear from the tribunal's decision that it was addressed on the basis that regulation 64A(2) *did* apply.

9. The tribunal accepted the whole submission, and although its decision may not have been as perfectly expressed as might have been desired, it did its best with the unexpected argument that had been put to it and awarded the appellant arrears of carer premium back to 7 9 91.

10. The appellant appealed on 3 grounds. He complained that the tribunal should have investigated whether there might have been an income support decision closer to 1 10 90 than 7 9 92. He complained that it had not considered an ex gratia payment, given his allegation of misinformation by the DSS at an earlier stage (which may have been what led to the award of ICA being backdated). And he cited CSIS/83/94, which had held that an adjudication officer's decision could be reviewed and revised as made in ignorance of or under a mistake as to a material fact, even though that fact did not exist at the date of the decision.

11. As did the adjudication officer now concerned, I reject all these grounds. The presenting officer had clearly taken the trouble to investigate the appellant's claim history, and I see no reason to doubt that if he had found an earlier relevant decision than the one of 7 9 92, he would have said so. No decision earlier than 1 10 90 would have been relevant (eg the review awarding the appellant disability premium from 30 : 90), because until 1 10 90 the appellant could not be treated under regulation 14B of the Income Support Regulations as "in receipt" of ICA, and nor would he until that date have been entitled to carer premium in addition to his disability premium. It is therefore difficult to see what would have been gained by the tribunal adjourning for further investigation.

12. The question of ex gratia payments is not one for the tribunal, which has no power to order such a payment even if satisfied that there may be grounds for one. If an appellant believes there are such grounds, he must take the matter up with the DSS direct.

13. As for CSIS/83/94, that decision reflected DSS practice as already applied in the appellant's favour, and would not have helped him further in the absence of an earlier relevant decision. But in any event, it has been held on appeal to the Scottish Court of Session (whose decisions in social security matters are binding on English adjudicating authorities) to have been wrong, and it is this case, *Chief Adjudication Officer v Combe* (19 6 97), which in my view correctly declares the law and renders the present tribunal's decision, and the

adjudication officer's submission on which it was based, wrong. The Court held there can be neither ignorance of, nor a mistake as to, a fact (a later award of another benefit) which does not exist at the time a decision is made.

14. Mr Combe was awarded income support on 18 12 91. On 15 4 92 he claimed disability living allowance (DLA), and on 9 9 93 he was awarded it at the middle rate, backdated to 15 4 92. His income support award was then reviewed and revised to include severe disability premium, to which he was entitled by virtue of receiving middle rate DLA and living alone. However, as the review was triggered by a change of circumstances under s25(1)(b) of the Administration Act, the adjudication officer awarded only 12 months arrears, back to September 1992, instead of backdating the premium to the start date of the DLA award. The appellant could not take advantage of regulation 64A(2)(c) lifting the time-bar on arrears under regulation 69 because this applies only where the review is based on ignorance or mistake of fact under s25(1)(a).

15. The Court of Session held that it was impossible for an adjudication officer to be "in ignorance" under s25(1)(a) of a fact which did not exist at the time of his decision. The same subsection also refers to a mistake as to a material fact. This "plainly refers to a material fact in existence at the time of the decision", which "strongly suggests that the earlier part of the paragraph (sic), in its reference to 'ignorance', has a similar application". Moreover s25(1)(b) (change of circumstances) "would be otiose if paragraph (a) were read as capable of embracing any fact which came into existence at any time after the original decision. The same consideration would also apply in regard to paragraph (c)" (s25(1)(c) - anticipated change of circumstances).

16. Because of this, regulation 64A(2), which is confined to reviews under s25(1)(a), could not help the appellant, who was limited to 12 months arrears by regulation 69.

17. The facts in *Combe* differ from those in the present case in one respect. In *Combe*, the only earlier income support decision available for review, that of 18 12 91, was made when the appellant could not be treated under paragraph 14B of Schedule 2 to the Income Support Regulations as being "in receipt" of the relevant benefit (middle rate DLA). He did not claim it until 4 months later, and there was no possibility under the law governing DLA of backdating the award to any period earlier than the date of claim. The present appellant's ICA award was backdated to a date earlier

than the income support decision of 7 9 92, so that at that date Schedule 2, paragraph 14B was capable of applying to him.

18. But I am unable to read the observations in *Combe* on the ambit of s25(1)(a) as confined to the facts of that case. In the present case too, the material fact of the, albeit backdated, ICA award did not come into existence until 1994. The "evidence" of it, in the form of communications from the ICA unit to the local office, did not exist at the date of the 7 9 92 decision and could not have been obtained at that date - for the simple reason that the award, which was the material fact, had not then been made, nor even applied for. The fact that the appellant was able to backdate his ICA award, perhaps because he had been wrongly advised initially, cannot in my view make a difference.

19. I appreciate, as did the Commissioner in CSIS/83/94, that the provisions I have been discussing can bear arbitrarily on individual claimants who may be the victims of delays in the benefit system or, as is contended to be the case here, of positively wrong advice from the DSS. I also appreciate that the DSS practice followed (at least partly) by the presenting officer in this case was an attempt to interpret the regulations as benevolently as possible towards claimants so placed at a disadvantage. But the apparently unfair results follow from the structure of the Act and Regulations.

20. The result in this case is that the tribunal was wrong in accepting the presenting officer's submission. The appellant's income support award could only, on the facts known to me, have been reviewed and revised so as to take into account the ICA award once that award was made, and later backdated, in 1994, and the reviews could only be on the ground of successive change of circumstances under s25(1)(b). Regulation 64A(2) had no application, and regulation 69(1)(a) limited the period for which arrears could be awarded to 12 months back from the dates the reviews were requested. As to this, I observe that the first review decision, made on 6 6 94, purported to award arrears of carer premium back to 26 4 93, to coincide with the initial ICA backdating. This appears to have been wrong. The notification from the ICA unit at page T1E may be taken to have been a "request" for a review of income support, but this was dated 11 5 94 and there is no indication of when it was received in the local office (nor why it took so long to be acted on). The date of such receipt would be the start date for backdating, which would limit arrears to a date in May, rather than April, 1994. However,

this is *de minimis* as well as academic, so the date I have adopted in paragraph 1 of this decision is 26 4 93.

21. The adjudication officer now concerned with this appeal has submitted that the tribunal was indeed entitled to review the decision of 7 9 92 under s25(1)(a), but that the material fact of which the adjudication officer was unaware was the change of circumstances (since the last pre-1 10 90 award) constituted by the backdated award of ICA coming into effect on 1 10 90. The evidence of that change of circumstances would be the later award. The adjudication officer would therefore have been reviewing that last award for change of circumstances under s25(1)(b), so that he would correctly have applied the regulation 69 limitation on the arrears payable. Under regulation 64A(1), the tribunal could only give the decision the adjudication officer could have given on the decision it was reviewing, so its decision too was properly subject to regulation 69. On this basis, the adjudication officer now concerned invited me to dismiss the appeal, the tribunal's decision having been correct, although not fully reasoned.

22. I admire his ingenuity, and hope I have done justice to his argument, but given the decision in *Combe* I cannot accept it. Indeed, the incongruity of reviewing the same decision under ss25(1)(a) and 25(1)(b) successively reinforces the correctness of the *Combe* decision.

23. With effect from 7 4 97, regulation 63 of the Adjudication Regulations (formerly regulation 69) has been amended by the insertion of paragraph 1A. This provides that

A determination on a claim or question relating to income support may be revised on a review so as to ...increase the claimant's applicable amount...in respect of a period which falls more than one month [the current normally permissible backdating period] before the date the review was requested...where

- (a) the reason for the revised determination is that the claimant has become entitled to another benefit; and
- (b) arrears of that other benefit are payable in respect of a period before the one-month period.

This provision is not limited to cases where the income support review is made under s25(1)(a), so would also cover a change of circumstances review under s25(1)(b). It places no limit on the period for which an increase of income support

can be paid. Nor does it appear to be limited to reviews of decisions made since the amendment took effect.

24. The appellant may therefore wish to request a further review of the adjudication officer's decision of 21 11 94, which confirmed entitlement to carer premium as from 1 10 90 but denied payment of arrears earlier than 26 4 93, with a view to securing payment of arrears from 1 10 90 to 6 9 91. I can of course give no guarantee of success, nor can I deal with the matter myself under s36 of the Administration Act as a question first arising on this appeal. I have no review request before me which post-dates 7 4 97, and any earlier document could not take advantage of this new provision.

(signed) Christine Fellner
Deputy Commissioner

Date: 13 February 1998