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Commissioner's File: CIS/767/94

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

[ORAL HEARING]

1. The claimant's appeal is allowed. The decision of the Leicester social security appeal tribunal dated 13 April 1994 is erroneous in point of law, for the reasons given below, and I set it aside. The appeal is referred to a differently constituted social security appeal tribunal for determination in accordance with the directions given in paragraphs 19 to 22 below (Social Security Administration Act 1992, section 23(7)(b)).

2. The claimant was born on 18 June 1931. He has been in receipt of invalidity benefit since 1974. He received supplementary benefit for many years, but according to the adjudication officer's written submission to the appeal tribunal, that entitlement ceased from 25 April 1988. However, he was not entitled to income support from 25 April 1988 because his income of £46.65 per week invalidity benefit exceeded his income support applicable amount of £46.45 (personal allowance for a single claimant, £33.40; disability premium, £13.05). The date of 25 April 1988 looks odd and it might be interesting to know if the claimant might have been able to gain some benefit from the Income Support (Transitional) Regulations 1987, but those matters are not directly before me.

3. The claimant made further claims for income support on 15 December 1988, 1 May 1991 and 10 July 1991. All three claims were disallowed on the ground that the claimant's income exceeded his applicable amount. The position on 15 December 1988 was the same as on 25 April 1988. On 1 May 1991, the claimant's applicable amount was £56.30 (personal allowance for a single claimant, £39.65; disability premium, £16.65) and his invalidity benefit was £58.90 per week. On 10 July 1991, his applicable amount was £58.10 (personal allowance for a single claimant, £39.65; pensioner premium, £18.45) and his invalidity benefit was still £58.90 per week.

4. On 19 June 1993 the claimant obtained an income support

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claim form from the Leicester City Council Benefits Campaign. He completed and signed it on the same day. It was received in the local office of the Department of Social Security on 22 June 1993. Notification was apparently sent out on the same day that the claimant was entitled to income support of £3.95 per week from 22 June 1993. His applicable amount of £67.55 (personal allowance for a single claimant, £44.00; pensioner premium, £23.35) exceeded his invalidity benefit of £63.60 per week.

5. In a letter dated 5 July 1993 the claimant asked that his entitlement should be backdated for 24 months prior to the award. He said that the reason was that he was refused benefit a number of years ago and that that reasonably lead him to believe that he was not able to qualify for income support. On 18 November 1993 the adjudication officer issued the decision that the claimant was not entitled to income support for the period from 18 June 1991 to 21 June 1993 because he had not shown good cause for the failure to make a claim before 22 June 1993.

6. The claimant appealed. In the written submission on form AT2, the adjudication officer supported the initial decision on the ground that the claimant was aware from his experience of the benefit system that all social security benefits increase in April of each year. As on the claim of 10 July 1991 the claimant's income exceeded his applicable amount only by 80p, it was unreasonable for him not have made another claim in April 1992 or to have made enquiries. In any case there could be no entitlement to benefit for a period earlier than 12 months before 22 June 1993.

7. At the hearing before the appeal tribunal the case made by the claimant was that when he made his claim after reaching the age of 60 he was told that he was getting what he was entitled to and that he did not claim before 19 June 1993 because he thought that he was not entitled. He thought he had to wait until he was 65.

8. The appeal tribunal dismissed the claimant's appeal. Its findings of fact set out the sequence of claims and their results and continued:

"His reason for delay in claiming was that he was "in the dark" and thought he could not claim again until his 65th birthday."

The appeal tribunal's reasons for decision were (preferring the handwritten version):

"A claimant's ignorance of his right to claim what he is entitled to does not, of itself, constitute continuous good cause for delay in claiming. It is a claimant's duty to take reasonable steps to obtain the necessary information and to act accordingly. This [the claimant] failed to do."

9. I granted the claimant's application for leave to appeal to the Commissioners. In the submission dated 5 February 1995 the



adjudication officer then concerned with the case supported the appeal on several grounds. He appeared to agree with the claimant's representative that the appeal tribunal had failed to make adequate findings of fact as to whether the claimant was aware of the different rates of benefit increases for different benefits and had failed to explain why it was reasonable to expect the claimant to obtain further information. He pointed out that the appeal tribunal had wrongly identified the period over which good cause had to be proved, since the claim for the period from 18 June 1991 to 21 June 1993 was not made until 6 July 1993. He also submitted that, in accordance with paragraph 17(iii) of Commissioners' decision R(SB) 17/84, the fresh claim made on 6 July 1993 following the refusal of benefit on 10 July 1991, which raised a question of prior entitlement, might as an alternative have been treated as an application for review of the decision of 10 July 1991. It was said that the appeal tribunal erred in law in the present case in not addressing the review question. However, it was submitted that, although the appeal tribunal had erred in law, the Commissioner should determine that there were no grounds to review the disallowance on 10 July 1991, that the claimant had not shown continuous good cause for the delay in claiming until 6 July 1993 and that there could be no entitlement for any period prior to 6 July 1992.

10. Not surprisingly, the claimant's representative, in his observations in reply dated 12 April 1995, supported the adjudication officer's submission that the appeal tribunal had erred in law, but took issue on the question of whether the claimant had shown good cause for the delay in claiming. He also took up the suggestion that the appeal tribunal should have considered the alternative remedy of review of the disallowance of income support from 10 July 1991 and submitted that there was a ground of review under section 25(1)(b) of the Social Security Administration Act 1992 in that there was a relevant change of circumstances on the uprating of benefit rates in April 1992.

11. The claimant's representative requested an oral hearing of the appeal. Because it seemed to me that there were particular difficulties in his submission about review on the ground of change of circumstances, I directed an oral hearing. The claimant did not attend the oral hearing. He was represented by Mr Toby Lintern of Leicester City East Welfare Rights. The adjudication officer was represented by Mr Lewis Varley of the Office of the Solicitor to the Department of Social Security. I am grateful to both representatives for their assistance.

12. I deal first with the question of the alternative remedy of review. I agree that the appeal tribunal, and the adjudication officer at earlier stages, should have considered whether the claimant's letter dated 5 July 1993 could be treated as a request to review the decision disallowing income support from 10 July 1991 as an alternative to its being treated as a claim for income support for the period from 18 June 1991 to 21 June 1993. Paragraph 17(iii) of R(SB) 9/84 says:

"In general, in the case of a fresh claim made after a



previous refusal and raising a question of prior entitlement such a claim may be treated as including a request for back-dating of the claim or an application for review as may be appropriate, bearing in mind the conditions applicable to each and the period of underlying past entitlement which may be established."

However, the difficulty in the present case is that it is plain and is not in dispute that the decision disallowing income support from 10 July 1991 was correct as at the date it was given and for many months afterwards. At that date the claimant's income from invalidity benefit exceeded his applicable amount. The decision was not given in ignorance of or under a mistake as to any material fact or in error of law. What is now being said for the claimant is that from the date in April 1992 when the rates of invalidity benefit and income support were altered by different amounts the decision became incorrect and that the alterations in the rates was a relevant changes of circumstances in relation to that decision. That argument cannot be correct. Although the alteration of the rates was a change of circumstances it was not a relevant changes of circumstances in relation to the decision disallowing income support from 10 July 1991. Since the change of circumstances was operative only from April 1992 it did not indicate that the decision disallowing income support was wrong or might have been different if the change of circumstances had been known of at the time (see Commissioners' decisions R(I) 56/54, paragraph 28, and R(G) 3/58, paragraph 10).

13. There is a fundamental difference between an award of benefit for an indefinite period, where a change of circumstances becoming operative after the date of the award and within the open-ended period covered by it will be relevant, and a decision disallowing benefit, where a change of circumstances becoming operative after the end of the period covered by the disallowance will not be relevant. A disallowance of benefit will not, unless it expressly covers some definite period, be effective beyond the date of the decision to that effect. Only a change of circumstances which is operative on a date within the period covered by the disallowance will be a relevant change of circumstances in relation to the disallowance, in the sense of indicating that the disallowance was or might be wrong for some part of that period. Thus in the present case the decision disallowing income support from 10 July 1991 appears to have been given on that date, or at any rate very shortly afterwards. That decision will have been effective to disallow income support from 10 July 1991 down to the date on which the adjudication officer gave the decision. That is why on a subsequent claim for income support benefit could be awarded without having to review the decision disallowing income support from 10 July 1991. The change of circumstances in April 1992 was not relevant to that decision.

14. There is nothing in paragraph 17(iii) or elsewhere in R(SB) 9/84 which is inconsistent with that approach. The Commissioners in that paragraph, and in paragraph 25 dealing with the circumstances of the case before them, carefully refer to the



period of underlying entitlement which may be established. If underlying entitlement cannot be established until a date subsequent to the period covered by a previous refusal, then, having regard to the conditions for review (and leaving aside the effect of provisions for advance awards), there is no point in treating a fresh claim as in the alternative a request to review the previous refusal. While I agree that in the circumstances of the present case the appeal tribunal should have given express consideration to the question of whether the claimant's letter dated 5 July 1993 could be treated as a request to review the decision disallowing income support from 10 July 1991, the only possible outcomes were to hold that it was not to be so treated or that there was no ground for reviewing the decision. It would be more straightforward, in circumstances like the present, to say that it was not appropriate to treat a letter or claim raising the issue of past entitlement as in the alternative a request for review.

15. I can then deal with the question of good cause quite shortly. Mr Varley raised as preliminary point the fact that, if the claimant's letter dated 5 July 1993 were to be treated as a claim for the period from 18 June 1991 to 21 June 1993, it was not made on a form approved by the Secretary of State for the purpose of income support. Therefore, he submitted, by virtue of regulation 4(1) of the Social Security (Claims and Payments) Regulations 1987, the question of whether the Secretary of State accepted the claim as having been made in sufficient manner had to be referred to the Secretary of State before there could be any adjudication on the claim. The appeal tribunal, and the adjudication officer at earlier stages, had not considered this problem because they treated the claim as having been made on 22 June 1993, when the income support claim form was received. But the claim made on that form was an unspecific one, with no reference to a past period. As held in paragraph 11 of R(SB) 9/84, such an unspecific claim on the official form may be taken to include a specific claim for a past period where the issue of back-dating is raised by or on behalf of the claimant before the adjudication officer determines the claim. In those circumstances, it seems that the claim for the past period should be treated as having been made as part of the unspecific claim (and therefore on the approved form) and on the same date. But such a process cannot operate if the issue of back-dating is raised after the adjudication officer determines the unspecific claim (see paragraphs 14 and 15 of my decision in CIS/371/1993). Thus in the present case a claim for income support for the period from 18 June 1991 to 21 June 1993 was not made until the letter dated 5 July 1993 was received.

16. In those circumstances, I might well have been inclined to hold that, since the question of back-dating raised in the letter dated 5 July 1993 had been referred to an adjudication officer, who had issued a decision on the question, the Secretary of State must be deemed to have been satisfied that the claim was made in sufficient manner (see the approach of the Tribunal of Commissioners to "unauthorised" claims in paragraph 8 of R(SB) 9/84). However, since the lack of evidence of acceptance by the



Secretary of State has been expressly raised and I am sending the appeal back to a new appeal tribunal, I have concluded that in order to avoid any doubt a decision by the Secretary of State should be obtained before the rehearing by the new appeal tribunal. The formal direction to that effect is in paragraph 19 below. The letter dated 5 July 1993 undoubtedly constituted a claim for the past period and on the information before me I can see no reason why it should not be accepted as having been made in sufficient manner.

17. So far as the good cause question itself is concerned, Mr Lintern and Mr Varley were in agreement that the appeal tribunal erred in law in failing to make findings of fact as to the state of the claimant's knowledge of how rates of income support and of invalidity benefit could fluctuate in relation to each other. Mr Varley expressly disassociated himself from paragraph 23(iv) of the adjudication officer's written submission dated 5 February 1995, in which it was asserted that from the claimant's experience of past claims he was aware of how entitlement was calculated and that the relative value of different benefits (ie income support and invalidity benefit) could fluctuate from year to year. There had been no finding to that effect and Mr Varley submitted that that was something which the new appeal tribunal would need to investigate. As a result of that failure the appeal tribunal did not explain why, in the light of the claimant's experience and the information which he had received, a reasonable person in that position would think that there was anything to enquire about. The appeal tribunal appeared not to make the enquiry described in paragraph 5 of Commissioner's decision R(P) 1/79, which was cited in the adjudication officer's submission on form AT2 (see also R(S) 3/79, R(S) 8/81 and R(G) 3/83).

18. For those reasons the appeal tribunal's decision dated 13 April 1994 must be set aside as erroneous in point of law. The appeal must be referred to a differently constituted social security appeal tribunal for determination in accordance with the following directions.

19. I direct the adjudication officer to refer to the Secretary of State the question of whether he accepts that the claim made in the claimant's letter dated 5 July 1993 was made in sufficient manner under regulation 4(1) of the Social Security (Claims and Payments) Regulations 1987 (Social Security Administration Act 1992, section 37(1)(b)). That reference is to be made immediately on the issue of this decision, so that the Secretary of State's decision is available to the new appeal tribunal which is to conduct the rehearing of the appeal.

20. Even if the Secretary of State were not to accept that claim to have been made in sufficient manner, there would have to be a rehearing to deal with the point that the letter dated 5 July 1993 might be treated as a request to review the decision disallowing income support from 10 July 1991, in the alternative to a claim for a past period. In considering that point, which may arise whatever the Secretary of State's decision, the new



appeal tribunal must bear in mind paragraphs 12 to 14 above.

21. If the Secretary of State does accept that the claim made in the letter dated 5 July 1993 was made in sufficient manner, the new appeal tribunal must determine the date on which that claim was made and ask itself whether the claimant has proved that throughout the period from the first day of the period claimed for down to the date of claim for the failure to make a claim. Thus the new appeal tribunal must consider the gap between claim made on 22 June 1993 and the making of the claim in the letter dated 5 July 1993 in the context of the need for continuous good cause. In relation to the period from 18 June 1991 onwards, the new appeal tribunal must investigate and make findings of fact as to whether the claimant was ignorant of any entitlement throughout the period in issue and as to what information he had actually received and what experience of the benefit system he had had. On that basis the new appeal tribunal must ask itself whether a reasonable person with that experience and having received that information would be expected to have made a claim or made enquiries about entitlement at any point during the period in issue (eg when benefits were uprated in April 1992). I need give no further directions about the general test of good cause to be applied, which is well-known. The new appeal tribunal must of course bear in mind the provision in regulation 19(4) of the Social Security (Claims and Payments) Regulations 1987 limiting the period for which entitlement to income support can be awarded to the 12 months before the date of the claim for the past period.

22. There must be a complete rehearing, on the basis of the evidence presented and submissions made to the new appeal tribunal, which will not be bound by any conclusions or findings expressed by the appeal tribunal of 13 April 1994. I must stress that the fact that the claimant has been successful in this appeal to the Commissioner carries no implications one way or the other as to what the final result in his case should be.

(Signed) J Mesher  
Commissioner

Date: **4 OCT 1995**