

*W. H. C. J.*

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My decision is as follows. It is given under section 23(7)(a)(i) of the Social Security Administration Act 1992.

- 1 The decision of the Portsmouth Social Security Appeal Tribunal held on 11th June 1997 is erroneous in point of law: see paragraphs 10 and 11.
- 1.2 Accordingly, I set it aside and, as I can do so without making fresh or further findings of fact, I give the decision that the tribunal should have given.
- 1.3 My decision is that the claimant is not entitled to payment of Income Support for any period earlier than 30th July 1995, either on the basis of a claim for Income Support or a review of the decision terminating her entitlement in February 1994.

#### The appeal to the Commissioner

- 2 This is an appeal to a Commissioner against the decision of the tribunal brought by the claimant with the leave of the tribunal's chairman. The adjudication officer supports the appeal, although not in a way that would benefit the claimant.

#### The history of the case

- 3 In 1994, the claimant was in receipt of both Income Support and Disability Living Allowance. Her entitlement to Disability Living Allowance terminated with the result that she ceased to be entitled to Income Support.
- 4 In March 1996, her entitlement to Disability Living Allowance was reinstated from and including 7th February 1994.
- 5 On 2nd August 1996, a letter was received from the claimant's CAB adviser stating that the claimant wished to claim Income Support. The letter asked that it should be treated as a claim backdated to 7th February 1994 or that the claimant's request of 4th November 1993 should be treated as a claim for Income Support. The letter of 4th November 1993 clearly and only refers to entitlement to Disability Living Allowance.
- 6 The claimant also claimed Income Support. The adjudication officer's submission to the tribunal stated that the claim was made on 14th August 1996. A letter from the CAB dated 23rd September 1996 states that a claim was sent to the Department on 19th August 1996. There is no copy of a claim form in the papers.
- 7 The CAB's letter of 23rd September 1996 also asked for a review of the claimant's "original claim". This request was repeated in a letter dated 10th December 1996 in which the ground for review was said to be error of fact in that the adjudication officer who terminated the claimant's award of Income Support was mistaken as to her entitlement to Disability Living Allowance. The request was again made in a letter dated 15th January 1997.

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8. In January 1997, Income Support was awarded. According to paragraph 5.3 of the submission to the tribunal, the award was made with effect from 30th July 1995. It appears from the submission to the tribunal that the award was made on review. The CAB's letter received on 2nd August 1996 was treated as the application and it was treated as made on 30th July 1996. I do not know what decision, if any, was made on the claim for Income Support.

9. That part of the adjudication officer's decision that was reproduced in Box 1 of Form AT2 as the decision under appeal was that Income Support was payable from 31st July 1995 (rather than 30th July 1995), but that no amount of Income Support was payable for the inclusive period from 7th February 1994 to 30th July 1995.

#### **The tribunal's decision and the errors of law**

10. The tribunal's decision was "To disallow the appeal." The summary of grounds issued with the decision dealt with the case as one involving a claim rather than a review. This is an error of law, because the tribunal had before it a decision given on review.

11. The tribunal's statement of the reasons for its decision and of its findings of material facts refers to the request for review, but then deals with good cause, which is only relevant to claims, before reverting to the limitations on payment on review. This confusion between factors relevant to claims and reviews is another error of law.

#### **A backdated claim**

12. In addition to the normal conditions of entitlement, there are two limitations on a backdated claim for Income Support. The first is that the claimant must show good cause for the delay in claiming: see regulation 19(2) of the Social Security (Claims and Payments) Regulations 1987. The second is that there can be no entitlement for any period earlier than 12 months before the actual date of claim: see section 1(2)(b) of the Social Security Administration Act 1992.

13. If the claimant's case is considered as a claim and her claim was treated as made on 30th July 1996, she could not be entitled to Income Support for any period earlier than 30th July 1995.

#### **A review**

14. In addition to the normal conditions of entitlement, there are two limitations on a review of Income Support.

#### *Grounds for review*

15. The first limitation is that there must be grounds to review the decision. The grounds most likely to arise are (i) that the officer who made the decision was mistaken or ignorant of some material fact or (ii) that there has been a change of circumstances (for example, some improvement or deterioration in the claimant's disablement) since the decision was made.

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16. The reason (to use a neutral term) that led to the reconsideration of the claimant's entitlement to Income Support was the retrospective change in her entitlement to Disability Living Allowance.

17. The adjudication officer who terminated the award of Income Support was not mistaken or ignorant of any fact at the date the termination was made, because it is not possible to be ignorant or mistaken about a fact that at the time is only in the future: see the decision of the Inner House of the Court of Session in Scotland in Chief Adjudication Officer v. Combe (19th June 1997) applied by the Commissioner in CSIS/80/1995.

18. The appropriate ground for review was that the retrospective award of Disability Living Allowance constituted a retrospective change of circumstances relevant to the claimant's entitlement to Income Support.

19. The adjudication officer submits to the Commissioner that it is not possible to review a termination of an award of benefit on the ground of a change of circumstances. The officer relies on the decision of the Commissioner in CIS/767/1994. I reject that submission. I respectfully agree with everything that the Commissioner there said about reviews of disallowances of benefit, but what he said does not apply to this case. In order to explain why, I have to set out the nature of decisions by adjudication officers.

20. Awards of benefit are usually made for an indefinite period: see regulation 17(1) of the Social Security (Claims and Payments) Regulations 1987. Decisions refusing claims or terminating existing awards are not made for an indefinite period, although they are sometimes worded as if they were. The adjudication officer or tribunal has, on general principles, to consider the case down to the date of decision. The refusal or termination only governs the period from the date of claim down to the date of decision.

21. It is not permissible for there to be in force at the same time two decision relating to the same period, even if they are to the same effect: see the decision of the Tribunal of Commissioners in R(I) 9/63, paragraph 18. If refusals and terminations had continuing effect beyond the date on which they were made, any subsequent claim would have to take effect as an application for review. That is not the practice of adjudication officers and, so far as I know, it has never been suggested that it should be.

22. I can now explain what the Commissioner did and did not decide in CIS/767/1994. The Commissioner held (paragraphs 12 to 14) that a change of circumstances that became operative outside the period covered by a decision refusing a claim did not provide a ground for review of that decision, because it did not affect the correctness of the decision. In this case, the change that occurred was retrospective in effect so that it became operative in the period covered by the decision terminating entitlement to Income Support.

23. If the claimant's case is considered as a review, there were grounds to review her entitlement to Income Support from February 1994.

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*Limitations on payment*

24. However, it is necessary also to consider the second limitation that applies on review. A decision may not be reviewed so as to make Income Support payable for any period more than 12 months earlier than the date of the application for the review: see regulation 63(1) of the Social Security (Adjudication) Regulations 1995. This is similar to the limitation on claims under section 1 of the Social Security Administration Act 1992, except that (i) it relates to payability rather than entitlement and (ii) it is subject to exceptions.

25. In particular, it is subject to the exceptions in regulation 57(1) and (2) of those Regulations. However, those exceptions only apply where the review is carried out on the grounds of mistake or ignorance of fact. As I have explained in paragraph 17, the review in this case could not be carried out on those grounds. So, the exceptions do not apply.

*Conclusion on review*

26. If the claimant's case is considered as a review and her application was treated as made on 30th July 1996, she could not be entitled to payment of Income Support for any period earlier than 30th July 1995.

**Conclusion**

27. So, whether the claimant's case is considered as a claim or as a review, she has received payment for the maximum period to which she could be entitled. Although the tribunal's decision was erroneous in law and must be set aside, I am able to give the decision that the tribunal should have given without fresh or further findings of fact. That decision is set out in paragraph 1.3.

**Signed:** Edward Jacobs  
Commissioner

**Date:** 5th January 1999