Multiple Claims – Procedure to be Followed – MAT/DAT Challenge CPAG.

59/94

MR/TEMP/2

Commissioner's File: CM/091A/1993

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Newcastle upon Tyne Medical Appeal Tribunal given on 24 November 1992 is erroneous in point of law. I set that decision aside because the tribunal had no jurisdiction to hear the claimant's appeal. The consequences of my decision are explained in paragraph 13 below.

2. This appeal concerns one claim for mobility allowance made as long ago as 7 December 1988 and another claim made on 22 April 1991. It turns on procedural points and I need to set out only the procedural history (adapted from a chronology helpfully provided by the Secretary of State's representative).

7.12.88 First claim for mobility allowance.

17.01.89 An adjudication officer disallows the first claim.

15.06.89 A medical board confirms the adjudications officer's decision on the medical questions.

2.11.89 A Medical Appeal Tribunal dismisses the claimant's appeal from the medical board.

22.4.91 Second claim for mobility allowance

8.7.91 An adjudication officer disallows the second claim.

29.7.91	A Commissioner sets aside the decision of the tribunal given on 2.11.89 and refers the case to a differently constituted tribunal.
11.12.91	A medical board confirms the adjudication officer's decision on the medical questions arising on the second claim.
14.4.92	A Medical Appeal Tribunal sits to reconsider the appeal on the first claim. They adjourn to enable the claimant to appeal out of time against the decision of 11.12.91 on the second claim.
24.11.92	The Medical Appeal Tribunal dismisses appeals on both claims.

3. The claimant now appeals with the leave of a Commissioner against the decision given on 24 November 1992, on the ground that the tribunal failed to record an adequate statement of their reasons for decision and so their decision is erroneous in point of law for want of compliance with regulation 31(4) of the Social Security (Adjudication) Regulations 1986. I do not think that an exhaustive analysis of the tribunal's decision will help the parties or the tribunal or tribunals who must now consider this case. Therefore, nothing is to be gained by my dealing with the ground of appeal in detail. I will merely state my conclusion that the statement of reasons, including the findings of fact, recorded by the tribunal is sufficient in the circumstances of this case. Although parts of the decision might have been clearer, I would not hold the decision to be erroneous in point of law on this ground. However, the tribunal or tribunals who must now consider this case should deal with any specific points raised by the claimant's representative who may wish to suggest that the last tribunal erred in point of fact.

4. The Secretary of State submits that there are more fundamental defects in the tribunal's decision. It is first submitted that the decision of the adjudication officer given on 8 July 1991 in respect of the second claim was a nullity on the ground that the first claim had not been finally determined. References are made to R(SB)4/85 and R(IS)21/93 for the proposition that entitlement for the period from 22 April 1991 was to be determined only on the claim made on 7 December 1988. In my view this submission is misconceived.

5. In the present case, the second claim was made after the first decision of a Medical Appeal Tribunal on the first claim. Therefore, the first claim would in fact have been finally determined before the second claim was made had there been no appeal to the Commissioner or had the Commissioner held the decision of the Medical Appeal Tribunal not to be erroneous in point of law. I asked the Secretary of State's representative

what would have happened to the second claim had the Commissioner dismissed the claimant's appeal. He submitted that the claim would have failed and cited paragraph 9 of R(S)1/83 in which a Tribunal of Commissioners said :-

> " Mr James next submitted that when a claim based on incapacity for an indefinite period, i.e. an open ended claim, has been made, a disallowance from the date of claim is effective to the date of the disallowance decision and disposes of the claim. There is no express statutory basis for this proposition but it is in accordance with the generally understood effect of such a decision. It is to be justified on the basis that where such an open ended claim has been made the claimant should be treated as continuing his claim until final determination of it. It will therefore persist during appeal procedure until a final decision is made whereupon the claim for the whole period is disposed of. If this were not so there would be potential prejudice to a claimant who did not lodge further claims during any protracted appeal procedure since he might find that subsequent claims were affected by the twelve month limitation in Section 82(2)(c) of the Social Security Act 1975."

However, in R(S)1/83, the appeal to the Commissioners was on a matter of fact as well as law. In the present case, as in all cases now, the appeal lay on a point of law only. The Commissioner had no power to deal with any factual matters relevant to entitlement to mobility allowance and the factual matters relevant to the claim from 22 April 91 could not have been determined at all on the first claim had the Commissioner not set aside the decision of the first tribunal and referred the case to another tribunal. The practical effect of the Secretary of State's submission would be that a claimant who failed in an appeal to a Commissioner would be unable to claim mobility allowance (or, now the mobility component of Disability Living Allowance) in respect of the lengthy period between a tribunal decision and a decision of a Commissioner. In R(S)1/83, the Tribunal were trying to avoid prejudice to claimants - not create it - and I do not accept that the existence of a pending appeal before a Commissioner can conceivably prevent a claim from being effective.

6. In any event, R(S)1/83 does not support the Secretary of State's submission. The Tribunal had before them a case in which a claimant had not made a further claim for benefit. It is wrong to regard their view that further claims were unnecessary as implying that further claims were impermissible. Indeed the possibility of further claims was expressly recognised by the Tribunal in paragraph 11 of their decision.

" A problem arises in relation to any further claims for the same benefit which may be submitted for an overlapping period. If such a claim is submitted after a final disposal of an original open ended claim it will, so far as overlapping, be precluded from adjudication on the merits by the rule of <u>res judicata</u>. See R(I)9/63 paragraphs 24 and 25. In that situation the original decision can be reconsidered only if there are grounds for review. If submitted during a period when the original claim is under appeal a new claim cannot in our opinion be regarded as automatically terminating the running of the old claim although such termination can in our view be regarded as effected in certain circumstances. Thus if the new claim is supported by a medical report which identifies the occurrence of a material change in the claimant's condition and so places a terminal date upon the duration of the claimant's condition as assessed in connection with the original claim, a terminus to that running of that claim can be accepted as established. Again, if there has been no adjudication under the original claim upon the period covered by the new claim, the termination of the running of the original claim could be regarded as effected by the withdrawal, express or implied, of that period of claim from the original claim. Furthermore it appears to us that the allowance of a new claim by an award, which is unchallenged, made before the original claim is finally disposed of, should be regarded as terminating the running of that claim. The insurance officer has a statutory duty to deal with any new claim and may be required to do so before the date of the final decision of the original open ended claim. To minimise the risk of the possible emergence of conflicting decisions relating to overlapping periods it is obviously essential that details of any subsequent claims and any adjudication upon them should always be disclosed by the insurance officer to the Commissioner when an appeal is pending on an earlier open ended claim. "

The Secretary of State's representative submits that in the present case the claimant did not identify a material change in her condition when she made her second claim. However, this is an inquisitorial jurisdiction and no one asked her to do so. Furthermore, the Tribunal of Commissioners made it clear that there are other considerations.

7. In my view, the fundamental rule is that there must not be more than one decision in respect of any one benefit for any single period. The next most important considerations, which may sometimes conflict with each other, are that all decisions in respect of a benefit should, so far as possible, be made together to avoid inconsistencies and that decisions should be made expeditiously.

8. The rule that there should only be one decision in respect of any period has the effect that, when a second claim is determined before an appeal in respect of an earlier claim, the period to be considered by the tribunal on the appeal ends on the day before the first day considered on the second claim. It is the <u>determination</u> of the second claim which causes the period covered by the first claim to be ended - not merely the making of the second claim. Therefore, if the second claim has not been determined before a tribunal hears the appeal on the first claim, the whole period up to the date of the hearing must be considered by the tribunal and the second claim then lapses.

9. An adjudication officer has a statutory duty to determine a claim within fourteen days "so far as practicable". Where there is an appeal pending against an earlier decision on the same issue, an adjudication officer will often be entitled to say that it is impracticable to determine the second claim until the appeal has been determined (which will usually cause the second claim to lapse) so as to avoid a proliferation of decisions which may be inconsistent with each other. However, the adjudication officer must take account of the delay which may be caused if the tribunal is unlikely to determine the appeal quickly. More importantly, a change for the worse in the claimant's condition will often justify the determination of the second claim because the issue before the tribunal will be slightly different, at least for part of the relevant period. If a new claim does not disclose a deterioration in health, the adjudication officer should ask the claimant whether there has been such a deterioration. It will be a matter of judgement in each case whether an adjudication officer delays determining a claim and if he or she is considering doing so it will usually be appropriate to tell the claimant, explaining why and seeking the claimant's views. It will also be necessary for the adjudication officer to ensure that the tribunal has all documents relating to the second claim before them.

10. In the present case, the adjudication officer did determine the second claim and the decision was confirmed by the medical board. The tribunal sitting on 14 April 1992 were right to conclude that it was necessary for the claimant to appeal against the medical board's decision if benefit was to be awarded by the tribunal for any period after 21 April 1991. They were also right to recognise that it was desirable to adjourn the appeal on the first claim so that the two cases could be heard together. However, neither that tribunal nor the one sitting on 24 November 1992 took account of the complications arising from the introduction of the new system of adjudication under the Disability Living Allowance and Disability Working Allowance Act

1991 and the consequent transitional provisions.

11. So far as the appeal in respect of the period up to 21 April 1991 was concerned, the Commissioner had remitted the matter to a Medical Appeal Tribunal. However, because the appeal had not been determined by 6 April 1992, regulation 24(9) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 applied and the appeal could only continue to be heard by a Medical Appeal Tribunal if the claimant so consented. That required the claimant to be given the opportunity of withholding her consent (CM/124/1993 and CM/409/1993). She says that she was not given that opportunity and there is no evidence to contradict that assertion. It seems likely that she was not given the opportunity of withholding her consent due to an oversight arising from the procedural history of her case. I find that the consent necessary to give the tribunal jurisdiction to consider her appeal in respect of the period to 21 April 1991 had not been given. Accordingly, the decision in respect of that period must be set aside and the claimant must be asked to choose between a Medical Appeal Tribunal and a Disability Appeal Tribunal.

12. So far as the appeal on the second claim (in respect of the period from 22 April 1991) is concerned, it is necessary to consider regulation 24(7) and (8) of the 1991 Regulations.

> " (7) Any appeal on a medical question from a decision of a Medical Board which is made on or after 10 February 1992 shall be subject to adjudication in accordance with the provisions of the 1975 Act relating to Disability Living Allowance and the provisions of Section B of Part IV of the Social Security (Adjudication) Regulations 1986 shall be disregarded.
>
> (8) Section 100 D(1) of the 1975 Act shall apply to the appeal mentioned in paragraph (7) as if the decision appealed against was the decision of an adjudication officer given on review under Section 100A(1) of the 1975 Act and the appeal shall be to a Disability Appeal Tribunal."

I asked the Secretary of State's representative whether the words in paragraph (7) "which is made on or after 10 February 1992" refer to the "appeal" or the "decision". He submitted that they refer to the "appeal". I accept that submission which seems consistent with the general scheme of the regulation. The consequence is that the appeal against the medical board's decision on the second claim should have been heard by a Disability Appeal Tribunal rather than a Medical Appeal Tribunal.

13. I must therefore set aside the decision of the tribunal in respect of both claims. The appeal in respect of the period from 22 April 1991 must be considered by a Disability Appeal Tribunal.

The appeal in respect of the period up to 21 April 1991 may be considered by either a Medical Appeal Tribunal or a Disability Tribunal, at the claimant's election. Clearly it will be much simpler for all concerned if it is heard by a Disability Appeal Tribunal so that both periods can be considered by the same tribunal. The parties should ensure that the Disability Appeal Tribunal, who must in any event consider a period going right up to the date of hearing (unless another claim has been determined), are provided with-up-to date evidence. I hope that it will be possible for these claims to be considered quickly by the tribunal or tribunals. It is not satisfactory that six years should have elapsed before a case is finally determined.

(Signed) M. Rowland
Commissioner

(Date) **17 June 1994**