

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the sum of £232.90 overpaid to the claimant by way of supplementary benefit is not recoverable from her. The appeal is allowed.
2. I held an oral hearing of this appeal on 2 May 1989 at which the claimant was present. She was represented by Miss A. Pickerdon from the Birmingham District Citizens Advice Bureau and Mr J. Stacey of the Chief Adjudication Officer's Office represented the adjudication officer.
3. The claimant appeals to the Commissioner against the unanimous decision of the Greater Birmingham social security appeal tribunal, given on 19 November 1987, which upheld a decision of the adjudication officer, given on review, that £232.90 had been overpaid by way of supplementary benefit to the claimant and was recoverable from her by virtue of the provisions of section 20 of the Supplementary Benefit Act 1976.
4. Section 20 of the Supplementary Benefit Act 1976 was repealed by Schedule 11 to the Social Security Act 1986 but with effect from 6 April 1987. Section 53 of the Social Security Act 1976 was applied by Schedule 7 to the 1986 Act. For the purpose of this appeal I find it unnecessary to set out either section; suffice it to say that for the right of recovery by the Secretary of State to exist, a person must have misrepresented or failed to disclose a material fact and it must be shown that a payment of benefit was a consequence of the misrepresentation or failure to disclose. Misrepresentation and failure to disclose are alternatives and a claimant can be caught by one or the other. The original adjudication officer's decision was given when section 20 was the relevant law, but by the time the review decision was given section 53 of the Social Security Act 1986 was in force. However nothing turns upon this.
5. A daughter was born to the claimant on 16 December 1985. At that time she had been in receipt of supplementary allowance for some years. She claimed child benefit. She was awarded this from 23 December 1985 and a child benefit order book was issued to her with the first order dated 21 April 1986. However, her supplementary benefit entitlement was not revised from that date because the Department did not consider the question of doing so until, in response to a routine check, the claimant completed a form A2 in which she disclosed that she was receiving child benefit. On 19 January 1987 the original adjudication officer decided that an amount of £268.40 was overpaid to the claimant for the period from 21 April 1986 to 11 January 1987, and was recoverable from her because she had failed to notify the Department that she had been awarded child benefit for her daughter. The

claimant was notified of this decision by letter dated 30 January 1987 (page 52 of the case papers). Clearly the adjudication officer's decision was reached on the basis that the claimant failed to disclose the child benefit. The decision was reviewed and revised after the claimant had appealed in order to reduce the amount to £232.90. The claimant included the following grounds in her letter of appeal:

"The whole claim was dealt with at your Walsall Road office. You were well aware that I had made a claim for child benefit. I was not aware that I was not entitled to any additional money. The error was made by your office, not as a consequence of any failure on my part, and therefore is not recoverable under section 20."

The adjudication officer made his written submission to the tribunal in the course of which he argued that the material fact was the award of child benefit and not the claim for that benefit. He referred to the instruction on the claimant's order book which read

"You must let the Issuing Office know at once on the blue form A9 or by letter, if you acquire any income, benefit, allowance or pension which you have not already reported to the Issuing Office"

He submitted that as the claimant had signed orders in her supplementary benefit order book, commencing the period 21 April 1986, on which she stated that she had read and understood the instruction and that she had correctly reported any facts which would affect the amount of her payment. Such statements each misrepresented the material fact that child benefit had been awarded and put into payment on 21 April 1986. He then referred to the adjudication officer having reached a decision that the claimant had misrepresented a material fact. It is to be observed that the adjudication officer had based his decision not on misrepresentation but on failure to disclose.

6. The case for the claimant before the tribunal was that she was asked in December 1985 or January 1986 by an official in the Walsall office whether she had yet claimed child benefit. She told the official that she had not done so but that she was about to put in a claim. She sent her claim to the Walsall office who wrote to her on 16 January 1986 asking for the child's birth certificate to be sent to that office. A reminder was sent to the claimant dated 3 February 1986 which used the words "forwarding your child's original birth certificate for [name of child], so that I can proceed further with your claim for child benefit". A further reminder was sent on 24 March 1986. It is to be noted that all these letters bore the address of the Walsall Road office.

7. The members of the tribunal found as fact that the claimant made a claim for child benefit through the local office at Walsall Road and that that office forwarded it to the child benefit office at Newcastle. Benefit was awarded from 23 December 1985 and the first order for payment was dated 21 April 1986. They further found that the claimant continued to cash her supplementary benefit order book after she received child benefit, and she signed the order book to the effect that she had reported any change in her circumstances (which included changes in financial circumstances) but that the claimant did not notify the Department that she had been receiving child benefit from 21 April 1986. The members of the tribunal accepted that she believed the Department knew, or should have known, that she was receiving child benefit because her claim form had been sent by the Walsall office and she had supplied a birth certificate of the child. However in the view of the members the signing of the order book was a misrepresentation, although it may have been an innocent misrepresentation. They were of opinion that the fact that the local office sent the claim for child benefit to the child benefit office and knew of the birth of the child did not absolve the claimant from the duty of notifying the Department when she started to receive child benefit. The members held that there was misrepresentation by the claimant when she signed her supplementary benefit order book stating that there was no change in her financial circumstances, whereas she was in fact in receipt of child benefit.

8. Miss Pickerden has argued before me that the material fact in issue before the tribunal was that a child had been born to the claimant and that she had claimed benefit in respect of it. She submits that the tribunal erred in looking to the change in the claimant's financial circumstances, because of the payment of child benefit, as being the material fact. Miss Pickerden's argument is similar to that which was advanced to the Commissioner in CSB/727/1987. He rejected it in the following passage:

"8. It was further argued on behalf of the claimant that as she had already revealed the fact that she had made a claim for child benefit and one parent benefit, the actual receipt of the payments was not "a material fact" within section 20(1) of the Supplementary Benefits Act 1976. I reject this submission also. In my judgment whenever a recipient of supplementary benefit receives a new source of income, whether or not the recipient considers that it might have to be taken into account as a resource, the existence of that new source of income is a material fact and therefore would in the normal course have to be disclosed to the appropriate office of the DHSS."

The law on the topic is, in my respectful view, accurately set out in that passage and it provides the answer to the point taken by Miss Pickerden. It is true that the Commissioner referred to a note in the order book identical with that in the order book before me and said that he did not carry the matter much further. But he was then considering the question of failure to disclose and the claimant's belief was relevant there. In the case before me the decision of the tribunal was that recovery was required as a result of misrepresentation. If the adjudication officer had relied on failure to disclose then the claimant's belief would have been relevant and in the circumstances of the present case her appeal would have been likely to succeed.

9. The decision of the adjudication officer was based on failure to disclose, but it was open to the tribunal to substitute a decision based on misrepresentation, provided of course that the claimant had had a fair opportunity to deal with the altered case. There is authority for that proposition in R(SB) 40/84, where it was pointed out that, although a tribunal could not uphold a decision under section 20 on grounds different from the original decision, it was open to it to substitute a decision of its own, e.g. on grounds of misrepresentation where the original decision was found on failure to disclose. On examination of the record in the case before me it is clear that the tribunal made a decision on the basis of misrepresentation, indeed, the argument before the tribunal proceeded on the basis of misrepresentation. I put it to Mrs Pritchard whether the claimant's representative may have been misled in some way in view of the original decision of the adjudication officer, but she accepted that this was not so and that the case being answered before the tribunal was on the basis of misrepresentation. In R(SB) 40/84 the Commissioner referred to three safeguards which should be adopted by a tribunal when they intended to substitute a decision of their own founded upon misrepresentation. These safeguards are designed to ensure that a claimant has an opportunity of dealing with an altered case. The submission to the tribunal by the adjudication officer identified the misrepresentation which he relied upon. The whole case before the tribunal proceeded on the basis of misrepresentation and not failure to disclose. Manifestly the claimant had a fair opportunity of dealing with the question of misrepresentation, and I do not find fault with the decision of the tribunal on this aspect of the case.

10. If the case had proceeded on the ground of failure to disclose a material fact it would have been necessary to satisfy the tribunal that the disclosure by the claimant was reasonably to be expected; R(SB) 54/83. The Walsall office was an integrated office, and it is accepted by the adjudication officer that its address was stamped on the claimant's supplementary benefit book and that it was "the issuing office". It was this office which received the claimant's claim for child benefit. The instructions on her supplementary benefit book told her that she must let "the issuing office" know if she acquired any income, benefit, allowance or pension which she had not already reported to "the issuing office".

Like the Commissioner in CSB/727/1987 it seems to me that the claimant could on that wording justifiably think that she had already reported to the issuing office the child benefit, since she had told that office that it was claimed and was due, all the more so in the case before me because of the correspondence which was sent to her from Walsall office. However, the decision of the tribunal was based on misrepresentation. The members found that by signing the certificate on her supplementary benefit order book the claimant in effect stated that there was no change in her financial circumstances, and that this was a misrepresentation. The declaration on the order book (described by the tribunal as a certificate) is as follows:

"I declare that I have read and understand all the instructions in this order book, that I have correctly reported any fact which could affect the amount of my payment and that I am entitled to the above sum." (my emphasis)

What was the representation made in that declaration? It seems to me that it was no more than that the claimant had reported any fact that she understood should be reported, as a result of reading the instructions, and imports the claimant's belief as to whether or not she had already informed "the issuing office" of her child benefit. It was a representation as to what she believed, and it would appear from the evidence that she honestly believed at that time that she had already made disclosure to the issuing office and was not obliged to make further disclosure. The point turns on what was actually represented and not whether the representation was innocent or otherwise. The declaration guards against claimants failing to disclose material facts, but in my judgment it is of no assistance to the adjudication officer on the question of misrepresentation in the circumstances of the present case. In CSB/1006/1985 it was held that there was no misrepresentation where the declaration was "as far as I know the information on this form is true and complete" and where the claimant honestly believed that a resource was not available to him. Likewise in the present case the declaration is qualified and limited to what the claimant believes she has to disclose on the basis of the instructions given to her. It represents no more. I am satisfied that the tribunal were wrong in law to treat the statement as a representation of the actual material fact relied upon by the adjudication officer, and because of that error I set the decision aside. In exercise of my jurisdiction conferred upon me by section 101(5)(a)(i) I give the decision which the tribunal should have given. For the reasons which I have given earlier I am satisfied that the claimant did not misrepresent a material fact and the amount of £232.90 overpaid to her by way of supplementary benefit is not recoverable.

(Signed) J J Skinner
Commissioner

Date: 23 June 1989