

SUPPLEMENTARY BENEFITS ACT 1976

THE SOCIAL SECURITY COMMISSIONERS PROCEDURE REGULATIONS 1987
REGULATION 24(1)

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER - CORRECTION

Paragraph 1	Line 3	delete	"16 December 1988"
		insert	"21 April 1989"

(Signed) J. Mitchell
Commissioner

(Date) 11 March 1992

Commissioner's File: CSB/050/90

JM/SH/2

Commissioner's File: CSB/050/1990

SUPPLEMENTARY BENEFITS ACT 1976**APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A****QUESTION OF LAW****DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is a claimant's appeal, brought by leave of the Commissioner, against a decision of the social security appeal tribunal dated 16 December 1988. That decision confirmed a decision of the adjudication officer which, although originally issued on 27 July 1988, was - on a date which does not clearly appear from the papers - subsequently reissued in a slightly different form. (From the practical standpoint of the claimant, the effect of the two forms of the decision was identical). As I explain below, there was a defect in law in the manner in which the appeal tribunal recorded its aforesaid decision. In the circumstances of this case, however, I do not regard that defect as vitiating. My formal decision is, accordingly, that the decision of the appeal tribunal dated 16 December 1988 is not erroneous in point of law.

2. At the material time the claimant was aged about 47 and living with his wife and a non-dependent son. Since 1983 he had been intermittently in receipt of supplementary benefit during various periods of unemployment. On 28 August 1987 the Department of Health and Social Security sent to his wife arrears of invalid care allowance in the total sum of £2,915.50, covering the inclusive period from 24 December 1984 to 13 September 1987. (At or about the same time an order book was issued to the claimant's wife providing for payments of invalid care allowance at the rate of £23.75 a week from 14 September 1987.) Pursuant to regulation 11 (2)(a) of the erstwhile Supplementary Benefit (Resources) Regulations 1981, payments of invalid care allowance fell to be taken into account in full as an income resource of the relevant assessment unit. Accordingly, if, instead of receiving a large sum by way of arrears, the claimant's wife had been paid her invalid care allowance week by week as it fell due, the weekly sum to which the claimant would have been entitled by

way of supplementary benefit would have been reduced by exactly the amount of the weekly invalid care allowance.

3. Section 27 of the Social Security Act 1986 was designed to deal with this type of situation. It replaces the very similar provisions of section 12 of the Supplementary Benefits Act 1976. Section 27, on its face, is directed to income support. However, paragraph 2 of Schedule 7 to the 1986 Act provides that section 27 shall apply in the case of supplementary benefit. Subsections (2) and (4) envisage two distinct situations. Subsection (2) provides that a lump sum payment of arrears (such as was made in this case) may be abated by the amount of supplementary benefit which, although actually paid, would not have been paid had the benefit represented by the lump sum been paid, week by week, at the appropriate time. Subsection (4) covers the situation where such abatement could have been, but was not in fact, made. In such a case, of course, there will have been an overall overpayment of benefit; and the subsection provides that "the Secretary of State may recover it otherwise than by abatement". It is those words that apply to this case.

4. At this stage I make two comments:

- (a) There is nothing whatever unfair or unreasonable about subsection (4). It is inevitable that, in a social security system such as that which prevails in this country, benefit will from time to time fall to be paid in arrears. And it is equally inevitable that, from time to time, some other benefit will have been paid in sums exceeding those which would have been payable had there been timely, week by week, payment of the benefit represented by the lump sum arrears. Commonsense - not to say common justice - dictates that the relevant claimant should not be entitled to retain the whole of the sums paid to him (or to his assessment unit) by way of the two benefits. To put it another way: it would be quite inequitable were he to profit by the accident that a benefit fell to be paid in arrears rather than week by week, at the appropriate time.

- (b) None of this has anything to do with "fault". The claimant did not attend the appeal tribunal hearing. (He had written to explain that he did not wish to jeopardise a job which he had found.) But in writing, he has maintained vigorously that he has throughout acted with complete propriety and has punctually furnished the Department with all relevant information. That is undoubtedly correct. But it is section 53 of the Social Security Act 1986 which turns upon a claimant's misrepresentation or failure to disclose. Neither misrepresentation nor failure to disclose has any bearing whatever upon the application of section

27. Its application depends entirely upon what has actually happened; and that "what" is largely a matter of dates and arithmetic. By the same token, "fault" upon the part of the Department does not come into the picture.

5. On the relevant form AT3 the appeal tribunal expressed its surprised dismay at the fact that "the Invalid Care Allowance section released the substantial arrears totalling £2,915.50 to the claimant's wife in August 1987 without first checking whether or not supplementary allowance had been paid in the period covered by the arrears." In other words, the appeal tribunal was indicating that the situation should have been dealt with under subsection (2) of section 27 (ie by abatement of the arrears paid). But, quite correctly, the appeal tribunal did not allow that consideration to affect its decision. Subsection (4) precisely covered the situation. The subsection is quoted in the papers. For convenience, however, I repeat it here:

" (4) Where an amount could have been recovered by abatement by virtue of subsection (2) or (3) above but has not been so recovered, the Secretary of State may recover it otherwise than by abatement -

(a) in the case of an amount which could have been recovered by virtue of subsection (2) above, from the person to whom it was paid; and

(b) in the case of an amount which could have been recovered by virtue of subsection (3) above, from the person to whom the prescribed benefit in question was paid."

6. The function of the adjudicating authorities (amongst whom are numbered the appeal tribunal and the Commissioner) is simply to determine whether a given case does or does not fall within the scope of subsection (4) of section 27. Whether, when and how any recoverable sum is actually recovered is entirely a question for the Secretary of State."

7. In a submission dated 16 March 1990 the adjudication officer now concerned supports the claimant's appeal upon the sole ground that both the local adjudication officer and the appeal tribunal recorded that the relevant sum was recoverable from the claimant under section 27(2) of the 1986 Act. That was undoubtedly an error. As I have been at pains to demonstrate above, the recoverability falls under section 27(4). I have decided to treat that error as a slip. From the claimant's point of view, it makes no practical difference. The alternative procedure open to me would be to set aside the appeal tribunal's decision and replace it with a decision of my own which would - from the claimant's standpoint - have precisely the same effect. I have decided against that latter course. On the relevant form AT3 the appeal tribunal recorded both its findings of fact and its reasons for the decision carefully and lucidly. The claimant can

have been left in no doubt as to how the appeal tribunal came to its conclusion. If, in the final line of its recorded reasons, "27(4)" had been written instead of "27(2)" the decision would have been beyond all criticism. I very much doubt whether what I have referred to as "a slip" was even noticed by the claimant himself. As I have said in paragraph 4(b) above, his objection to the appeal tribunal's decision is founded upon the contention that he himself acted perfectly properly throughout. I have sought to explain why that is of no assistance to him in a section 27 case. He will now know that his case fell under section 27(4) and not section 27(2). It must be doubtful whether that will be of the slightest interest to him.

8. On the form OSSC 3 which he signed on 1 April 1990, the claimant refers to his having been allowed to retain a sum (which was actually £128.68) which appears to have been paid to him by Departmental error. The papers contain no particulars whatever in respect of that payment. It appears not to have fallen within the scope of section 27 at all. I assume that -

- (i) it did not fall within the scope of section 27;
- (ii) if recoverable at all, it would have had to have been recoverable under section 53;
- (iii) the sum was not paid in consequence of any misrepresentation or failure to disclose on the part of the claimant; and
- (iv) the sum was not, accordingly, recoverable from the claimant.

None of that, of course, affects the sum the subject of this decision.

9. The claimant's appeal is disallowed.

(Signed) J Mitchell
Commissioner

(Date) 3 February 1992