

Social Security Appeal Tribunals - finality of decisions; change of circumstances / change of law.

MJG/TEMP/3

Commissioner's File: CSB/112/1993

(5)

SUPPLEMENTARY BENEFITS ACT 1976

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A

QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Brueton Renée Patricia (Ms.)

Social Security Appeal Tribunal: Central London

Case No: 7 0752150

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 2 October 1992 (tribunal register number 7:0752150, relating to heating addition) as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to an entirely differently constituted social security appeal tribunal: Social Security Administration Act 1992 Section 23.

2. This is an appeal to the Commissioner by the claimant, a woman born on 20 April 1934. The appeal is against the unanimous decision of a social security appeal tribunal dated 2 October 1992, which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 15 September 1991 in the following terms,

" Entitlement to a higher rate of additional requirements for heating in the period February 1981 to February 1984 cannot be revised on review as the matter has previously been adjudicated on, i.e. review followed by revision has already been carried out."

3. The appeal was the subject of two oral hearings before me. The first was on 11 March 1994 after which I issued a Direction asking for further information (see below). The second was on

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3 June 1994. At both hearings the claimant was present and addressed me. She was not represented. The adjudication officer was represented by Miss J Smith of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to the claimant and to Miss Smith for their assistance to me at the hearings.

4. Briefly the history of this matter is as follows. On 22 May 1991 the Department received a document headed "Claim Form" which commenced,

" I think I was entitled to extra money from Supplementary Benefit before April 1988. The reason for my request is that the department have made a mistake as to a material fact when calculating my benefit. My needs were as follows:

.....

Extra Heating Costs because of ill health and accommodation which is difficult to heat from Feb 1981.

.....

Please treat this as a late claim for benefit back to my sixteenth birthday or the earliest date which I, or a member of my family, could have qualified for benefit. This request for a review uses Section 104(1A or B) and Reg. R72(1A or B) for backdating. In addition, please review all decisions relating to my availability for work."

This document was signed by the claimant. It also referred to a claim for hospital fares for a visit to the claimant's mother from May 1973 to May 1982. However that matter was separately dealt with ultimately by a social security appeal tribunal on 5 June 1992, whose decision is now the subject of a separate appeal to the Commissioner, I having given leave to appeal at the hearing before me on 3 June 1994.

5. In a letter to the claimant from the Department dated 15 September 1991 it was stated as follows,

"Before making a decision on whether a review of heating allowance is possible I carefully examined your past entitlement. Details were established as follows;

From 1981 onwards you received the lower rate of heating addition in respect of your poor health.

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From 1984 onwards you received a higher rate of heating addition to reflect problems with damp accommodation as well as poor health.

When the visiting officer came to see you in 1985 it was accepted that your accommodation had been hard to heat as long ago as 1981. Accordingly the adjudication officer reviewed your entitlement and awarded arrears back to March 1984. Unfortunately at that time he was prevented from paying the increase back to 1981 due to legislation then in force [see below]. From the above account it can be seen that you have already had a review of entitlement covering the period you have asked about. Therefore, I cannot therefore repeat this review and must refuse your request."

6. The adjudication officer then gave the decision issued on 15 September 1991 referred to in paragraph 2 above and the social security appeal tribunal gave its decision (now appealed against to the Commissioner) dated 2 October 1992 (there have been earlier adjournments) referred to in paragraph 2 above.

7. By the time the matter got to the social security appeal tribunal on 2 October 1992, it had been established that the claimant had earlier appealed to a social security appeal tribunal against the 1985 adjudication officer's decision which is referred to in the letter of 15 September 1991. That social security appeal tribunal in 1985 had given a decision confirming the adjudication officer's decision allowing back-dating but only for twelve months. However, the record of the 1985 tribunal decision was not before the tribunal of 2 October 1992. In fact that record has been produced only after a direction by me at the conclusion of my hearing on 11 March 1994.

8. At the hearing before the tribunal on 2 October 1992, the claimant was represented. The representative is recorded as drawing attention to regulation 72 of the Social Security (Adjudication) Regulations 1986 which so far as is material provided (it has since been revoked) as follows,

" Exemption from Limitations on Payment of Arrears of Benefit

72(1) ...Nothing in this section shall operate so as to limit the

amount of benefit or additional benefit that may be awarded on a review of a decision if the adjudicating authority making the review is satisfied either -

- (a) that the decision under review was erroneous by reason only of a mistake made, or of something done or omitted to be done by an officer of the Department of Health and Social Security or of the Department of Employment acting as such, or by an adjudicating authority or the clerk or other officer of such an authority, and that the claimant and anyone acting for [her] neither caused nor materially contributed to that mistake, act or omission; or

- (b) that where the grounds for review are that the decision was given in ignorance of or was based on a mistake as to a material fact, those grounds are established by evidence which was not before the adjudicating authority which gave the decision; that the claimant and anyone acting for his could not reasonably have produced that evidence to that authority at or before the time the decision was given, and that it has not been produced as soon as reasonably practicable."

That regulation therefore constituted an exception to the normal twelve months' limit on arrears payable on a revision on review, provided for by regulation 69 of the 1986 Regulations.

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9. The representative submitted to the 1992 tribunal that there had been a change in the law because the previous set of Adjudication Regulations i.e. the Social Security (Adjudication) Regulations 1984 had contained a similar twelve months' limitation rule in regulation 87 of the 1984 Regulations but did not contain any provision for extension of the twelve months' period, unlike regulation 72 of the 1986 Regulations which was new in 1986. It was therefore submitted to the tribunal of October 1992 that there had been a "relevant change of circumstances" within the meaning of what is now section 25(1)(b) of the Social Security Administration Act 1992, justifying a review on that ground.

10. The tribunal in its reasons for dismissing the claimant's appeal said on this point,

The tribunal disregarded the alleged change in circumstances i.e. the change in law after the earlier [i.e. 1985] tribunal decision and considered that it was not open to them to review the earlier decision"

They were thus acceding to a submission made to them by the adjudication officer that the matter was res judicata i.e. had already been decided and could not be brought up again for decision by another tribunal.

11. At the hearing before me on 3 June 1994, Miss Smith submitted that that ruling was correct and that res judicata applied, the matter already having been decided in 1985 by a social security appeal tribunal. She also submitted that the same consequence occurred as a result of what is now section 60 of the Social Security Administration Act 1992 reading, so far as is material,

Finality of decision

60(1) Subject to the provisions of this Part of this Act, the decision of any claim or question in accordance with the foregoing provisions of this Part of this Act shall be final; and subject to the provisions of any regulations under Section 58 above, the decision of any claim or question in accordance with those regulations shall be final.

(2) Sub-section (1) above shall not make any finding of fact or other determination embodied in or necessary to a decision, or on what it is based, conclusive for the purpose of any further decision".

12. To decide whether those submissions by Miss Smith are correct, one must look at the actual record of the decision of the 1985 tribunal. That tribunal gave its decision on 6 June 1985. Its findings of fact were as follows,

" The appellant lives alone in local authority accommodation. On 11/3/85 the appellant was visited at home, and as a result of this visit was awarded additional requirements for heating and laundry costs, backdated 52 weeks (from 15/3/85.) The appellant appealed against the limitation of the backdating to 52 weeks. "

13. The tribunal dismissed the claimant's appeal and simply gave as their reason "Regulation 87 of the Social Security (Adjudication) Regulations [1984]."

14. That decision was of course correct on the law as it was at the time though its reasons for its decision are not adequate. The question is however whether that decision constituted res judicata in relation to the claim (so called but really an application for review) made by the claimant and received by the department on 22 May 1991. Also in issue is the question whether the decision of the tribunal dated 6 June 1985 should be "final" in relation to the matters before the tribunal in October 1992 (now appealed against).

15. In my judgement the 1985 tribunal decision did not constitute res judicata in relation to the matters before the 1992 tribunal. The 1985 tribunal had no opportunity to give any ruling on the factual questions set out in detail in regulation 72 of the 1986 Adjudication Regulations for the very good reason, of course, that the regulation was not in force at that time, nor was there any similar predecessor regulation.

16. It therefore follows that the claimant would be entitled to have the matter re-opened when the law changed by the making of regulation 72 of the 1986 Regulations, since the questions in regulation 72 (as to mistake) were certainly not considered by the 1985 tribunal.

17. The further question then arises whether the 1985 tribunal's decision was final in relation to the questions raised by the claimant in the 1991 application or not. This question presents some difficulty. It is clear of course that the 1985 tribunal had not given any decision on the "question" of whether there should be more than twelve months backdating under regulation 72 of the 1986 Regulations but had they given a decision "of any claim". In my judgement what is meant by "claim" in this context must mean the 'claim' for a review of entitlement and does not refer to the original claim for supplementary benefit. I have reached this conclusion not because the document received on 22 May 1991 was headed "claim form" but simply because 'claim' in section 60(1) must in commonsense have this meaning where what the 1985 tribunal was giving a decision on was not the original

supplementary benefit claim but on the 'claim' to have a review and revision of that claim.

18. It therefore follows that when the claimant made a fresh 'claim' for review received by the department on 22 May 1991 that was not a matter that had been adjudicated on previously. Therefore the claimant was entitled to have the provisions of regulation 72 of the 1986 Regulations taken into account. That was not done either by the adjudication officer in his decision issued on 15 September 1991 or by the social security appeal tribunal in its decision dated 2 October 1992. That omission in my view constitutes an error of law because I consider that the tribunal wrongly directed itself that it had no power to look into the matter because of the earlier tribunal decision in 1985.

19. I therefore direct the new tribunal that it must consider whether or not on the facts of this case the provisions of regulation 72 of the 1986 Adjudication Regulations allow a back dating earlier than 15 March 1984 (the date to which there had been an earlier backdating of a claim for higher heating allowance) and if so to what date. The claimant suggests that February 1981 is the appropriate date. Before of course making a final decision about whether or not there should be more than twelve months backdating under regulation 72, the new tribunal will wish to be satisfied that on the facts of the case there was entitlement for the relevant period to the higher rate heating allowance, though this does appear to have been accepted up until now by all concerned.

20. I ought also to say that in my view the social security appeal tribunal of 2 October 1992 was also erroneous in law in its statement in its reasons,

" The tribunal disregarded the alleged change in circumstances i.e. the change in law after the earlier tribunal decision".

That was a matter that had been raised before them by the claimant's representative and although it was not of course raised in the original 'claim' for a review (received on 22 May 1991) it was nevertheless a matter before the tribunal and which they could deal with in their discretion under what is now section 36 (1) of the Social Security Administration Act 1992, providing as follows,

" Questions first arising on appeal

36(1) Where a question which but for this section would fall to be determined by an adjudication officer first arises in the course of an appeal to a social security appeal tribunal... the tribunal ... may, if they .. think fit, proceed to determine the question notwithstanding that

it has not been considered by an adjudication officer"

21. Clearly the question as to whether or not the adjudication officer's review decision (limiting to twelve months arrears) of 1985 could be the subject of further review on the ground of relevant change of circumstances was a matter which the 1992 tribunal could have dealt with under their power in section 36(1) of the 1992 Act. Indeed it could well have caused the 1992 tribunal to have arrived at a different conclusion. That of course would be a different route but in my view is equally available as well as the route which I have indicated in the earlier parts of my decision.

22. The reality of the matter is therefore that the new tribunal does in my judgement have the power to consider the question whether the original award of supplementary benefit can be varied by revision on review back to e.g. February 1991 to reflect an entitlement of the claimant to a higher heating allowance. It does not, I think, really matter whether that is done (if done at all) by revision of the original award of supplementary benefit or by a revision on review of the 1985 decision not to backdate for more than twelve months. The practical result will be the same.

(Signed) M.J. Goodman
Commissioner

(Date) 1 July 1994