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REVIEW
Paral

Welfare Rights Service
Morton House,
Borough Road,
Middlesbrough.

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Commissioner's File: CSIS/45/90

BJD

SOCIAL SECURITY ACTS 1975 - 1990

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY
APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Social Security Appeal Tribunal: Stirling

Case No: S14 01734

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 8 January 1990 is erroneous in law and is set aside. The claimant's case is referred to another tribunal for reconsideration.

2. This is an appeal by the claimant with leave on a question of law against the above-mentioned tribunal decision. The appeal was dealt with at an oral hearing held before me at which the claimant, who attended in person, was represented by Mrs M Paterson, a housing benefits adviser with Stirling District Council and the adjudication officer was represented by Mr D Cassidy of the Office of the Solicitor to the Secretary of State for Scotland. I am obliged to both representatives for their submissions.

3. The facts of this case, arising from a decision of an adjudication officer upon an overpayment of benefit of £3,974.02 said to have occurred in the period from 31 August 1984 to 14 May 1989, sufficiently appear from the very clear decision of the tribunal who made the following findings of fact:-

"The appellant is aged 62 and has been receiving supplementary benefit/income support since June 1979 which has been payable by order book since 13.5.83. His wife Mary is aged 65. She became 60 on 27.7.84 and has been receiving retirement pension since 2.8.84. She is seriously incapacitated by a stroke and receives attendance allowance and mobility allowance. The Taylor's have a non-dependent son aged 25 who is working.

In form A2 dated 1.6.86 Mr Taylor declared the receipt of attendance allowance and mobility allowance but did not disclose that his wife was receiving retirement pension as well. Box 7 of form A2 specifically refers to disclosure of retirement pension.

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In form A2 dated 8.5.89 Mr Taylor did disclose in Box 6 that his wife was receiving retirement pension of £20.72 per week.

The Tribunal accepts that on an unspecified date in July 1984 Mr Taylor wrote to the DHSS at Stirling advising that his wife would become 60 on 27.7.84. The purpose of that notification was to ensure that his wife would start to receive retirement pension with effect from her 60th birthday. He made no further declaration of the receipt of his wife's retirement pension until the form A2 dated 8.5.89.

Mr Petrie was recognised by Mr Taylor as the officer who had visited him, as he thought, in the Spring of 1986 but the Tribunal find that this visit in fact took place on 15.12.87 and that its sole purpose was to establish the commencement date of the current order book as to which there was some confusion in their office records.

The calculation of the alleged overpayment contained in document 5 of the case papers is accepted by both parties as being correct."

4. The tribunal in a majority decision upheld the decision of the adjudication officer and found that there had been an overpayment of supplementary benefit/income support amounting to £3,974.02 which the Secretary of State was entitled to recover. The tribunal's reasons for their decision were stated in the following terms:-

"The majority of the Tribunal find that although the appellant notified the Department in July 1984 of the commencement of his wife's retirement pension there was a continuing onus on him to disclose this to the Supplementary Benefit Section of the DSS and that he failed to make any further disclosure until 8.5.89. In particular he failed to make disclosure in form A2 dated 1.6.86 which he signed as being a complete and correct statement and which specifically required him to disclose retirement pension. The majority followed a line of reported cases including R(SB) 15/87 at paragraph 29 and R(SB) 54/83 at paragraph 15 which holds that the applicant must inform the right Department or office. Paragraph 18 of the latter case makes it clear that the obligation is a continuing one and that the claimant cannot sit idly by while receiving benefit at the incorrect rate.

The Social Security Act 1986 by Section 53 makes provision for the Secretary of State's entitlement to recover an overpayment if a person has misrepresented, whether fraudulently or otherwise a material fact. The Tribunal accepts that the misrepresentation by Mr Taylor was wholly innocent.

The dissenting view in the Tribunal was that by notifying the Department of his wife's approaching 60th birthday in July 1984, Mr Taylor had done enough to disclose the position and that there had been no failure to disclose up till 31.7.86. Accordingly the overpayment and sum recoverable should be restricted to £2,737.49."

5. In this appeal it was originally contended for the claimant that section 53 of the Social Security Act 1986 should not have been applied, or should not have been applied throughout the period of overpayment. Reference was made to section 119 of the Social Security Act 1975. However the overpayment in question was an overpayment of supplementary benefit followed by income support and section 119 of the 1975 Act was not applicable to those benefits. Section 20 of the Supplementary Benefits Act 1976 was applicable to supplementary benefit cases. The decision of the Court of Appeal in Secretary of State for Social Security and another v Tunncliffe, unreported, dated 13 December 1990, a copy of which is included in the appeal papers, has established that section 53 of the 1986 Act is applicable to overpayment decisions after 6 April 1987 notwithstanding that the part of the period of the overpayment falls before that date. It follows that the tribunal were correct in accepting the application of section 53.

6. The decision of the tribunal is however erroneous in law in my judgment in 2 other respects. The first point is a somewhat technical but nevertheless important one. Although the tribunal referred to section 53 of the 1986 Act they did not make reference to section 53(4). Under the provisions of that section (subject to an exception in regulations which is not here applicable) it was a pre-condition of the recoverability of an overpayment under the section that the decisions awarding the benefit be revised on review. The adjudication officer's somewhat inaccurate decision which was under appeal in this case purported to revise one decision only, notwithstanding the period of some 5 years and a change in the nature of benefit, and did so on the ground of ignorance of material fact. There was however necessarily more than one decision of an adjudication officer involved and as Mr Cassidy very properly pointed out the ground of review of the earliest decision was presumably the occurrence of a relevant change of circumstances occurring during the running of that award when the claimant's wife began to receive retirement pension and the subsequent ground of review was presumably ignorance of that material fact. Having regard to the terms of section 53(4) this matter should have been dealt with by the tribunal by calling for identification of the relevant decisions and a determination upon the appropriate grounds of review.

7. In the second place the tribunal dealt with the claimant's notification in July 1984 and found it to be a notification to the Department of Social Security but not to the supplementary benefit section so that there was, in the view of the majority, a continuing onus of disclosure on the claimant thereafter and a subsequent failure to disclose in June 1986. But the tribunal

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did not deal with the question whether in the circumstances of this case disclosure was reasonably to be expected by the claimant. The situation was that following the claimant's letter to his local office of the Department regarding retirement pension for his wife a letter was sent to him by the local office (being the office to which his supplementary benefit order book directed him to notify relevant changes) in the following terms:-

"For Mrs Mary Taylor

As a temporary arrangement until we can determine your full entitlement to retirement pension, payments will be made at a provisional rate weekly by Girocheque. The first payment is enclosed and the period it covers is shown on the Girocheque.

Yours faithfully

Manager."

8. In these circumstances and having regard to R(SB) 21/82 as approved in R(SB) 54/83 it was incumbent upon the tribunal to consider whether disclosure by the claimant to the same office of the receipt of retirement pension by his wife was reasonably to be expected. The tribunal did not deal with that point and accordingly both in that regard and in respect of the matter dealt with in paragraph 6 above the decision of the tribunal is erroneous in law and must be set aside.

9. I was informed that further information was available in this case and in the circumstances it is appropriate for me to refer the case to another tribunal for rehearing. The new tribunal should deal with both matters referred to above. In connection with the second of these, unreported decision CSS/4/90 was referred to by Mr Cassidy. A copy of that decision is now included in the appeal papers. The tribunal should consider also whether, as contended in this appeal by Mr Cassidy, the situation changed in June 1986 when the claimant completed form A2 in which he did not disclose the retirement pension. Depending upon the tribunal's view it might then be necessary to go on to consider the question of possible disclosure by the claimant in December 1987 on the occasion of the home visit by a visiting officer. In relation to what transpired at that visit it appears that material additional evidence is available. The question of causal connection between any failure of disclosure and the occurrence of the overpayment will of course also fall to be considered should the tribunal reach that stage.

10. The claimant's representative sought to raise before me the question of underpayments of benefit with reference to the special needs of the claimant's wife, submitting that the relevant information had been put before the adjudication officer but not taken into account. However although the subject of additional requirements in respect of special wear and tear of

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clothing was specifically raised by the claimant in completing the form A2 dated 1 June 1986 it is not clear that that matter was raised earlier and the subject of a need for extra baths by the claimant's wife was not specifically raised even on that form. If these matters are separately raised on behalf of the claimant with the Department by way of review before the new tribunal hearing they will not of course form any part of their consideration in dealing with the present appeal. If not, however, the tribunal will require to bear in mind the limitations upon taking account of such matters indicated in reported decision R(SB) 10/85, paragraph 10, impliedly approved by the Court of Appeal in Comcock v The Chief Adjudication Officer decided on 1 December 1989, now reported as the appendix to R(SB) 6/90.

11. The appeal of the claimant is allowed.

(signed) J G Mitchell
Commissioner
Date: 6 June 1991