

What is the operative
decision for overpayment review
- 2 cases on one?

DJM/HJD

Commissioner's File: CSIS/44/93

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Airdrie

Case No: 556 36222

[ORAL HEARING]

1. There was an oral hearing in this case on 16 November 1993. The claimant was represented by Mr Orr, Welfare Rights Officer, Strathclyde Regional Council. The Adjudication Officer was represented by Mr Shaw. My decision is that the decision of the social security appeal tribunal given at Airdrie on 25 November 1992 was erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted tribunal for a rehearing.

2. In this case an adjudication officer issued the following decision on 28 April 1992:

"I have reviewed each of the decisions from 20.3.91 to 7.11.91 of the adjudication officer awarding income support from and including 7.3.91.

I am satisfied that the decisions were given in ignorance of a material fact.

My revised decision for the period from 7.3.91 to 21.3.91 (both dates included) is that the claimant is entitled to Income Support at the reduced rate £14.96 and that from 22.3.91 the claimant is not entitled to Income Support (reduced and non entitlement due to partners resources).

As a result an overpayment of income support has been made from 7.3.91 to 13.2.91 (sic) (both dates included) amounting to £1530.28 as shown on the attached schedule.

On 18.3.91 and 20.5.91 [the claimant] misrepresented the material fact that his partner was in receipt of Invalidity Benefit.

As a consequence, income support amounting to £1530.28 from 7.3.91 to 13.2.91 (both dates included) was paid which would not have been paid but for the misrepresentation.

Accordingly that amount is recoverable from [the claimant]."

The claimant appealed to a social security appeal tribunal. The decision of the tribunal was in the following terms:-

"Appeal refused. The overpayment is recoverable from the appellant."

The findings in fact that the tribunal found were material to their decision were as follows:-

"The overpayment resulted from the absence of information relating to the financial circumstances of the appellant's partner, [MG]."

The reasons given for the decision were as follows:-

"There was a failure to disclose all the relevant information which resulted in an overpayment. (There does not appear to have been a deliberate attempt to withhold the information. It is respectfully suggested that the repayment terms are as favourable as possible to the appellant)."

3. The claimant has appealed to the Commissioner. His appeal is supported by the adjudication officer. It was common ground at the oral hearing before me that the decision of the social security appeal tribunal erred in law and required to be set aside. The adjudication officer in supporting the claimant's appeal set out in paragraphs 4, 5, 6 and 7 of his written submission the basis upon which the tribunal erred in law. The claimant's representative accepted the arguments put forward by the adjudication officer in respect of the claimant's appeal. In these circumstances it is not necessary for me to go into significant detail. However I will briefly indicate what the basis of the support was. First examination of the adjudication officer's decision discloses that the adjudication officer decided that on 18 March 1991 and 20 May 1991 the claimant misrepresented the material fact that his partner was in receipt of invalidity benefit. However the basis upon which the tribunal held that an overpayment was recoverable from the claimant was because, according to them, there was a failure to disclose all relevant information which resulted in an overpayment. The adjudication officer in these circumstances submitted that the tribunal erred in law because they did not follow the principles in the decision of the Commissioner R(SB)4/84 when substituting their own decision for that of the adjudication officer. In that case the Commissioner took the view that where a tribunal was substituting a decision of their own founding upon misrepresentation as opposed to the adjudication officer's formulation of non-disclosure it was an essential pre-requisite that the tribunal:

- "(i) indicated to the claimant that they had such a course under consideration;
- (ii) identified the misrepresentation/s to be relied upon; and
- (iii) afforded the claimant adequate opportunity to meet the altered case without been disadvantaged by surprise."

These views of the Commissioner can be found in paragraph 12 of his decision. The adjudication officer in this case is quite correct when he says that the tribunal do not appear to have forewarned the claimant of their proposed course of action, nor did they afford him the opportunity to meet the altered case. Thus I agree with the adjudication officer that in this respect the tribunal erred in law and their decision falls to be set aside on these grounds. The adjudication officer in his submission went on to say that the tribunal also erred in law because:-

- (a) they made insufficient findings of fact; and

- (b) failed to comply with section 53(1A) of the Social Security Act 1986.

It was said in relation to the first of these matters that the tribunal erred in law because they failed to show that they had given due regard to all the six tests outlined in paragraph 13 of the decision of the Commissioner in R(SB)54/83 and therefore have breached regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986. While in the circumstances of this case I would not consider that the tribunal had erred in law by failing to make a finding in respect of the first of the matters set out by the Commissioner in paragraph 13 of that case (relating to the identity of the appropriate Secretary of State) I am of the view that the findings in fact of the tribunal are so limited and inadequate that they do not properly and fully address the factors set out by the Commissioner in that decision. I thus agree that the tribunal have erred in law in this respect. In addition the adjudication officer in his submission points out that there was a letter dated 1 August 1990 before the tribunal setting out the fact that the claimant is someone who would be classed as having learning difficulties and that it was entirely feasible that he did not know that his partner was in receipt of benefit. There is certainly no record of the tribunal having made findings in relation to that letter or giving any reasons for the rejection of its contents. That is something that they ought to have done. Their failure to do so amounts to a failure to give adequate reasons for their decision. I would agree with the adjudication officer's submission on this point. The adjudication officer also submits to the Commissioner that the tribunal erred in law in failing to determine the amount of overpayment recoverable. It was also submitted that in determining the amount to be recovered it was incumbent on the tribunal to identify the period of overpayment. The adjudication officer quoted section 53(1A) of the Social Security Act 1986. I agree with the adjudication officer in that regard also.

4. The issue which was focused by the claimant on appeal is succinctly set out in the written submission by the claimant to the Commissioner. It is in the following terms:-

"Firstly, once the department has identified an overpayment in a claimant's benefit entitlement it takes steps to amend that entitlement i.e. it reduces the weekly entitlement to what it considers to be a correct amount, I would argue that to do so an Adjudication Officer must carry out a review under one of the grounds included in Section 104 of the 1975 Act. I would argue that having done so he has replaced the last operative date (sic) i.e. the erroneous one awarding benefit with a subsequent decision i.e. the one amending weekly entitlement. In this case the decision to amend entitlement was carried out on 14th February 1992. On 28.4.92 the Adjudication Officer then sought recovery of the alleged overpayment of benefit. The recovery was sought under the terms of Section 53 of the 1986 Act following satisfaction of Section 104 of the 1975 Act. To satisfy Section 104 it would have to be proved that there were grounds for reviewing the last operative decision. I would submit that the last operative decision was that of 14th February 1992 and that technically there were no grounds for finding that decision fell to be reviewed which would in turn prevent satisfaction of Section 104.

I would contend further that by carrying out amendment and recovery as a result of overpayment cases, the department are failing to deal with

complete decisions. I see nowhere in the relevant legislation that allows this form of decision making. I would contend that just as claimants are bound by literal interpretation of the law then so too must also the department adhere and conduct decisions within what the law says and not what is practical in the circumstances. I would argue that the correct approach, although I stand to be corrected, in such cases should be amendment and seeking of recovery all made as part of one decision."

It appears from a letter from the claimant's representative seeking leave to appeal that this argument was addressed to the tribunal. However it is clear from the record of the proceedings that the argument was not noted by the chairman and was not dealt with by the tribunal. I accept that the argument was made. The failure of the tribunal to deal with it means that the tribunal have erred in law by failing to give adequate reasons for their decision. In addition the argument proceeded upon the basis that the adjudication officer made two decisions, one terminating the benefit and the other of revisal and review with the consequent decision on overpayment at different times. The tribunal have made no findings in fact in relation to the dates or the content of the decision or decisions made by the adjudication officer. It was submitted by Mr Orr to me that the operative decision was one of 13 February 1992 to terminate the benefit. However there is no reference to such a decision in the adjudication officer's summary of facts in 5.2 to 5.5 of his submission to the tribunal. The full copy of the adjudication officer's decision appealed against to the tribunal was submitted to it and that showed in the Schedule that benefit terminated on 13 February 1992, though the decision was dated 13 April 1992. Thus it was inferred that a decision had been taken to terminate benefit on 13 February 1992. It seems to me that before it is possible to deal with the substance of the claimant's argument it is necessary to ascertain what the actual position was for appropriate findings in fact to be made in respect thereof. It was accepted by Mr Shaw that if there was an earlier decision to terminate the benefit then it is not in the papers. There seemed to be common ground between Mr Orr and Mr Shaw that without the details of the earlier decision, if there was one, it would not be possible to have the argument effectively debated and determined. In these circumstances it would not be proper for me without full argument to dispose of the submission made at this stage. I am however inclined to the view that that revisal on review in these cases could properly take place in two stages. Clearly when the adjudication officer receives information indicating the continuance of a past and continuing overpayment he has grounds for review of past decisions (on ignorance or mistake as to material fact) and also has grounds to review for the future (based on the claimant no longer fulfilling the condition). What appears to happen is that in practice the adjudication officer reviews and revises forthwith on the latter ground, pending the corrected calculation of part benefit (which establishes the amount of or a payment which he later incorporates in his revised decision on the further ground). If the position in this case is consistent in fact the situation outlined above then it may well be that the point raised by Mr Orr does not arise upon the basis that there was two fold revisal on review of the operative decision.

5. I direct the adjudication officer to produce to the fresh tribunal all the decisions made in the case by an adjudication officer and to indicate if there was a decision terminating the benefit and if so its date. The adjudication officer should also present a fresh submission to the tribunal dealing with the argument which the claimant wishes to advance. That submission should

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deal with the cases CSSB/544/91, paragraph 9 which is starred decision 47/91, and CSSB/316/89 which were both placed before me and the views I have canvassed above. The issues in the case should be apparent to the fresh tribunal from what has been said in this decision. The approach they should adopt in deciding the appeal should also be apparent.

6. The appeal succeeds.

(signed) D J May
Commissioner
Date: 29 November 1993