

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given at Edinburgh on 11 November 1994 is not erroneous upon a point of law. The appeal fails. I dismiss it.
2. This case came before me at a continued oral hearing on 16 and 17 October 1997. The claimant was represented by Mr Livingstone a welfare rights officer employed by the City of Edinburgh Council. The adjudication officer was represented by Mr Neilson of the Office to the Solicitor of the Secretary of State for Scotland.
3. This case has a somewhat complicated history. It appears that the claimant has been in receipt of income support since the date it replaced supplementary benefit, namely 11 April 1988. It appears that on 23 January 1993 the care premium was added to the claimant's award of income support. A record that this was done is in a note which is recorded at page 81 of the bundle. It does not demonstrate that a review to include the carer premium was carried out. That must be inferred.
4. Thereafter the next decision relating to the claimant's income support appears to have been made on 31 May 1994. This decision has not been produced. The only record of it is a Department of Social Security memorandum set out at page 6. All it says is that arrears of severe disability premium are due in the sum of £3,610.40 and sets out the calculation as to how these figures are made up. The document on the face of it does not show that any review of the decision of 23 January 1993 was carried out, nor does it show any indefinite award of severe disability premium.
5. Thereafter there was another decision on 5 July 1994. It has not been produced. There is a record at page 10 in the form of a memorandum from the Department of Social Security. It indicates that there is an amount of severe disability premium due in the sum of £888.59. It does not demonstrate any review of the decision of 31 May 1994 or the decision of 23 January 1994.
6. It appears however that the retrospective awards of severe disability premium followed upon a decision of a disability appeal tribunal awarding attendance allowance and the care component of disability living allowance for the periods set out in the decision of that tribunal. This is recorded at page 9.
7. It was accepted by Mr Neilson that the distinction apparently made by the adjudication officer in relation to the decision of 5 July 1994 whereby the premium was awarded for the periods during which the claimant received the higher rate of the attendance allowance but not for the periods when he was in receipt of the lower rate of attendance allowance was erroneous in law. It is pointed out in the submission to the tribunal whose decision is appealed against to the Commissioner that the legislation in relation to severe disability premium did not differentiate between the two rates of attendance in respect of the qualifying condition for the premium. That was accepted by Mr Neilson.

8. Following upon the decisions of 5 July 1994 and 31 May 1994 the claimant telephoned the benefits agency. A record of his call is recorded at page 12 of the bundle. It is said there:-

"[The claimant] disputes the start date on his arrears award. He has been informed that 19.11.90 has been taken rather than 15.10.89."

9. It is accepted that notwithstanding the dispute the claimant had in relation to the decision of 5 July 1994 it was not appealed by the claimant. I am told that the decisions of 31 May and 5 July 1994 could not be produced. The only record of them is contained in the two memoranda to which I have referred. As I have indicated, they do not demonstrate that a review of the last operative decisions in respect of income support had taken place. If there had been such a review they do not state the basis upon which that review had been carried out.

10. Following upon the telephone call from the claimant an adjudication officer on 11 August 1994 carried out a review of the decisions of 31 May 1994 and 5 July 1994. That decision was in the following terms:-

"I have reviewed the decision of 31 5 94 awarding the severe disability premium from 2 4 92 and of 5 7 94 awarding the severe disability premium from 19 11 90. I am satisfied that the Adjudication Officer erred in law by not considering the provisions of regulation 64A of the Social Security (Adjudication) Regulations 1987. My revised decision is that the severe disability premium is not payable until 1 4 94. It cannot be paid prior to 1 4 94 because the qualifying condition ie. the award of attendance allowance is a change of circumstances. This restricts revision of the award to 52 weeks from the date review was requested."

11. The claimant appealed against that decision. In a submission to the tribunal which were to hear the appeal the adjudication officer submitted that from 5 October 1989 the claimant had a continuous notional entitlement to the severe disability premium. Thereafter having quoted section 25 of the Social Security Administration Act 1992 he said:-

"6.5 The adjudication officer considered the provisions of Section 25 in relation to this appeal and decided:

1. That the decision of 31 5 94 and 5 7 94 fell to be reviewed under section 25(2). The adjudication officer had failed to consider the provision of regulations 64A and 69 of the Adjudication Regulations and this was an error in law.

2. The matter of the attendance allowance award and resulting qualification for the severe disability premium must now be looked at afresh. The decision under review was identified as that made on 23 1 93 awarding a carer premium. With regards to Section 25 he considered:

(1)(a) It could not be said that the decision of 23 1 93 was given in ignorance of, or based on a mistake as to a material fact. That fact i.e. the attendance allowance award did not exist on 23 1 94 (tribunal decision of 12 1 94).

(b) The attendance allowance award was a relevant change of circumstances. Grounds for review exist under Section 25(1)(b).

(c) The adjudication officer could not anticipate the outcome of a Disability Appeal Tribunal (in this case the adjudication officer was not even aware the question arose).

(d) There was no question relevant to the question of the severe disability premium which required to be answered other than by an adjudication officer.

(e) Review under section 57(4) or (5) relate to unemployment benefit, sickness benefit and invalidity benefit so did not apply to this, an income support decision.

(2) The decision of 23 1 93 was not erroneous in point of law. That decision related to the award of carer premium because [the claimant] had been awarded invalid care allowance in respect of caring for another person.

I submit therefore that the award of attendance allowance gives ground to review the income support decision of 23 1 93 under section 25(1)(b) because this is a relevant change of circumstances."

He then submitted:-

"6.6 The provisions of Regulation 69 of the Adjudication Regulations provides, so far as is relevant to this appeal, that except in a case to which Regulation 64A(1) or (3) applies a determination on a claim or question relating to income support shall not be revised on review under Section 25 of the Administration Act as to making income support payable or to increase the amount of income support payable in respect of a period which falls more than 12 months before the date on which review was requested.

6.7 With regard to revision of benefit on a review Regulation 64A of the Adjudication Regulations provides that:-

(1) In the case of a review to which either paragraph (2) or paragraph (3) applies, the decision given shall have effect from the date from which the decision being reviewed had effect or from such earlier date as the authority giving the decision being reviewed could have awarded benefit had that authority taken account of the evidence mentioned in paragraph (2) or not overlook or misconstrued some provision or determination as mentioned in paragraph (3).

(2) This paragraph applies to a review under sub-section (1)(a) of Section 104 of the 1975 Act (review for error of fact) of any decision,

(3) This paragraph applies to a review under sub-section (1A) of Section 104 of the 1975 Act (a) (review for error of law) of any decision,

(4) and (5).

(NB. The tribunal are respectfully advised that Section 104 of the Social Security Act 1975 was replaced by section 25 of the Social Security (Administration) Regulations 1986 by virtue of the Consolidation Acts 1992. This does not alter the substance of the Law).

6.8 The adjudication officer decided that regulation 69 allowed revision 12 months prior to the date review was requested. The request for review was received on 5 9 94. Income support can be revised from 1 4 93 (the first day of the benefit week 12 months prior).

The adjudication officer had regard to regulation 64A but decided that since, as submitted above, review occurred because of a change of circumstances the provisions of that regulation are not satisfied.

6.9 The tribunal are respectfully advised that the department has recognised that current legislation does not accommodate situations where there has been a delay of more than 12 months in awarding a qualifying benefit.

Accordingly, in such instances ex-gratia payment is considered for the earlier part of the backdated award which goes beyond 12 months."

That submission clearly sets out the basis upon which the adjudication officer approached and made the decision of 11 August 1994. It can I think be inferred from what is said there, and there was no evidence to contradict it, that the decisions of 5 July 1994 and 31 May 1994 were review decisions proceeding under and in terms of section 25(1)(a) of the Social Security Administration Act 1992. It is however unsatisfactory that this has to be inferred. There ought to have been a proper record of these decisions or material from which they could have been adequately reconstructed.

12. The claimant's appeal was heard on 7 November 1994. The decision of the tribunal was as follows:-

"The appeal is unsuccessful and the decision of the adjudication officer upheld."

The findings of the tribunals on questions of fact material to their decision were as follows:-

-1 The tribunal found that [the claimant] lives alone and no-one received invalid care allowance in respect of caring for him.

- 2 The tribunal found that [the claimant] was awarded attendance allowance with effect from 15.10.89.
- 3 The tribunal found that [the claimant] had been awarded carer premium on 23.1.93.
- 4 The tribunal found that awarding attendance allowance with effect from 23.1.93.
- 5 The tribunal found that the Dept had not made a decision in ignorance of or based on a mistake as to a material fact."

13. The reasons given by the tribunal for their decision were as follows:-

"As the Dept had not made a decision in ignorance of or based on a mistake as to a material fact but has awarded benefit as a result of relevant change of circumstances, grounds for review exist under Section 25(1)(b) of the Social Security Administration Act 1992.

The tribunal also considered Regulation 17 of and Schedule 2 to the Income Support General Regulations 1987, Regulation 65(a) and 69 of the Social Security Adjudication Regulations 1987."

14. The tribunal in this case having upheld the decision of the adjudication officer of 11 August 1994, the question in this appeal is whether the adjudication officer was correct in his review on the grounds of error in law of the decisions of 5 July 1994 and 31 May 1994. If he was correct in doing so then there would be no question of the claimant being entitled to any backdating of an award of severe disability premium beyond that provided for in regulation 69 of the Social Security (Adjudication) Regulations 1986. The effect of that regulation is set out in the opinion of the Court as delivered by the Lord Justice Clerk in the case of the Chief Adjudication Officer v Combe, a decision of the Inner House of the Court of Session dated 19 June 1997. In the opinion of the Court it was stated:-

"Regulation 69 of the Social Security (Adjudication) Regulations 1986 places a limit on the retrospective revisal of a determination on a claim or question relating to income support. In general such a determination is not to be revised on review so as to make income support payable or to increase the amount of income support payable in respect of, *inter alia*, "any period which falls more than 12 months before the date on which the review was requested or, where no request is made, the date of review"."

The Court then went on to deal with the exception to the general rule. It was said:-

"This is subject to the exception of the cases covered by one or other of a number of provisions under the Regulations, including Regulation 64A(2). This provides, in short, that it applies to a review of any decision where the adjudication officer or, as

Mr Livingstone, that the effect of the award of attendance allowance and disability living allowance was not a change of circumstances in relation to the award of income support but was one which was covered by section 25(1)(a) of the Social Security Administration Act 1992 in spite of what was said by the Court in Combe. A distinction from Combe was sought to be drawn in respect that it was submitted although paragraph 14B of the Income Support (General) Regulations 1987 was referred to by the Inner House it was not addressed in the context of the case which they were deciding. That paragraph is to the effect that a person is to be regarded as being in receipt of any benefit if, any only if, it is paid in respect of him and is to be so regarded only for any period in respect of which that benefit is paid. Mr Neilson submitted that the effect of that provision is that the award of attendance allowance from 1989 and disability living allowance thereafter is a fact which is deemed to be in existence at the time of the decision of 22 July 1993. Therefore by virtue of that deeming it is possible to review under section 25(1)(a) because there was ignorance of a material fact which was deemed to be in existence even if it was not.

19. The difficulty I have with this line of argument is that I do not see that there is any difference between this case and Combe and I am bound to follow the Inner House of the Court of Session. This case is on all fours with Combe. Although there is no record of an argument along the lines presented to me having been advanced before the Inner House reference is made in the opinion of the Court to regulation 14B of the Income Support (General) Regulations 1987. I am also inclined to the view that even if Mr Neilson was correct that the award of attendance allowance was deemed to be in existence for 1989 such a deemed fact is not something that the adjudication officer who made the decision could have been aware of at the time he made his decision. Thus in my view the award made by the tribunal is clearly a change of circumstances. There is thus no merit in this submission.

20. In these circumstances I am satisfied that the adjudication officer in his decision of 11 August 1994 and the tribunal's decision thereafter upholding it reached the correct conclusion in the case. The tribunal identified in finding in fact 3 the last decision in respect of income support which required to be the subject of review in respect of the award of the arrears of severe disability premium. I am satisfied having considered the argument advanced by Mr Neilson that no error of law has been demonstrated on the part of the tribunal by Mr Neilson or the claimant. I should perhaps add that Mr Livingstone referred me to page 53 of the bundle which is an extract from welfare rights bulletin 126/June 1995. That extract quotes from a letter by the Parliamentary Under Secretary for Social Security at the time. However I would indicate that the views expressed therein do not represent the law. That is set out in the case of Combe.

21. The appeal fails.

(signed)
D J MAY QC
Commissioner
Date: 28 October 1997