JJM/HJD/T/CH **Commissioner's File:** CSIS/83/94

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: Motherwell

Case No: 558 72882

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1. This appeal is allowed. My decision is that the decision of the tribunal dated 28 April 1994 is erroneous in law, and I set it aside. I hold that the claimant is entitled to have payment of severe disability premium backdated prior to the week commencing 14 September 1992.

2. This is an appeal by the claimant, with leave of the chairman of the tribunal, against a decision of the Motherwell social security appeal tribunal dismissing his appeal against a review decision of the adjudication officer, dated 6 October 1993, which was to revise the income support payable to the claimant for no more than 12 months before the date on which that review was requested.

3. The relevant facts of this case have never been in dispute, but the chronology is important and I set it out here for ease of reference:-

18 December 1991	Decision to award income support to claimant.
15 April 1992	Claimant claims disability living allowance at the middle rate.
9 September 1993	After an unexplained delay for which it is not suggested the claimant is in any way responsible, the Benefits Agency write to the claimant awarding disability living allowance at the middle rate with effect from 15 April 1992 (although their letter does not say so in terms).
10 September 1993	Claimant informs adjudication officer accordingly, and seeks revision of the decision awarding income support with consequent backdating of severe disability premium to 15 April 1992.
6 October 1993	Decision presently under appeal made by adjudication officer; this is to review that decision, but not to revise the income support payable before the prescribed day in the week commencing 14 September 1992.

4. That decision was appealed. The proposition put forward by the claimant to the tribunal was that he was entitled to have his income support revised with effect from the date of his ultimately successful claim for disability living allowance at the middle rate. The issue of law was, as the tribunal recognised, whether the facts of the case brought it within section 25(1)(a) of the Social Security Administration Act 1992, in which case that proposition was correct; or only within section 25(1)(b), in which case it was not. The tribunal held that section 25(1)(a) was not satisfied: they gave no real reasons for that view, but the logic of the argument against the claimant was such that perhaps they could not usefully have said much more than they did to support that finding, and I do not think that the absence of reasons is of any present significance.

5. In terms of regulation 17 and Schedule 2, paragraph 13 of the Income Support (General) Regulations 1987, the claimant was entitled to a severe disability premium for any particular period "If, and only if - ..... (b) ..... (i) he is in receipt of ..... the care component of disability living allowance at the highest or middle rate ....". In terms of paragraph 14(b) of the Schedule, he was to be regarded as in receipt thereof "If, and only if, it is paid in respect of him and shall be so regarded only for any period in respect of which that benefit is paid". Accordingly, as was not in dispute, he was entitled to a severe disability premium from about 15 April 1992.

6. However, in terms of regulations 69(1) and 64A of the Social Security (Adjudication) Regulations 1986, which I need not set out at length, his right, following the review of the original decision to award income support which did not include severe disability premium, to have payment of the premium to which he was entitled for the approximate period 15 April 1992 to 14 September 1992 (the exact dates would depend on the terms of Schedule 7 to the Social Security (Claims and Payments) Regulations 1987, and I am not aware of them) would depend on whether (a) in terms of section 25(1)(a) of the 1992 Act, the decision reviewed was given in ignorance of, or was based on a mistake as to some material fact, and (b) in terms of regulation 64A(2)(c), the evidence which the decision of 6 October 1993 relied on did not exist and could not have been obtained at the time of the original decision, but was produced to the Department of Social Security as soon as reasonably practicable after it became available to the claimant. There were, of course, other theoretically possible routes to the right to payment for this period, but none are of practical relevance to the case.

7. No issue has ever been taken, nor could be taken, with the fulfilment of the second of these conditions. The evidence relied on was the decision letter of the Benefits Agency of 9 September 1993; that did not exist and could not be obtained before that date; it was produced as soon as reasonably practicable. The question, as the tribunal recognised, turned on the applicability of section 25(1)(a) of the Act. The rival contentions can be shortly put. For the claimant, it is said that there was ignorance of the material fact that from 15 April 1992 the claimant was entitled to middle rate disability living allowance, and for the adjudication officer it is said that when the decision under review was made "the adjudication officer was aware of all material facts then existing".

8. It is important to be clear just what is said to be the material fact of which there was ignorance. That is the fact of entitlement to the allowance in question from 15 April 1992. No-one knew that then, or could know it until the decision which found its way into the letter of 9 September 1993. So the adjudication officer, in making the decision which was sought to be reviewed, was ignorant of that fact. I think that that is, for the reasons stated below, an end of the question, and the claimant is accordingly entitled to succeed.

9. It is necessary to appreciate the precise argument which the adjudication officer makes. That is that the adjudication officer was, on 18 December 1991, "aware of all material facts then existing". There is authority for this approach in the decision of the Commissioner in CIS/650/91, which is cited for this proposition in Mesher (page 604 of the 1994 Edition of "Income Related Benefits"). There is at best a certain artificiality about this; the entitlement in question certainly was an existing fact from 15 April 1992 which is as far back as the claimant seeks to go. I think, however, that this approach, although from a purely philosophical point of view it may have some merit (it is akin to David Hume's criticism of induction in the Treatise Concerning Human Nature) is not well-founded as a matter of statutory interpretation.

10. In the first place, it carries the practical consequence, as indeed was pointed out in CIS/650/91, that "merely because a claim, properly and diligently proceeded with, may take more than a year to decide, a claimant in effect loses benefit to which there would otherwise have been automatic entitlement". That was rightly, although with possibly more restraint than I would exercise myself, there characterised as "unfair". It would also, logically, apply to cases which had not been treated with any proper diligence by the adjudicating authorities. Such a result, it seems to me, in penalising the citizen and rewarding the state for the state's delays, offends the maxim *nemo ex suo delicto meliorum suam conditionem facere potest* (Digest, 50.17.134; no-one can improve his position by his own wrong doing). If the language of the statute is unambiguous, so be it; but such a construction with such a result is not, I think, to be adopted unless it is unavoidable.

11. In the second place, the question is, I think, analogous to the question in, and usefully governed by the decision in, Wincentzen v Monklands DC, 1988 SLT 259 and 847. That was a decision of Lord Clyde, upheld on appeal by the First Division of the Court of Session, on the meaning of the phrase "unaware of any relevant fact" in section 17(3) of the Housing (Homeless Persons) Act 1977 (now section 26(3) of the Housing (Scotland) Act 1987 and section 60(3) of the Housing Act 1985). The petitioner there had received a threat; at the relevant time, she was unaware that the person who made that threat meant it, or would in the event carry it out. The respondent argued that "The matter of which the petitioner was alleged to be unaware lay in the future, being a future consequence of her actings .... Section 17(3) relates to facts which are capable of being known at the time of the act or omission in consequence of which the loss of accommodation occurs." (page 261B). Lord Clyde, however, held "I see no reason why the Act should not extend to include matters of factual consequence of which it may be possible to say that the person may or may not be unaware even although they will occur at a future date .... While on a strict use of language it may be in appropriate to speak of knowledge in relation to future events in respect of the element of uncertainty in prediction where human acting is concerned, I do not consider that the sub-section should be construed so narrowly as to exclude such a future act or consequence as is here in issue ..... While the subject matter of the allegedly unawareness in any particular case can be characterised as matter of fact or as matter of law, and in the latter case treated as irrelevant, it seems to me too fine a distinction to separate matters of factual consequence from matters of present or past fact and only recognise the latter is as relevant" (page 261D to E and J). In the Inner House, lack of awareness that the threats were seriously made was seen as sufficient, but Counsel in the course of the argument was obliged to accept that one might be aware or unaware of a fact although it had not yet happened. A similar approach has been taken, albeit less explicitly, in several decisions of the English Courts; see for example R v Mole Valley DC Ex Parte Burton, 1988 20 HLR 479, and R v Winchester CC Ex Parte Ashton, 1991 24 HLR 48 and 520. I take from this that, for the purposes of

section 25(1)(a), an adjudication officer may be stated to be "ignorant of a material fact" although a fact is not then "existing".

12. In the third place, as a matter of ordinary language, I see no reason why the concepts of a "fact" and of "ignorance" should be restricted to matters then existing. Today is Thursday; it is equally a fact that tomorrow is Friday. In Wincentzen, gravity and simple arithmetic were cited from the bench as further examples. It requires, I think, a finer distinction between fact and prediction than the statute calls for to describe such propositions as "tomorrow is Friday" or "the claimant will from the date of his successful claim be entitled to this benefit" as mere predictions. Nor can I see a reason for restricting them to the inevitable effects of facts already in existence, or known to exist. Such a distinction may well be called for in the criminal law (see for example British Airways Board v Taylor, 1976 1 All ER 65) but different considerations apply to statutory interpretation in that context. Accordingly, even without authority, I would hold that section 25(1)(a) applied to the present case.

13. I reached this conclusion with satisfaction, for the reasons stated in paragraph 10 above. Such cases must arise fairly frequently. Had I felt obliged to reach the same conclusion as the Commissioner did so reluctantly in CIS/650/91, I would have been inclined to make the same recommendation that the Secretary of State consider an ex gratia payment. I am glad I need not do so.

14. As I have noted, I am not aware of the precise date in April 1992 from which entitlement to severe disability premium ran. That matter must therefore go back to an adjudication officer for ascertainment. Thereafter, the claimant will be entitled to have payment backdated to that date. This appeal is accordingly allowed.

(signed) Jonathan J Mitchell
(Deputy Commissioner)
Date: 4 July 1995