

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal dated 19 March 1996 is erroneous in law and is set aside. The claimant's case is referred to another tribunal for reconsideration in accordance with the directions given below.

2. This is an appeal by the adjudication officer 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 on 27 August 1997 at which the adjudication officer was represented by Mr Neilson, acting in Scotland on behalf of the Department of Social Security. The claimant was represented by Mr C Orr, Welfare Rights Officer with Glasgow City Council Social Work Department. I am obliged to both representatives for their submissions.

3. On 21 March 1995 the claimant requested a review of her income support award with a view to the inclusion of a disability premium. The claimant, who was then aged 58, is a widow in receipt of income support and disability living allowance. The latter benefit was awarded to the claimant in 1992. Although it is a benefit which entitles an income support beneficiary such as the claimant to receive a disability premium under Schedule 2 of the Income Support (General) Regulations 1987, that premium had not been awarded. An adjudication officer reviewed the decision awarding income support and revised it to include a disability premium backdated for 12 months to 22 March 1994 under the terms of regulation 69 of the Social Security (Adjudication) Regulations 1986. He took the view that the extended backdating provisions of regulation 64A of those Regulations were not satisfied in the context of the disability living allowance award.

4. The claimant appealed to a social security appeal tribunal and sought to justify the application of regulation 64A upon a different ground. Evidence was presented to and accepted by the tribunal that the claimant had suffered from ill-health for a considerable number of years. She had had her left lung removed in 1978 and had a long-standing history of angina. She had weekly or fortnightly appointments with her general practitioner. Her husband had died in 1979 and the claimant received supplementary benefit thereafter until April 1988. The claimant had submitted a 26-week medical statement from her doctor on 18 February 1988 although it was indicated that she had no entitlement either to sickness benefit or to contribution credits. She had also submitted a prior medical certificate in November 1983 in relation to a need for extra nourishment. That had presumably been submitted to the supplementary benefit authorities. The tribunal accepted that the claimant had been incapable of work throughout the period since April 1988.

5. It was argued on the claimant's behalf that the medical certificate in 1988 was "specific evidence" for the purposes of regulation 64A which ought to have resulted in an award of the disability premium in the claimant's income support from the outset. The tribunal accepted that argument, and allowed the claimant's appeal. They found the claimant entitled to the disability premium from 13 April 1988 to 21 March 1994. Their critical finding in fact was as follows:-

"4. When the adjudication officer made an award of income support no consideration was given to the medical certificates contained within her case papers."

The tribunal's reasons on this aspect of the case were stated as follows:-

"In relation to the issue of backdating the Disability Premium of Income Support from the introduction of this benefit in April 1988, we are satisfied that we are not bound by the restrictions in backdating to a 52 week period in view of the fact that there was an error on the part of the Adjudication Officer in failing to note all the relevant evidence contained in the casepapers relating to [the claimant] at the time that the award of Income Support was made. There was no further onus on [the claimant] to produce further evidence relating to her disability than that already contained within the casepapers."

6. The relieving provisions of regulation 64A of the Adjudication Regulations 1986, as they then were, so far as material to the case before the tribunal, depended upon it being established that:-

- (a) the evidence upon which it is relying to revise the decision under review is specific evidence which the authority which was then determining the claim or question had before it at the time of making the decision under review and which was directly relevant to the determination of that claim or question but which that authority failed to take into account; or
- (b) the evidence upon which it is relying to revise the decision under review is a document or other record containing such evidence which at the time of making the submission to the authority which was then to determine the claim or question, the officer of the Department of Social Security, the Department of Employment or the former Department of Health and Social Security who made the submission had in his possession but failed to submit;....."

7. Mr Neilson for the adjudication officer submitted to me that the tribunal had insufficient evidence and made insufficient findings to justify their application of either of the above sub-paragraphs of regulation 64A(2). Their finding quoted above implied the application of sub-paragraph (a) but assumed, without evidence, that the medical evidence in question was contained in the case papers before the adjudication officer who made the decision on income support. So far as the possible application of sub-paragraph (b) was concerned, he said, the finding did not disclose that that evidence was in the possession of an officer of the Department who had "failed to submit" it to the adjudication officer. In that connection he referred to and relied upon decision CIS/7404/95, paragraph 11, in which the Commissioner said:-

"In commonsense, however, it seems to me that the Departmental Officer who has information in relation to a claim made in connection with one particular benefit could not possibly be under a duty to submit that information to another official dealing with a different benefit of which the first official had no knowledge at all. So, in this case, the sickness benefit official could not possibly be said to have failed to submit evidence in his possession to the adjudication officer dealing with the claimant's entitlement to income support so as to activate regulation 64A(2)(b) in the claimant's favour."

8. Mr Orr for the claimant was constrained to accept that the tribunal's decision was deficient in the respects alleged although he pointed out that, as the tribunal had noted, the presenting officer had not challenged the claimant's argument at the hearing. Mr Orr suggested that the word "authority" in regulation 64A(2)(a) might be broader than an adjudicating authority and thus include the Secretary of State. Mr Orr accepted that the disability premium would not have been immediately payable on 13 April 1988 on the basis of the medical statement of 18 February 1988 alone, because of the 28 week qualification period under paragraph 12(1)(b) of Schedule 2 to the Income Support Regulations as then in force. In relation to the possible application of both sub-paragraphs of regulation 64A(2) he submitted that there must be a mechanism for transferring medical statements as appropriate between the national insurance and income support sections of the Department's offices in order to prevent the occurrence of overpayments. He also agreed with me that in relation to an income support claimant aged 51 in April 1988 the question of capacity for work arose or should have arisen in relation to the requirement of availability for work.

9. Mr Orr further disclosed that an application for retrospective review of the claimant's supplementary benefit entitlement prior to April 1988 was presently under appeal to another social security appeal tribunal. That appeal raised questions of the claimant's incapacity for work and relief from the obligation of availability prior to April 1988. The conclusion upon that matter would be of obvious relevance to the present case. In the circumstances both representatives agreed that if I found the tribunal decision erroneous in law the case should be referred back for rehearing along with the supplementary benefit appeal.

10. I am in no doubt that the tribunal decision is erroneous in law by reason of the deficiencies identified by Mr Neilson. I am unable to accept that the word "authority" has the wider meaning and the wider implications suggested by Mr Orr. The authority referred to is the authority who has to determine the claim or question in issue. In terms of section 20 of the Social Security Administration Act 1992 that authority is the adjudication officer. The clear implication of the tribunal's decision is that they sought to place reliance on regulation 64A(2)(a) but there is no finding and no evidence to justify the conclusion that the case papers before the income support adjudication officer included the medical statements referred to. There is a similar lack of evidence to justify reliance upon the alternative ground under sub-paragraph (b) although I do not exclude the possibility that relevant evidence could be obtained which would enable the case to be distinguished from that dealt with in the Commissioner's decision CIS/7404/95 above referred to.

11. I set aside the decision of the tribunal. The claimant's case is referred to another tribunal for reconsideration. It is clearly appropriate that that case be considered along with the claimant's supplementary benefit appeal relating to the period prior to April 1988. The outcome of that appeal is obviously likely to have a direct effect on this appeal and clearly the supplementary benefit appeal should be considered first. In the circumstances I am able to give only limited directions to the new tribunal. They will have before them the concession of the adjudication officer, repeated before me, that the claimant was incapable of work since at least April 1988. The tribunal will have regard afresh to the provisions of regulation 64A (now regulation 57 of the Social Security (Adjudication) Regulation 1995). It may be necessary to consider those provisions on the same or a different basis from that previously examined. As regards the qualification for a disability premium the tribunal will bear in mind the provisions of paragraph 12(1)(b) of Schedule 2 to the Income Support (General)

Regulations as in force in April 1988 and as extended by the transitional provisions of regulation 8(4) of the Income Support (Transitional) Regulations 1987. Unless the adjudication officer is prepared to concede entitlement to the premium from April 1988 (as distinct from the question of revision under regulation 64A/regulation 57) a further submission from the adjudication officer for the benefit of the new tribunal is desirable on the applicable provisions.

12. The appeal of the adjudication officer is allowed.

(signed)

J G MITCHELL QC

Commissioner

Date: 3 September 1997