*14/92

✓ Reduction Of RP On Going Into Hospital — Automatic Credit Terminated

WMW/JOB

Commissioner's File: CSP/2/91
*14/92

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

Name: MRS JUNE I CURRIE ON BEHALF OF MARY STEWART (DECEASED)

Social Security Appeal Tribunal: Edinburgh

Case No: 520/1584

[ORAL HEARING]

---

1. I hold the decision of the Edinburgh Social Security Appeal Tribunal dated 12 December 1990 to be erroneous in point of law. Accordingly I set it aside. Because I consider it expedient so to do I exercise the power conferred by section 101(5)(a)(ii) to give the decision that I consider appropriate to the case in light both of the findings of fact made by the tribunal and those which follow. That decision is to refuse the appeal from the decision of an adjudication officer dated 31 July 1990. It follows that that decision remains the executive decision on the case.

2. The case came before me by way of an oral hearing at which the appellant, the claimant's daughter and appointee, was represented by her husband, Mr David Currie and the adjudication officer by Mr David Cassidy, Solicitor, of the Office of the Solicitor in Scotland to the Department of Social Security. I am indebted to both for their submissions.

3. The adjudication officer's decision of July 1990 reviewed an earlier decision awarding retirement pension to Mrs Stewart. She is sadly now deceased. It is convenient nonetheless to refer to her throughout as "the claimant". The ground for review was a relevant change of circumstances namely an admission to hospital following a period of permanent residence in prescribed accommodation. The effect of the revisal was to reduce the rate at which pension was payable and to find that there had been an overpayment over the period between the admission to hospital and intimation of that change to the Department. The overpayment was held to be recoverable. The claimant appealed to the tribunal.

4. It appears from the material presented to the tribunal, including the chairman's note of evidence, that the factual issues before the tribunal were, first, that Mrs Stewart had only been in prescribed accommodation on a temporary basis. The second factual issue was that there had been no prior indication that in the events which had occurred repayment might be sought.

5. The tribunal made the following findings of fact -

"1. The Claimant is in receipt of Retirement Pension from 4/7/66

including an increase on 24/6/85. She was widowed on 18/2/90 and awarded a higher rate Retirement Pension (category B) from 19 February 1990. From 11/8/86 payment was made by Credit Transfer at four weekly intervals.

2. The Claimant entered a Local Authority Part IV Home on 14/12/89 as a temporary resident.

3. Her husband died on 19/2/90. At this stage she became a permanent resident.

4. She was transferred to East Fortune Hospital on 2/4/90 because she was unable to walk.

5. The Claimant's representative advised the Department on 9/5/90 of the position.

6. He relied on the advice handed out by a leaflet (See Reasons for Decision).

7. There was an overpayment of Benefit of £151.00.

8. This was caused by departmental error and departmental procedures."

The unanimous decision was to uphold that of the adjudication officer save so far as he had made a finding about repayment. The tribunal determined that -

"...no Repayment Order is made."

They gave as their reasons this -

"There is no doubt at all that Mrs Stewart obtained benefit to which she was not entitled. Whether the Regulations are fair to a Claimant is perhaps a matter for debate but it is not part of the function of this Tribunal to discourse upon them. However, it is fair to say that the leaflet as handed out to people dealing with reduction in pensions on admission to hospital and [sic] does not deal with the position of a person being put into a Local Authority Part IV home and thereafter transferring to hospital. The Claimant's representative, her son-in-law, Mr Currie did all that was required of him in terms of the leaflet and the fact that the Department had offered and the Claimant had accepted payment by credit transfer, is an administrative matter. It will be inequitable in the circumstances to ask Mrs Stewart to make any repayment.

NOTE: [By the chairman] It is a matter of considerable regret that the Department, in the shape of the Presenting Officer and the S.S.A.T. Office, were unable to produce this leaflet, accordingly I am unable to give it a number, but Mr Scott for the Department did not dispute its contents."

It is against that decision that the claimant, now by her appointee, again appeals.

6. The written submission by the adjudication officer contended that there were certain errors of law in the tribunal decision but that the appropriate decision upon the case nonetheless was that made by the original adjudication officer. Mr Currie took some exception to the adjudication officer apparently thereby seeking to effect an appeal which he had not in fact made. Whilst I appreciate his concern, once a case has been appealed by either party it is open to both to make submissions to the Commissioner on the law involved. The Commissioner's jurisdiction being inquisitorial and not adversarial means that a tribunal decision may well be found to be wrong in law for reasons other than those advocated by the party appealing with the result that whilst technically the appeal may succeed the consequences are no better, or even worse, for that party.

7. Mr Currie's first point on the appeal was that there had been nothing, or insufficient, to show that Mrs Stewart had been a permanent resident in the prescribed accommodation. He advanced a number of considerations tending to point to Mrs Stewart's stay there as having been temporary throughout. But that issue of fact is not for me; nor was it really for the tribunal. As I show below it was for the local authority who ran the home. The tribunal correctly accepted their evidence. I therefore must endorse their finding that in February 1990 Mrs Stewart "... became a permanent resident." It was common ground that Mrs Stewart had entered the prescribed accommodation, in Gullane, as a temporary resident. The local authority, responsible for running the accommodation, had determined that when Mrs Stewart's husband died there was thereafter - ".. no prospect of her returning home." A letter to the Department from them and dated 11 September 1990 stated this -

> "Her husband died on 18 February 1990, she was made a permanent resident as there was no prospect of her returning home."

I accept from Mr Currie that the family were never told of the change in the nature of Mrs Stewart's residence. Whether or not there was a duty upon the local authority to inform them, in terms of the legislation under which they administered the home, is not a matter for me. Certainly there was no such obligation under the Social Security legislation. Accordingly non-intimation can not render valueless the local authority evidence contained in their letter to the Department nor can it indicate any error in law by the tribunal. Indeed the local authority letter is really conclusive for present purposes upon the issue of the nature of the residence. The In-Patients Regulations 1975 so provide at regulation 17(2), more fully quoted at paragraph 9 below. It includes the clear words - ".. where it has been decided by the appropriate authority that [the individual] should be permitted to reside in that prescribed accommodation otherwise than temporarily...". The local authority being the body controlling residence in their home was the "appropriate authority" for the purposes of the regulation.

8. I accept from Mr Currie that had they appreciated the position he and his wife might have made different arrangements and so secured that Mrs Stewart did not go into hospital directly from prescribed accommodation. I appreciate that, but the case must be decided upon the facts as they are, and not as they might have been. I should add, however, that I am rather doubtful whether the location of Mrs Stewart's normal or permanent accommodation would have been altered by merely a night or two elsewhere as was being suggested by Mr Currie.

9. The other major point in the appeal advanced by Mr Currie concerned the immediate reduction in Mrs Stewart's pension. His case was that it should have continued without reduction for at least 12 months following her admission to prescribed accommodation. To deal with that I must turn to the law. Part II of the Social Security (Hospital In-Patients) Regulations 1975, herein referred to as the In-Patients Regulations, provides, at regulation 4, for the adjustment of any personal benefit where the recipient is in hospital, or has been in hospital for more than certain periods. There are various provisions involved. It is enough to say that Mrs Stewart's retirement pension was undoubtedly one of the personal benefits covered, being a pension payable under the 1975 Social Security Act and so within Schedule 2 of the Regulations. And at regulation 6 appears the provision which was operated in this case, namely that which provides for the reduction after 52 weeks in hospital. Regulation 6(2) then controlled the amount by which Mrs Stewart's rate of pension fell to be adjusted. But then there appears, at Part V of the Regulations, regulation 17 which determines how the periods in the regulations require to be calculated. Regulation 17(2) provides that -

> ".. where a person has entered a hospital .. for the purpose of receiving there medical or other treatment as an in-patient after having ceased to reside in any prescribed accommodation, he shall be regarded as having received free in-patient treatment throughout the period during which he so resided, except that where it has been decided by the appropriate authority that he should be permitted to reside in that prescribed accommodation otherwise than temporarily, the period of that residence (whatever its duration) shall be deemed to have been a period of 52 weeks."

And paragraph (6) defines "prescribed accommodation" to include the Gullane retirement home where was the claimant. Mr Currie was therefore right to expect that his mother-in-law's pension would be untouched until at least 52 weeks after she had entered the home. But it is a not infrequent provision in legislation that a qualification, such as a period of time, may be deemed to satisfy provisions which otherwise would not be satisfied. That is what has happened here. Because the permission of, or the agreement by, the local authority for the claimant to reside in the Gullane accommodation had become otherwise than temporarily, that residence, however short its duration, is to be taken for the purposes of the Regulations as having been for a period of 52 weeks. Nor is that all. Those 52 weeks, despite the real facts, are to be taken, again in terms of regulation 17(2), as weeks of receipt of "free in-patient treatment". The result of that is that there required to be an immediate adjustment of Mrs Stewart's personal benefit on hospitalisation since regulation 4 provides -

> "Where a person -
>
> (a) receives, or has received, free in-patient treatment continuously for a period of more than six weeks;
>
> (b) satisfies the conditions for the receipt of a personal benefit which is specified in Schedule 2 to the Regulations,
>
> the weekly rate of that benefit shall be adjusted -

(d) for any part of that period after the 52nd week, in accordance with regulation 6 .."

So it is that there is here a deemed receipt of free in-patient treatment continuously for 52 weeks, although far from the actual facts as at the date at which Mrs Stewart entered hospital. That then meant that her pension required at once to be moderated in terms of regulation 6. Fortunately, perhaps, no question of calculation arose in this case.

10. Mr Currie complained also about information in a Departmental pamphlet, NI9. There it appears to be stated that those who normally live in local authority homes will only "usually" have their pensions reduced on admission to hospital. He asked "What are the unusual cases?", no doubt with a view to seeking to have this case thereby covered. But Departmental pamphlets are not authoritative statements of the law. Whether the pamphlet in this regard accurately reflects the law, or is merely seeking in general terms to give simplified guidance and so uses the rather vague word "usually", is not for me. The pamphlet was not before the tribunal; nor was it before me. In any event it could not have affected my decision. My jurisdiction is concerned only with the actual law and not what the Department may think to be the law. I can only say that it may wish to consider whether the position can be more accurately, yet still simply, presented in their guidance so that people like Mr Currie and his wife, if not also his mother-in-law, are not in future misled.

11. Mr Currie's final, and major, point concerned the question of recovery of the £151 overpaid. He endeavoured to suggest that whether payment had been by direct credit, as here, or not was of no consequence. His mother-in-law could and would still have cashed her book. Notification having been made within six weeks of her entry to hospital should have been enough. I am not sure about intimation within 6 weeks being enough, but the general point is one which again attracts sympathy. Normally, in an overpayment case, section 53(1) of the Social Security Act 1986 would have applied so that recovery would have been dependent upon the overpayment having been made because of a failure to disclose a material fact. That is to say, here, that there could only have been recovery if the overpayment had been because of a failure to disclose Mrs Stewart's hospitalisation. Even then sub-section (4) would have required first a review varying the amount of the payment. But, as Mr Cassidy pointed out, this is a sub-section (3) case. That is to say it is one where payments of benefit were credited to a bank or other account under arrangements made with Mrs Stewart's agreement or at her request. The point is that under sub-section (3) circumstances may be prescribed by which the Secretary of State can recover payments made in excess of entitlement so long only as notice of the effect of the Regulations was given. The statute also refers to such notice "as may be prescribed" and to its having been given "in such manner as may be prescribed". Further it followed, submitted Mr Cassidy, that in a sub-section (3) case a review was not necessary. I agree, at least to the extent that it was not a pre-requisite. But I see no reason why an adjudication officer in such a case should not exercise his power under section 104 of the 1975 Act to revise the amount of pension payable at the same time as determining the amount for recovery. He is going to have to do so at some stage of the case.

12. The case history records, and it was not the subject of dispute, that in August 1986 Mrs Stewart elected to receive payment of her pension by credit transfer direct to her bank account at four weekly intervals. Mr Cassidy informed me that that is an operation known as "ACT" - "automatic credit transfer". For convenience, but for no other reason, I shall use the acronym. Now, that arrangement having been made the Social Security (Claims and Payments) Regulations 1979, and in particular regulation 16A, applied. It provided that to be effective the arrangement required -

> ".. the claimant's application and ... the consent of the Secretary of State .."

Paragraph (3) of the regulation provided that an application was to be in writing on a form approved for the purpose by the Secretary of State, or in such other manner in writing as he might accept as sufficient and it -

> "(b) shall contain a statement or be accompanied by a written statement made by the applicant declaring that he has read and understood the conditions applicable to payment of benefit in accordance with this regulation."

The form approved for the purpose was BR436. It was issued attached to a pamphlet NI105 and the edition furnished to the tribunal, and to me, was that of March 1984. The information provided in the pamphlet about overpayment was that -

> ".. special rules apply. Under these you will have to pay back the amount overpaid. But you will not have to do so if:
>
> > The Secretary of State decides that the overpayment was not due to the credit transfer arrangements (or that the special rules should not apply in the particular circumstances); and
> >
> > The adjudicating officer then decides that repayment is not required."

That was a simplified version of what the law contained in Claims and Payments Regulation 16A(9) then provided. It was in that form that a claimant would read about the conditions applicable before certifying that he, or she, had read and understood them as required by regulation 16A(3), and (8) so far as concerned overpayment. Form BR436, at Part I, required an acknowledgement by signature that -

> "I have read and understood leaflet NI105 which accompanied this form and wish the benefit to which I am entitled to be paid as instructed above.
>
> I understand that I am responsible for informing the Department of Health and Social Security of any changes in circumstances which may affect entitlement.
>
> I also understand that all overpayments of benefit will be repayable to the Department of Health and Social Security except in the circumstances set out in the leaflet, and I agree to repay any overpayments which are repayable."

The actual effect of regulation 16A(8) and (9), put shortly, was to provide for recovery of an overpayment in accordance with the then in force section 119 of the Social Security Act 1975 as if the defence therein contained, about the use of due care and diligence to avoid an overpayment, had been stripped out, unless the Secretary of State certified that the overpayment, or any part thereof, was not materially due to the arrangement to receive benefit by way of an ACT or certified that there were particular circumstances making it inappropriate to apply the direct recovery provisions. That is how matters stood in 1986. But it is important to understand, as Mr Cassidy submitted, that these arrangements were in a kind of mutual balance. On the one hand it was easier for the Department to administer payment by way of ACT and on the other it was less trouble to an individual thereby to receive the payment. But because there was no control about the dates when payment wad due and the amount thereof, nor that at such dates entitlement continued, such as would have been effected by use of a book of orders or by giro, so there was a disadvantage to the Department of unwittingly paying out where payment was not warranted. Conversely a claimant would not necessarily know if he, or she, had been credited with money to which the individual was not entitled. The simplest and fairest remedy for both was for an 'automatic' recovery by the provisions just set out.

13. As time passed the rules the changed, as they tend to do. At least in this case the change was more of form than of substance. At the date of the adjudication officer's decision the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988, hereinafter called "the Recovery Regulations", had effectively replaced the 1979 Claims and Payments Regulations. Regulation 11 of the Recovery Regulations deals with ACT overpayments. Under it the prescribed conditions for recoverability are that the Secretary of State has first certified that the payment in excess of entitlement was materially due to the arrangements for payment to have been made by automated or other direct transfer. That is simply in form the reverse of, but in practical terms really the same as, the Claims and Payments regulation 18A(9) certificate. Then, where the arrangement was agreed before 6 April 1987, the second condition is one that the application to be paid by ACT had contained a statement, or had been accompanied by a written statement, made by the applicant and which had complied with the provisions of old regulation 16A(3)(b) and (8).

14. Mr Cassidy accepted, inevitably, that it was a condition of recoverability here that there had been a statement in compliance with the second condition of Recovery Regulation 11. The Secretary of State's certificate required for the first condition was present. Mr Cassidy adopted the written submission that the absence of a finding about there having been a written statement to satisfy the second condition of Recovery regulation 11 was an error of law in, and so fatal to, the tribunal decision. I agree. That is the first of two errors of law which appear to me to be contained within that decision. But Mr Cassidy went on to urge that I should adopt the findings of fact made by the tribunal, add one to the effect that Recovery Regulation 11's second condition was satisfied, and then reimpose the adjudication officer's original decision. That, in effect, I have done because I accept Mr Cassidy's further submission that actual production of the written statement is not necessary. No doubt documents get lost or destroyed over a period of four years. Indeed the indication given to me was that such documents are destroyed automatically after two years. The best evidence rule does not apply with full vigour to tribunal proceedings. Even if it did then the terms of, and the fact of the completion of, the fact of the destroyed

statement might have been proved otherwise than by its production. The question would then be what was the next best evidence about that fact.

15. Mr Cassidy's main submission about the need to produce the statement was in essence simple. Having regard to the regulations set out already payment of pension by way of ACT could only have been done if an appropriate statement had existed. If not the payments would have been illegal. Nobody had ever challenged the validity of the payments. On the contrary they had always been accepted. There was a presumption in favour of legality so that if it was now suggested that there could not be recovery because there had not been such a written statement the onus of proof was firmly upon those so maintaining. And in effect, as I understood his argument, that meant that they would have to prove that the payments had all along been made without proper authority. Whether that would have yet rendered them recoverable, albeit by a different route, was a matter not discussed and I express no opinion about it.

16. In my judgment Mr Cassidy's contention is correct. At its simplest there was a balance of burden on both sides. In order validly to obtain payment by ACT Mrs Stewart had to provide a certain statement - such as on form BR436. For something like four years she had received payment by ACT. Recovery of the current overpayment depended upon the existence of the same statement. It would be at the least anomalous if she could take advantage of the existence of the document and so the soundness of the payment and then found upon its absence - that is its destruction - so as to avoid recovery. She - that is now Mr Currie on behalf of his wife - would have had to go further and make a positive case, established by evidence, that no such document had ever existed. The case would also have had to explain how ACT payments had occurred. The situation is at the least an example of the application of the the maxim -"*omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*": that is that all things are presumed to have been done properly and with due formality until and unless it be proved to the contrary. No such case has been mounted here: there is no criticism in that. It may even be that something of the doctrine of election, or of approbate and reprobate, is applicable. In short one cannot have it both ways - that the essential statement exists when to advantage but not when to disadvantage. For these several reasons I feel entitled, indeed bound, to hold that Mrs Stewart had provided a statement to the requisite effect and that most probably by having completed a BR436.

17. I should record that before the tribunal there was a statement by the Secretary of State that payment by direct credit transfer could not have been made unless the claimant had completed the declaration on form BR436. Indeed document 27, attached to 26, the Secretary of State's certificate in terms of Recovery Regulation 11, stated this -

> "The original form signed by the applicant is not available because it is the Department's usual practice to destroy claim forms and similar documents on a time basis in order to avoid administrative and storage problems.
>
> In particular, it should be noted that applications for payment by direct credit transfer are thoroughly checked by the Department to confirm that they contain all the required information. Payment cannot be made by this method in accordance with the applicant's instructions unless the statement on the standard application form is signed."

I have not thought it necessary to regard that evidence any more than the tribunal appear to have done. But it does show a practical similarity to the interpretation of the law which I have reached.

18. Further I should note that at one stage Mr Currie seemed to concede that his mother-in-law had indeed signed a form BR436. But later it appeared that he was simply making an assumption. In short, as a layman, he was coming to the same conclusion as that at which I have arrived by following the rather more ponderous legal approach. Because she had got her payments by ACT he felt she must have filled up an appropriate form at some stage. He did not realise that it could have been done otherwise. But of course, at least in theory, it could have been done otherwise - such as by letter - avoiding giving the particular written intimation that the conditions had been read and understood. Of course it would also have to be implied that such a letter had erroneously been acted upon. But that would have had to be the formal case of challenge and would have required appropriate proof. No such proof has ever been offered. For the reasons given I have not held Mr Currie to his concession, which was clearly not a proper legal one.

19. I adopt the findings of fact made by the tribunal and add to them that in 1986 Mrs Stewart provided a statement within her application for benefit to be paid by ACT which complied with the provisions of regulations 16A(3)(b) and (8) of the 1979 Claims and Payments Regulations. In light of that and for the reasons given above I am satisfied that there was a material change of circumstances when Mrs Stewart entered hospital warranting the adjudication officer in reviewing the decision awarding the amount of retirement pension. The appropriate revisal in the circumstances has to reflect that she had to be regarded as having received free in-patient treatment for a continuous period of more than 52 weeks prior to admission to hospital. I am satisfied that the adjudication officer's decision in carrying out that revisal was appropriate and that the sum overpaid, correctly calculated at £151, is recoverable.

20. Before leaving the case I should record that Mr Cassidy went on to submit that it would be un-necessary to produce a copy of a statement issued in terms of Recovery Regulation 11(2)(b) even in a case based on a post-April 1987 arrangement. I do not have to decide that but feel that I should indicate that I am not inclined to accept it as at present advised. In the instant case it was the claimant's act that had triggered the ACT payments so that there arose a presumption that that act had been properly done. In the case figured it would be a separate and independent act by the Department to issue the required notice to the claimant. There does not then seem to be any similarity of trigger and so no presumption.

21. The appeal succeeds in law but not in practical terms.

(signed) W M Walker
Commissioner
Date: 28 February 1992