

Sec 17(4) Review cannot be represented — known value can be measured by 68 Council (E.G. - who) (ASKING ABOUT BEN)
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JGMi/AB

Commissioner's File: CSS/31/93

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

1. The claimant's appeal succeeds. The decision of the tribunal dated 27 April 1993 is erroneous in law and is set aside. The decision which I give in its place as the decision which the tribunal should have made is that the claimant's appeal against the decision of the adjudication officer of 24 July 1992 is allowed. The adjudication officer's decision was erroneous in law and invalid for the reasons explained below.

2. This is an appeal by the claimant with leave on a question of law against the above mentioned tribunal decision of 27 April 1993. The appeal is supported by the adjudication officer now concerned with the case.

3. The claimant was in receipt of invalidity benefit under a decision of 15 January 1992. On 6 April 1992 a medical officer of the Benefits Agency reported after examination of the claimant that the claimant was in the doctor's opinion fit for his former occupation with a local authority cleansing department. No review of the decision awarding invalidity benefit was made at that stage. It appears that the Secretary of State issued a notice to the claimant requiring return of his order book on 17 April 1992. No explanation regarding a cessation of his entitlement to benefit was or could have been given. The claimant continued to cash orders in that book until 28 May 1992. On 29 May 1992 an officer of the Benefits Agency uplifted the book from the claimant who claimed not to have received the Secretary of State's notice. There must have been some appreciation by the Department of the fact that entitlement to the benefit had not been terminated. Giro orders for payment of benefit to the claimant were issued for the 3 subsequent weeks up to 18 June 1992.

4. Then after an almost incomprehensible departmental request for review (page 14 of the appeal papers) an adjudication officer on 18 June 1992 reviewed the decision awarding invalidity benefit to the claimant from 19 January 1992 under reference to regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987. He held that the requirements for entitlement to the benefit were not satisfied because he was satisfied that from 13 April 1992 the claimant was not incapable of work. He purported to hold by revised decision that the claimant was not entitled to invalidity benefit from 13 April 1992. Thereafter on 24 July 1992 an adjudication officer made the following decision:-

"As a result of the review decision dated 18.6.92 an overpayment of invalidity benefit has

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been made from 13.4.92 to 18.6.92 (both dates included) amounting to £735.33.

On 23.4.92, 30.4.92, 7, 14, 21, 28 May 1992, 4, 11 and 18.6.92 [the claimant] misrepresented he had been directed to return the order book in issue to the Agency. As a consequence invalidity benefit amounting to £684.72 from 17.4.92 to 18.6.92 (both dates included) as detailed below was paid which would not have been paid but for the misrepresentation. Accordingly that amount is recoverable from [the claimant].

17.4.92-18.6.92 9 x £76.08 = £684.72

Overpayment Schedule

<u>Dates</u>	<u>Period</u>	<u>Weekly amount</u>	<u>Total</u>
17.4.92- 18.6.92	9 weeks	£76.08	£684.72"

5. The claimant appealed to a social security appeal tribunal. The adjudication officer submitted to the tribunal that overpayment to the extent of £228.24 contained in the 3 giro cheques issued as above mentioned should be disregarded by the tribunal as being irrecoverable. That left a balance of £456.48 which was still maintained to be recoverable. That restriction of the amount said to be recoverable was plainly right since there could be no question of misrepresentation relative to the order book after 29 May 1992.

6. Regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987 provides:-

"(4) In any case where benefit is awarded in respect of days subsequent to the date of claim the award shall be subject to the condition that the claimant satisfies the requirements for entitlement; and where those requirements are not satisfied the award shall be reviewed."

Section 71(5) of the Social Security Administration Act 1992 (formerly section 53(4) of the Social Security Act 1986) contains the following material provisions:-

"(5) Except where regulations otherwise provide, an amount shall not be recoverable under sub-section (1) above...unless -

- (a) the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review; and
- (b) it has been determined on the appeal or review that the amount is so recoverable."

The tribunal refused the claimant's appeal and endorsed the decision of the adjudication officer restricting the repayment to £456.48. They did not query the validity of the review under regulation 17(4). They decided on the balance of probability that the claimant had received the

Secretary of State's notice requiring the return of his order book. They therefore regarded the claimant's continued cashing of orders up to 28 May 1992 as involving a misrepresentation that he was entitled to present those orders for payment. This had caused the overpayments which were therefore held recoverable. It was stressed by the tribunal that the appeal related to the issue of overpayment and that the claimant did not dispute his recovery of capacity for work.

7. In supporting the claimant's appeal the adjudication officer now concerned with the case submits that the tribunal were required to satisfy themselves that a valid review had taken place of the determination in pursuance of which the benefit was paid but failed to do so. The adjudication officer points out that the review made on 18 June 1992 under regulation 17(4) was to the effect that the claimant did not satisfy the requirements for title to benefit from and including 13 April 1992. He submits that a decision concerning the failure of a claimant to continue to satisfy the requirements of an award made in respect of days subsequent to the date of claim should only be given so to have effect from the date that the adjudication officer considers the facts and reaches his conclusion and should not be applied to a retrospective period. He therefore submits that as the original review decision purported to revise entitlement from an invalid date no (recoverable) overpayment arose.

8. I agree with that submission. In my judgment regulation 17(4) contains no warrant for the retrospective revisal of an award made in respect of days subsequent to the date of claim. The position may be contrasted with the statutory power of review of decisions under section 25(1)(b) of the Social Security Administration Act 1992 under which a decision may be reviewed at any time if there has been a relevant change of circumstances since the decision was given. Since the decision under appeal depended for its validity upon there having been a valid review terminating the claimant's entitlement to the benefit it follows that the decision under appeal was and should have been held to be invalid.

9. The adjudication officer submits that the tribunal further erred in law in holding that the claimant had made a misrepresentation of material fact for the purposes of section 71(1) of the Social Security Administration Act 1992 in presenting the order book for encashment after, as the tribunal had held, he had been required by a notice of the Secretary of State to return it. The adjudication officer now concerned submits in paragraph 13 of his submission dated 10 November 1993:-

"I submit that this cannot amount to misrepresentation as the claimant is not declaring a "right to present the order book", but simply that he is entitled to the sum which as explained above cannot be a misrepresentation until the award of benefit has been reviewed by the adjudication officer."

10. I see the force of that submission. However I am aware that in a short unreported decision on Commissioner's file CSB/249/1989 a Commissioner held that without reliance upon the signed declaration as a misrepresentation there could be "misrepresentation by conduct". In that case a supplementary benefit claimant who had given notice to the Department that he was about to start work and who had been told to return his order book proceeded to cash an order from the book a week later and some time after starting work. No decision terminating his entitlement had apparently been made prior to his encashment of the order. The Commissioner accepted a submission by the adjudication officer that:-

"The active encashment, after the claimant had received form NO4, which had requested

him to return the order book without encashing any further orders, was a misrepresentation by conduct. The claimant was representing that he had remained entitled to the sum of benefit on the face of the order despite being advised otherwise on form NO4. this positive and deliberate act was sufficient to satisfy the test of misrepresentation."

11. It appears from that narrative that the case was regarded as one of a misrepresentation, by his conduct, of the claimant's continuing entitlement to the benefit, evidenced by his presenting the order for payment after receiving contrary advice. If so, while that decision indicates that there may be a misrepresentation on entitlement in wider circumstances than the adjudication officer in the present case suggests, it is distinguishable on its facts from the present case. The difficulties arising in this area of the law are well illustrated by the decisions of the Court of Appeal in Jones and Sharples v The Chief Adjudication Officer, unreported, 1 July 1993. In view of the fundamental error of law affecting the overpayment decision as a result of the invalid review decision I am not obliged to decide this further issue and I prefer not to express any concluded view upon it without having had the benefit of full argument on both sides. Similarly it is unnecessary for me to decide the additional point raised by the claimant regarding a right to offset possible income support under regulation 13 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988.

12. The decision of the tribunal is set aside as erroneous in law. I have exercised the power to give the decision which the tribunal should have given and that decision is as set forth in the second half of paragraph 1 above.

13. The appeal of the claimant is allowed.

(signed)

J G Mitchell
Commissioner

Date: 22 March 1994

