

✓ Overpayment. Review decision required by SSJ(A) void. Therefore no need AD's decision on overpayment. Claimant's appeal against SSAT's decision upholding AD's decision therefore succeeded.

JGMI/HJD

Commissioner's File: CSSB/316/89

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL TO THE COMMISSIONER FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Glasgow North

Case No: 555 06627

ORAL HEARING

1. My decision is that the decision of the social security appeal tribunal dated 31 January 1989 whereby the tribunal refused the claimant's appeal and upheld the "reviewed decision of adjudication officer that the sum of £151.89 was overpaid from 25.3.87 to 19.5.87 and is recoverable from the claimant" is erroneous in law and is set aside. The decision which I give in its place is that the claimant's appeal is upheld. No valid decision was made by an adjudication officer under section 53 of the Social Security Act 1986 on an overpayment of supplementary benefit to the claimant for all or part of the period from 25 March 1987 to 26 May 1987.

2. This is the second of 2 appeals by the claimant consequent upon the attempted recovery of overpayments arising in common circumstances. The other appeal is dealt with by my decision in the case on Commissioner's file CSSB/315/89. Leave to appeal in the present appeal was granted by the tribunal chairman on a question of law. Both cases were dealt with at an oral hearing held before me at which the claimant, who did not attend, was represented by Mr C Orr of Strathclyde Social Work Department and the adjudication officer was represented by Mr D Cassidy of the Office of the Solicitor to the Secretary of State for Scotland. Much time was spent at the oral hearing in examining Departmental records relating to a series of decisions made or purported to be made in this case. Mrs Lang of the Department of Social Security, Edinburgh, also attended the hearing and gave fair and helpful evidence in explanation of these documents and of normal procedures.

3. In 1987 the claimant was in receipt of supplementary benefit in respect of himself and his wife and family. She was expecting their second child and on 8 January 1987 the local office dealing with the claimant's supplementary benefit was notified by the local National Insurance office that the claimant's wife would be due maternity allowance at a specified rate from 12 January 1987. The claimant's benefit was adjusted accordingly. The claimant's wife had previously been entitled to sickness benefit for a prior period close enough to link with the maternity allowance period, the days of which, in terms

of section 22(3) of the Social Security Act 1975 as in force at the material time, fell to be treated as days of incapacity for work. As a result the claimant's wife qualified for invalidity benefit from 14 February 1987 at various rates until 16 May 1987. Her child was born on 26 March 1987 and the claimant's wife became entitled to additional child benefit at the rate of £7.10 per week from 30 March 1987, rising to £7.25 per week.

4. Arrears payments of invalidity benefit and child benefit issued to the claimant's wife were in due course the subject of decisions by an adjudication officer under section 27 of the Social Security Act 1986 and these form the subject matter of the case on Commissioner's file CSSB/315/89 mentioned above. Continuing payments of supplementary benefit were made to the claimant which did not take account of the assessment unit's continuing receipt of invalidity benefit and child benefit for the second child. The decision under which these continuing payments were made was dated 24 April 1987. On 20 May 1987 a decision on review was made which revised the award of supplementary benefit for the future to take account of these additional resources. That decision was not disputed by the claimant and does not form any part of the present appeal.

5. However the adjudication officer made at least 3 attempts to reach a decision on the overpayment and recoverability of benefit in respect of the intervening past period, viz. decisions dated 16 November 1987, 15 February 1988 and 28 April 1988. The claimant appealed against the first and last of these decisions. The decisions of 15 February 1988 and 28 April 1988 appear to have been issued in attempts, in each case, to correct errors in previous decisions. The decision dated 28 April 1988 was regarded as the decision upon which the claimant's appeal proceeded to a tribunal. However by the time the case came before the tribunal on 31 January 1989 the adjudication officer was conceding that the calculation of overpayment still required to be altered. (It was conceded before me on behalf of the adjudication officer that even that last concession left the calculation still incorrect.)

6. The case unfortunately became even worse on close examination at the hearing before me. The decision put to the tribunal, and said to have been issued on 28 April 1988, was in the following terms:-

"The sum of £169.64 was overpaid from 25.3.87 to 26.5.87 and is recoverable from [the claimant] because he failed to disclose a material fact - namely that the child benefit had been awarded to his wife."

The decision as there reproduced therefore did not make any reference to invalidity benefit. The schedule of overpayments lodged in support of the adjudication officer's decision however mainly consisted of overpayments of invalidity benefit. As mentioned above the adjudication officer sought at the hearing to correct the overpayment sum. No doubt because the correction sought was a reduction of the amount, no objection appears to have been made but again, as mentioned above, even the corrected sum was erroneous. The

hearing at the tribunal was largely concerned with the issue of non-disclosure of material fact by the claimant relative to his wife's receipt of both invalidity benefit and child benefit. The tribunal accepted that there had been such non-disclosure which had caused overpayment of the sum as "corrected" by the adjudication officer. The tribunal therefore upheld the "revised" decision of the adjudication officer and the terms of the tribunal decision are as quoted in paragraph 1 of this decision.

7. Before me Mr Cassidy on behalf of the Adjudication Officer adopted a frank but robust approach. He accepted (1) that a decision under section 53 of the Social Security Act 1986 could only validly be made after review of the relevant award having regard to the provisions of section 53(4) and regulation 12 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988 where, as here, there was no suggestion that review was not possible. In view of that concession, which I accept, I do not need to rehearse the terms of those provisions. He submitted (2) that this case should be dealt with on the basis that such a review was required in respect of the whole period of alleged overpayment, thus avoiding any question whether part of the period fell to be dealt with under the previously operative provisions of section 20 of the Supplementary Benefits Act 1976. Mr Cassidy submitted furthermore (3) that the decision issued on 28 April 1988 could only be a decision made on review of the earlier decision of 15 February 1988 itself necessarily made on review of the decision of 16 November 1987 and that there were no valid grounds for either of such reviews. He submitted (4) that it followed that both decisions should be regarded as invalid and (5) that accordingly, for that reason alone, the decision of the tribunal dated 31 January 1989 must be held to be erroneous in law. Mr Orr agreed. I accept these propositions and I also note in passing that the decision dated 28 April 1988 upheld by the tribunal bore to relate only to child benefit whereas it was conceded before me that any recoverable overpayment under section 53 could not on the evidence extend to child benefit at all and could only have related to invalidity benefit. In the circumstances I set aside the decision of the tribunal as erroneous in law.

8. Mr Cassidy went on however to submit as follows - (1) that it was possible to spell out from various Departmental records produced to me that a not wholly invalid decision reviewing and revising the award of supplementary benefit and finding an overpayment of benefit to have occurred and to be recoverable had been made by an adjudication officer and issued as his decision by a letter dated 6 November 1987. This was to be constructed from inferred grounds of review deduced from production numbered A6 dated 20 May 1987 followed by a revised decision dated 16 November 1987. That decision was admittedly defective and incorrect but could be examined and corrected on appeal. (2) That as the subsequent review decisions were invalid, that decision stood; (3) that as the claimant had appealed against that decision, that ought to be regarded as the valid appeal taken to the tribunal; and (4) that the case could therefore be remitted by me for rehearing by another tribunal with directions for its disposal. Mr Orr, not unnaturally, contested step (1) of that further submission by Mr Cassidy and maintained that it

could not be established that a valid review decision under sections 104 of the Social Security Act 1975 and 53 of the Social Security Act 1986 had been made.

9. It is clear that Mr Cassidy's further submissions are unusually radical and require careful examination. The first point is of course fundamental. It was pointed out on behalf of the adjudication officer that it was common and indeed approved practice in local offices of the Department of Social Security when an overpayment came to light for the adjudication officer to review and revise a current award for the future immediately and thereafter to issue his decision on past overpayment. The present case was an example of that practice.

10. The earliest possible correction of a continuing award which has been found to be incorrect is obviously desirable and I accept that an effective decision for the purposes of section 53(1), (1A) and (4) can be made notwithstanding that grounds of review and reversal of the award for the past and the future, which must of course be appropriate, are established at a date prior to the making of the decision establishing the detail of the overpayment.

11. However given what can only be described as the chaotic state of the recorded decisions, letters and documents in this case, it is in my judgment necessary to look very critically at what is relied upon in an attempt to demonstrate that there was a defective, but not wholly invalid decision under section 53 completed in this case by an adjudication officer in November 1987. I have considered production A6 dated 20 May 1987 and the text of the adjudication officer's "decision" dated 16 November 1987, (Production C2) on which Mr Cassidy seeks to rely. The latter is incomplete and refers to a sum of £199.25 which has no identifiable relationship to an overpayment in the period referred to. It was issued by a letter bearing the date 6 November 1987 in which the claimant was informed of an overpayment decision and threatened with action within 28 days. The "decision" makes an unintelligible reference back to an earlier decision. The only suggested referency back is to the document dated 20 May 1987 headed "Payment Panel", (Production A6). That document for its part does not in my judgment establish a review or even grounds for a review of the past award under section 104 of the Social Security Act 1975. In the circumstances I have no hesitation in concluding that these documents are wholly inept to establish an adjudication officer's decision of any validity for the purposes of section 53 of the Social Security Act 1986.

12. It follows that there is nothing which I could properly remit to another tribunal for further adjudication. It is accordingly appropriate for me to substitute my own decision for that of the tribunal in this case which must be that no valid adjudication officer's decision on the overpayment alleged has been made.

13. The appeal of the claimant is allowed.

(signed) J. G. Mitchell  
 Commissioner  
 Date: 16 November 1990

H10

Payment panel Reference number 165610

£ 48 00 from 20/5/87

Notes

MA+IVB for wife stopped  
 CB in payt.

Payment details Issue B2 to S'burn UBO with the forms listed below

Cycle P Claim file A VU category 0 Rate 0 No. days 7

UR week ending date	E	p	Tc	Mt
11 05 87	048	00	4	0

B2 cancelled

Because

B2a issued on

B2c issued by phone call on

Earnings limits

claimant  E4  
 E  
 partner  E4  
 E

B2 notes

A  Nil tax D  Claimants benefit ends because  
 B  Housing Benefit  
 C  Direct payments E  Other notes  
 £10.05 per week

T/off returned

V off request

Forms to issue with B2

A14N and H3  Others

B2 prepared by P  
 on 2 MAY 87

B2 checked by  
 on

Last payment made via

4/1/87

Cheques

Issue  giro f number

With forms  voucher  warrant

FF 260 prepared by checked by

on on

Authorisation

A14F and B3

prepared by JWP checked by

authorised by H

on 19/5/87 on 20/5/87

Forms to issue at the same time

A358  A365  A367  B73   
 Others

by

on

S dated week

referred to

Action cleared

OP  
 IVB for wife not declared - Ab. 19/5/87  
 CB duplication /OP.

Area North East 4,  
15, Glenbarr Street,  
Glasgow G21



Tel 552 8801

Our ref

Your ref

If phoning or  
calling ask for Chris Orr

Date

Readers will recall that in CSB 621/88 it was decided that if the review decision required under S53(4) was not in evidence before the tribunal dealing with the overpayment then all that happened in regard to the overpayment was void even though it might be obvious to all what the grounds of review under S104 would be.

In CSSB 517/89 the Commissioner was a little kinder and in sending the case back to the SSAT gave the DSS the chance to produce the review decision before the new tribunal.

However in the attached decision the Commissioner had before him the actual decision made on review. This was because the DSS rep. at the oral hearing was in a panic at the effect of the two decisions noted above.

Now read on.

In order to recover an overpayment under S53 one must first have a review decision in order to satisfy S53(4).

This review is NOT the overpayment decision (the LT54). This review decision would be the changing of the weekly payment as a result of the discovery of the income source it would be on an A14 which starts a new weekly payment. It might be months (or in some cases years) before the recovery procedure is started.

But if this review of the weekly benefit is defective then everything else falls. Everything thereafter is void. As you will see at para 11 the Commissioner decides that the AO's decision changing the weekly benefit is void. He isn't specific but note it doesn't specify the decision under review. It doesn't specify the ground of review.

It is clear therefore that from now on the reviewing A14 must be before the tribunal I would suspect that they will all turn out to be void. The one presenting officer who has so far seen this decision accepts that most A14s are written in such a form that on a strict reading they would not pass muster as valid decisions just as if they had never been signed by an AO.

This Commissioner's decision is therefore one more reason why all overpayments should be appealed even if there has been a court case prior to the recovery action.

BUT

there is a more fundamental point. The review in this case instituted a new weekly payment although the Commissioner did not need to decide this point it would seem clear that it would be void for future purposes as well as the past period.

The weekly benefit paid to the claimant since would become a non-recoverable overpayment. Indeed there was no warrant to reduce his benefit to its correct level and it should therefore be reinstated again it would be a non recoverable overpayment.

The only way the defect can be cured is by a fresh decision being issued (properly written out of course) and this would give the claimant a fresh right of appeal.

So with reg 72 cases the first thing is to establish whether there has ever been a competent review in the case. If not then the defective decisions will have to be rewritten, reissued and reappealed. Therefore no need to use reg 72.

It must be stressed that the part of the A14 containing the actual decision is never sent to the claimant.

The tribunals must demand sight of the actual A14 as without it how can one know if S104 is satisfied. Then once we have it we can argue it is void and must be reissued.

This would also apply in SDP cases. If the decision of April 88 is void then it must be reissued in proper form and it would then attract a new right of appeal.

Even if the A14 wasn't void. Look at the one the Commissioner had before him. How on earth would you establish what view of anything the AO had.

COMMENTS PLEASE

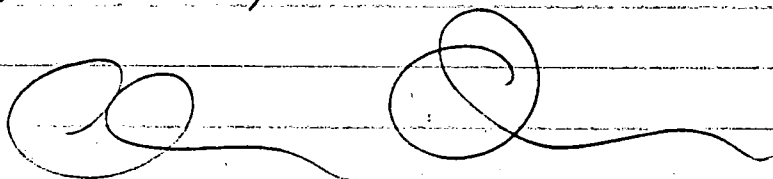
25/11/90

about anything.

In Glasgow & SDP cases a lot of tribunals are now adjourning so that the DSS who are submitting errors of law can produce the decision of April 88 so that one can see precisely what view (if any) the AO actually had.

I suspect what we will get will be favourable to claimants - a pile of vague decisions which follow the enclosed may not be decisions at all.

Please pass a copy to P. Wood & V. Chapman.



JUN

Further to CSSB 517/89 page 7  
Bulletin 98 - find enclosed the latest  
instrument.

Apart from what it does to overpayments  
reg 72 I think it has implication for  
the 90 Act. If the OSS are saying  
error of law against an submission of  
any material fact why should we care  
that they are describing the situation  
in relation to the AO correctly in the  
ATZ.

Only the actual decision under  
review what view the AO had  
PTG