

Overpayments - § 53(1) requires AO to reverse decision awarding benefit before decision to recover is made. Reg 13 SS (Payment) Regs only apply where it is not possible to reverse under s. 704. If AO doesn't reverse where it is possible to do so, decision to recover is invalid & of no effect.  
② DSS should produce witnesses where a statement important to the case is disputed.

DR/JGKS

Commissioner's File: CSSB/517/89

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 South

Case No: 553 12532

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 14 August 1989 is erroneous in point of law and is therefore set aside.

2. The claimant at the time under consideration was a 41 year old single man who was in receipt of supplementary benefit. During the period between 4 June 1986 and 22 September 1987 the claimant received supplementary benefit on the basis that he was living at an address in the west of Scotland as a commercial boarder. It was then considered that the claimant had been actually living at that address as an ordinary member of the household and the question arose regarding whether the claimant had received an overpayment of benefit amounting to £2852.20. The question also arose as to whether that sum was recoverable from the claimant having regard to the provisions of section 20 of the Supplementary Benefits Act 1976 and section 53 of the Social Security Act 1986. Said section 53 replaced said section 20 with effect from 6 April 1987. Section 53(1) of the said Social Security Act 1986 provides as follows:-

"53.-(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure-

(a) a payment has been made in respect of a benefit to which this section applies; or

(b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose."

Section 20 of the 1976 Act mentioned above contained somewhat similar provisions. Section 53, however, provides in subsection 4 as follows:-

"(4) Except where regulations otherwise prescribe, an amount shall not be recoverable under subsection (1) above or regulations under subsection (3) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review."

Said section 20 did not contain provisions similar to said subsection 4.

3. In a decision which was issued on 18 January 1988 the local adjudication officer decided as follows:-

"The claimant has been overpaid supplementary benefit from 4.6.86 to 22.9.87 amounting to £2852.20 because he misrepresented a material fact, namely that he claimed to be a commercial boarder whereas he was an ordinary member of the household."

It will be noted that according to the papers which are before me there would appear to have been no review proceedings under section 104 of the Social Security Act 1975 which should have been taken by the local adjudication officer having regard to the provisions of said section 53(4) mentioned above. The claimant appealed against the local adjudication officer's decision but finally after two adjournments a social security appeal tribunal decided on 14 August 1989 that the decision of the local adjudication officer should be upheld. Thereafter the claimant applied for leave to appeal to a Commissioner on a question of law from the tribunal's decision, and that application was granted by the chairman of the tribunal. An oral hearing in connection with the appeal thereafter took place before me.

4. At the hearing before me the claimant's representative submitted that it appeared that no review proceedings had been taken by the local adjudication officer which meant that the adjudication officer's decision was invalid and of no force or effect. Reference was made to regulation 13 of the Social Security (Payments) Regulations 1987 which provided as follows:-

"13. Section 53(4) of the Act (recoverability dependent on reversal, variation or revision of determination) shall not apply where the fact and circumstances of the misrepresentation or non-disclosure do not provide a basis for reviewing and revising the determination under which payment was made."

It was maintained that an adjudication officer in an overpayment case must first decide whether or not section 104 of the 1975 Act can be used, and it is only if that statutory provision cannot be used that said regulation 13 can be used. It was pointed out that in the present case there was no suggestion that review proceedings under section 104 could not be used and that recourse to said regulation 13

had to be made. The legal representative of the adjudication officer now concerned with the case submitted that review proceedings may have taken place in the present case but in any event there was no need for a technical decision on the review and revisal questions since in a section 53 case a misrepresentation and overpayment are so closely linked as to render unnecessary a specific reference to review proceedings. It was further contended that the real question at issue in a case such as the present one was whether there had been a misrepresentation or a failure to disclose any material fact leading to an overpayment and that the review question was a technical matter which could be assumed to have taken place. I have sympathy with these contentions made by the legal representative of the adjudication officer now concerned with the case, but I consider that I cannot uphold them. If review proceedings are available under section 104 of the 1975 Act, then it is essential for a review and revisal decision to be taken by an adjudication officer. It is only if such review proceedings are not available that said regulation 13 can be used. The position in the present case is, as I see it, that if in fact a review decision was made by the local adjudication officer then the appropriate document ought to be produced. If no review decision took place, and it is not suggested that a review decision could not take place, then the said adjudication officer's decision is invalid and of no force or effect. That is the decision which the tribunal should have reached. If that is the position, then it will be for a decision to be taken regarding whether overpayment proceedings should be commenced afresh.

5. If by any chance it turns out that the local adjudication officer did in fact issue a review decision, then I am still of the opinion that the decision of the tribunal is erroneous in point of law and therefore falls to be set aside. For one thing the tribunal did not deal with this review question at all. Also there is another reason why the tribunal decision is erroneous in law. One of the main items of evidence which was founded upon by the local adjudication officer was a statement signed by the claimant on 5 October 1987 which was obtained by two officials of the Department of Social Security. That statement was in the following terms:-

"I, James Armstrong wish to state, without prejudice to any further action by the department, that my girlfriend wrote the letter that I presented to the department for my claim to benefit on 29/5/86 and although I had been residing at c/o 213 Montrose St, Clydebank it was not as a commercial boarder but as a member of the household."

The claimant attended a hearing before a social security appeal tribunal on 19 May 1989. At that hearing the claimant asked for an adjournment because he had arranged to have a witness present to whom he had made payment for board and lodging, and he explained that this witness had not turned up at a pre-arranged meeting place. The claimant when asked about the said statement dated 5 October 1987 maintained that it had been written out by one of the two men from the Department of Social Security; that it was not true; that he was told he would get no money until he signed it; and that when he

signed it he immediately got his money. The proceedings before the tribunal contain the statement:-

"It is clear that it would be necessary to have witnesses in this case to clarify some facts."

The tribunal decided as follows:-

"Appeal adjourned to allow the claimant to have at least one witness with him. The adjournment will also allow DSS to consider having in attendance one or both of the witnesses to the statement dated 5.10.87 to reply to the allegations of the claimant."

A further hearing took place before a tribunal on 26 June 1989 which was again adjourned. A final hearing took place before another tribunal on 14 August 1989 and the tribunal unanimously decided to uphold the decision of the adjudication officer. The reasons for the tribunal's decision were as follows:-

"Mr Armstrong represented to the Department that he was a commercial boarder and paid £40 per week to Mrs Malley. These representations resulted in his receiving £69.70 from the Department from 4/4/86 to 18/11/86, £69.80 from 19/11/86 to 7/4/87 and £70 from 8/4/87 to 22/9/87, being the rate payable to a commercial boarder.

In fact he was living as an ordinary member of the Malley household and was entitled only to £27.50, £27.75 and £28.40 for the above periods resulting in an overpayment of £2852.20. The information on the B1 form was false. The information given on the signed statement of 5/10/87 was true. We did not believe Mr Armstrong's suggestion that he signed the statement so that the Department would give him money to pay his present boarding. He admitted the statement had been read over to him and that he understood fully its implications. We heard neither from Mrs Malley nor John Malley whom he might have been expected to call as witnesses if his version was true. We thought his explanation for signing inherently improbable and found this was a misrepresentation in the B1 which led to an overpayment of £2852.20. We dismiss the appeal."

It was contended on behalf of the claimant at the hearing before me that at the hearing before the tribunal on 14 August 1989 the adjudication officer ought to have produced as witnesses the said officers who had obtained the said statement from the claimant on 5 October 1987. Furthermore, the record of the proceedings of the tribunal contain no explanation regarding why these officers of the Department of Social Security had not been called as witnesses. The said statement was of course an important issue in this overpayment case, and it was agreed by the legal representative of the adjudication officer now concerned with the case that these two officials of the Department should have been present. The tribunal's decision is therefore in my opinion erroneous in point of law on that

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account. Even if review proceedings did in fact take place the case must nevertheless be reconsidered by another tribunal.

6. The claimant's appeal is allowed.

(signed) Douglas Reith  
Commissioner  
Date:- 22 June 1990