

Service = sent not delivered.

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JMH/TEMP/1

Commissioner's File: CA/486/1992

DSS File: SD450/C57

SOCIAL SECURITY ACTS 1975 TO 1986

APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON
A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

1. My decision is that the decision of the Attendance Allowance Board was not erroneous in point of law. Accordingly this appeal is dismissed.

2. This is an appeal from the decision of the Attendance Allowance Board dated 26 March 1992 (T51/52). That decision was, in effect, that, since the claimant had not made her application for review within the prescribed period, the only applicable grounds for review were those set out in paragraph (a) of section 106(1) Social Security Act 1975 viz if the Board "are satisfied there has been a relevant change of circumstances since the determination was made, or that the determination was made in ignorance of a material fact or was based on a mistake as to a material fact.". This the Board did not find and therefore they refused to review the determination. Thus the provisions for review generally on any ground in paragraph (b) of section 106(1) was not available to the claimant.

3. The original determination on the claim for attendance allowance was made on 6 June 1991. There is evidence that it was posted to the claimant on 28 June 1991 (66) although the adjudication officer states that it was sent to the claimant on 25 June 1991, presumably because that is the date stamped on the determination - T21/29. However, the determination did not arrive. Following a telephone call from the claimant's husband on 6 November a further copy of the written decision was sent and was received by the claimant on 21 November 1991. The claimant applied for a review (66) by a letter received on 13.12.91.

4. "The prescribed period" is defined in regulation 38(1) of the Adjudication Regulations 1986 to be "the period of 3 months from the date on which notice of the determination which it is sought to have reviewed was given or sent to the claimant." the questions which arise are:-

(i) Is there jurisdiction to extend the time?

(ii) Was the determination given or sent to the claimant in

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circumstances when it was not received by her?

5. (i) Is there jurisdiction to extend the time?

The courts do, of course, have express power in R.S.C. O.3r.5 to extend or bridge the time limit set out in the rules and in some cases have inherent power to do so. But where a statute lays down a time limit, there is generally no inherent power to extend. For example I refer to eg. an application for a new business tenancy under Part II of the Landlord and Tenant Act 1954 where it has been held that so far as section 29(3) is concerned there is no power to extend the time limit - see note 12 para 574 Halsbury's Laws 4th Edition Vol 27(1). Perhaps, more to the point, is the Limitation Act 1980 where no extensions are permitted other than those expressly provided for under Part II "Extension or Exclusion of Ordinary Time Limit."

That there is no power to extend is consistent with the decision at CA/192/1988 and I hold that the three months period cannot be extended.

(ii) Was the determination given or sent for the purposes of regulation 38(1) of the Adjudication Regulations in circumstances when it was not received?

It seems prima facie somewhat unreasonable that a claimant might lose a right to a general review under section 106(1)(b) if the determination was sent to him but it went astray in the post and was never delivered. However regulation 1(3) of the Adjudication Regulations provides:-

"Where, by any provision of the Acts or of these Regulations -

(a) ...

(b) when a notice or other document is required to be given or sent to any person that notice or document shall if sent by post to that person's last known or notified address be treated as having been given or sent on the day it was posted."

The copy of the determination at T21 shows that it was addressed to the claimant at p66 and that it was sent on 28 June 1991. I am accordingly prepared to accept that the determination was sent on that date and properly addressed. It appears to me that because of regulation 1(3)(b) I have quoted above the provisions of regulation 38(1) of the Adjudication Regulations must prima facie be taken to have been satisfied.

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The statute book has many examples of when service by post is deemed to be effected: see for example section 196 Law of Property Act 1925, section 329 Town and Country Planning Act 1990. There is, more important, section 7 Interpretation Act 1978 which provides:

"Where an Act authorises ... any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

Now "Act" includes a local or private Act but is to be distinguished from subordinate legislation, which the Regulation is - see section 21(1). However section 7 is applicable to subordinate legislation unless the contrary intention appears - see section 23(1). It is to be noted that there is missing from regulation 1(3) the words I have underlined "unless the contrary is proved". Instead of that expression, some statutory provisions - see for example section 196 LPA 1925 - provide that "if that letter is not returned through the post-office undelivered, then that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered."

Assuming the determination was not received by the claimant, what is the applicability of section 7, if any, to this case with particular reference to the words "unless the contrary is proved". There are, I think, two answers to this.

First, a mere assertion by the recipient that he had not received the document concerned has been held by the Court of Appeal to be insufficient to amount to proof to the contrary for the purposes of section 7, and that is all the claimant alleges in this case. Thus assuming section 7 did apply and assuming it was open to the claimant to adduce proof that the determination has not been received, the claimant fails in her proof. However I do not think that one gets that far at all since as will appear below I do not think receipt of the determination is relevant.

The second answer is this. The words in section 7 "unless the contrary is proved" relate only to the date of receipt not to the fact of service. That section is in two parts. The first part provides that the sending of a document in the manner laid down is deemed to be service. The second part, dealing as it does with delivery, comes into play if the document has to be received by a certain time. See per Parker L.J. in R v London Quarter Sessions ex parte Rossi 1956 1 QB 682 at page 700. Thus if the document can be served at any time - as could the determination in this case - the non-receipt is irrelevant. This has been

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expressly held to be so in Moody v Godstone R.D.C. 1966 1 WLR 7085, a case concerning the service of an enforcement notice, under the terms of which the person served had 28 days in which to comply. His defence was that he had never received the notice but since there was no time limit for the service of the notice but only in relation to his compliance therewith, non-receipt was irrelevant: service had been made. Similarly, in this case, it seems to me that non-receipt is irrelevant even though the claimant is put under a time limit in which to seek review. That time limit is defined by reference to the date on which the notice was given or sent.

In coming to this conclusion I have assumed that section 7 Interpretation Act is applicable without coming to any conclusion whether it is or is not.

6. With some reluctance I come to the conclusion that, notwithstanding the determination was not received by the claimant within the three months period, and was presumably lost in the post, nevertheless she has lost her right to a review under para (b) of section 106(1).

(Signed) J M Henty
Commissioner

(Date) 8 June 1994