Bulletin 165

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/6336/1999

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ACT 1998

APPEAL FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: MR J MESHER

Claimant: Mrs Elsie Hosford

Tribunal: Sheffield

Tribunal Case No: S/01/138/99/00160

Date of tribunal hearing: 9 July 1999

[ORAL HEARING]

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Sheffield social security appeal tribunal dated 9 July 1999 is erroneous in point of law, for the reasons given below, and I set it aside. The appeal against the adjudication officer's decision dated 2 November 1998 is referred to an appeal tribunal constituted under the Social Security Act 1998 for determination in accordance with the directions given in paragraph 31 below (Social Security Act 1998, section 14(8)(b)).

2. I start by apologising for the delay in giving this decision, which has gone beyond what I warned at the oral hearing might occur.

THE BACKGROUND

3. The claimant was awarded the higher rate of the mobility component of disability living allowance (DLA) and the lowest rate of the care component from 24 March 1995. She has a long history of schizophrenia and depression. Her DLA was paid by order book, issued from the DLA Unit in Blackpool. The claimant was admitted to the Northern General Hospital on 17 November 1997, having taken an overdose of medication during an episode of exceptionally severe symptoms, and was transferred to Nether Edge Hospital on 18 November 1997. She remained as an in-patient for many months, but began to have some periods of leave at home from 20 December 1997.

4. The first that the DLA Unit knew of the claimant's admission to hospital was the receipt on 20 March 1998 of a form BF600 from the local office of the Benefits Agency which said that she had been admitted to hospital on 19 November 1997. The names of both hospitals were given, with the note "Med 10 recd at LO". It was later discovered that the local office was informed of the claimant's admission to hospital by an in-patient certificate on 20 November 1997 (see page 79). The DLA Unit sent forms to the hospitals, which confirmed the dates of admission, although inaccurate information was initially given about the periods of leave.

5. An adjudication officer on 30 June 1998 gave a decision reviewing the decision awarding the claimant DLA on the ground of relevant change of circumstances and giving the revised decision that DLA was not payable to the claimant for any day of free hospital in-patient treatment from and including 15 December 1997. An overpayment of £668.50 for the period from 17 December 1997 to 24 March 1998 was identified, which was found to be recoverable from the claimant under section 71 of the Social Security Administration Act 1992 on the ground that she had failed to disclose her admission to hospital.

6. An application for review on the claimant's behalf was unsuccessful, although the adjudication officer's decision of 2 November 1998 ignored the evidence presented of periods of leave from hospital within the period of the alleged overpayment. An appeal was made on the claimant's behalf. The main points were, as in the application for review, (a) that the

claimant had told medical staff at Nether Edge Hospital that the Benefits Agency needed to be told of her admission and someone did inform the local office; (b) that in her seriously impaired mental condition the claimant went on receiving DLA believing that she must be entitled to it, as the information had been given; and (c) the amount of the overpayment did not take into account days of leave.

THE APPEAL TRIBUNAL'S DECISION

7. The claimant attended the hearing before the appeal tribunal on 9 July 1999 with a representative. Her evidence included that while she was in hospital her daughter had cashed her order books (monthly for DLA and weekly for income support). The claimant had signed the books and her daughter collected the money.

8. The appeal tribunal dismissed the appeal, but directed that the amount of the overpayment was to be recalculated to take account of the dates of leave from Nether Edge Hospital, in accordance with regulations 8 to 10 of the Social Security (Disability Living Allowance) Regulations 1991, with referral back to the appeal tribunal in the event of dispute. The statement of material facts and reasons contained the following:

> "4. The overpayment is recoverable from the appellant as she misrepresented the material fact that her circumstances had not changed.
>
> 5. Mr Briggs [the claimant's representative] argues that the appellant cannot be held responsible for the overpayment because of her mental state. But she does not have an appointee but signs her own claims and CAO v Sherriff decides that she is capable of a representation if she is capable of making a claim (also CSB 218/91).
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> 6. She must disclose to the office 'handling the transaction', ie the DLA Unit in Blackpool (R(SB) 15/87). Disclosure to the DSS office is not enough. They were not the issuing office and did not pay the benefit. They were not in any way agents for the DLA Unit. She failed to make effective disclosure. We fully accept that she asked the nurse to inform 'Chesham House' (the DSS) and this was done. But that was effective only for Income Support.
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> 7. The AO seeks recovery for failure to disclose under s71 SSAA 92. But we consider it is misrepresentation, albeit totally innocent. Each time [the claimant] signed her order she misrepresented that she was entitled to the benefit (Jones v CAO and Franklin v CAO). This was an innocent misrepresentation because her purported disclosure had been ineffective as regards DLA. We have no doubt that the misrepresentation was wholly innocent but it nevertheless triggers recovery (CAO v Page) being based on a positive and deliberate action, ie signing her payable orders and arranging for them to be encashed."

9. The claimant now appeals against that decision with the leave of a Commissioner. The first written submission on behalf of the Secretary of State, dated 30 May 2000, did not support the appeal. The case, after waiting in an administrative queue, was referred to me in January 2001. In view of that wait and of the number of outstanding issues, I directed an oral

hearing. In addition, the decisions of the Tribunal of Commissioners in CG/4494/1999 and CG/5631/1999 (dealing with the question of the branch of the Department of Social Security to which disclosure has to be made) had been signed late in December 2000. At the oral hearing the claimant was represented by Mr Stewart Wright of the Child Poverty Action Group. The Secretary of State was represented by Mr Leo Scoon of the Office of the Solicitor to the Department of Social Security. I am grateful to both representatives for their well-directed submissions and for the very helpful provision of written skeleton arguments.

ERRORS OF LAW

10. Mr Scoon accepted that the appeal tribunal had erred in law in four respects identified by Mr Wright. I agree. The first three can be dealt with briefly, as the errors can be avoided relatively easily by the appeal tribunal which deals with the case on rehearing. The fourth needs rather more expansion.

(a) No notice of change of basis of recoverability

11. First, it was an error of law for the appeal tribunal to shift the basis of recoverability from failure to disclose to misrepresentation without giving notice to the claimant's representative that such a course was being considered and giving a fair opportunity to meet the altered case (R(SB) 40/84, paragraph 12, and CG/4494/1999, paragraph 5). The important differences in substance between the different bases of recoverability are shown by the other matters discussed below.

(b) No evidence of misrepresentations

12. Second, it was an error of law for the appeal tribunal to rely on misrepresentations made by the claimant in signing the DLA order book counterfoils without having evidence of the declarations incorporated on those counterfoils at the relevant date. Ideally the counterfoils actually signed by the claimant would be available, but it is I think accepted that evidence of the standard form of counterfoil in use for the relevant benefit at the relevant time would be sufficient. The appeal tribunal in the present case did not have such evidence. It made an assumption that the claimant would have signed a declaration in a particular form. It was wrong in law to do so. That error is reinforced by the evidence that at the relevant time the claimant's daughter was taking the order book to be cashed at the Post Office after the claimant had signed the counterfoil. In such circumstances the claimant and the person cashing the order have to sign the counterfoil in different places on the front and the back. I do not know exactly what declaration is signed by the claimant in such circumstances, and the appeal tribunal should only have proceeded on evidence of what would have been signed by both parties in such a case.

13. It may be that in some cases before appeal tribunals it is expressly conceded on behalf of a claimant, with knowledge of the consequences, that an order book declaration in a particular form has been signed. In such a case it might not be wrong in law for the appeal tribunal to proceed without further evidence on the point. But evidence of the particular misrepresentation which is alleged to have been made must remain a fundamental part of what needs to be produced by the Secretary of State to an appeal tribunal where misrepresentation of material fact is relied on.

(c) Reliance on misrepresentation of law, not fact

14. Third, the appeal tribunal erred in law in basing its decision on a misrepresentation by the claimant that she was entitled to benefit (paragraph 7 of the statement of facts and reasons). Such a misrepresentation is one of law and not of fact (CG/4494/1999, paragraph 6, and see Evans LJ in Jones v Chief Adjudication Officer [1994] 1 WLR 62, at 69, adopted in a number of Commissioners' decisions). Therefore, it cannot in itself ground recoverability under section 71. If the appeal tribunal had based itself on a representation that the claimant had correctly reported any facts which could affect the amount of benefit paid (as paragraph 4 of the statement of facts and reasons might suggest), there would have been reliance on a misrepresentation of material fact. But the first and second errors identified above would still have been present, and it would have been necessary to explore what "correctly reported" might mean in the circumstances of the case.

(d) Effect of disclosure to local office

15. Fourth, the appeal tribunal erred in law in failing to investigate further the circumstances in which disclosure was made to the local office of the Benefits Agency. This applies whether one is talking of failure to disclose or of a misrepresentation in signing an order book counterfoil, although there are additional complications in the second case. Two points need to be looked at separately: the sending of the in-patient certificate or other documents and the telephone call to the local office by a nurse.

In-patient certificates and other documents

16. There was clear evidence, which the appeal tribunal accepted, that an in-patient certificate was received in the local office on 20 November 1997. There was also evidence that a Med 10, which may or may not be the same as an in-patient certificate, was received. There was also evidence in a letter from the ward clerk in Nether Edge Hospital (page 86) that more than one Med 10 had been sent and that admission details were given at the same time. The appeal tribunal correctly (as confirmed by the Tribunal of Commissioners in CG/4494/1999 and CG/5631/1999) took the view that this disclosure of the claimant's admission to hospital was not disclosure to the office handling her DLA claim in accordance with R(SB) 15/87. However, there was no evidence before the appeal tribunal of exactly what any of the documents contained and I consider that they should have investigated further.

17. In-patient certificates, Med 10s, any particular forms for hospitals to report the admission of a claimant or other information on admission sent by a hospital all sound like documents which would be signed by a member of the medical or non-medical staff of the hospital. If a document was sent solely on behalf of the hospital, that might seem not to be disclosure by or on behalf of the claimant as required by paragraph 29 of R(SB) 15/87. But the Tribunal of Commissioners went on there to say:

> "In this context we consider that disclosure could fall within the ambit of having been made 'on behalf' of the claimant if someone else were to give information concerning the claimant in the course of some entirely separate transaction (for example, in connection with the informant's own claim for benefit), provided that:-
> (a) the information was given to the relevant benefit office;
> (b) the claimant was aware that the information had been so given; and

(c) in the circumstances it was reasonable for the claimant to believe that it was unnecessary for him to take any action himself."

Leaving aside condition (a) for the moment, the sending of documents in the present case might well come within conditions (b) and (c), since the claimant had raised the question of informing the benefit authorities with the hospital staff and might have gained an impression that the matter was being dealt with so that it was unnecessary for her to take any action herself at that point. There is no question in the present case of information being given in the course of some other transaction, but it seems to me that similar principles should apply on the question of when disclosure by a claimant is carried out by another person. However, condition (a) must be considered.

18. On that issue, the earlier part of R(SB) 15/87, and R(SB) 54/83, are relevant. In paragraph 28 of R(SB) 15/87 the Tribunal of Commissioners stated that a claimant's duty to disclose is best fulfilled by disclosure to the local office where his claim is being handled and, after discussing that situation, continued:

> "But, as was pointed out in R(SB) 54/83, there can be occasions when the duty can be fulfilled by disclosure elsewhere. This can happen, for instance, if an officer in another office of the Department of Health and Social Security or local unemployment benefit office accepts information in circumstances which make it reasonable for the claimant to think the matters disclosed will be passed on to the local office in question. It was in reference to this sort of case that the Commissioner included in paragraph 18 of Decision R(SB) 54/83 his statement about a continuing duty. A claimant who has made such disclosure has not in fact made disclosure to the right person or in the right place, but he has done something which has the effect that, for the time being at least, further disclosure is not reasonably to be expected of him."

In my judgment it is plain that the Tribunal of Commissioners intended that principle to extend not just to cases where the claimant personally gave information, but also to cases under paragraph 29 where another person gave the information. Thus, in the present case condition (a) in paragraph 29 would be satisfied if documents were sent to the local office in circumstances which would make it reasonable for the person giving the relevant information to think that it would be passed on to the DLA Unit.

19. The appeal tribunal failed to investigate that issue. That would have involved seeking to obtain copies of the actual in-patient certificates, Med 10s or admissions details sent to the local office by Nether Edge Hospital, or if those were not available, specimen documents. If those documents made a specific mention of the claimant's being in receipt of DLA and could be understood as containing a request, express or implied, that information on her admission to hospital be passed on to the DLA authorities, that would help to bring the case within paragraph 29 of R(SB) 15/87. But I think that there would have needed to be some further evidence, either of some specific reply in this case or of a general practice of a local office of the Benefits Agency receiving information from a hospital about admission and passing on the information to the offices dealing with the benefits mentioned, for condition (c) in paragraph 29 to have been satisfied. It appears from the action which was eventually taken

by the local office in sending the form BF600 that there was some kind of formalised practice of passing on information, and that at least by 17 March 1998 the local office knew that the claimant was receiving DLA. However, what is not known is what prompted the local office to take that action in March 1998 and why it was not done immediately the information on admission to hospital was received. If there was a failure to carry out administrative arrangements then, regardless of the ultimate result in law, that might influence the Secretary of State in deciding whether to enforce any right to recover from the claimant.

20. The possibility of the duty to disclose having been fulfilled arose sufficiently clearly on the existing evidence that the appeal tribunal should have investigated further. If the claimant's duty to disclose had been fulfilled at the outset, then there could at that point have been no failure to disclose. A point may have been reached later at which the claimant ought to have realised that the information about her admission to hospital had not been transmitted to the DLA Unit, so that it became reasonable to expect her to make further disclosure, but that would have depended on the assessment of evidence of many factors, including the claimant's state of health and knowledge of the conditions for payment of DLA. More tricky legally is the question whether it would have made a significant difference if recoverability had properly been based on misrepresentation, through the order book declaration, rather than failure to disclose.

21. The point made by Mr Scoon was that the standard form of the order book declaration (assuming that it had been signed by the claimant) was that she had correctly reported any facts which could affect the amount of her payment, and that the order book instructions current at the relevant time were to tell the DLA Unit of changes of circumstances, including admission to hospital. He submitted that unless and until the information reached the DLA Unit the facts had not been correctly reported. There might have been an attempt to report them, but no more. In addition, in Chief Adjudication Officer v Jones Dillon LJ (at [1994] 1 WLR 72 - 3) held that while a declaration in the above terms had to be limited to a representation that all material facts known to the claimant had been correctly reported, it was not possible to read in a further qualification such as "in so far as disclosure could reasonably be expected of me". As the principle in paragraph 28 of R(SB) 15/87 operates to create a situation in which a claimant is not reasonably expected to make further disclosure, it could be argued that nevertheless a declaration that any material facts had been correctly reported was factually wrong and therefore a misrepresentation.

22. I have no doubt that what Dillon LJ said in Jones is not to be interpreted in that way. The issue there was whether it was relevant to ask what facts a reasonable man might or might not think material. The issue of whether a claimant is not reasonably expected to make further disclosure, where disclosure has already been made in circumstances falling within paragraphs 28 and 29 of R(SB) 15/87, is quite different. In my judgment, if the duty of disclosure has been fulfilled in a way set out in those paragraphs, a statement that any material facts have been correctly reported is factually true. If the duty has been fulfilled, that is sufficient for correctness. If after a time the "continuing" duty to disclose revives, then future declarations might be incorrect and amount to misrepresentations of material fact. But until that point they do not. That supplies a further reason for the appeal tribunal having needed to investigate the evidence further. I do not need to explore here any of the other

situations of fact mentioned at the oral hearing.

Telephone call

23. The appeal tribunal accepted in substance the claimant's case that she asked a nurse (or it may have been the ward sister or some other member of staff) to tell the Department of Social Security that she was in hospital and that the nurse did telephone the local office. For similar reasons to those given immediately above, the appeal tribunal should have investigated further and given the opportunity to the claimant's representative and the adjudication officer to obtain further evidence. If the nurse had mentioned in the telephone call that the claimant was receiving DLA as well as income support and had been told something in reply to make it reasonable to think that the information that the claimant had been admitted to hospital would be passed on to the DLA Unit, then the claimant's duty of disclosure would have been fulfilled. The consequence would have been that there was no failure to disclose or misrepresentation on the order book counterfoils unless and until the claimant ought to have realised that the information had not been transmitted to the DLA Unit so that there was a duty to make further disclosure.

24. The case for the appeal tribunal having erred in law is rather weaker here, for the practical reason that the claimant's representative might well not have been able to find the person who made the telephone call and that person might well not have been able to remember what had been said by the officer in Chesham House, since she would probably have not made a written record. However, there might have been some written record in the claimant's income support file if a search had been made. I think that there was just enough practical possibility of further evidence emerging that the appeal tribunal ought to have given the opportunity for it to be sought.

POINTS ON WHICH THERE WAS NO ERROR OF LAW

25. A number of other points of law have been raised in the appeal, which I should also deal with. The first of them is particularly important in explaining why I have not been able to substitute a decision on the appeal against the adjudication officer's decision of 2 November 1998.

(a) Disclosure to any office of the Secretary of State

26. Mr Wright correctly accepted that I am bound to follow the decision of the Tribunal of Commissioners in CG/4494/1999 and CG/5631/1999 (broadly endorsing the rule that disclosure has to be to the office dealing with the relevant claim). However, in order to protect the present claimant's position, he maintained the unsuccessful submission made in those cases, that disclosure to the Secretary of State through any office of the Department of Social Security (as it then still was) fulfilled the duty of disclosure, and that knowledge of a material fact in any such office would break the causal link between any failure to disclose or misrepresentation and any subsequent overpayment of benefit. I reject that submission, in reliance on the Tribunal of Commissioners' decisions. Accordingly, I find that the appeal tribunal did not err in law in taking the approach upheld in those decisions.

27. I couple with the point in the previous paragraph Mr Wright's submission that payment of benefit is not made as a result of the signing of a standard order book, which should be

treated as merely a receipt for moneys already handed over by the Post Office. He said that the same submission had been made to the Tribunal of Commissioners. It is not mentioned in their decisions. In those circumstances I regard it as having been impliedly rejected by the Tribunal of Commissioners, as it is inconsistent with the legal approach taken in their decisions. I reject it also.

(b) Non est factum

28. There was some discussion at the oral hearing of the doctrine of non est factum (ie roughly that a person under a disability should not be bound by signing a document fundamentally different from what he thought he was signing). This was raised as potentially applicable by the Tribunal of Commissioners in CG/4494/1999. There was dispute between Mr Scoon and Mr Wright as to whether that was consistent with the decision of the Court of Appeal in Chief Adjudication Officer v Sherriff, reported as R(IS) 14/96. Mr Wright submitted that the appeal tribunal in the present case erred in law in failing to look at non est factum when the claimant's representative had submitted that the claimant should not be held responsible for any misrepresentations in view of her mental state at the time. I agree that the appeal tribunal may have given too much significance to the point in Sherriff that if a person has the capacity to make a claim, she has the capacity to make a representation. That point might hold good where the representation is made in a claim form signed by the claimant. But the fact that a claimant in the past has made a claim and signed a claim form does not mean that she has capacity at later dates to make a misrepresentation. However, the claimant's oral evidence to the appeal tribunal suggested that she knew exactly what she was signing when she signed the order books in hospital and in my view the evidence was not such as to require the appeal tribunal to consider non est factum. Thus any misinterpretation of Sherriff was not material to its decision.

(c) The amount of the overpayment and days of leave

29. In a direction before the oral hearing I suggested that the appeal tribunal might have erred in law in failing to give sufficient guidance in paragraph 3 of its reasons on the principles according to which the amount of the overpayment was to be recalculated to take account of periods of home leave from hospital. Information was provided by the Secretary of State on the recalculation which had been made and the days which had been excluded from the period of overpayment as days on which regulation 8 of the Social Security (Disability Living Allowance) Regulations 1991 did not bite. The approach was in accordance with my decision in CDLA/11099/1995. Mr Wright did not challenge the basis of that recalculation, subject of course to his submissions on recoverability. He did not wish to press any arguments about inadequate guidance from the appeal tribunal. As the appeal tribunal's decision has to be set aside for other reasons, the point need not be pursued.

THE COMMISSIONER'S DECISION

30. For the reasons given above, the appeal tribunal's decision must be set aside as erroneous in point of law. I cannot decide the case on the evidence currently available, as I would have been able to if my conclusion in paragraph 26 above had been the opposite to that set out. The claimant's appeal against the adjudication officer's decision dated 2 November 1998 must therefore be referred to an appeal tribunal constituted under the Social Security Act 1998 and regulation 36(6) of the Social Security and Child Support (Decisions and Appeals)

Regulations 1999 for determination in accordance with the directions given below. No-one who was a member of the appeal tribunal of 9 July 1999 is to be a member of the new appeal tribunal.

DIRECTIONS TO THE NEW APPEAL TRIBUNAL

31. There is to be a complete rehearing of the claimant's appeal on the evidence produced and submissions made to the new appeal tribunal, which will not be bound by any conclusions expressed or findings made by the appeal tribunal of 9 July 1999. The legal approach set out above must be applied. Before the rehearing the Secretary of State is to arrange for a search to be carried out of the claimant's income support or other records deriving from the local office so as to be able to provide the evidence referred to in paragraphs 19 and 24 above, as far as it is available. That will include evidence of the practice at the time for the transmission of information relevant to DLA from local offices to the DLA Unit. The written submission for the rehearing should explain why, if this is the case, any particular item of evidence is not available. That submission must make clear whether the Secretary of State is relying on failure to disclose or misrepresentation or both as the basis for recoverability of the overpayment. If misrepresentation is relied on, the evidence mentioned in paragraphs 12 and 13 above must be produced. If the new appeal tribunal is minded at any stage to consider a basis other than that relied on by the Secretary of State the claimant and any representative must be given notice and a fair opportunity to deal with the point. The claimant's representative will no doubt wish to pursue the evidence from a member of staff of Nether Edge Hospital mentioned in paragraph 24 above and evidence of any understandings or arrangements at the relevant time about the provision of information about admission to hospital between the Benefits Agency and hospital authorities.

(Signed) J Mesher
Commissioner

Date: 27 July 2001