C22/98 / Rowland

Non-remit

(1) 44689 2.4

CAS(O) 63 13/5/99

SOCIAL SECURITY COMMISSIONER

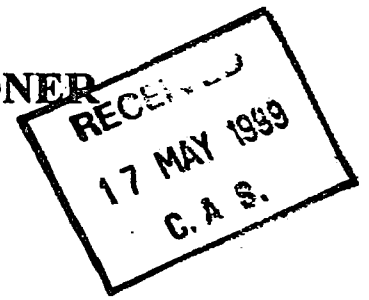
CG/662/1998 (63)

[redacted]

CG/2112/1998

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

DECISIONS OF THE COMMISSIONER



Mr. COMMISSIONER ROWLAND

Claimant:
Tribunal:
Date of tribunal decision:
Tribunal Registration No.

Claimant: [redacted]
Tribunal:
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Tribunal Registration No.

Claimant:
Tribunal:
Date of tribunal decision:
Tribunal Registration No.

Date: 7 May 1999

64

CG/622/98
CG/1567/98
CG/2112/98

DECISIONS OF THE COMMISSIONER

1. In each of these cases, an indefinite award of invalidity care allowance was made to a claimant who was looking after a person who had been awarded disability living allowance for a fixed period. At the end of that fixed period, the award of disability living allowance was not renewed at a rate that entitled the claimant to invalid care allowance but payment of invalid care allowance nonetheless continued. The question that arises in each case is whether the overpayment of invalid care allowance is recoverable, given both that the Invalid Care Allowance Unit knew, when the award of invalid care allowance was made, that the disability living allowance had been awarded for a fixed period and that they had the means of knowing, when that period ended, that a renewal claim had not been successful to the required extent.

2. I held an oral hearing at which the claimant in CG/622/98 was represented by Mr Lawrence Sheppard of the Grimethorpe Neighbourhood Development Unit, the claimant in CG/1567/98 was represented by Mr Bernard McBreen of the Huyton Unemployed Centre, and the claimant in CG/2112/98 neither appeared nor was represented. The adjudication officers were represented by Mr Richard Drabble QC, instructed by the Solicitor to the Departments of Social Security and Health. I am grateful to all three advocates for their helpful submissions.

3. Section 71(1) of the Social Security Administration Act 1992 provides:-

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

It is thus clear that an overpayment may be recovered only if it is made in consequence of a misrepresentation as to a material fact or a failure to disclose a material fact.

4. A claimant is entitled to invalid care allowance under section 70 of the Social Security Contributions and Benefits Act 1992 only if he or she is caring for a person in respect of whom there is payable either an attendance allowance, or a disability living allowance by virtue of entitlement to the care component at the highest or middle rate, or one of certain prescribed benefits known as constant attendance allowances being paid at a sufficiently high rate. An award of the mobility component of disability living allowance, or of the lowest rate of the care component of disability living allowance or of a constant attendance allowance at an insufficient rate, does not entitle the carer to invalid care allowance.

5. In the present cases, the claim form for invalid care allowance asked for details of the disabled person, including the type of disability benefit in payment (or claimed) and their reference number (or date of claim) but did not ask for details of the rate at which the benefit had been awarded or the period of any award. However, those details of the award were obtained by the Invalid Care Allowance Unit before the claim for invalid care allowance was determined. It appears that, before computerisation, the old Attendance Allowance Unit were not always asked to supply details of the period of the award but they in fact did so in the case on file CG/622/98 and it is accepted that in all the cases before me the Invalid Care Allowance Unit were aware of the date when the current award of attendance allowance or disability living allowance would expire. It is also accepted that the Invalid Care Allowance Unit now have access to the Disability Benefit Unit's computer records so that, provided the records are accurate, they can at any time ascertain whether there has been an award of attendance allowance or disability living allowance to a disabled person and, if so, the details of the award. Notwithstanding this, awards of invalid care allowance are made for an indefinite period, rather than being made for a definite period linked to the period of the award of attendance allowance or disability living allowance, and, at the time with which I am concerned, there was no mechanism in place to ensure that records were checked when an award of attendance allowance or disability living allowance was due to expire in order to see whether a renewal claim had been made and had been sufficiently successful. Instead, the Invalid Care Allowance Unit relied upon claimants to inform them. The instruction in the notes at the back of a claimant's order book said that he or she should inform the Department of Social Security if -

> "The person you are looking after stops getting Attendance Allowance, Constant Attendance Allowance or Disability Living Allowance or the rate of their Constant Attendance Allowance or Disability Living Allowance is reduced."

I have no doubt that the Benefits Agency were entitled to rely on claimants in that way but whether it was wise to rely *only* on claimants when modern technology provided a fairly simple and reasonably reliable additional source of information seems, at best, doubtful.

6. In the case on file CG/622/98, the claimant cared for her disabled son who had been awarded attendance allowance from 15 January 1979 to 28 November 1992, his 16th birthday. From 6 April 1992, attendance allowance was replaced by disability living allowance for people under 65 and the award was automatically converted to an award at the middle rate of the care component of disability living allowance. On a renewal claim, only the lowest rate of disability living allowance was awarded from 30 November 1992. However, invalid care allowance, which had been awarded from 1984, continued in payment until 16 February 1997 by which time £7,644.85 had been overpaid. The adjudication officer decided that that sum was recoverable on the ground that the claimant had failed to disclose the material fact that her son's award of disability living allowance "reduced on 30.11.92". The Barnsley social security appeal tribunal dismissed her appeal. They found as a fact that she had acted entirely innocently because she did not understand the nature of attendance allowance and disability living allowance but they nevertheless found that a reasonable person in her situation would have disclosed the change in the rate of payment and that the claimant's failure to disclose had led to the overpayment. She now appeals against the tribunal's decision with my leave.

7. In the case on file CG/1567/98, the claimant cared for his wife who was awarded the middle rate of the care component of disability living allowance from 19 August 1992 to 17 August 1993. Invalid care allowance was awarded indefinitely from 19 August 1992. A further award of disability living allowance at the same rate as before was made from 18 August 1993 to 20 August 1996. Another renewal claim was then unsuccessful and so was an application for review. The claimant submitted an appeal. The clerk to the disability appeal tribunal asked for further information which was apparently not forthcoming because, on 14 July 1997, he or she wrote -

> "I am writing about your recent letter/form which I received on 3.2.97. I am sorry to tell you I cannot accept this as a valid appeal. This is because you have not provided the information I requested in my letter of 13.3.97.
>
> Your case will not go forward to a tribunal and no further action will be taken on it by the Independent Tribunal Service.
>
> There is no right of appeal against this decision."

Quite what statutory power the clerk thought he or she had conclusively to determine what was or was not a valid appeal I do not know but the upshot is that no disability living allowance has been awarded since 20 August 1996. The claimant, however, continued to cash payable orders for invalid care allowance while his wife was pursuing the claim for disability living allowance until the error was noticed. The consequence was that he was overpaid invalid care allowance from 26 August 1996 to 26 January 1997, the total overpayment being £1,504.80. The adjudication officer decided that that sum was recoverable on the ground that the claimant had failed to disclose the fact that payment of disability living allowance to his wife had ceased. The Liverpool social security appeal tribunal dismissed his appeal and the claimant now appeals against the tribunal's decision with the leave of a full-time chairman.

8. In the case on file CG/2112/98, the claimant cared for her mother who claimed disability living allowance in 1994. The highest rate of the care component and the higher rate of the mobility component were awarded from 6 April 1994 to 4 April 1995 and invalid care allowance was awarded from 6 April 1994 and continued in payment until 19 January 1997. It is unclear quite what happened after 4 April 1995 but the Invalid Care Allowance Unit certainly thought that payment of disability living allowance ceased only from 14 June 1995. In any event, recovery was sought in respect only of the overpayment from 19 June 1995 to 19 January 1997, amounting to £2,981.10, and an adjudication officer decided that that amount was recoverable because the claimant had failed to disclose that the award of disability living allowance had ceased. On appeal, the Wakefield social security appeal tribunal held that an overpayment was recoverable but that the amount that was recoverable should be calculated by deducting from the total overpayment the amount of additional income support that would have been awarded if invalid care allowance had not been paid. They therefore directed that, if the parties could not agree the amount to be recovered, the case should be listed again. That never happened. The claimant now appeals against the tribunal's decision with my leave.

9. A number of different arguments have been raised at various stages of these appeals. It is unnecessary for me to set out the course the submissions have followed. It is common ground that there arise three principal questions: did the claimant fail to disclose a material fact (as the tribunal found) or alternatively did he or she misrepresent a material fact and, if either of those questions is answered in the affirmative, was any overpayment made in consequence of the failure to disclose or the misrepresentation ? The first two question being alternatives, if one is answered in the affirmative it is unnecessary to answer the other.

10. Mr McBreen mounted a powerful argument that there could be no failure to disclose a material fact if the relevant part of the Benefits Agency already knew that fact. He pointed out that not only did the Invalid Care Allowance Unit know that the award of disability living allowance to the claimant in CG/1567/98 was due to end on 26 August 1996 but they also had available to them the information that no further award had been made in respect of a period after that date. He referred me to R(SB) 15/87. The argument involves consideration of a number of interesting but difficult issues. However, I have come to the conclusion that, as it is unnecessary for me to express a view on it, I should not do so.

11. The reason why it is unnecessary to express a view on that question is that Mr Drabble has persuaded me that in each of these cases the evidence before the tribunal showed that the claimant misrepresented a material fact. A misrepresentation was made when he or she signed each payable order for invalid care allowance. That is because in doing so he or she declared: "I have correctly reported any facts which could affect the amount of my payment". By making that declaration, the claimant represented that he or she had correctly reported such facts and in each of the present cases it had been accepted by the claimant that no report had been made. In *Jones v. Chief Adjudication Officer* [1994] 1 W.L.R. 62, the majority of the Court of Appeal held that a representation in the terms of that declaration, if untrue, was a misrepresentation of a material fact.

12. Mr Drabble submitted that the fact "which could affect the amount of my payment" in the present cases was the termination of the original award of disability living allowance. In my view, that fact did not by itself affect the amount of the claimants' invalid care allowance. The additional relevant fact that had not been reported in these cases was the fact that no further sufficient award had been made in respect of any subsequent period. It might be objected that not receiving a benefit is a *non*-fact rather than a fact, but in ordinary language one can talk of the "fact" that a benefit is *not* being paid, and it is not actually unreasonable to expect a claimant to report such a non-fact. The instruction in the order book to notify the Invalid Care Allowance Unit if the disabled person "stops getting" a disability benefit was clear enough. It required notification when an award ended *and* was not replaced. Equally, as Mr Drabble submitted, the instruction to report a reduction in the rate of disability living allowance was as apt to describe the termination of one award and the commencement of another award at a lower rate as it was apt to describe the review of an award and its revision to a lower rate.

13. It is important to observe that the majority of the Court of Appeal in *Jones* held that the representation made by signing a payable order must be limited to a representation that the claimant had reported facts *known* to him or her. Dillon LJ said that the limitation was required "as a matter both of common sense and law". The correctness of that approach was confirmed in *Franklin v. Chief Adjudication Officer* (C.A., December 13, 1995). That

limitation did not assist Mr Jones and it does not assist the present claimants because they knew the relevant facts. I would be inclined to add that the representation must, for similar reasons, be limited to facts that have not already been reported on the signatory's behalf or otherwise, subject to the conditions suggested in R(SB) 15/87 at paragraph 29 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."

Adding that further limitation would not have assisted Mr Jones and, again, it does not assist the claimants in the present cases. The conditions must be applied strictly. The existence of *accurate* information in the computer system would arguably be enough to satisfy condition (a), but in none of these cases could the claimant possibly have *known*, at the time of signing the payable order, whether or not the information held was accurate and so condition (b) is not satisfied. Condition (c) is also not satisfied because the Benefits Agency were perfectly entitled to ask the claimants to report facts as a means of checking the accuracy of information held on computer and the fact that the Agency apparently did not use the computer at all did not make it any more reasonable for the claimants not to follow the instruction in the order book. Even Mr McBreen was constrained to accept that there were misrepresentations on the facts of these cases.

14. The fundamental question in these cases is therefore whether the overpayments were made *in consequence of* the misrepresentations. Both Mr Sheppard and Mr McBreen argued that they were not and at one stage that was also the position of the adjudication officer. Their arguments were that, in each case, the overpayment was caused by the Invalid Care Allowance Unit's failure to act on the material they already had. It was submitted that the Unit knew that one award of disability living allowance was going to end and that they were not entitled to assume that another award would be made, particularly as they had, in their office, the means of checking the current position. Reliance was placed on CSIS/7/94. In that case the claimant was overpaid income support during a period in respect of which the claimant had been in receipt of family credit. The local office had received notification of the award of family credit from the Family Credit Unit. They had not been notified by the claimant. The Commissioner said:-

> "In this case it seems clear that the primary if not indeed the whole reason why there was an overpayment was that the relevant office failed properly to act when it received notice from the Family Credit Unit. Undoubtedly there was a failure to disclose by the claimant. And that is why words to that effect have been retained in my decision given in paragraph 2 above. But the overpayment in this case in my opinion was more probably *caused* not by that failure but by the failure of the office to act upon the information when it got it."

15. Mr Drabble, however, submitted that the misrepresentations in the present cases were plainly the immediate cause of the overpayments because, if the claimant had not signed the declarations on the payable orders, the post offices would not have made payments on behalf of the Secretary of State to the claimants. Furthermore, he submitted that the Commissioner in CSIS/7/94 had erred in his approach and he observed that the Commissioner does not

appear to have been referred to the decision of the Court of Appeal in *Duggan v. Chief Adjudication Officer* (reported as an Appendix to R(SB) 13/89). In *Duggan*, the claimant failed to disclose that his wife was in receipt of unemployment benefit but the tribunal found that that was not the cause of the overpayment of supplementary benefit because the adjudication officer had failed to make appropriate enquiries. That decision was reversed by a Commissioner whose decision the Court of Appeal upheld. May LJ said at page 603B:-

> "The wrong assumption by the adjudication officer may in certain circumstances have been a cause of the overpayment, but it does not follow that it was the sole cause. As a matter of common-sense, which questions of causation always are, if one poses the question: did the failure of the claimant to disclose the fact that his wife was in receipt of unemployment benefit have as at least one of its consequences the overpayment of the supplementary benefit ?, the only reasonable answer that one can give is 'yes'."

Later, at page 603G, he said:-

> "It may be, as I have said, that there were two causes of the consequence at the time I have outlined, but certainly one of the causes was the failure of the claimant, albeit wholly innocently, to comply with his continuing obligation under section 20 of the statute to disclose a material fact."

Croom-Johnson LJ said, at page 608C:-

> "It is quite clear that the tribunal, in wholly ignoring the fact that Mr Duggan's duty was a continuing duty, came to a wrong conclusion when it came to the conclusion which it did and I would agree with what my Lord has said that, even putting that on one side, their decision that the causation of the overpayment was only that the adjudication officer increased the supplementary benefit when he thought that maternity benefit had come to an end, was a conclusion to which no reasonable tribunal could have come. But quite apart from that, even if it could in some way be regarded as a cause of the failure to reduce Mr Duggan's benefit, the other and real cause here was the breach of the statutory duty imposed upon Mr Duggan by section 20 of the Supplementary Benefits Act 1976."

Glidewell LJ agreed with both judgments. Mr Drabble submitted that it followed from that decision that an overpayment was recoverable where a misrepresentation was *a* cause of the overpayment, even if it was not the sole, or even the principal, cause.

16. I accept Mr Drabble's submissions. There are no doubt cases where, if the Benefits Agency have failed to act properly on the basis of information in their possession, an adjudication officer will be unable to show that they would have reacted differently to the same information being supplied by the claimant. Such a case may arise where there is a settled misunderstanding of the law within the Benefits Agency. However, the question is whether the reporting of the material fact by the claimant could actually have prevented the overpayment, even when account is taken of the Agency's failing. In CF/3532/97 overpayments of child benefit were made because the adjudication officer wrongly believed that the claimant was entitled to child benefit while employed by the NAFFI in Germany.

The claimant then ceased to be employed by the NAFFI and did not report that fact. It was held that, even though the claimant ought not to have been receiving child benefit in the first place, the overpayment after cessation of his employment was recoverable from him because it would not have been made if the claimant had reported the fact that he was no longer employed. The overpayment in respect of that period was caused both by the adjudication officer's error of law and by the claimant's non-disclosure and, applying *Duggan*, was recoverable. I consider that that decision is to be preferred to CSIS/7/94.

17. Mr McBreen submitted that the Invalid Care Allowance Unit would not have acted on information supplied by the claimants because they did not act on uncorroborated information as a matter of practice. I accept that the Unit checks a claimant's assertion that he or she is receiving attendance allowance or disability living allowance at an appropriate rate but it does not follow that they would check an assertion, against the claimant's own interest, that benefit was *not* in payment and, in any event, if such information was always checked, its receipt would have prompted the check.

18. It is therefore my view that in each of these cases the overpayment was made in consequence of a misrepresentation and the decision of the tribunal that it was recoverable was correct. For the reasons I have given, it is unnecessary for me to decide whether the tribunals were right to decide that the claimants had failed to disclose a material fact. In each case, there had clearly been a misrepresentation of a material fact and the misrepresentation was a cause of the overpayment so that the tribunal's conclusion that the overpayment was recoverable was inevitable. Indeed, it seems to me that, in every case where a claimant has signed a payable order to the effect that he or she has reported any fact that might affect entitlement to benefit, it is wholly unnecessary for the adjudication officer or tribunal to consider whether or not the claimant has *failed to disclose* a material fact in the light of all the case-law built up around those words and it is much easier to consider whether or not the claimant has *reported* a material fact.

19. In the case on file CG/2112/98, Mr Drabble invited me to substitute £962.35 for £2,981.10 as the amount of the recoverable overpayment. That is because the original calculation was made without proper regard to regulation 13 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988. However, I have no power to substitute a decision for that of a tribunal in the absence of any error on the part of the tribunal. Although I have approached the case on a basis that is different from the tribunal's, I have not found the tribunal to have erred in law. This is not a question *first* arising before me and so I cannot deal with it under section 36 of the Social Security Administration Act 1992. The tribunal were alive to the regulation 13 point and adjourned consideration of the question of the amount that was recoverable as, in my view, they were entitled to do. It is arguable that the tribunal's decision was incomplete and that therefore this appeal was premature but I prefer to take the view that the tribunal had made a complete decision on one question before them and had adjourned consideration of another. On either approach, it seems to me that the proper course for me to take is to dismiss the claimant's appeal in this case, as in the others, and to leave the tribunal to consider the amount of the overpayment which is a question still pending before them. As the Secretary of State may base recovery proceedings on the decision, it is important that it is given in the proper form by the proper body. No doubt, if both parties are in agreement as to the decision to be given, it can be dealt with at a "paper hearing".

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20. Accordingly, I dismiss all three of these appeals.

M. ROWLAND
Commissioner
7 May 1999

(7)

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *38/99

(Commissioner's File Nos.: CG/662/98, CG/1567/98 and CG/2112/98)

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*Commissioners' decisions are identified by **case references** only, to preserve the privacy of individual claimants and other parties.*

***Starring** denotes only that the case is considered to be of general interest or importance. It does not confer any additional status over an unstarred decision.*

***Reported** decisions in the official series published by HMSO and CAS are generally to be followed in preference to others, as selection for reporting implies that a decision carries the assent of at least a majority of Commissioners in Great Britain or in Northern Ireland as the case may be.*

*The practice about official reporting of Commissioners' decisions in **Great Britain** (which is currently under review) is explained in reported case R(I) 12/75 and a Practice Memorandum issued by the Chief Commissioner on 31 March 1987, which can be found in the official report volumes and on the Internet. As noted in the memorandum there is a general standing invitation to comment on the report-worthiness of any decision, whether or not starred for general circulation. However, a decision will not be selected for reporting if it is known that there is an appeal pending against it.*

*The practice in **Northern Ireland** (also under review) is similar, decisions being selected for reporting by the Northern Ireland Chief Commissioner. Northern Ireland Commissioners' decisions are published as a separate series.*

Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Miss J Bravo
Office of the Social Security and Child Support Commissioners
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 23 SEP 1999 **1999**

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

CG/662/98
CG/1567/98
CG/2112/98

DECISIONS OF THE COMMISSIONER

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It is thus clear that an overpayment may be recovered only if it is made in consequence of a misrepresentation as to a material fact or a failure to disclose a material fact.

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I have no doubt that the Benefits Agency were entitled to rely on claimants in that way but whether it was wise to rely *only* on claimants when modern technology provided a fairly simple and reasonably reliable additional source of information seems, at best, doubtful.

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7. In the case on file CG/1567/98, the claimant cared for his wife who was awarded the middle rate of the care component of disability living allowance from 19 August 1992 to 17 August 1993. Invalid care allowance was awarded indefinitely from 19 August 1992. A further award of disability living allowance at the same rate as before was made from 18 August 1993 to 20 August 1996. Another renewal claim was then unsuccessful and so was an application for review. The claimant submitted an appeal. The clerk to the disability appeal tribunal asked for further information which was apparently not forthcoming because, on 14 July 1997, he or she wrote -

> "I am writing about your recent letter/form which I received on 3.2.97. I am sorry to tell you I cannot accept this as a valid appeal. This is because you have not provided the information I requested in my letter of 13.3.97.
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Quite what statutory power the clerk thought he or she had conclusively to determine what was or was not a valid appeal I do not know but the upshot is that no disability living allowance has been awarded since 20 August 1996. The claimant, however, continued to cash payable orders for invalid care allowance while his wife was pursuing the claim for disability living allowance until the error was noticed. The consequence was that he was overpaid invalid care allowance from 26 August 1996 to 26 January 1997, the total overpayment being £1,504.80. The adjudication officer decided that that sum was recoverable on the ground that the claimant had failed to disclose the fact that payment of disability living allowance to his wife had ceased. The Liverpool social security appeal tribunal dismissed his appeal and the claimant now appeals against the tribunal's decision with the leave of a full-time chairman.

8. In the case on file CG/2112/98, the claimant cared for her mother who claimed disability living allowance in 1994. The highest rate of the care component and the higher rate of the mobility component were awarded from 6 April 1994 to 4 April 1995 and invalid care allowance was awarded from 6 April 1994 and continued in payment until 19 January 1997. It is unclear quite what happened after 4 April 1995 but the Invalid Care Allowance Unit certainly thought that payment of disability living allowance ceased only from 14 June 1995. In any event, recovery was sought in respect only of the overpayment from 19 June 1995 to 19 January 1997, amounting to £2,981.10, and an adjudication officer decided that that amount was recoverable because the claimant had failed to disclose that the award of disability living allowance had ceased. On appeal, the Wakefield social security appeal tribunal held that an overpayment was recoverable but that the amount that was recoverable should be calculated by deducting from the total overpayment the amount of additional income support that would have been awarded if invalid care allowance had not been paid. They therefore directed that, if the parties could not agree the amount to be recovered, the case should be listed again. That never happened. The claimant now appeals against the tribunal's decision with my leave.

9. A number of different arguments have been raised at various stages of these appeals. It is unnecessary for me to set out the course the submissions have followed. It is common ground that there arise three principal questions: did the claimant fail to disclose a material fact (as the tribunal found) or alternatively did he or she misrepresent a material fact and, if either of those questions is answered in the affirmative, was any overpayment made in consequence of the failure to disclose or the misrepresentation ? The first two question being alternatives, if one is answered in the affirmative it is unnecessary to answer the other.

10. Mr McBreen mounted a powerful argument that there could be no failure to disclose a material fact if the relevant part of the Benefits Agency already knew that fact. He pointed out that not only did the Invalid Care Allowance Unit know that the award of disability living allowance to the claimant in CG/1567/98 was due to end on 26 August 1996 but they also had available to them the information that no further award had been made in respect of a period after that date. He referred me to R(SB) 15/87. The argument involves consideration of a number of interesting but difficult issues. However, I have come to the conclusion that, as it is unnecessary for me to express a view on it, I should not do so.

11. The reason why it is unnecessary to express a view on that question is that Mr Drabble has persuaded me that in each of these cases the evidence before the tribunal showed that the claimant misrepresented a material fact. A misrepresentation was made when he or she signed each payable order for invalid care allowance. That is because in doing so he or she declared: "I have correctly reported any facts which could affect the amount of my payment". By making that declaration, the claimant represented that he or she had correctly reported such facts and in each of the present cases it had been accepted by the claimant that no report had been made. In *Jones v. Chief Adjudication Officer* [1994] 1 W.L.R. 62, the majority of the Court of Appeal held that a representation in the terms of that declaration, if untrue, was a misrepresentation of a material fact.

12. Mr Drabble submitted that the fact "which could affect the amount of my payment" in the present cases was the termination of the original award of disability living allowance. In my view, that fact did not by itself affect the amount of the claimants' invalid care allowance. The additional relevant fact that had not been reported in these cases was the fact that no further sufficient award had been made in respect of any subsequent period. It might be objected that not receiving a benefit is a *non*-fact rather than a fact, but in ordinary language one can talk of the "fact" that a benefit is *not* being paid, and it is not actually unreasonable to expect a claimant to report such a non-fact. The instruction in the order book to notify the Invalid Care Allowance Unit if the disabled person "stops getting" a disability benefit was clear enough. It required notification when an award ended *and* was not replaced. Equally, as Mr Drabble submitted, the instruction to report a reduction in the rate of disability living allowance was as apt to describe the termination of one award and the commencement of another award at a lower rate as it was apt to describe the review of an award and its revision to a lower rate.

13. It is important to observe that the majority of the Court of Appeal in *Jones* held that the representation made by signing a payable order must be limited to a representation that the claimant had reported facts *known* to him or her. Dillon LJ said that the limitation was required "as a matter both of common sense and law". The correctness of that approach was confirmed in *Franklin v. Chief Adjudication Officer* (C.A., December 13, 1995). That

limitation did not assist Mr Jones and it does not assist the present claimants because they knew the relevant facts. I would be inclined to add that the representation must, for similar reasons, be limited to facts that have not already been reported on the signatory's behalf or otherwise, subject to the conditions suggested in R(SB) 15/87 at paragraph 29 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."

Adding that further limitation would not have assisted Mr Jones and, again, it does not assist the claimants in the present cases. The conditions must be applied strictly. The existence of *accurate* information in the computer system would arguably be enough to satisfy condition (a), but in none of these cases could the claimant possibly have *known*, at the time of signing the payable order, whether or not the information held was accurate and so condition (b) is not satisfied. Condition (c) is also not satisfied because the Benefits Agency were perfectly entitled to ask the claimants to report facts as a means of checking the accuracy of information held on computer and the fact that the Agency apparently did not use the computer at all did not make it any more reasonable for the claimants not to follow the instruction in the order book. Even Mr McBreen was constrained to accept that there were misrepresentations on the facts of these cases.

14. The fundamental question in these cases is therefore whether the overpayments were made *in consequence of* the misrepresentations. Both Mr Sheppard and Mr McBreen argued that they were not and at one stage that was also the position of the adjudication officer. Their arguments were that, in each case, the overpayment was caused by the Invalid Care Allowance Unit's failure to act on the material they already had. It was submitted that the Unit knew that one award of disability living allowance was going to end and that they were not entitled to assume that another award would be made, particularly as they had, in their office, the means of checking the current position. Reliance was placed on CSIS/7/94. In that case the claimant was overpaid income support during a period in respect of which the claimant had been in receipt of family credit. The local office had received notification of the award of family credit from the Family Credit Unit. They had not been notified by the claimant. The Commissioner said:-

> "In this case it seems clear that the primary if not indeed the whole reason why there was an overpayment was that the relevant office failed properly to act when it received notice from the Family Credit Unit. Undoubtedly there was a failure to disclose by the claimant. And that is why words to that effect have been retained in my decision given in paragraph 2 above. But the overpayment in this case in my opinion was more probably *caused* not by that failure but by the failure of the office to act upon the information when it got it."

15. Mr Drabble, however, submitted that the misrepresentations in the present cases were plainly the immediate cause of the overpayments because, if the claimant had not signed the declarations on the payable orders, the post offices would not have made payments on behalf of the Secretary of State to the claimants. Furthermore, he submitted that the Commissioner in CSIS/7/94 had erred in his approach and he observed that the Commissioner does not

appear to have been referred to the decision of the Court of Appeal in *Duggan v. Chief Adjudication Officer* (reported as an Appendix to R(SB) 13/89). In *Duggan*, the claimant failed to disclose that his wife was in receipt of unemployment benefit but the tribunal found that that was not the cause of the overpayment of supplementary benefit because the adjudication officer had failed to make appropriate enquiries. That decision was reversed by a Commissioner whose decision the Court of Appeal upheld. May LJ said at page 603B:-

> "The wrong assumption by the adjudication officer may in certain circumstances have been a cause of the overpayment, but it does not follow that it was the sole cause. As a matter of common-sense, which questions of causation always are, if one poses the question: did the failure of the claimant to disclose the fact that his wife was in receipt of unemployment benefit have as at least one of its consequences the overpayment of the supplementary benefit ?, the only reasonable answer that one can give is 'yes'."

Later, at page 603G, he said:-

> "It may be, as I have said, that there were two causes of the consequence at the time I have outlined, but certainly one of the causes was the failure of the claimant, albeit wholly innocently, to comply with his continuing obligation under section 20 of the statute to disclose a material fact."

Croom-Johnson LJ said, at page 608C:-

> "It is quite clear that the tribunal, in wholly ignoring the fact that Mr Duggan's duty was a continuing duty, came to a wrong conclusion when it came to the conclusion which it did and I would agree with what my Lord has said that, even putting that on one side, their decision that the causation of the overpayment was only that the adjudication officer increased the supplementary benefit when he thought that maternity benefit had come to an end, was a conclusion to which no reasonable tribunal could have come. But quite apart from that, even if it could in some way be regarded as a cause of the failure to reduce Mr Duggan's benefit, the other and real cause here was the breach of the statutory duty imposed upon Mr Duggan by section 20 of the Supplementary Benefits Act 1976."

Glidewell LJ agreed with both judgments. Mr Drabble submitted that it followed from that decision that an overpayment was recoverable where a misrepresentation was *a* cause of the overpayment, even if it was not the sole, or even the principal, cause.

16. I accept Mr Drabble's submissions. There are no doubt cases where, if the Benefits Agency have failed to act properly on the basis of information in their possession, an adjudication officer will be unable to show that they would have reacted differently to the same information being supplied by the claimant. Such a case may arise where there is a settled misunderstanding of the law within the Benefits Agency. However, the question is whether the reporting of the material fact by the claimant could actually have prevented the overpayment, even when account is taken of the Agency's failing. In CF/3532/97 overpayments of child benefit were made because the adjudication officer wrongly believed that the claimant was entitled to child benefit while employed by the NAAFI in Germany.

The claimant then ceased to be employed by the NAAFI and did not report that fact. It was held that, even though the claimant ought not to have been receiving child benefit in the first place, the overpayment after cessation of his employment was recoverable from him because it would not have been made if the claimant had reported the fact that he was no longer employed. The overpayment in respect of that period was caused both by the adjudication officer's error of law and by the claimant's non-disclosure and, applying *Duggan*, was recoverable. I consider that that decision is to be preferred to CSIS/7/94.

17. Mr McBreen submitted that the Invalid Care Allowance Unit would not have acted on information supplied by the claimants because they did not act on uncorroborated information as a matter of practice. I accept that the Unit checks a claimant's assertion that he or she is receiving attendance allowance or disability living allowance at an appropriate rate but it does not follow that they would check an assertion, against the claimant's own interest, that benefit was *not* in payment and, in any event, if such information was always checked, its receipt would have prompted the check.

18. It is therefore my view that in each of these cases the overpayment was made in consequence of a misrepresentation and the decision of the tribunal that it was recoverable was correct. For the reasons I have given, it is unnecessary for me to decide whether the tribunals were right to decide that the claimants had failed to disclose a material fact. In each case, there had clearly been a misrepresentation of a material fact and the misrepresentation was a cause of the overpayment so that the tribunal's conclusion that the overpayment was recoverable was inevitable. Indeed, it seems to me that, in every case where a claimant has signed a payable order to the effect that he or she has reported any fact that might affect entitlement to benefit, it is wholly unnecessary for the adjudication officer or tribunal to consider whether or not the claimant has *failed to disclose* a material fact in the light of all the case-law built up around those words and it is much easier to consider whether or not the claimant has *reported* a material fact.

19. In the case on file CG/2112/98, Mr Drabble invited me to substitute £962.35 for £2,981.10 as the amount of the recoverable overpayment. That is because the original calculation was made without proper regard to regulation 13 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988. However, I have no power to substitute a decision for that of a tribunal in the absence of any error on the part of the tribunal. Although I have approached the case on a basis that is different from the tribunal's, I have not found the tribunal to have erred in law. This is not a question *first* arising before me and so I cannot deal with it under section 36 of the Social Security Administration Act 1992. The tribunal were alive to the regulation 13 point and adjourned consideration of the question of the amount that was recoverable as, in my view, they were entitled to do. It is arguable that the tribunal's decision was incomplete and that therefore this appeal was premature but I prefer to take the view that the tribunal had made a complete decision on one question before them and had adjourned consideration of another. On either approach, it seems to me that the proper course for me to take is to dismiss the claimant's appeal in this case, as in the others, and to leave the tribunal to consider the amount of the overpayment which is a question still pending before them. As the Secretary of State may base recovery proceedings on the decision, it is important that it is given in the proper form by the proper body. No doubt, if both parties are in agreement as to the decision to be given, it can be dealt with at a "paper hearing".

20. Accordingly, I dismiss all three of these appeals.

M. ROWLAND
Commissioner
7 May 1999