

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The Secretary of State's appeal to the Commissioner is allowed. The decision of the Wakefield appeal tribunal dated 9 May 2006 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute a decision on the claimant's appeal against the Secretary of State's decision dated 2 September 2005 (Social Security Act 1998, section 14(8)(a)(i)). My decision is that the appeal is disallowed and that the decision dated 2 September 2005 is confirmed.

The background

2. This case is about the complicated provisions allowing recipients of certain benefits to go on receiving increases of benefit for children after the date on which such increases were abolished for new claimants on the introduction of child tax credits in 2003. In particular it is about the circumstances in which that protection is lost. The particular benefit concerned is carer's allowance, formerly known as invalid care allowance, to which a person is entitled if "engaged in caring for a severely disabled person" and a number of other conditions are satisfied (Social Security Contributions and Benefits Act 1992, section 70(1)). Section 70(2) provides that "severely disabled person" means:

"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 such other payment out of public funds on account of his need for attendance as may be prescribed."

3. The claimant here was awarded carer's allowance (CA) from and including 29 May 2000 because she was caring for a Mrs F B (her aunt), who had an award of the middle rate of the care component of disability living allowance (DLA). In accordance with section 90 of the Contributions and Benefits Act and regulation 12(2) of and Schedule 2 to the Social Security (Dependency) Regulations 1977 the weekly rate of her CA was increased by the prescribed rate for two children. From 6 April 2003, when section 90 and various other provisions were repealed, the claimant continued to be treated as if that repeal had not happened (Tax Credits Act 2002 (Commencement No 3 and Transitional Provisions and Savings) Order 2003 ("the Transitional Provisions and Savings Order", examined in detail below). She continued to receive the increases. On 23 February 2004 Mrs F B was admitted to hospital as an in-patient. She came out of hospital on 15 May 2004. A decision was made in relation to her DLA that the care component was not payable to her from 24 March 2004 to 18 May 2004 (Social Security (Disability Living Allowance) Regulations 1991, regulations 8 and 10, which provide for payability of the care component to cease after first 28 days of being an in-patient. The CA authorities took account of this in a decision dated 2 September 2005, which superseded the decision awarding CA from 29 May 2000 and decided that the claimant was not entitled to CA for the period from 29 March 2004 to 16 May 2004, as for that period Mrs F B was not within the definition of "severely disabled person". But the rate of CA to which she was entitled from 17 May 2004 onwards did not include the increases for the children, because it was said that the protection given by the Transitional Protection and Savings Order had been lost on the break in

the claimant's entitlement to CA. On appeal, the appeal tribunal disagreed. The Secretary of State submits that the appeal tribunal was wrong in law to do so.

4. The crucial provision is Article 3 of the Transitional Provisions and Savings Order, headed "Saving provision":

"3.--(1) Notwithstanding the coming into force of the specified provisions [the abolition of child dependency increases including under section 90 of the Contributions and Benefits Act], the Contributions and Benefits Act and the [Social Security Administration Act 1992] shall, in cases to which paragraph (2) applies, subject to paragraph (3), continue to have effect from the commencement date [6 April 2003] as if those provisions had not come into force.

(2) This paragraph applies where a person--

- (a) is entitled to a relevant increase on the day before the commencement date; or
- (b) claims a relevant increase on or after the commencement date and it is subsequently determined that he is entitled to a relevant increase in respect of a period which includes the day before the commencement date.

(3) The provisions saved by paragraph (1) shall continue to have effect until--

- (a) subject to sub-paragraph (c), where a relevant increase ceases to be payable to a person to whom paragraph (2) applies for a period greater than 58 days beginning with the day on which it was last payable, on the day 59 days after the day on which it was last payable; or
- (b) in any other case, subject to sub-paragraph (c), on the date on which entitlement to a relevant increase ceases;
- (c) where regulation 6(19) or (23) of the Social Security (Claims and Payments) Regulations 1987 applies to a further claim for a relevant increase, on the date on which entitlement to that relevant increase ceases."

Under Article 3(4) "a relevant increase" means an increase under section 80 or 90 of the Contribution and Benefits Act. All references to Articles 2 or 3 below are to this Order.

5. It is also convenient to dispose here of an argument raised by the claimant's representative, Rachel Ingleby of Kirklees Benefit Advice Service, in the course of the appeal to the Commissioner, although not raised before the appeal tribunal. This was that while Mrs F B was an in-patient in hospital she did not cease to be within the meaning of "severely disabled person" in section 70(2) of the Contributions and Benefits Act, because she was maintained out of public funds while in hospital. That argument cannot succeed. First, Mrs F B was not receiving any sort of payment by virtue of being an in-patient and in the benefits context the services and attention received while in hospital cannot be regarded as a payment to the patient. Second, as pointed out in the submission dated 9 January 2007 on behalf of the Secretary of State, the only sort of payments from public funds that count under section 70(2) to make someone a "severely disabled person" are payments that have been so prescribed in regulations. The only regulation to prescribe such payments is regulation 3 of the Social Security (Invalid Care Allowance) Regulations 1976, which specifies only constant attendance allowances under various industrial injuries schemes and under a war pensions scheme. The whole regulation was

set out in the submission. I need not set it out here. Manifestly, Mrs F B did not receive any prescribed payment out of public funds to bring her within the definition in section 70(2).

6. The explanation of the decision under appeal given in the Secretary of State's written submission to the appeal tribunal was that, where after 6 April 2003 entitlement to a child dependency addition to CA is lost, the protection of Article 2 is lost from the day that that entitlement ceases. Where it was merely that payment was not made, the protection was lost after the 58th day.

The appeal tribunal's decision

7. The claimant did not attend the hearing on 9 May 2006, but was represented by Ms Ingleby. There was no presenting officer representing the Secretary of State. The appeal tribunal allowed the appeal. In its statement of reasons it adopted what had been said on the decision notice, that Mrs F B's DLA was suspended for the period from 24 March 2004 to 18 May 2004 while she was in hospital and that:

"This led to a decision on disentitlement from 29/03/2004 to 16/05/2004. The submission argues that loss for 57 consecutive days loses transitional protection for the dependency increases. The days in question add up to 49 and that part of the decision cannot be supported."

The appeal to the Commissioner

8. The Secretary of State now appeals against the appeal tribunal's decision with the leave of the chairman of the appeal tribunal. The ground is essentially that the appeal tribunal appears to have applied the provisions of Article 3(3)(a) when Article 3(3)(b) should have been applied. The appeal tribunal had properly identified that the claimant ceased to be entitled to CA for the period from 29 March 2004 to 16 May 2004, so that she could not have been entitled to an increase in the rate of that benefit from 29 March 2004 either and the saving provision ceased to apply on that date. That case was elaborated in the full and very clear written submission dated 10 October 2006 from Mr Wayne Spencer on behalf of the Secretary of State. The submission had attached a copy of the decision of Mr Commissioner Powell in CG/3012/2004 dealing with the application of Article 3 in different circumstances.

9. Ms Ingleby replied in a carefully considered submission dated 6 December 2006. I can concentrate on the arguments made there, rather than at earlier stages in the case. Thus, Ms Ingleby seems to have abandoned the argument that Article 3(3)(a) applies where there is a temporary break in entitlement and Article 3(3)(b) applies only where entitlement ceases altogether. That course is sound. The order in which the sub-paragraphs of Article 3(3) appear is capable of causing confusion. One might say that when a claimant of CA ceases to be entitled to a child dependency increase, *a fortiori* the increase ceases to be payable, so that sub-paragraph (a) would apply if it stood alone, with its rule allowing the saving provision to survive for 58 days. Then sub-paragraph (b), terminating the effect of the saving provision as soon as entitlement to an increase ceases, applies only in "any other case", that is where sub-paragraph (a) does not apply. However, the insuperable difficulty with that approach is that it leaves nothing to which sub-paragraph (b) can apply. In the context of Article 3 as a whole, the only

meaning that sub-paragraph (a) can be given is that it applies only where a child dependency increase merely ceases to be payable, without entitlement to the increase being affected. For instance, that could happen where the claimant's earnings exceeded the prescribed limit (see CG/3012/2004) or where the Social Security (Overlapping Benefits) Regulations 1979 applied. Sub-paragraph (b) then applies in cases where more than mere payability of the increase has ceased and entitlement has ceased. In that context, I can see no basis for distinguishing between a ceasing of entitlement in circumstances where there may be entitlement again in the future and a ceasing that is expected to be permanent.

10. The first main argument put forward in Ms Ingleby's submission of 6 December 2006 was the one that I have already rejected in paragraph 5 above. It cannot make any difference to Mrs F B's status as not being a "severely disabled person" when the DLA care component was not payable that the claimant was continuing to provide substantial care for her while she was in hospital.

11. The second argument was that Article 3(3)(b) applies only where the conditions of entitlement for an increase of the rate of CA cease to be met, not when the conditions of entitlement for CA itself cease to be met. I reject that argument. The conditions in section 90 of the Contributions and Benefits Act and under Schedule 2 to the Dependency Regulations do not in so many words make it a condition of entitlement to the increase of the rate of CA for child dependants that the claimant is entitled to CA. However, both regulation 12(2) and the provisions of Schedule 2 refer to the prescribed conditions in which a "beneficiary" is entitled to such an increase. "Beneficiary" is defined in section 122(1) of the Contributions and Benefits Act in relation to any benefit as "the person entitled to that benefit". It therefore follows that if a person ceases to be a beneficiary, by entitlement to the benefit concerned ceasing, the conditions of entitlement to an increase of that benefit for child dependants also cease to be met.

12. The third argument, building on an earlier submission, was that the circumstances of the present case fell within Article 3(3)(c), which showed an intention, where there had been a successful re-claim of entitlement to CA, for the savings provision to survive until the end of the entitlement after the re-claim. I reject that argument. That is partly for the main reason given by Mr Spencer in paragraph 10 of the submission of 10 October 2006, that the necessary sequence of events had not occurred. Looking at the terms of Article 3(3)(c), there was no "further claim" for an increase for child dependants, as the whole matter was dealt with by way of supersession after the event, dealing on 2 September 2005 with the interruption in entitlement to CA for the period from 29 March 2004 to 16 May 2004. That could be said to be important because regulation 6 of the Claims and Payments Regulations is concerned with the date on which claims are to be treated as made.

13. However, it does not seem very satisfactory if the applicability of Article 3(3)(c) turns entirely on the accident of whether a decision terminating entitlement to CA is made before DLA becomes payable again to the disabled person, so that a new claim would be necessary, or afterwards. I consider that regulation 6(19) of the Claims and Payments Regulations (regulation 6(23) being irrelevant as applying only to incapacity benefit) did not apply in the circumstances of the present case, but not quite for the reasons put forward in paragraph 10 of Mr Spencer's

submission of 10 October 2006. In addition, I do not think that the operation of regulation 6(19) to (21) is as limited as Mr Spencer has suggested in paragraph 4 of his submission of 9 January 2007. Regulation 6(19) applies only, in the context of CA and DLA, where "the award of [DLA] has itself been terminated or reduced by means of a revision, supersession, appeal or termination of an award for a fixed period in such a way as to affect the award of [CA]". In my judgment, the supersession decision that DLA was not payable to Mrs F B after she had been a hospital in-patient for 28 days did not terminate or reduce her award of DLA. Although the word "award" may not have a specific definition under the social security legislation, it refers to what is done in a decision allowing a claim, which must always involve a decision that the claimant is entitled to the benefit claimed. Using the notions of terminating or reducing an award indicates an effect on entitlement, not just payability, unless other words are used expressly pointing to such an extension. Here, the decision that DLA was not payable to Mrs F B did not terminate her award of the middle rate of the care component of DLA. It left that entitlement intact. Nor did that decision reduce that award. In the context the word "reduce" must refer to a decision reducing a claimant's entitlement from one level to another, for instance a supersession under which an existing entitlement to the middle rate of the care component is reduced to an entitlement to the lowest rate of the care component, which would take the person out of the definition of "severely disabled person".

14. Accordingly, I am satisfied that neither Article 3(3)(a) nor (c) applies in the circumstances of the present case, leaving Article 3(3)(b) as the operative provision. The appeal tribunal erred in law by apparently applying Article 3(3)(a) and reaching a conclusion that was inconsistent with Article 3(3)(b). For those reasons, I set its decision aside as erroneous in point of law.

The Commissioner's decision on the appeal against the decision of 2 September 2005

15. It is plainly expedient for me to substitute the decision that the appeal tribunal should have given on its findings of fact. That decision is to disallow the claimant's appeal and in effect to confirm the Secretary of State's decision of 2 September 2005, which I do not need to set out in full. The superseding decision so far as it has effect from and including 17 May 2004 is that the claimant is entitled to carer's allowance, but without any increase for child dependants under section 90 of the Social Security Contributions and Benefits Act 1992.

(Signed) J Mesher
Commissioner

Date: 31 January 2007