Bulletin 185

Commissioner's File: CIB/2836/2002

DECISION OF THE TRIBUNAL OF COMMISSIONERS

1. This is an appeal by the Secretary of State, with the permission of a legally qualified panel member, against the decision of a tribunal sitting at Sheffield on 10th April 2002 ("the appeal tribunal"). For the reasons which we give, that decision is erroneous in point of law. We therefore allow the appeal and set aside the decision of the appeal tribunal.

2. In exercise of the powers conferred upon us by section 14(8)(a)(ii) of the Social Security Act 1998, we consider it expedient to make the findings which we do in relation to the decisions which are before us and to give the decision which we consider expedient in the light of our findings. Our decision is as follows.

(1) The effective decision which is before us, and which was before the appeal tribunal, by way of appeal, is a decision dated 25th October 2001, which we identify below and refer to as the second October decision.

(2) The second October decision takes effect as a supersession decision. It supersedes an earlier decision by which the claimant was awarded what is known as an adult dependency increase in respect of his wife. It takes effect from and including 13th April 2000 and the grounds of supersession are that a relevant change of circumstances occurred.

(3) We disallow the claimant's appeal against the second October decision so that the effect of that decision is confirmed

(4) The following decisions among those we had had to consider are so fundamentally flawed that we find them to be without legal effect and we so declare. Namely, a decision dated 7th August 2001, the decision dated 25th October 2001, which we identify below as the first October decision, and the decision dated 23rd November 2001.

3. This appeal was the subject of an oral hearing which took place before us in two parts in London. The first part took place on 9th July 2003. On that occasion the Secretary of State was represented by Mr James Maurici of Counsel instructed by Mr Jeremy Heath of the Office of the Solicitor to the Department for Work and Pensions. The respondent claimant was not present but he was represented by Mr Giles Charter, a welfare rights officer with the Rotherham

Metropolitan Borough Council. We heard argument on the substantive issue which our Tribunal of Commissioners had been convened to determine and in relation to which conflicting views had been expressed by different Commissioners.

4. In the course of the hearing it became apparent that there were significant defects in the chain of decision making which gave rise to the appeal. This chain is set out below. Indeed, part of the difficulty was to identify which of a number of decisions was the decision under appeal. Many of the legal issues involved were due to be considered in depth by another Tribunal of Commissioners which had been convened to consider a variety of difficulties concerning the supersession and revision of decisions under sections 8 to 11 of the Social Security Act 1998 (the "Decisions Tribunal"). After discussion, Mr Maurici on behalf of the Secretary of State made an application to adjourn the further hearing of this appeal until after the decision of the Decisions Tribunal had been delivered. We granted that adjournment and did so on the basis that, broadly, the argument on the substantive issue had been concluded and that the adjourned hearing would focus on the problems in the chain of decision making.

5. The decision of the Decisions Tribunal was given on 21st January 2004, under decision numbers CIB/4751/2002, CDLA/4743/2002, CDLA/4939/2002 and CDLA/5141/2002. The resumed hearing before us took place on 3rd February 2004. On that occasion the Secretary of State was represented by Mr Heath. Once again the respondent claimant was not present but was represented by Mr Charter. We wish to record our gratitude to all those who appeared before us for their thoughtful and carefully constructed submissions. We are also grateful to those who provided written submissions in the course of the appeal process. An especial mention is due to Mr Charter because he was unable to call on the resources that the Secretary of State had at his disposal.

Overview

6. The issue which we are required to determine is one of statutory construction. We shall set out the relevant provisions in due course. However, as indicated, procedural questions arose with regard to the decisions which had been taken. We quickly came to the conclusion that almost all the recent decisions which were before us were defective in varying degrees. It appeared to us that we had, first, to try to disentangle the decision making process. Secondly, having done so, to

identify the decision under appeal to us. Thirdly, to make a decision on it. Fourthly, to deal with the other decisions contained in the decision making process. We should prefer to begin by dealing with the point of statutory construction since that would make our decision more approachable. However, in order to make our decision comprehensible it is necessary to set out the facts in some detail. Among the most important of those facts are the various decisions that have been taken. That being so, it appears to us that we must first deal with the procedural aspects of the matter before turning out attention to the substantive point of construction.

7. In relation to the chain of decision making we approach the matter in the light of the guidance given by the Decisions Tribunal. In particular, that given in paragraph 192 of the decision.

> "192. On an appeal against a decision which (if valid) changes the effect of a previous decision but which the appeal tribunal finds to contain defects (for example, failure to use the terms "revise" or "supersede", failure to indicate that a previous decision is being revised or superseded, failure to identify the previous decision being revised or superseded, failure to specify the ground for revision or supersession, or reliance on the wrong ground for revision or supersession):
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> (1) if the tribunal finds that the decision was made under Section 9 or 10 it has jurisdiction to make the decision which it considers that the Secretary of State should have made (thereby remedying any such defects in the decision, whether properly regarded as defects of form or substance), and therefore should not simply set such a decision aside as invalid (or "inept") (Paragraphs 73, 74 and 77-80):
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> (2) whilst there may be some such decisions which have so little coherence or connection to legal powers that they do not amount to decisions under Section 9 or Section 10 at all (Paragraph 72)
>
> (a) a decision should generally be regarded as having been made under Section 9 if (however defectively expressed) it alters the original decision as from the effective date of that original decision, and
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> (b) a decision should generally be regarded as having been made under Section 10 if (however defectively expressed) it alters the original decision as from some date later than the effective date of that original decision (Paragraphs 75-76):

(3) the tribunal will not err in law if in its decision notice it does not set aside and reformulate the decision under appeal unless either (i) the decision as expressed is actually wrong in some material respect or (ii) there would be some benefit to the claimant or to the adjudication process in reformulating the decision (Paragraphs 81-82). "

The facts and the chain of decision making

8. The claimant was born on 9th March 1937, and his wife was born on 28th October 1941. According to the Secretary of State's submissions to the tribunal, he became incapable of work on 29th February 1992. He was awarded sickness benefit from 4th March 1992 to 11th September 1992. He was then awarded invalidity benefit from and including 12th September 1992. From and including 13 April 1995, that award of invalidity benefit was converted into one of long term incapacity benefit. At some stage the claimant claimed, and received, what is known as an adult dependency increase in respect of his wife. We explain what this is below and refer to this increase by the initials "ADI". We have not seen the relevant decision. We are told that from 12th September 1992, which was the date when the claimant was awarded invalidity benefit, until 5th April 1993 the claimant's wife was receiving unemployment benefit in her own right. Consequently, no ADI was payable. ADI was payable from 6th April 1993, and continued to be payable apart from a very short period running from 22nd September to 9th October 1993, during which the claimant's wife received sickness benefit. However, thereafter ADI continued to be paid to the claimant and was in payment in April 1995, when the changeover from invalidity allowance to incapacity benefit was made. ADI continued to be paid to the claimant under the incapacity benefit transitional arrangements and continued to be paid under those arrangements until the events of 2000 and 2001, which we shall recount.

9. In February 2000, the claimant's wife made a claim for incapacity benefit in her own right. We have not seen the claim form or the resulting decision awarding benefit. We are told that the claim was treated as made from 13th February 2000 and that incapacity benefit was awarded from 16th February 2000, after the imposition of waiting days, but that the decision was for some reason not made until April 2000. We see no reason to question those facts. In February 2000, the rate at which incapacity benefit was awarded to the claimant's wife was £50.35. This was more than the amount of the ADI which the claimant was receiving in

respect of his wife – namely £39.95. Consequently regulation 10 of the Social Security (Overlapping Benefits) Regulations 1979 (SI 1979/597) came into play. We shall refer to these as the "Overlapping Benefits Regulations". On that basis, and in an ideal world, we consider that, in addition to the decision awarding incapacity benefit to the claimant's wife, the following decisions should have been taken.

(1) At the same time as the decision awarding her incapacity benefit, or shortly thereafter, a decision under regulation 10 providing that so long as the claimant's wife continued to receive incapacity benefit in her own right, ADI was not to be paid to the claimant.

(2) Secondly, and on the basis that the Secretary of State is right on the main, substantive, point, on, say, 14th April 2000, or shortly thereafter, a decision that because ADI had not been paid or payable for at least 57 continuous days, the protection given by the transitional arrangements referred to below had ceased. This would have been a supersession decision. The grounds of supersession being a relevant change of circumstances – that is, the expiration of the 57 days. The decision which it superseded would have been the decision, or if more than one, the latest effective decision awarding entitlement to ADI.

The first of these decisions would have dealt with payment. It would not have dealt with entitlement. What we are clear about is that until the second decision was taken, there remained in being a decision taken at some time in the past awarding the claimant ADI in respect of his wife.

10. The world is not an ideal place and what should have happened did not. What in fact occurred was as follows. On 10th April 2000 (see page 70 of the papers) a named officer completed form LT54. That is a form which is headed "Reconsideration/Revision/Supersession of a decision". The person completing it ticked a series of boxes. The effect of the boxes which were ticked reads as follows.

> "I apply to the Decision Maker for revision of the decision of the decision maker [and here a date should have been inserted but was not] on the claims for IB – ADI for the periods (13.2.00)."

The form then went on to say:

> "I apply to the decision maker for the determination of the over payment resulting from: Customer claiming ADI for wife at £39.95 – wife entitled to IB from 16.2.00 at £50.35."

11. Those requests resulted in two decisions being taken. The first of these appears at page 71 of the papers. It is dated 12th April 2000. The copy we have is only part of the relevant form – although the important part. It is a headed decision and the operative part reads: "Claim disallowed from 16/2/00". The evidence and justification for the decision reads as follows.

> "An increase of incapacity benefit is not payable for [the claimant's wife] from and including 16.2.00 because incapacity benefit is payable to her at the weekly rate of £50.35 and payment of both benefits is not allowed."

The second decision is dated 14th April 2000. It is headed "Decision" and also "The decision of the DM". It reads:

> "Of £325.31 already paid to [the claimant] for [his wife] from £16.2.00 to 12.4.00 the whole sum is to be offset against the arrears of incapacity benefit due to [the claimant's wife] for 16.2.00 to 12.4.00."

Pausing there, we are not greatly concerned with the second of those decisions. The first decision is, however, extremely important. It is a decision made under regulation 10 of the Social Security (Overlapping Benefits) Regulations 1979.

12. The claimant's wife continued to receive incapacity benefit for some months until she failed the personal capability assessment. The award in her favour ceased from 13th August 2000. On 6th September 2000, the claimant made a telephone call to his local office. We have not seen a note of the conversation, but paragraph 6 of the submissions to the appeal tribunal put the matter this way.

> "On 6.9.00 [the claimant] telephoned the local office and asked for a claim form for an adult dependency increase. He was advised that as his wife was under 60 years of age and he had no dependent children the form was not appropriate. He said that his wife had been advised that if her incapacity benefit stopped her husband could reclaim and he requested that an explanation was given to his wife. This was done by telephone on the same day."

He followed this up with a further telephone conversation and a letter dated 13th September 2000, the operative part of which reads:

"Further to our telephone conversation today. I am writing to see if it is possible to have the £40.40 per wk. that I claimed for my wife on top of my incapability benefit restored. I feel that we were wrongly advised by one of your employees who rang my wife on 16th March 2000 a.m. at which time we were led to understand by her that it would be automatically reinstated when my wife came off incapacity benefit.

13. According to the submissions to the tribunal, the whole matter was referred to "the appropriate section at Newcastle for consideration of a special payment for the possible financial loss". We do not know when the reference was made but no decision was made until 19th July 2001. That decision was communicated to the claimant by a letter dated 23rd July 2001. It is too long a letter to quote from. It is enough to say that it rejects the matters put forward by the claimant although such rejection is not, in the light of our own investigations, entirely convincing and ends by refusing a special payment.

14. A few days after receiving that letter, namely on 31st July 2001, the claimant completed the claim form IB10 which appears at pages 4 to 22 of the papers. That is a claim form for "Claiming extra Incapacity Benefit, Severe Disablement Allowance or Maternity Allowance for another adult or child". It is a form which is appropriate for an original claim. The claimant obviously noted that this form did not accord with what he was seeking because, in "Part 10 other information" he asked for the claim to be backdated 31st Aug. 2000, and then went on to make it plain that he considered that this would merely be the re-instatement of his existing entitlement.

15. The completed claim form was received on 1st August 2001 and someone then completed form BF10 which is headed "Request for a decision". The "Reason for request" was simply "Incapacity benefit for a period from 31 August 2000, and the box "Referral type late claim" was ticked. The details are as follows.

"IB10 received 1.8.01 requesting payment of ADI from 31.8.00.

Wife is under 60 and there are no dependant children.

Please consider title to ADI plus late claim."

16. On 7th August 2001, a decision was made disallowing that claim. The decision was in the following terms.

> "[The claimant] is not entitled to an increase of Incapacity Benefit for [his wife] from 31.8.00 to 30.4.01 (both dates included). This is because his claim for that period made on 1.8.01 (date it was received) was not within the time limit for claiming. The time limit for claiming is 3 months.
>
> [The claimant] is not entitled to an increase of Incapacity benefit for [his wife] from 1.5.01 to 27.10.01 because she is not aged at least 60 and [the claimant] is not entitled or treated as entitled to an increase of benefit for a child. The conditions for a transitional award of the increase is not satisfied."

The law relied on included regulation 12 of the Social Security Benefits (Dependency) Regulations 1977, which relates to severe disablement allowance.

17. It is convenient to comment at this stage on that decision. First, in our judgment, the decision of 7th August 2001 is not the decision which was appealed to the appeal tribunal. Mr Heath urged us that it was although it seemed to us that Mr Maurici took a rather different view and opted for a decision of 25th October 2001, to which we shall shortly come.

18. Secondly, we consider that the decision of 7th August 2001, was fundamentally flawed. So flawed that we do not consider we can correct it. In paragraph 72 of their decision, the Decisions Tribunal gave the following guidance.

> "72. We agree with the proposition implicit in the submissions of all parties that there may be some decisions made by the Secretary of State which have so little coherence or connection to legal powers that they do not amount to decisions under section 10 at all. ..."

We consider that the decision of 7th August 2002 is one such decision. It is so fundamentally flawed as to be inconsistent with any proper exercise of a legal

power. At the date it was made, the original decision awarding the claimant entitlement to ADI was still in being. In our view its operation could only be brought to an end by a supersession decision superseding the original award on one of the permitted grounds. As can be seen from what follows the Benefits Agency either overlooked the fact that the decision awarding ADI was never superseded or else it was simply confused as to what the true position was. Instead of making a, late, supersession decision, the Benefits Agency persuaded the claimant, apparently against his own misgivings, to make a fresh claim for a benefit to which he was already entitled. There was therefore no valid claim on which there was power to give a decision. Nonetheless the claim that was thought to exist was then rejected for the earlier period for which he claimed on the basis that the claim was late (paragraph 1 of the decision of 7th August 2001). It was rejected for the later period, up to 27th October 2001, on the grounds that no award could be made under the incapacity benefit rules (paragraph 2 of the decision). It is only the last sentence of the second paragraph which makes any reference to the transitional provisions.

19. Mr Heath sought to persuade us that that sentence was the key to the whole decision. He argued that if it was removed from the end of the text and placed right at the beginning, preferably as a separate paragraph, the whole decision fell into place and could be read as a supersession decision superseding the award of entitlement to ADI. We decline so to read the decision. On its face, it was clearly a decision dealing with a new claim and did not purport to be anything else. All the more so when one recalls that the decision was given in response to the request for a decision set out in the form BF10, which is dated 1st August 2001. That request is couched in terms of a new claim. We accept that a decision maker dealing with a request for a decision may consider that what has been requested is inappropriate and that some other decision should be given instead. However, that does not appear to be what occurred on 7th August 2001. In our view the decision clearly follows on from the request and is in accordance with it.

20. Returning to the facts, it is clear that between 7th August 2001, and 25th October 2001, someone had second thoughts about the decision of 7th August 2001. Those thoughts related to the fact that the decision of 7th

August 2001 had taken the matter up to 27th October 2001. The following day (28th October 2001) was the claimant's wife's 60th birthday. It was also a Sunday. It is, we think, clear that the decision maker did not go beyond 27th October 2001 because he or she assumed that from and including the following day the claimant's wife would receive her retirement pension and this would be another reason why the claimant should not receive ADI. However, the decision maker appears to have overlooked the fact that 28th October 2001 was a Sunday and it is well established that no pension is payable until the Monday following the relevant birthday. In this case, that was Monday 29th October 2001. Logically, therefore, under the incapacity benefit rules, the claimant was entitled to ADI for the one day during which is wife was 60 but did not receive any retirement pension. On 25th October 2001, an officer of the Benefits Agency, whom we shall call "Mrs A", completed an LT54 form requesting a decision. Making sense of the various ticked boxes, the form records "I apply to the Decision Maker for a revision decision" and also "I apply to the Decision Maker for a reconsideration of the decision of the Decision Maker dated 7/8/01". The details of the referral were as follows.

> "T.P. lost 13.4.2001.
>
> Claim to ADI from 28/10/01 (aged 60). RP payable from 29/10/01 @ £70.25 exceeds £41.75 a week ADI .....Long Term Incap."

21. That resulted in the decision of a decision maker whom we shall call "Miss B", dated 25th October 2001, which appears at page 76 of the papers. For convenience we shall refer to it as "the first October decision". It is stated to be a revision decision and the decision being revised is to be "changed in part", "ADI only". The decision is as follows.

> "I have revised the decision of the decision maker dated 7.8.01. The decision should have also included an award of an increase of Incapacity Benefit for [the claimant's wife] from and including 28.10.01. As a result [the claimant] is entitled to an increase of Incapacity Benefit for [his wife] from and including 28.10.01 at the weekly rate of £41.75 per week because she reaches the age of 60 on that day.

An increase of Incapacity benefit is not payable for [the claimant's wife] from and including 29.10.01. This is because Retirement Pension is payable to [her] at the weekly rate of £70.25 and payment of both benefits is not allowed.

Social Security (Overlapping Benefits) Regulations reg 10."

22. Miss B appears to have formed doubts about the chain of decision making because, again on 25th October 2001, she completed and signed another form LT54 (page 77 of the papers). It stated "I apply to the Decision Maker for a decision". That is, for a decision which was neither a revision decision nor a supersession decision. Miss B probably opted for a "decision" because she was unable to locate details of the original decision which had awarded entitlement ADI many years before. We think this is so because she did not identify any decision by date or otherwise. The details of the referral which Miss B gave were "ADI TP lost 13.4.2000. protected from 13.4.95 to 12.4.2000". That is, ADI transitional protection was lost from 13 April 2000. Further that such transitional protection was in being from the implementation of incapacity benefit until the expiration of the 57 days on 12 April 2000. Miss B had, we consider, spotted the flaw in the previous decision making. She herself gave the resulting decision, again dated 25 October 2001. A copy will be found at page 78 of the papers. We shall refer to it as "the second October decision". It is described as a "decision". Its effect on benefit is said to be "changed in part" "ADI only". The decision is as follows.

"[The claimant] has ceased to be entitled to an increase of Incapacity Benefit which was awarded under transitional arrangements for [his wife] from and including 13.4.00. This is because an increase of Incapacity Benefit has not been paid for at least 57 continuous days.

Social Security Contributions and Benefits Act 1992 Section 86A Social Security (Incapacity Benefit) (Transitional) Regulations reg 24(7)(b)."

It should be noted that Miss B correctly identified regulation 24(7)(b) of the Social Security (Incapacity Benefit) (Transitional) Regulations as being the provision which removed the transitional protection.

23. We deal with the two decisions of 25th October 2001. The first October decision was given at the request of Mrs A which was a request for a revision decision. It is expressly stated to be a revision of the decision of 7th August 2001. We do not consider that it can be read in any other way. Since the decision of 7th August 2001 was fundamentally flawed, and cannot be corrected, it follows as a matter of consistency that this decision of 25th October 2001 must fall with it. The second October decision, which was requested by Miss B herself, in our judgment takes effect as a valid supersession decision. It is described simply as a decision but that, in our judgment, is mere nomenclature. It is in substance a supersession decision which correctly identifies a relevant change of circumstance and invokes the relevant regulatory provision. It does not expressly state that the decision is founded on the identified relevant change but it expressly purports to alter the existing decision on entitlement and identifies the date from which a superseding decision, on the ground of relevant change of circumstances, would take effect. Nothing is missing save that the box marked "supersession" which should have been ticked has not been, the decision which is superseded should, preferably, have been identified by date and although the relevant change has been identified it has not been described as such. We refer to paragraph 192 of the decision of the Decisions Tribunal which we set out above. In our view this was the first occasion on which entitlement to ADI was removed – as opposed to payment being suspended by the Overlapping Benefits Regulations. It is also, we consider, the decision, indeed the only effective decision, which was appealed to the appeal tribunal. Mr Heath tried to persuade us to read the two decisions of 25th October together and as one. We decline to do so.

24. In relation to the effective decision under appeal, it is we think significant that the claimant's actual appeal was made on 29th October 2001 and received on 30th October 2001, and not earlier. The central part of his grounds of appeal to the appeal tribunal are expressed as follows.

> "My wife claimed Incapacity Benefit for herself from 16.2.00 – 30.8.00, she still had an underlying entitlement to the Adult addition on my Incapacity Benefit because I was receiving Incapacity Benefit prior to 1995, this was not cancelled out because my wife was in receipt of a benefit. Therefore when her Incapacity Benefit stopped she should

have been entitled to the Adult addition again because of protection (pre 1995 claim). This should have been put back into payment when I warned you of a change of circumstances in my letter dated 13.9.00. My appeal should be allowed because the Decision Maker failed to take into consideration a material fact (letter dated 13.9.00).

25. Our conclusion that the first October decision was fundamentally flawed while the second October decision operates by way of supersession does, on the facts, leave one difficulty. There is no decision covering the single day – Sunday, 28th October 2001 – when the claimant was entitled to ADI because his wife was 60 but she received no retirement pension. We consider that, at this late stage, we should not enter into the complicated questions of whether and how we or the Secretary of State could now give a decision authorising the payment of ADI for that single day. Too much time has passed. In practical terms, only a single day's ADI, a small amount, is involved. Further, although it is possible that he has not done so, we think it unlikely that the claimant did not receive the relevant amount a long time ago. There would be no question of any repayment being required.

26. To complete this history, a further form LT54 was completed on 23rd November 2001. We do not know what prompted this request although it may have been a routine process after an appeal had been lodged. (It was not made by either Mrs A or Miss B). It states "I apply to the Decision Maker for reconsideration of the decision of the Decision Maker dated 7/8/01". See the details of the referral at page 79. That request resulted in a long decision, dated 23rd November 2001, which appears at page 81 of the papers. It is, we think, too long to set out here. It is expressed to be a reconsideration of the decision of 7th August 2001. Since in our view that decision was fundamentally flawed, the decision of 23rd November 2001 falls with it. In any event, a valid supersession decision had already been given and that was an end of that particular matter.

27. We began our analysis of the decision making chain by explaining that the defects to which we have referred became apparent in the course of the hearing before us. We have carried out our analysis with the advantage of carefully constructed submissions from both sides. We have also had the considerable benefit

of guidance from the Decisions Tribunal. It is not, therefore, surprising that none of the points we have raised were taken before the appeal tribunal. Before the appeal tribunal the appeal proceeded on the basis that the decision under appeal was that made on 7th August 2001. The statement of reasons for the decision begins with the words: "This is an appeal against the decision of 07.08.01, that [the claimant] is not entitled to an increase in incapacity benefit for his wife from 31.08.00 to 27.19.01 under the Social Security Contributions and Benefits Act 1992 s.86A and the Social Security Incapacity Benefit Transitional Regulations 1994". It follows from our analysis that the appeal was concerned with the wrong decision and it must further follow that its basic approach, and the resulting decision, were erroneous in point of law.

The substantive issue

28. We turn to the issue of construction we were convened to decide. For the moment, the substantive issue can be summarised as follows. Prior to 13th April 1995, there existed a benefit known as invalidity benefit. On 13th April 1995, that benefit was replaced by incapacity benefit. As a general rule, those in receipt of the old benefit were transferred to the new. However, the two benefits differed in a number of important respects. One difference related to a particular increase in the rate of the weekly benefit. That increase being commonly known either as the "adult dependency allowance" or as the "adult dependency increase". For simplicity, throughout this decision, we refer to this allowance or increase as "ADI". This, as its name suggests, was an increase paid to those on invalidity benefit who had an adult who was dependent on them. The usual case being that of a dependent spouse – most commonly, a wife. With the introduction of incapacity benefit, the circumstances in which the ADI could be claimed were restricted. In particular, to cases where the dependent spouse was over 60 or there was a dependent child. Simply being a dependent spouse was no longer sufficient. That, naturally, meant that there were many recipients who received the ADI under the old benefit but who did not qualify for it under the new. Not surprisingly, their position was protected by transitional provisions. These were contained in the Social Security (Incapacity Benefit) (Transitional) Regulations 1995 (SI 1995/310). We shall call these the Transitional Regulations. In particular, regulation 24(1) of those regulations which provides that "in a transitional case where at any time during a period of 56 days immediately before [13th April 1995] ... an increase in the rate of invalidity benefit was payable for a spouse who was an adult dependent ... an amount equal to that

increase shall be payable". The key word in that quotation is "payable". What does it mean? Regulation 24(7) goes on to provide that entitlement to ADI is lost if "no increase of invalidity benefit or long-term incapacity benefit is paid or payable for at least 57 days in a period of incapacity for work". The key words are "paid or payable".

29. This is a convenient point to set out the relevant legislation. Following the introduction of incapacity benefit, the provision providing for ADI is section 86A of the Social Security Contributions and Benefits Act 1992, which has the heading or marginal note "Incapacity benefit – increase for adult dependants".

> 86A(1) The weekly rates of short-term and long term incapacity benefit shall, in such circumstances as may be prescribed, be increased for adult dependants by the appropriate amounts specified in relation to benefit of that description in Schedule 4, Part IV, column (3)
>
> (2) Regulations may provide that where the person in respect of whom an increase of benefit is claimed has earnings in excess of such amount as may be prescribed there shall be no increase of benefit under this section."

The relevant regulatory provision is regulation 9(1) of the Social Security (Incapacity Benefit – Increases for Dependants) Regulations 1994 (SI 1994/2945) which, for present purposes, provides that where the dependent wife is under the age of 60 ADI is to be awarded only if there is a dependent child. However, this was not so under the invalidity regime. The position of those who were already entitled to ADI on 13th April 1995, was preserved by regulation 24 of the Transitional Regulations. Regulation 24 is headed "Increase of rate for long-term incapacity benefit for dependents in transitional cases".

> 24(1) ... in a transitional case where at any time during the period of 56 days immediately before the appointed day [i.e. 13th April 1995] –
>
> (a) ...
>
> (b) an increase in the rate of invalidity benefit was payable for a spouse who was an adult dependent under Part IV of the 1992 Act,
>
> an amount equal to that increase shall be payable.

That is the provision which preserves an entitlement which existed at 13th April 1995. Regulation 24(7) then specifies the circumstances in which transitional protection is to be lost.

(7) ... a person shall cease to be entitled to an increase under paragraph (1) when either -

(a) no invalidity benefit or long-term incapacity benefit has been paid for at least 57 continuous days;

(b) no increase of invalidity benefit or long-term incapacity benefit is paid or payable for at least 57 continuous days in a period of incapacity for work.

30. The relevant parts of regulation 10 of the Overlapping Benefits Regulations are as follows.

(1) Subject to the following provisions of this regulation, where a dependency benefit under the Act is payable for the same period as one or more of the following personal benefits is, or but for the provisions of these regulations would be, payable to a dependant -

(a) a personal benefit under Chapter I or II of Part II of the Act ...

(b) ...

(2) Where the weekly rate of a personal benefit (or, if more than one, the aggregate weekly rate payable after any adjustment made by virtue of regulation 4(1) or 6(1) -

(a) is equal to or exceeds the weekly rate of the dependency benefit, the dependency benefit shall not be paid;

(b) in any other case, the weekly rate of the dependency benefit payable shall be adjusted, if necessary, so that it does.

The remaining provisions of regulation 10 are not relevant for present purposes. Regulation 16 of the Overlapping Benefits Regulations is as follows.

16. Any person who would be entitled to any benefit under the Act or under the Jobseekers Act but for these regulations shall be treated as if he were entitled thereto for the purpose of any rights or obligations under the Act and the regulations made under it or under the Jobseekers Act and the regulations made under it, (whether of himself or some other person) which depend on his being so entitled other than for the purposes of the right to payment of that benefit.

31. The words "payable" and "paid or payable" in regulation 24(7) of the Transitional Regulations are important. They require consideration of the precise effect of regulation 10 of the Overlapping Benefits Regulations. When giving a direction in this appeal on 13th November 2002, Mr Commissioner Rowland observed:

> "There may arise the question whether the concepts of "entitlement" and "payability" are used interchangeably in the Social Security (Overlapping Benefits) Regulations 1979, which were drafted before the decision of the House of Lords in *Insurance Officer –v- McCaffrey* [1984] 1 W.L.R. 1353 .... In particular, it may be material that regulation 16 refers to entitlement while referring back to regulations (in the plural) which all (save one) refer to payability. Does regulation 16 therefore treat benefit as being *payable* for all purposes other than the right to payment?"

32. The question has given rise to differences of opinion among Commissioners. In three cases Commissioners have been concerned with the effect of regulation 24 of the Transitional Regulations where, on 13th April 1995, ADI was not being paid and had not been paid for more than 56 days. In each case it was argued that entitlement was preserved and that ADI should once more be paid when the reason for its not being paid ceased to operate. Each of the three Commissioners was concerned with the meaning of the word "payable" in regulation 24(1). In only one case was the Commissioner required to go on to consider regulation 24(7).

33. In February 1998, Mr Commissioner Goodman decided CIB/3522/1997. The issue arose because the dependent wife's earnings exceeded the amount of ADI. Mr Commissioner Goodman identified the point which he had to decide as being that, prima facie, the transitional provision was not complied with unless it could be shown that, although the increase was not "being paid", it was nevertheless "payable" at any time in the 56 days immediately before 13th April 1995. In paragraph 11 of his decision, he found the answer in section 92 of the Social Security Contributions and Benefits Act 1992, the wording of which he had already set out.

> "11. ... The phrase I have underlined i.e., "... the award shall continue in force but the increase shall not be payable for any week ..." is critical. The section does not speak of any underlying entitlement (as the tribunal held).

Quite the reverse, the expression used in section 92(1)(b) is "ceases to be entitled". All that the section does is to provide that "the award shall continue in force" i.e. there is no need for a series of revisions and reviews every time the wife's earnings go up or down. The section goes on to say "the increase shall not be payable for any week if the earnings relevant to that week exceed the amount of the increase, or as the case may be, the specified amount." The word is "payable". The section would have the effect in this case of providing that on 13th April 1995, and for 56 days beforehand, when the wife's earnings were too high, thus preventing entitlement, that the increase should not "be payable". That appears to me to be conclusive of the matter because regulation 24(1)(b) of the above-cited 1995 Transitional Regulations applies only where the increase for the wife is "payable" on 13 April 1995 or in the 56 days beforehand. Section 92 of the 1992 Act provides that in that period it was not "payable". Consequently the claimant was not on 13 April 1995 entitled to the transitional increase and cannot be entitled to it thereafter."

Thus the decision in CIB/3522/1997 turned on the words of section 92, not on the operation of the Overlapping Benefits Regulations.

34. In decision CIB/27/1997, where the dependent wife was getting invalid care allowance from 1994 to 1996 at an amount which exceeded the amount of ADI receivable by her husband, Mr Commissioner Pacey reached a similar conclusion but, different provisions being in issue, for different reasons. In paragraph 12 of his decision, he said this.

"12. I accept the arguments of Mr Heath and reject those of Mr Atkinson. To my mind there is a clear and vital distinction between the entitlement provided for under regulation 16 of the Overlapping Benefits Regulations and the payability referred to under regulation 24 of the Transitional Regulations. The primary legislation clearly repealed that part of the Contributions and Benefits Act (section 83(1)(b)) which provided for the increase of benefit sought and did so in unequivocal terms, consistent with the clear and fundamental change from invalidity benefit to incapacity benefit. That is to my mind clear and powerful evidence of a contrary intention demonstrated in the primary legislation but I am fortified in my reasoning by the fact that any contrary intention so evidenced clearly flows through to the relevant part of the secondary legislation, regulation 24 of the Transitional Regulations

effectively drawing the distinction to which I have referred, between payability and entitlement. Section 4 of the Incapacity for Work Act merely provides power to make provisions for the transition to incapacity benefit and it is necessary to look at the terms and effect of the primary and subordinate legislation to see whether a contrary intention has been demonstrated. The importance of considering the relevant transitional regulations in such a case as this is shown by CIB/3522/97 see paragraph 10. I also note that in Abbott v. Minister of Lands [1895] AC 425 (concerning section 38(2) of the Interpretation Act 1889, the predecessor of section 16(1) of the Interpretation Act 1978) it was held that mere right existing at the date of a repealing statute to take advantage of a repealed enactment is not an accrued right."

Thus, Mr Commissioner Pacey held that ADI had not been payable to the husband in the 56 days immediately before 13th April 1995, so that he did not come within the transitional protection conferred by regulation 24(1).

35. However, in CIB/14383/1996, Miss Commissioner Fellner, who did not have the benefit of being referred to CIB/27/1997, although the factual situation was substantially the same, reached the opposite conclusion. In paragraph 14, after referring to a number of uses of the word "payable", Miss Commissioner Fellner said:

"14. The same word "payable" being used throughout, I see no reason for giving it different meanings in different provisions all relating to the same benefit. Regulation 24(1)(b) envisages that the increase may be "payable" even though not being "paid". Regulation 24(7)(b) does the same, and there is here a telltale contrast with subparagraph (7)(a), which removes the increase as soon as invalidity/long-term incapacity benefit has not been "paid" for 57 days. The probability is that in using "payable" as an alternative to "paid" in these contexts, the draftsman had in mind that receipt of certain personal benefits (many of which are temporary) may temporarily reduce or prevent payment of dependency increase, without its ceasing to be payable."

Thus the Commissioner held that the claimant was within the transitional protection afforded by regulation 24(1) and had not lost his entitlement to ADI under regulation 24(7). It followed that payment of ADI was to resume after his wife's entitlement to invalid care allowance ended.

36. The appeal tribunal, which consisted of a legally qualified chairman sitting with a medical member, had all three decisions cited to it.

The chairman preferred the reasoning of Miss Commissioner Fellner in decision CIB/14383/1996. The medical member took the contrary view and preferred the reasoning in decisions CIB/3522/1997 and CIB/27/1997. This being a two member tribunal, the views of the chairman prevailed by virtue of section 7(2)(c) of the Social Security Act 1998. The decision of the appeal was, therefore, that although the effect of regulation 10 of the Overlapping Benefits Regulations was to preclude the payment of ADI to the claimant while his wife was receiving incapacity benefit in her own right, ADI nevertheless remained payable and consequently the transitional protection was never lost. The Secretary of State appealed on the grounds that such a construction was erroneous. We agree that it is for the reasons we are about to give.

37. The Secretary of State submits that social security legislation involves three, recognised, concepts. Namely "entitlement", "payability" and "payment". The distinction between "entitlement" and "payability" was drawn by Lord Scarman at page 1356 in *McCaffrey*.

> "... The logic of entitlement and claim is clear: a claim is based on the existence of entitlement. Thirdly, section 79(1) does not speak of "entitlement". It merely declares it to be "a condition of a person's right to any benefit that he makes a claim." These words do not have to be construed as a reference to entitlement. They can equally well, as a matter of ordinary English, be a reference to the right to be paid. And this is the meaning appropriate to a section dealing with administration of benefit. Accordingly, I read the subsection as having this effect: a claimant not only has to show the existence of entitlement but has also to make a claim in the prescribed manner and within the prescribed time in order that he may be paid. This construction avoids introducing a restriction upon entitlement not to be found in section 36 and makes sense of section 79(1) as a provision dealing with the administration of benefit."

In R(P)3/85, Mr Commissioner Mitchell, at paragraph 6, put the matter in the following way.

> "It is to be observed that regulation 7(3) does not deal with the circumstance of a child undertaking full-time employment by removing entitlement or providing that a person shall cease to be a "child". It

> deals with the situation by providing that the benefit shall not be payable. Up to the date of the ... decision of the House of Lords in *Insurance Officer v McCaffrey* ..., it was generally considered that there was no practical difference between the concepts of entitlement to and payability of benefit in social security legislation so that a statutory bar to payment constituted disentitlement ... I agree ... that the House of Lords "thus rejected the effective conclusion that had been reached in decision R(S)11/83 that there was no practical difference between the concept of a person's not being entitled to benefit and that of the benefit not being payable to him."

38. In this case the words we have to construe are contained in regulation 24(7) of the Transitional Regulations and are that a person shall cease to be entitled to an increase under regulation 24(1) where "no increase of invalidity benefit or long term incapacity benefit is *paid or payable* for at least 57 continuous days in a period of incapacity for work". In the present appeal there was no actual payment of ADI for 57 continuous days. Consequently, the key word is "payable". Was ADI "payable" during that period notwithstanding the provisions of the Overlapping Benefits Regulations?

39. The Secretary of State submits that we must be careful to distinguish between "entitlement" and "payability" because they are different concepts. Throughout the period of 57 days, the claimant remained "entitled" to ADI but it was not "payable" to him because of the effect of the Overlapping Benefits Regulations. We accept the Secretary of State's submission that to say, as the claimant does, "payable" means "Money could be paid under these rules, though it may not actually be paid due to the provisions of other rules" is wrong and confuses "entitlement" and "payability". If, as a consequence of the interaction of a number of sets of regulations, benefit is not actually payable to a person, then it is not "payable". Mr Charter's submission for the claimant was that the effect of the adjustment to ADI under regulation 10, being in terms that the ADI was not to be paid or that a nil amount was to be paid, left it nonetheless payable. We reject that submission primarily on our construction of the relevant regulations.

40. The natural reading of regulation 10(2) of the Overlapping Benefits Regulations, looked at on its own, is that in providing that ADI shall not be paid, the regulation has the effect that the dependency benefit is not payable. Regulation 10 uses the term "payable" when referring to circumstances in which some rate of the dependency benefit continues to be payable and the term "paid", or rather "shall not be paid", when the amount of ADI is wiped out by the amount of the personal benefit. The two terms are used in contrast, so that if ADI is not to be paid it is not payable. The opening words of regulation 10(1), making it a condition that ADI is payable, do not suggest the contrary. Those words refer to the circumstances prevailing before regulation 10 is applied. They do not suggest that ADI remains payable despite the application of regulation 10(2)(b).

41. The context of the Overlapping Benefits Regulations as a whole supports that conclusion. Regulations 4 to 9 use a slightly different technique. There the adjustment made is to deduct one benefit (A) from the other (B) and to provide in relation to benefit B that "the balance of it, if any, shall be payable" (see, for example, regulation 4(5)). If no balance is payable, there would seem to be no doubt that the effect is that benefit B is not payable. Although the technique differs, the practical effect of the adjustment under regulation 10 is exactly the same. It would create an inconsistency for regulation 10 to have the effect argued for by Mr Charter. The language of regulation 10 falls a long way short of what would be necessary to create such an effect.

42. The analysis above would mean in the present case that, for the purposes of regulation 24(7) of the Transitional Regulations, the ADI was not payable to the claimant for the relevant period. However, we must consider the potential effect of regulation 16 of the Overlapping Benefits Regulations. It could be argued, building on what was said by Mr Commissioner Rowland when giving the direction of 13th November 2002, that although regulation 16 uses the language of entitlement, it has an effect whenever any of the other regulations remove the payability of a benefit or reduce the amount payable. If so, it would restrict the operation of any part of the Overlapping Benefit Regulations to stopping the payment of the benefit affected and, for the purposes of qualification for other benefits or for the

same benefit at a later date, leave the recipient's rights as if they had not been affected by the Overlapping Benefits Regulations.

43. It could be argued that, since the only other provision in the Overlapping Benefits Regulations which refers to entitlement is regulation 15, which provides for priority between persons entitled to an increase in benefit, and all other regulations refer to "paid", "payable", "adjustment" etc, and regulation 16 apparently applies wherever "these regulations", in the plural, have an effect on entitlement, that it was unlikely that the intention was to exclude circumstances where there was only an effect on payability. That would be reinforced by the understanding at the time that the current Overlapping Benefits Regulations were drafted (before the decision of the House of Lords in *McCaffrey*) that a right to payment of a benefit and entitlement to a benefit were effectively the same thing. (We were provided with a copy of the statement of the National Insurance Joint Authority on the preliminary draft of the 1948 Overlapping Benefits Regulations which expressly set out exactly that understanding.)

44. We cannot accept any such argument. The difference in the use of language in regulation 15 and 16 of the Overlapping Benefits Regulations is too stark to allow the application of regulation 16 where any of the other regulations, such as regulation 10 in the present case, have merely taken away the payability of a benefit, and have not taken away entitlement.

45. Although it appears that in 1979 only regulation 15 had that effect, the reference to "these regulations" in the plural in regulation 16 does not assist interpretation. That seems to us no more than a conventional reference to the potential effect of the Overlapping Benefits Regulations as a whole. Regulation 16 simply cannot bite in the period for which the award of incapacity benefit was made to the claimant's wife and regulation 10 removed the payability of the ADI. For that period, and before the decision of 25th October 2002 was made, the claimant remained entitled to the ADI.

46. We must turn to the terms of regulation 24(7)(b) of the Transitional Regulations, and in particular sub-paragraph (b), which provides that a person shall cease to be entitled to an ADI under regulation 24(1) when

no increase of long-term incapacity benefit is paid or payable for at least 57 days in a period of incapacity for work. The natural meaning of those words would cover the circumstances where payability of an ADI has been removed by the operation of regulation 10 of the Overlapping Benefits Regulations. That is the meaning to be adopted.

Conclusion

47. We consider that the word "payable", when used in paragraphs (1) and (7) of regulation 24 of the Transitional Regulations has the meaning given above. We therefore agree with the relevant views expressed by Mr Commissioner Pacey in decision CIB/27/1997. We do not agree with the relevant views expressed by Miss Commissioner Fellner in decision CIB/14383/1996 without having the benefit of having Mr Commissioner Pacey's decision cited to her. Mr Commissioner Goodman's decision CIB/3522/1997 does not assist us because it was not concerned with the effect of regulation 10 of the Overlapping Benefits Regulations. As a consequence, the Secretary of State's appeal succeeds and we give the decision which we do in paragraph 2 above.

(Signed)

D.J. May QC

J. Mesher

J.P. Powell

Commissioners

Dated: 19th April 2004