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Commissioner's File: CIS/422/1992

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

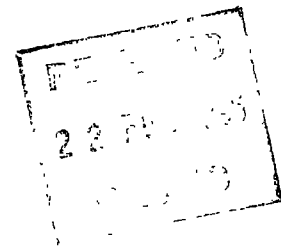
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A  
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No: 3



SUPPLEMENTAL DECISION

1. This decision is supplemental to the original decision given by me on this file and dated 18 March 1993. Paragraph 1 of that decision read as follows,

"I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 7 November 1991 as that decision is erroneous in law and I set it aside. My decision is as follows:-

- (a) In ascertaining the claimant's entitlement to Income Support, in pursuance of her claim for that benefit made on 3 September 1990, no amount of notional earnings under regulation 42(6) of the Income Support (General) Regulations 1987, S.I. 1987 No. 1967 is to be taken into account;
- (b) the claimant has proved that there was good cause for the delay in making the claim for Income Support throughout the period of 12 months before the date of claim and any Income Support awarded to her should be back-dated accordingly - Social Security (Claims and Payments) Regulations 1987, S.I. 1987 No. 1968, regulation 19."

2. In paragraph 17 of that decision I said,

"The adjudication officer will now forthwith need to re-assess the claimant's income and capital (if any) and make any appropriate award of income support. ... any difficulty or dispute can be referred to me for Direction or Supplemental Decision."

3. After that decision was promulgated the parties indicated that they wished to refer the case back to me as they had not been able to agree on the actual amount of income support payable to the claimant in respect of her claim. There was also a difficulty about what was the correct date of claim (see below). Consequently I held another oral hearing of this case on 16 January 1995 at which the claimant was not present but was represented by Ms. N Corkery of the Devon Welfare Rights Unit. The adjudication officer was represented by Mr. P. Brown, Counsel, instructed by the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Ms Corkery and to Mr. Brown for their assistance to me in this case.

4. There are two distinct issues involved. The first is what is to be regarded as the correct date of claim, bearing in mind paragraph 1(b) of my original decision (see above) in which I indicated that there could be backdating of 12 months before the date of claim because the claimant had shown "good cause" for delay. Conflicting submissions are now made to me by the adjudication officer now concerned (in a detailed written submission dated 9 September 1994) and by the Devon Welfare Rights Unit in a written submission dated 27 September 1994. Those submissions were amplified orally at the hearing before me.

5. However on examination of this case it appears to me that the question of what was the appropriate date of claim was in fact already determined by paragraph 1 of my original decision of 18 March 1993, since in paragraph 1(a) of that decision (quoted in paragraph 1 above) I stated that the claim was "made on 3 September 1990". That issue is therefore at Commissioner level, res judicata and whether the date is right or wrong I cannot decide the issue again. So far therefore as I am concerned the date must be treated as 3 September 1990 which means of course that the backdating to which I refer in paragraph 1(b) of my original decision will be to 3 September 1989. If it is considered that there was a mistake of fact in paragraph 1 of my original decision of 18 March 1993 the remedy is for application to be made to the adjudication officer on fresh evidence for revision of that part of my decision. I have no power to do that.

6. I now proceed to what was the principal issue in this case on which the parties could not agree, namely how there should be treated the sum of approximately £185 per week contributed by the son out of his own resources to his mother, the claimant. The question is whether the whole or part of that sum should not be treated as the claimant's income, by virtue of the disregard in paragraph 18 of Schedule 9 to the Income Support (General) Regulations 1987. That paragraph provides that there shall be

a disregard for income support purposes of,

"18. Any payment made to the claimant by a person who normally resides with the claimant which is a contribution towards his living and accommodation costs ..."

7. In paragraph 12 of my original decision speaking of this £185 per week I stated,

"The adjudication officer points out that, in its findings of fact and reasons for decision, the tribunal took into account when considering paragraph 18 [of Schedule 3 to Schedule 9 to the 1987 Regulations] the whole of the £185.63 per week that the son paid towards the household expenses, overlooking the fact that some of those expenses at least were not incurred by or given for the benefit of the son but were for the claimant herself. That is undoubtedly so. The £185.63 included for example all the payments on mortgages of the house in which the mother and son lived, and all of the payment for water, electricity and telephone bills, poll tax, television expenses, car insurance etc. There is no doubt that, in characterising the whole £185.63 per week paid by the son as coming within paragraph 18 of Schedule 9, the tribunal erred in law since part of the £185.63 was not paid for the son's living and accommodation costs but was to pay for the costs of his mother. The point also has to be borne in mind, however, (as stressed by Ms Corkery at the hearing before me) that, because of the son's exceptional needs owing to his severe disability, the couple were no doubt having to occupy more expensive accommodation than might otherwise be the case if the mother was simply living on her own." (my underlining).

8. At paragraph 15 of that decision I referred to "the appropriate 'discount' from the £185.63 per week contributed by the son, on account of the fact that some of those expenses would be his mother's and not his expenses ..". In paragraph 17 of my decision I said of the claimant, "her income will, presumably, include the non-disregarded part of the son's payment of £185.63 per week."

9. Again, I should point out that the rule of res judicata would prohibit me from re-deciding or varying the matters which I have already dealt with in my first decision. Any variation of my original decision can only be made on a review on proper grounds by an adjudication officer, or on an appeal to the Court of Appeal (if leave were given). I have no power to make such variation myself. It follows therefore that I cannot accede to any contention that there should not be some discount from the £185.63 per week in calculating the amount of the disregard under paragraph 18 of Schedule 9 to the 1987 Regulations, because I had already said in my original decision that there would have to be such a discount "on account of the fact that some of those expenses would be [the claimant's] and not [the son's] expenses" (paragraph 15).

10. It follows that the only matter which I can now decide in this supplemental decision is what is the proportion of the £185.63 per week which can properly be disregarded as being "any payment made to the claimant by [the son] which is a contribution towards [the son's] living and accommodation costs" (1987 Regulations, Sched.9, para.18) bearing in mind that there may have to be larger accommodation provided because of the son's severe disabilities and the fact that they may require more expenditure attributable to him than attributable to the mother eg. in transport and heating costs. The son was severely injured in the Falklands War and also has other health problems. Bearing all these facts in mind, I have come to the conclusion that it would be fair to say that 75% of the £185.63 per week paid by the son is properly attributable towards his own living and accommodation costs. I bear in mind that those words must be given a wide meaning, as is very properly conceded by the adjudication officer now concerned in paragraph 14 of his written submission of 9 September 1994. Only 25% of that payment therefore is not to be disregarded on the ground that it is a contribution by the son not towards his own living and accommodation costs but towards his mother's. The adjudication officer should forthwith make the appropriate calculations of the income support (if any) due to the claimant back to the deemed date of claim on 3 August 1989.

11. Lastly, I return to a contention which was not raised at the original hearing before me but has only been raised since on the submissions relating to this supplemental decision. It is possibly doubtful whether I ought at this stage to consider a new matter which has not been raised before, either in writing or orally before me. Certainly it was not raised before me at the time I gave my original decision. However, both parties indicated at the second oral hearing before me that they were willing for me to deal with the point and I propose to do so.

12. Paragraph 15 of Schedule 9 to the Income Support (General) Regulations 1987, as substituted by regulation 22 of S.I. 1990 No. 547 as from 9 April 1990, allows exemption for certain payments which are "voluntary". The original version of paragraph 15 also used the word "voluntary". In paragraphs 10-12 of his written submission of 9 September 1994, the adjudication officer now concerned raises the possibility that the weekly payments of £185 approximately by the son to his mother per week might be subsumed under paragraph 15 but then goes on to submit, after citing R v. Doncaster Borough Council, Ex Parte Boulton [Divisional Court, 11 December 1992] and a Commissioner's decision on file CIS/646/1991 (reported as R(IS) 4/94), that it cannot be said that the payments by the son were "voluntary", in the sense of being made without getting anything in return. Ms Corkery contends otherwise; on the ground that in reality the son got nothing for his payment because his mother would have rendered the services, whether paid or not. That may or may not be so, but the fact of the matter is that the payments were made and the son got something in return for them. I am therefore compelled to hold, on the above-cited authorities, that the payments were not "voluntary".

13. Lastly, I should say that this matter has been outstanding for a considerable time. I would ask the adjudication officer now to ensure that the appropriate calculations of income support are made as quickly as possible and that any additional income support due to the claimant should be paid forthwith. If there are any further problems, they can be brought back to me or another Commissioner for direction or supplemental decision but I very much hope that there will be no need for that now I have given this supplemental decision. If there is any need for any matter to be brought back to me or another Commissioner, then it should be done as a matter of urgency.

(Signed) M.J. Goodman  
Commissioner

(Date) 1 February 1995