

ATH/SH/6

Commissioner's File: CIS/84/1989

## SOCIAL SECURITY ACT 1986

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

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow this appeal by the claimant. The decision of the social security appeal tribunal dated 16 January 1989 was erroneous in law and I set it aside. The case must be reheard and redetermined by a differently constituted tribunal.

2. At the relevant time the claimant was a married woman aged 54 living with her husband aged 36. On 23 February 1988 she claimed supplementary benefit for herself and her husband. She was awarded supplementary benefit from 20 February 1988 on the basis that her income comprised attendance allowance, mobility allowance and severe disablement allowance. On 21 February 1988 the sickness benefit section advised the supplementary benefit office that the claimant's husband had been awarded sickness benefit with effect from 23 February 1988. (It appears from paragraph 4 of the adjudication officer's submission on the appeal dated 6 September 1991 that a first payment of sickness benefit was issued on 14 March 1988 and included arrears and covered the period 23 February 1988 to 14 March 1988.) By a decision issued on 26 October 1988 the adjudication officer decided:-

"On 14.3.88 [the claimant's] husband was paid sickness benefit at a weekly rate of £30.05 attributed to the period from 29.2.88 to 20.3.88 (both dates included). Supplementary benefit amounting to £90.15 would not have been paid if sickness benefit had been paid on 29 February 1988. Accordingly, supplementary benefit amounting to £90.15 from 29.2.88 to 20.3.88 (both dates included) has been overpaid and is recoverable from [the claimant]"

The claimant appealed. On 16 January 1989 the social security

appeal tribunal disallowed the appeal. The claimant appeals with leave of another Commissioner.

### 3. The law

Section 27 of the Social Security Act 1986, which came into operation on 6 April 1987, deals with the prevention of duplication of payments and sub-section (2) provides:-

" (2) Where -

- (a) a prescribed payment which apart from this sub-section falls to be made from public funds in the United Kingdom ... is not made on or before the date which is the prescribed date in relation to the claimant; and
- (b) it is determined that an amount ('the relevant amount') has been paid by way of income support that would not have been paid if the payment mentioned in paragraph (a) above had been made on the prescribed date,

then -

- (i) in the case of a payment from public funds in the United Kingdom, the authority responsible for making it may abate it by the relevant amount; and
- (ii) in the case of any other payment, the Secretary of State shall be entitled to receive the relevant amount out of the payment."

Sub-section (4) of section 27 provides:-

" (4) Where an amount could have been recovered by abatement by virtue of sub-section (2) ... but has not been so recovered, the Secretary of State may recover it otherwise than by way of abatement -

- (a) in the case of an amount which could have been recovered by virtue of sub-section (2) above, from the person to whom it was paid; and
- (b) [not relevant]."

Although section 27 deals with income support, the section "shall have effect in relation to supplementary benefit as it has effect in relation to income support": section 73 and paragraph 2 of Schedule 7 to the Act.

4. Section 27(2) refers to "a prescribed payment" and "the

prescribed date". Those phrases are defined in regulations. In February and March 1988 the relevant regulation was regulation 9 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1987. That regulation, so far as is relevant, provided:-

" 9. (1) For the purposes of section 27(2) of the Act (recovery of amount of benefit awarded because prescribed payments not made on prescribed date), the payment of any of the following is a prescribed payment:-

(a) any benefit under the Social Security Act 1975 other than any grant or gratuity ...

(2) The prescribed date, in relation to any payment prescribed by paragraph (1) is the date by which receipt of or entitlement to that benefit would have to be notified to the Secretary of State if it were to be taken into account in determining, whether on review or otherwise, the amount of or entitlement to supplementary pension or allowance."

As from 11 April 1988 regulation 9 of those Regulations was replaced by regulation 8 of the Social Security (Payments on Account, Overpayments and Recovery,) Regulations 1988. Regulation 8(1)(a) of the 1988 Regulations repeats regulation 9(1)(a) of the 1987 Regulations. Regulation 8(2) of the 1988 Regulations provides:-

"The prescribed date, in relation to any payment prescribed by paragraph 1 is the date by which receipt of or entitlement to that benefit would have to be notified to the Secretary of State if it were to be taken into account in determining, whether on review or otherwise, the amount of or entitlement to income support."

Regulation 8(2) applies if the benefit involved was supplementary benefit not income support: regulation 31(1) of the 1988 Regulations.

5. Sickness benefit is a benefit under the Social Security Act 1975 and is, therefore, "a prescribed payment" under regulation 9(1)(a) of the 1987 Regulations and regulation 8(1)(a) of the 1988 Regulations. The payment of sickness benefit to the claimant's husband was, therefore, a "prescribed payment" for the purposes of section 27(2)(a) of the Social Security Act 1986 and it was necessary, therefore, for the purposes of that subsection to determine "the prescribed date" in relation to the payment of sickness benefit. As I have indicated above, "the prescribed date", whether under regulation 9(2) of the 1987 Regulations or under regulation 8(2) of the 1988 Regulations -

"is the date by which receipt of or entitlement to that benefit [i.e. sickness benefit] would have to be notified to the Secretary of State if it were to be taken into account in determining, whether on review or otherwise, the amount of or entitlement to supplementary benefit."

6. In R(SB) 28/85 the Commissioner had to consider section 12(1) of the Supplementary Benefits Act 1976 (in its amended form as from 24 November 1980, the terms of which were similar to the present section 27(2) of the Social Security Act 1986), and regulation 3 of the Supplementary Benefit (Duplication and Overpayment) Regulations 1980. Regulation 3(1) of those Regulations defined "a prescribed payment"; and regulation 3(2) defined "the prescribed date" in substantially the same terms as that phrase was defined in regulation 9(2) of the 1987 regulations (which I have cited above). In paragraph 8 of his decision the Commissioner said:-

"8. As regards the relevant statutory provisions operative from 21 November 1980 onwards, it is clear that in determining the sum recoverable by the Secretary of State ... it is crucial to determine the date on which each of the prescribed payments ... ought to have been made ('the prescribed date') and also the exact amount of the excess payment sought to be recovered ('the relevant amount').

The "prescribed payment" in that case was German invalidity benefit and it was sought to recover an overpayment of supplementary benefit from the arrears of German invalidity pension. It seems to me, however, that the principles applied in that case are applicable in the present case. In other words, it was crucial to determine the date on which each of the payments of sickness benefit ought to have been made and the exact amount of the excess payment of supplementary benefit sought to be recovered.

7. According to paragraph 4 of the adjudication officer's submission on the appeal dated 6 September 1991 (page 28 of the case papers) the first payment of sickness benefit was issued on 14 May 1988 and included arrears and covered the period 23 February 1988 to 14 March 1988. It is clear, however, that the appeal tribunal in the present case made no finding of fact and reached no decision as to "the prescribed date" i.e. the date on which each of the payments of sickness benefit ought to have been made; and they did not, therefore, make any decision as to the exact amount of the excess payment sought to be recovered. Accordingly, their decision was erroneous in point of law and I must set it aside.

8. The adjudication officer in his submission on the appeal dated 6 September 1991 has submitted in paragraph 6 that there is insufficient evidence in the papers to decide the prescribed date or dates and, accordingly, I must remit this case to a new tribunal.

9. In dealing with the question of the excess payment sought

to be recovered - "the relevant amount": see section 12(1) of the Supplementary Benefits Act 1976 which was in similar terms to the present section 27(2)(b) of the Social Security Act 1986 - I draw attention to the observations of the Commissioner in R(SB) 28/85 at paragraph 8:-

" 8. ... Again, for the purposes of determining 'the relevant amount' the tribunal had to determine when each material payment of supplementary benefit was in fact made and for what period, and also what was the latest time by which the benefit officer, notified of a receipt or entitlement to [sickness benefit], could by appropriate action have negated or adjusted the making of the supplementary benefit payment in question. Furthermore, the tribunal should have determined how the [sickness] benefit should be attributed to the relevant supplementary benefit week."

It would clearly be helpful to the new tribunal if the adjudication officer were to make a further submission dealing with the questions of the prescribed date or dates and of the excess payment sought to be recovered.

10. For those reasons, I allow this appeal.

(Signed) A.T. Hoolahan  
Commissioner

(Date) 20 January 1992