

HL/SH/IW/6

- Review grounds for late award of a qualifying benefit
- Late award of benefit can be a relevant change of circumstances of a nil award.
(Burke 155)

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CIS/217/1999

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER H LEVENSON

Claimant :
Tribunal : Birmingham
Tribunal Case No :

1. This appeal by the claimant succeeds. In accordance with the provisions of section 23(7)(a) of the Social Security Administration Act 1999 I set aside the decision made by the social security appeal tribunal on 5 October 1998. I substitute my own decision. This is to the effect that the claimant is entitled to income support from and including 2 February 1998. I remit to the adjudication officer and/or the Secretary of State issues relating to the calculation of entitlement to, and payment of, any arrears of income support now due on the basis of my decision.

2. Although the basic facts in this case are straightforward, the law is less so. I held an oral hearing of this appeal on 2 November 1999. The claimant was represented by Mr Bob Prew of the Birmingham City Council Welfare Rights and Money Advice Unit. The adjudication officer was represented by Ms V Bergmann from the Office of the Solicitor to the Department of Social Security. I am grateful to both of them for their assistance and for the courteous way in which the hearing was conducted as well as their indulgence for some of my wilder flights of fancy in endeavouring to rectify what appeared to be a very unfair situation.

3. The basic facts in this case are not in dispute. The claimant was born on 7 September 1913. He lives with his wife who was born on 26 January 1918. At the relevant time they had savings of about £1,500. The claimant received retirement pension of £68.69 weekly and his wife received retirement pension of £37.84 weekly. In addition the claimant received a monthly occupational pension of £230.91 (equivalent to £53.28 weekly). The claimant's wife received a higher rate attendance allowance. The claimant himself was registered blind and applied for attendance allowance for himself on or about 3 February 1998. On a claim form signed on 5 February 1998 and received by the Benefits Agency or Department of Social Security on 9 February 1998 the claimant also made a claim for income support. On page 34 of the claim form (which is reproduced on page 34 of the bundle of papers) the claimant stated that he had applied for attendance allowance and made it clear that no decision had yet been made on this application.

4. It is not necessary to go into full details of the income support scheme, save to indicate that in general terms a person is entitled to income support if his income (as calculated in accordance with the relevant provisions) is less than the applicable amount. The applicable amount is calculated by reference to various factors and includes certain premiums according to the circumstances. If a couple are both in receipt of attendance allowance, and nobody is receiving invalid care allowance in respect of looking after either of them, the applicable amount includes a severe disability premium (which at the relevant time was £74.30

weekly). In the present case the claimant was awarded attendance allowance backdated to 2 February 1998. The decision to award attendance allowance was made on 3 March 1998. Had that decision been made before the decision on the income support claim, there is no doubt whatsoever that the claimant would have been entitled to income support from the date of claim. However, ironically when one considers the extended delays which occur in the operation of much of the social security system, a very speedy decision was taken in this case on the claim for income support. On 11 February 1998 the adjudication officer decided that the claimant was not entitled to income support because his income exceeded his applicable amount. I do not have the precise figures, but there is no doubt that the amount of the severe disability premium at the rate for couples was greater than the amount by which the claimant's income exceeded the applicable amount before he was awarded attendance allowance.

5. On 31 March 1998 the claimant notified the income support authority of the award of attendance allowance and requested a review of the decision refusing income support. On or about 8 April 1998 the adjudication officer refused to review the previous refusal of income support and the claimant was advised to make a fresh claim for income support. He did so, the new claim being treated as having been made on 31 March 1998, and on 21 April 1998 the adjudication officer awarded income support from 2 April 1998. Because of this sequence of events the claimant lost just under two months of entitlement to income support, a significant amount to a couple with the means of the couple in this case. There was some discussion at the hearing before me as to whether the second claim for income support could be backdated. However, the appeal had not been made against a refusal to backdate the award on the second claim, but against the refusal to review the decision on the first claim. There is no reason why the adjudication officer should not have considered backdating the award made on the second claim, and that might have rendered the appeal before me unnecessary, but I do not have jurisdiction to make a decision on the second claim.

6. In a form signed on 7 April 1998 and received on 23 April 1998 the claimant appealed to the social security appeal tribunal against the refusal to review the decision on the first claim. The tribunal considered the matter on 5 October 1998 and confirmed the decision of the adjudication officer relying in effect on the decision made by Mr Commissioner Mesher in CIS/767/1994 (*78/95). On 21 December 1998 the claimant applied for leave to appeal to the Social Security Commissioner against the decision of the tribunal. On 8 January 1999 the chairman of the tribunal refused leave to appeal but I granted leave on 25 March 1999. On 9 August 1999 I directed that an oral hearing take place.

7. So far as is relevant section 25(1) of the Social Security Administration Act 1992 provides as follows:

25. (1) Subject to the following provisions of this section, any decision under this Act of an adjudication officer, a social security appeal tribunal or a Commissioner (other than a decision relating to an attendance allowance, a disability living allowance or a disability working allowance) may be reviewed at any time by an adjudication officer or, on a reference by an adjudication officer, by a social security appeal tribunal, if -

(a) the officer or tribunal is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact; or

(b) there has been any relevant change of circumstances since the decision was given; or

(c) it is anticipated that a relevant change of circumstances will so occur; or ...

(2) Any decision of an adjudication officer (other than a decision relating to an attendance allowance, a disability living allowance or a disability working allowance) may be reviewed, upon the ground that it was erroneous in point of law, by an adjudication officer or, on a reference from an adjudication officer, by a social security appeal tribunal.

8. There was considerable discussion in the papers, and some at the hearing, as to whether section 25(1)(a) can apply in this case. However, Mr Prew did not suggest that it could, it would unduly complicate and lengthen my decision to discuss this issue, and it is not necessary that I do so. The period for which the effect of a review can be backdated depends on the ground of the review. The rules are to be found in the Social Security (Adjudication) Regulations 1995. Generally, if a review is based on a change of circumstances, then regulation 63(1)(a) limits the period of backdating to one month before the date on which the review was requested. However, where the reason for the revised determination is that the claimant has become entitled to another benefit (as was the case here) then regulation 63(1E) enables the revised entitlement to be paid free of the general one month limit. Where the basis of review is error of law under section 25(2) then regulation 57(1) and (3) allows the review to take effect from the date from which the decision being reviewed had effect.

9. In CIS/767/1994 (*78/95) Mr Commissioner Mesher was considering a refusal of income support which was correct at the date it was made and for many months afterwards but in which the claimant argued that the decision became incorrect when the benefit rates changed in April 1992. In paragraph 13 the Commissioner stated:

"13. There is a fundamental difference between an award of benefit for an indefinite period, where a change of circumstances on becoming operative after the date of the award and within the open-ended period covered by it will be relevant, and a decision disallowing benefit, where a change of circumstances becoming operative after the end of the period covered by the disallowance will not be relevant. A disallowance of benefit will not, unless it expressly covers some definite period, be effective beyond the date of the decision to that effect. Only a change of circumstances which is operative on a date within the period covered by the disallowance will be a relevant change of circumstances in relation to the disallowance, in the sense of indicating that the disallowance was or might be wrong for some part of that period. Thus in the present case the decision disallowing income support from 10 July 1991 appears to have been given on that date, or at any rate very shortly afterwards. That decision will have been effective to disallow income support from 10 July 1991 down to the date on which the adjudication officer gave the decision. That is why on a subsequent claim for income support benefit could be awarded without having to review the decision disallowing income support from 10 July 1991. The change of circumstances in April 1992 was not relevant to that decision."

10. Mr Prew argued that the change of circumstances in this case, the award of attendance allowance, was operative from the date from which attendance allowance was awarded (2 February 1998) and therefore the refusal of the first claim could be reviewed. Ms Bergmann argued that the award of attendance allowance was not operative until it was made on 3 March 1998 (or perhaps until it was notified to the claimant). She sought to rely on dictionary definitions of the word "operative" to explain what Mr Commissioner Mesher meant by his use of that word. I do not find such an approach helpful. Language used by Commissioners is not to be approached as though it were the language of a statute, and the meaning of words used by Commissioners is generally to be found from consideration of the relevant decision and its context.

11. Mr Prew referred to the decision of Mr Commissioner Jacobs in CIS/902/1998. In that case the claimant was in receipt of income support and disability living allowance. Disability living allowance was terminated

and this led to the ending of entitlement to income support because of the reduction in the applicable amount. In March 1996 disability living allowance was reinstated with effect from 7 February 1994. A new claim for income support was made on 2 August 1996 and was allowed and backdated for 12 months. However, this left a missing period in between the termination of income support and the commencement date of the new claim, and the Commissioner had to consider whether, in the light of CIS/767/1994 (*78/95) there had been a change of circumstances so as to justify a review of the original disallowance of income support. In paragraph 22 of his decision Mr Commissioner Jacobs stated:

"... CIS/767/1994 ... held ... that a change of circumstances that became operative outside the period covered by a decision refusing a claim did not provide a ground for review of that decision, because it did not affect the correctness of the decision. In this case, the change that occurred was retrospective in effect so that it became operative in the period covered by the decision terminating entitlement to income support."

12. The present case is not precisely the same because Mr Commissioner Jacobs was dealing with a case where an existing award of income support was terminated and I am dealing with a new claim that was refused. However, in my view his decision and general approach were correct and his approach supports the view that I take. Ms Bergmann argued that if the award of attendance allowance in the present case operates retrospectively to the date from which it was awarded, then it would turn out that on that date there had not been a change of circumstances since the decision was made. Apart from leading us up a logical blind alley, this approach confuses the decision on attendance allowance with the decision on income support. The change of circumstances is the fact that attendance allowance has been awarded. Any change of circumstances by its nature takes place after the relevant decision. However, the award of attendance allowance was to commence from a date no later than the date on which the income support decision was made, the change of circumstances was operative from the date on which it was later decided that there had been entitlement to attendance allowance, and this was within the period covered by the disallowance of income support. I can see no reason of logic, policy or law which compels me to decide other than that there was in the present case a relevant change of circumstances for the purposes of section 25(1)(b). This justified a review of the adjudication officer's decision of 11 February 1998. That decision should be reviewed to award income support back to the date of the award of attendance allowance, the claim for income support having referred to the pending attendance allowance claim (R(SB)9/84)).

13. Mr Prew also argued that the decision of the adjudication officer refusing income support was made in error of law. He relied on a more recent decision of Mr Commissioner Mesher in CG/1479/1999, decided on 31 August 1999. In that case a claim for invalid care allowance made by the claimant for looking after his wife was refused while his wife's associated claim for disability living allowance was pending. Some months later disability living allowance was awarded to take effect from a date six weeks after the date of the invalid care allowance claim. An award of invalid care allowance was made on a new claim but backdating was limited to three months. Again, this left a gap. The Commissioner ruled out the operation of section 25(1)(b) because the award of disability living allowance took effect several weeks after the refusal of the invalid care allowance claim. However, the Commissioner was of the opinion that the original decision to refuse invalid care allowance was erroneous in point of law because there had been a breach of section 21(1) of the Social Security Administration Act 1992 in the adjudication officer's determining the invalid care allowance claim before the result of the claimant's wife's claim for disability living allowance was known. The Commissioner's reasoning is to be found in paragraphs 13 to 24 of his decision and it is not necessary to repeat it here in any detail. He relied on the decision of the Court of Appeal in R v. Secretary of State for Social Services, Ex parte Child Poverty Action Group [1990] 2 QB 540. In particular, Lord Justice Woolf stated at pages 552 and 553:

"... what the Department is required to do is to submit the claim when it is in a fit state for determination albeit this is after the date on which it is treated as being made for the purposes of the regulations ..."

14. Ms Bergmann argued that in effect the Commissioner had turned the Court of Appeal's decision on its head. The decision had been about the failure to refer matters to the adjudication officer within a particular time. The fact that it was not unlawful to delay the decision did not mean that it was unlawful to fail to delay the decision. Lord Justice Woolf had pointed out that although an adjudication officer was under a statutory duty to dispose of claims, he was acting administratively when doing so.

15. However, I am not persuaded by these criticisms of the decision in CG/1479/1999. That decision was made after an oral hearing at which the adjudication officer was represented and was a detailed and fully reasoned decision. The approach adopted by the Commissioner enables potential injustice to be avoided, I see nothing wrong with it in principle and I agree with the line of reasoning. In the present case the whole basis of the first claim for income support was that there was also a claim made for attendance allowance on the claimant's own behalf. I accept the point made by the Commissioner in

CG/1479/1999 that the adjudication officer has a margin of appreciation in exercising his or her discretion. I also accept Lord Justice Woolf's use of the term "acting administratively". However, even though "acting administratively", when they are deciding questions of entitlement to subsistence benefit adjudication officers must act properly in all of the circumstances. As in CG/1479/1999, "I can see no rational point" in making the decision to refuse income support on the date when it was made rather than delaying it until the outcome of the claim for attendance allowance was known. There would have been no disadvantage to the claimant in that course and there would have been no detriment to the adjudication officer or the Secretary of State. There would have been no advantage to the claimant in having an immediate decision and there would have been a disadvantage to both sides (as there was) in having to grapple with the bureaucracy of a new decision and the difficulties in backdating that decision to avoid injustice. Thus, the adjudication officer's decision of 11 February 1998 was also made in error of law and should be reviewed under the provisions of S.25(2) of the 1992 Act.

16. For the above reasons this appeal by the claimant succeeds.

(Signed) H Levenson
Commissioner

(Date) 1 December 1999