

C.P.A.G.

AWEW/SH/1

Commissioner's File: CIS/391/1990

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal ("the appeal tribunal") dated 24 April 1990 was erroneous in law and falls to be set aside.

2. This is an appeal, with leave granted by the appeal tribunal chairman, by a daughter ("the appointee") appointed by the Secretary of State to act on behalf of her father who was unable to manage his own affairs but is now deceased.

3. The appointee had appealed to the appeal tribunal from the decision of an adjudication officer who had held that benefit amounting to £199.75, representing £152.96 income support and £46.29 retirement pension had been overpaid to the appointee on behalf of her late father and was recoverable from her under section 53 of the Social Security Act 1986 on the ground that she had failed to disclose the material fact that her father had died the day before the benefit orders were cashed.

4. The appeal tribunal gave its findings and reasons as follows -

"Mr Aldred died on 5 July 1989. His benefit orders were cashed on 6 July 1989 for the ensuing week. The decision to cash these orders arose from the advice of the nursing home. However, the claimant's appointee failed to notify the Department of the material fact that the claimant had died the day before the benefit orders were cashed on 6 July 1989 and as a result there was an overpayment of benefit comprising £152.96 income support and £46.79 retirement pension.

If a person fails to report or misrepresents a material fact and an overpayment of benefit arises the Secretary of State is entitled to recover the amount overpaid section 53, Social Security Act 1986."

5. The adjudication officer now concerned with the case contends in submissions dated 15 October 1990 that those findings and reasons disclosed no error of law. I do not accept that submission.

6. The appointee did not appear and was not represented at the hearing before the appeal tribunal, but it was common ground from the outset that the appointee had been appointed by the Secretary of State to act on behalf of her father in any social security matter. He was resident in a nursing home, the fees for which amounted to £190.75 per week. This was paid from the proceeds of the father's retirement pension of £46.79 and the balance of £152.96 from the proceeds of his income support. On 5 July 1989 the father died. The next day the appointee's son went to the nursing home to pay their outstanding fees. Following advice given by the nursing home, as the appeal tribunal found, the father's benefit orders for the ensuing week were cashed and the proceeds used to pay the nursing home account. The appeal tribunal made no finding on the matter but there was a letter before them from the appointee explaining that the basis of this advice was that the orders in question were dated the 3rd July which was two days before her father's death. I have not had the advantage of seeing the order book or books (it appears from para. 5.3 on page T5 of the papers that there may have been more than one), but apparently each order bears a Monday date while the front cover indicates that the weekly pay day is Thursday. Eventually the overpayment of £199.75 came to light.

7. It is now well established by such Commissioners decisions as R(SB) 21/82 and R(SB) 54/83 and R(SB) 15/87 that the concept of failure to disclose a material fact for the purposes of section 20 of the Supplementary Benefits Act 1976 and now for the purposes of section 53 of the Social Security Act 1986 implies that in the circumstances of the case disclosure of the material fact was reasonably to be expected. The appointee's case here is that against the background of the distress caused by her father's sudden death, the insistence of the nursing home that payment to them in the way made was in order and, above all, the ambiguity in the order book regarding payment dates, the disclosure of her father's death before the orders were encashed was not reasonably to be expected.

8. It is manifest from the appeal tribunal's decision that this principle, and the appointee's case based upon it, were not at all addressed by the appeal tribunal. Such an omission made their decision wrong in law. Having regard, in particular, to the fact that the order book in question is not before me I am not placed in this case to substitute my own findings of fact for those of the appeal tribunal.

9. In the result I allow this appeal, set aside the decision of the appeal tribunal and remit the case to a differently constituted tribunal for a rehearing of the whole matter.

(Signed) A.W.E. Wheeler
Commissioner

(Date) 8 April 1992