

IRO GW (DECEASED)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

ATTENDANCE ALLOWANCE

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 1 November 2021

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I grant leave to appeal and proceed to determine all questions arising thereon as though they arose on appeal.
2. The decision of the appeal tribunal dated 1 November 2021 is not in material error of law. Accordingly, the decision of the appeal tribunal is confirmed.
3. This decision will come as a disappointment to the appellant. He is an articulate and intelligent man who is to be commended for his diligent and unstinting efforts, through the complexities of claim, decision-making and appeals, in seeking justice for his late brother in respect of entitlement to Attendance Allowance (AA) for a particular period.
4. As will be explained below, however, a decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. An application to the Social Security Commissioner for leave to appeal requires the appellant to identify the grounds or basis on which it is submitted the decision of the appeal tribunal is in error of law. Having considered the application made by the appellant, and the grounds set out in the application, I am satisfied that no material error of law can be identified. I am obliged, as was the appeal tribunal, to apply the relevant legislative provisions to the facts of the case. That means that there is only one inevitable outcome.

Background

5. In his written observations on the application for leave to appeal, Mr Clements, for the Department, set out the following background which I accept:

(The appellant) made a request on 6 March 2019 to the Department for Communities (the Department) to issue him with an Attendance Allowance (AA) claim form to be completed on behalf of his brother (the claimant). The appellant completed the claim form on 4 April 2019, and it was received by the Department on 8 April 2019. The claim was treated as made on 6 March 2019.

The appellant submitted evidence with the claim form that he and his sister had been appointed as controllers for the claimant by the High Court of Justice on 13 November 2018. The appellant also supplied the Department with a letter from the Belfast Health and Social Care Trust (the Trust) stating that the claimant had been admitted to hospital in February 2017, was transferred to ... Nursing Home on 14 November 2017, and was subsequently transferred to ... Care Home on 30 July 2018. The appellant noted on page 26 of the claim form that the claimant's stay in ... Care Home was either wholly or partially funded by the Trust.

A decision maker in the AA office of the Department made a telephone call to the Trust on 25 April 2019. The Trust informed the decision maker that it was funding the claimant's stay in ... Care Home. The decision maker then made a decision on 25 April 2019 that the claimant was entitled to the higher rate of AA from 6 March 2019, but that AA was not payable to the claimant from 6 March 2019 because the Trust was funding his stay in a care home. Notice of the decision was issued to the appellant on 25 April 2019.

The appellant contacted the Department on 24 June 2019 to notify it that the claimant's stay in ... Care Home was wholly self-funded. The Department's subsequent correspondence with the Trust confirmed that the claimant's stay was entirely self-funded from 22 October 2018. On 4 September 2019, the Department revised its decision of 25 April 2019 to the effect that AA was payable to the claimant from 6 March 2019. The decision notice was issued to the appellant on 4 September 2019.

The appellant telephoned the Department on 12 September 2019 to apply for a revision of the 4 September 2019 decision on the basis that the claim should be 'backdated' to November 2018. The Department also received a letter from the appellant on 16 September 2019 in which he stated that he wished to appeal the 4 September 2019 decision. This was treated as another application for revision, as the appellant did not have a right of appeal against the decision until the Department had considered an application for revision. A decision maker considered the application on 30 October 2019 but did not change the 4 September 2019 decision.

Notice of the “mandatory reconsideration” outcome was issued to the appellant on 30 October 2019.

The Appeals Service received an appeal from the appellant on 28 November 2019. His appeal was heard by a tribunal sitting on 1 November 2021. The tribunal decided that the claimant was not entitled to AA before 6 March 2021.

The appellant requested a written statement of reasons from the tribunal on 8 November 2021. He then applied to the chairman of the appeal tribunal for leave to appeal to the Commissioner on 20 December 2021, which was before the tribunal’s statement of reasons had been issued to him (a correction to the tribunal’s decision was issued to the appellant on 1 December 2021 and he may have thought that this was the statement of reasons). The statement of reasons was issued on 24 February 2022. The chairman of the appeal tribunal refused leave to appeal on 24 April 2022, and notice was issued to the appellant on 16 May 2022. His application to the Commissioner for leave to appeal was received on 23 May 2022.

The statement of reasons for the appeal tribunal’s decision

6. In the statement of reasons for its decision, the appeal tribunal set out the following:

‘Introduction.

1. This appeal is brought by (the appellant) on behalf of his brother, G. G is the appellant. There is no dispute that the appellant is entitled to the highest rate of the benefit. The issue is to the start date of payment.
2. The appellant suffered a major stroke and developed vascular dementia. He was admitted to hospital and on discharge required nursing care. He was profoundly incapacitated. He was transferred to ..., a nursing home for sufferers of dementia. There was a hearing before a Mental Health Review Tribunal on 17 May 2021. It concluded he required enhanced care and 24 supervision in a secure environment such as the placement. His needs could not be met in his own home and there had been previous unsuccessful placements.
3. The appellant was self-funding from 22 October 2018.
4. The appellant's brother telephoned the office dealing with attendance allowance on 6 March 2019. The application form was sent out and was returned within the specified six weeks. On 25 April 2019 the

decision-maker concluded he was entitled to attendance allowance at the highest rate from and including 6 March 2019, the date of the application.

5. The appellant's appointee asked that the payment be from an earlier date. The period in issue is from 28th October 2018 when the appellant became self-funding and 6 March 2019 when the benefit claim was accepted.
6. The Department concluded that the legislation did not permit this. It referred to Regulation 6 of the Social Security (Claims and Payments) Regulations (NI) 1987. The regulation provides that a claim is made when it is received. Alternatively, the claim is made when a request has been received and the form is returned within the time specified. Regulation 6(1)(g) provides as follows:

Where the claim form is not obtained from an appropriate office, the effect of the legislation is that the person is not entitled to an attendance allowance before the date on which a claim is received in an appropriate office.

7. The appellant's brother states he did not apply earlier because of information provided by the Trust. Furthermore, at that stage he had not been made his brother's appointee and his brother did not have the capacity to make an application.
8. The appellant's brother has made a complaint to the public services ombudsman about the Trust. He said they should have advised him earlier than they did that his brother was self-funding from 22 October 2018. He has provided a letter dated 23 December 2020 from a Mr McC, Investigating Officer. Mr McC states that the ombudsman office would not accept his complaint. It was pointed out the Trust had accepted unacceptable delay on its part in informing the appellant about the change in his brother's assessment and had implemented a change in its policy. However, Mr McC said that an investigation would not be proportionate. He suggests the possibility of bringing a complaint after the conclusion of this appeal.
9. The appointee has stated that he and his sister were given joint control of the appellant's financial affairs from the office of care and protection in November

2018. He states that his brother had been living alone and independently until 18 July 2017 when he was admitted to hospital. It was discovered he had suffered a bleed on the brain. He was discharged on 14 November 2017 to ... Home Belfast. Then, on 30 July 2018 he was admitted to the brain injury unit and then transferred on 22 April 2022 ... hospital. Then on 16 December 2020 he was transferred to ... home.

10. The appointee has provided a letter from the Trust dated 5 June 2020 responding to complaints he made. It is signed by a Ms MH, described as a director of adult social and primary care. It refers to a meeting with hospital staff and the appellant's family in November 2017 to discuss discharge from the hospital. With some reservations on the appointee's part, he was transferred to ... Nursing Home. Subsequently this was not considered an appropriate environment for him. Alternatives were sourced.
11. There was a care management review with family on 18 January. A placement was made at another establishment. This proved unsatisfactory, with the manager of the agency that supplied the care worker and the care worker concerned being suspended. There were then further investigations into the treatment of the appellant.
12. The Trust in its letter indicates that a financial assessment was conducted under the Health and Personal Social Services (assessment or resources) Regulations (NI) 1993. He was initially classed as a temporary patient which involved calculating charges based on income, benefits, and savings. Then, on 30 July 2018 he was classified as permanent which meant the value of his property taken into account after the first 12 weeks. On the dates used by the Trust this was from 22 October 2018. After the 12 weeks he was charged for the full cost of the placement. The Trust accepts that the change in charges was not notified or the possibility that he may be entitled to claim attendance allowance. The first notification was 31 May 2019. There was a meeting arranged on 1 July 2019 with the family in attendance when this was explained.
13. The letter refers to the Disability and Carers Service. It is not clear if she is referring to some service within the Trust or if she means the respondent in the present proceedings. She refers to a judicial review and

acknowledges errors by the Trust. There is an inference she is suggesting a review rather than a judicial review in the High Court as is traditionally known. If the reference is to the respondent, then there is a lack of appreciation of the strict time limits that apply in the legislation for claiming.

Consideration

14. The appointee and his sister had to face the difficulties following the appellant's sudden ill-health with a bleed on his brain. He was admitted to hospital. It is likely in the early stages the family's primary focus was upon his medical condition. It is entirely understandable that the family would not understand much of the financial implications of his stay in hospital. With time the hospital wanted to arrange discharge. Again, the appointee and his sister were most likely being asked to make decisions about matters about which they had limited experience. Sadly, the placements were not satisfactory.
15. The Trust letter indicates that the Trust made a decision to change his status from temporary to permanent which in turn affected his financial liability. They have accepted that the Trust and its accounting department did not advise of the charges or the possibility the appellant could claim Attendance Allowance.
16. The family now have some appreciation of what has taken place. It is very much to their credit that they have been the voice for the appellant. The appointee indicated that he believed he had to wait until he and his sister were appointed by the court to take charge of his brother's affairs. In the tribunal's experience the Department have in place a more informal procedure whereby a person can be nominated as appointee for benefits purpose. However, the family may not have appreciated that. Irrespective of this, the primary point is that the Trust accept they did not advise the family of the change in the appellant's status. This would appear to be an administrative decision taken by the Trust no doubt having due regard to medical advice on the prognosis. Consequently, the family could not have known that at a certain point the appellant status would change.

Conclusions

17. We have recited all of the above for a better understanding of the background. In terms of the appeal before us unfortunately we do not have jurisdiction to allow the claim from an earlier stage. This is because we must apply the legislation which does not permit this. This is irrespective of the reasons or any issue as to fault. The ombudsman's office has deferred further action pending our decision. We appreciate entirely the difficulties the family have faced, the efforts they have made and the frustrations and disappointments along the way. Regrettably, we cannot afford a remedy, but we hope that ultimately, they will receive a more positive outcome.'

The grounds of appeal

7. In his application for leave to appeal which was received in the office of the Social Security Commissioners, the appellant set out the following grounds of appeal;

'Legislation provides that a decision may be revised by the Department if there has been an official error, or the decision was made in ignorance of or based on a mistake as to a material fact.

The Social Security NI Order 1988 [sic] Article 10, Social Security (Decisions and appeals) Regulations (NI) 1999, Regulation 4.

Firstly, I would like to say and my reasons for Appeal to the Disability and Carers service on the 30-10-2019 regarding my brother GW Attendance Allowance benefits was not against their backdating of AA due from 06-03-2019. I totally agreed with that decision.

On the 05-05-20 I received a letter from the Belfast Health Trust, confirming all that I had said in my statement of the 30-10-2019 to the Disability Careers Service was correct, in that same letter they also informed me that my brother G had been self-funding from 22-10-2018 and therefore would have been entitled to AA benefits, their letter also stated that the D.C.S did not send the appropriate paperwork to Belfast Trust Finance Department to verify the self-funding date and advised me to contact D.C.S and ask for a judicial review of this matter.

It is quite clear to me that errors made by these two Government departments resulted in me not applying for the AA benefits for my brother G would have been entitled to from 22-10-2018 to 05-03-09.

On the day of the appeal hearing by the Tribunal panel of 01-11-2021 I give the letters of new evidence I received on 05-05-2020 from the Belfast Trust to the Tribunal panel for consideration. They did not seem interested and asked no questions of me about these letters. I now feel their remit was only to give judgment up to 06-03-19. If require I can provide these letters to your Office.'

The Department's response to the grounds of appeal

8. In his written observations dated 6 July 2022, Mr Clements made the following written observations on the application for leave to appeal:

'The Department's response

The appellant made an AA claim on the claimant's behalf on 8 April 2019. As he had requested the claim form on 6 March 2019 and the claim was made within six weeks of the form being issued, the claim was treated as made on 6 March 2019 per regulation 6(8) of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987. Section 1(1) of the Social Security Administration (Northern Ireland) Act 1992 provides that no person shall be entitled to any benefit unless he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit.

There is no provision in social security legislation that would have permitted the tribunal to decide that the claimant was entitled to AA in respect of a period in which no claim was made within the time prescribed. There is also no provision that would have allowed it to decide that the claim could be treated as made earlier than 6 March 2019 or to decide that the claim should be 'backdated' to an earlier date. Notwithstanding the appellant's supposition that he would have claimed earlier if the Trust had acted sooner to inform him of the change in funding and/or advise him of the claimant's potential entitlement to AA, the tribunal was bound by the relevant legislation and the only decision it could make when applying that legislation was the claimant was not entitled to AA prior to the date of claim.

Case law such as *C1/11-12(CA)* confirms that there is no benefit entitlement before the date of claim (or, in the case

of some other benefits, before the date that the legislation permits a claim to be backdated to) where the claim may have been delayed because the Department did not advise a claimant to claim benefit. I submit that similar reasoning can be applied to a case where the Trust did not advise a claimant to claim benefit.

I submit that the appellant has not identified an error of law in the tribunal's decision. However, there is a potential flaw in the decision under appeal which the tribunal has not mentioned in its statement of reasons. The decision maker did not identify a valid ground for revision. They cited "a relevant change of circumstances", which is a valid ground for supersession but not for revision. The decision could have been revised under regulation 3(1)(b)(iv) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 if the Department had treated the appellant's 24 June 2019 telephone call as an application for revision and if the time for applying for a revision had been extended under regulation 4 of the same Regulations. The decision cites regulations 3 and 4 as well as article 10 of the Social Security (Northern Ireland) Order 1998 so it may be possible that the Department did indeed revise on this ground. However, I do not consider that there was sufficient evidence in the case papers for the tribunal to conclude that the Department had identified a valid ground of revision, and I submit that the tribunal should have investigated further to confirm whether or not the decision had been correctly made.

If the Commissioner takes the view that this amounts to a material error of law, I would respectfully ask him to set the tribunal's decision aside and give the decision that the tribunal should have made.

Should the Commissioner decide to grant leave to appeal, I consent to the Commissioner treating the application as an appeal and determining any question arising on the application as if it arose on appeal. Furthermore, if it is accepted that the decision appealed against was erroneous then my observations may be treated as observations under regulation 18(1) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.'

The oral hearing of the application for leave to appeal

9. The appellant attended the oral hearing of the application to leave to appeal. The Department was represented by Mr Robinson. The appellant expanded on the grounds of appeal which he had set out in the application for leave to appeal. The appellant also referred to paragraph 23 of the

Case Summary prepared for the oral hearing of the application. In paragraph 23, Mr Robinson stated the following:

‘The appellant has further submitted that he supplied information to the Tribunal on the day of the hearing from the Trust (dated 05th May 2020) for their consideration and that in his view the Tribunal did not consider this evidence. Although there is no reference to this documentation within the Tribunal’s decision, as stated above there are no provisions that would have allowed the date of claim to be amended, so this may well be a moot point.’

10. At the oral hearing, the appellant asserted that he had provided documentary evidence to the appeal tribunal including correspondence dated **5 June 2020**. The emphasis here is my own. He was concerned at Mr Robinson’s assertion that the further documentary evidence which he had provided had not been considered. I observed that in paragraph 10 of the statement of reasons for the appeal tribunal’s decision, the appeal tribunal does refer to the correspondence of 5 June 2020 and adds the content of that correspondence to the narrative of the background to the appeal. Mr Robinson conceded that the reference in paragraph 23 of the Case Summary to correspondence dated 5 May 2020 was in error and that the reference should have been to the correspondence of 5 June 2020.
11. The appellant set out in some further detail the background to the claim for AA and referenced the difficult and emotive circumstances in which that application, and the subsequent appeal had been made.
12. At the oral hearing, I asked Mr Robinson to the submission which had been made in paragraph 15 of the original observations on the application for leave to appeal by Mr Clements. The submissions concerned the legal basis for the decision under appeal. Mr Robinson submitted that he agreed with the submission made by Mr Clements.

Errors of law

13. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
14. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:
 - “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);

- (ii) failing to give reasons or any adequate reasons for findings on material matters;
- (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) giving weight to immaterial matters;
- (v) making a material misdirection of law on any material matter;
- (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

Analysis

15. In my view, the only basis on which it could be said that the decision of the appeal tribunal is in error of law is the failure of the appeal tribunal to consider the legal basis for the decision under appeal. This is the point which was made by Mr Clements in paragraph 15 of the original written observations on the application for leave to appeal and supported by Mr Robinson at the oral hearing of the application.
16. At Tab 11 of the submission prepared for the oral hearing of the appeal before the appeal tribunal there is a decision dated 4 September 2019. It is not possible from this decision to determine its precise legal basis. This is for two reasons. The first is that part of the narrative pertaining to the decision is missing. The second is that the narrative which is available refers to 'a relevant change of circumstance' and cites article 10 of the Social Security (Northern Ireland) Order 1999, ('the 1998 Order') as amended and regulations 3 and 4 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, (the 1999 Regulations) as amended.
17. As Mr Clements has pointed out, a 'change of circumstances' is a valid ground for supersession under article 11 of the 1998 Order and regulation 6 of the 1999 Regulations but not a ground for revision. Mr Clements goes on to speculate the basis on which the Department did purport to revise an earlier decision but submits that there '... is insufficient evidence in the case papers for the tribunal to conclude that the Department had identified a valid ground for revision, and I submit that the tribunal should have investigated further to confirm whether or not the decision had been correctly made.'

18. The duties of an appeal tribunal, in determining an appeal against either a revision or supersession decision, were comprehensively analysed and reviewed by a Tribunal of Social Security Commissioners in Great Britain in *R(IB)2/04*. That decision is clear authority for the proposition that where an appeal tribunal identifies defects in a decision which purports to change the effect of a previous decision (e.g. 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), the appeal tribunal has the jurisdiction to remedy those defects and make the decision which the Department ought to have made.
19. The power to remedy defects is limited, however. The Tribunal of Commissioners in *R(IB) 2/04* recognised, at paragraph 72 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 ... at all.’
20. These exceptional cases could not be subjected to the identified remedying powers.
21. All of this guidance reminds an appeal tribunal that it must identify the decision under appeal and decide whether that decision is correct. In so doing the appeal tribunal may be directed by the submissions of the Department on what the decision under appeal is, on the factual, evidential, and legal issues arising, on the legislative provisions and case-law applicable to the issues arising and on the correctness of the decision which has been made. The Departmental submission, and any addenda, should be as accurate, comprehensive, and useful as possible. The submission is for direction, however, and does not negate the responsibility of the appeal tribunal to make its own examination and analysis.
22. I am also reminded that in his application for leave to appeal, the appellant made submissions on the legal basis for the decision under appeal.
23. There is, in my view a strong basis for determining that the decision of the appeal tribunal is in error of law based on a failure to identify the decision under appeal and decide whether that decision is correct. That is not the end of the matter, however. I have to go on to consider whether that error in material and whether it makes any difference to the substantive decision of the appeal tribunal to disallow that the appeal. My view is that it does not.
24. In relation to the substantive issue, which was before it, that is whether entitlement to AA could be backdated to an date earlier to the date of the award, it is clear that the appeal tribunal undertook a rigorous and rational

assessment of all of the evidence before it. The appeal tribunal gave a sufficient explanation of its assessment of the evidence, explaining why it took the particular view of the evidence which it did. Any conflict in the evidence before the appeal tribunal has been clearly resolved and explained.

25. The appeal tribunal made sufficient findings of fact, relevant to its decision, all of which are wholly sustainable on the evidence, and all of which are supported by relevant evidence. None of the appeal tribunal's findings are irrational, perverse, or immaterial. All issues raised by the appeal, either expressly or apparent from the evidence were fully examined by the appeal tribunal in conformity with its inquisitorial role.
26. The proceedings of the appeal tribunal were conducted in accordance with the principles of natural justice, and its decision is reflective of an apposite consideration of, and adherence to such principles. Read as a whole, the statement of reasons for the appeal tribunal's decision provides a detailed explanation of the basis on which the appeal tribunal arrived at its conclusions on the issues before it.
27. If I am wrong on the issue of whether the decision of the appeal tribunal is in error of law based on a failure to identify the decision under appeal and decide whether that decision is correct and, further, whether the decision was not material then my only options would be to remake that part of the decision which addresses the legal basis for the decision under appeal, or remit it to another appeal tribunal or the Department. None of those latter options will avail the appellant, however. It will only protract a process which will lead to the inevitable outcome that there can be no backdating of entitlement to AA.

Disposal

28. The decision of the appeal tribunal dated 1 November 2021 is not in material error of law. Accordingly, the decision of the appeal tribunal is confirmed.

(signed): K Mullan

Chief Commissioner

18 June 2024