



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-000211-ESA
UA-2023-000212-ESA
[2024] UKUT 167 (AAC)**

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

ST (by his appointee TT)

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Judge Markus KC

Decision date: 6th June 2024
Decided on consideration of the papers

Representation:

Appellant: Mr Andy Pennington, Bridport and District Citizens Advice
Respondent: Ms Jessica Cowan, Decision Making and Appeals, Leeds

DECISION

The decision of the Upper Tribunal is to refuse the appeal.

REASONS FOR DECISION

1. These appeals concern two linked decisions of the Secretary of State for Work and Pensions ('SSWP'). In the first decision, dated 18th January 2021, the SSWP decided that the Appellant's entitlement to Employment and Support Allowance did not include the Severe Disability Premium between 06.09.19 and 26.11.20. This is referred to as the Entitlement Decision. In the Second decision, dated 15 June 2021, the SSWP decided that in consequence of the first decision the Appellant had received a recoverable overpayment of £4250.70. This is referred to as the Overpayment Decision.

2. The Appellant (ST) appealed against both decisions through his appointee (TT) who is his mother. By decision dated 8 November 2022 the First-tier Tribunal (FtT) refused both appeals. The FtT refused permission to appeal and the Upper Tribunal granted permission to appeal on 27th March 2023.

3. The parties have each provided written submissions pursuant to initial directions by UT Judge Wikeley and subsequently in response to directions by me. Although the SSWP had originally supported the appeals, he has changed his position in consequence of my observations when making the subsequent directions. Mr Pennington for the Appellant has also lately invited the tribunal to dismiss the appeals. He has not sought to withdraw the appeals nor have the parties requested a consent order, and the Appellant has not consented to a decision without reasons.

4. Neither party has requested an oral hearing. In the light of the comprehensive written submissions provided by the parties, I am satisfied that I can fairly determine the appeals without a hearing.

Factual background

5. ST has been in receipt of income-related ESA ('ESA(IR)') since 15th September 2014. The award included an additional amount of Severe Disability Payment ('SDP') as he was in receipt of Personal Independence Payment and lived alone.

6. His mother and appointee, TT, was paid Carer's Allowance ('CA') from 2nd September 2019 to 29th November 2021.

7. On 7th February 2020 TT made a claim in her own right for New Style ESA ('ESA(NS)'). Despite being initially refused but that refusal was revised on 3rd September 2020 and ESA(NS) was awarded from 7th February 2020. The arrears were paid to her.

8. On 18th January 2021 the DWP decided that ST was not entitled to SDP from 6th September 2019 to 26th November 2020 because TT had been in receipt of CA, and that ST had in consequence there had been a recoverable overpayment of £4,250.70.

9. On ST's behalf, TT appealed to the First-tier Tribunal ('FtT') against both decisions. On 8th November 2022 the FtT refused the appeals. The FtT provided a statement of reasons on 31st December 2022. ST's application for permission to appeal was refused by the FtT but was subsequently granted by Upper Tribunal.

Legal Framework

10. Section 4(1) Welfare Reform Act 2007 provides that the amount of ESA(IR) is the applicable amount or, if the claimant has an income, the amount by which the applicable amount exceeds his income. By section 4(2) the applicable amount is to be prescribed by regulations.

11. Regulation 67(1) of the Employment and Support Allowance Regulations 2008 provides that the amounts prescribed for those purposes are the prescribed amount

determined in accordance with paragraph 1 of Schedule 4 to the Regulations and, amongst other amounts, the amount of any applicable premium. The premiums are set out in Part 3 of Schedule 4 and include the SDP. The conditions of entitlement to the SDP are set out in Part 2 of Schedule 4 and in the case of a single claimant include, in paragraph 6(2)(a)(iii), that “no person is entitled to, and in receipt of, a carer’s allowance...in respect of caring for the claimant”.

12. Regulation 4(5)(a) of the Social Security (Overlapping Benefits) Regulations 1979 provides that, where both a contributory and non-contributory benefit are payable, the non-contributory benefit is adjusted by deducting from it the amount of the contributory benefit and only the balance, if any, is payable.

13. The Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988 provided, at the relevant time, at regulation 5:

“(1) ... any sum paid in respect of a period covered by a subsequent determination in any of the cases set out in paragraph (2) shall be offset against arrears of entitlement under the subsequent determination and, except to the extent that the sum exceeds the arrears, shall be treated as properly paid on account of them.

...(2) Paragraph (1) applies in the following cases—

...*Case 2: Award or payment of benefit in lieu*

Where a person has been paid a sum by way of benefit under the original award and it is subsequently determined ... that another benefit or, as the case may be, universal credit should be awarded or is payable in lieu of the first.”

14. Section 71 Social Security Administration Act 1992 governs the recoverability of overpayments. In summary, where a payment of any benefit (save for certain exceptions which are not applicable here) has been made in consequence of a misrepresentation or failure to disclose a material fact, whether fraudulent or not, the SSWP is entitled to recover the amount of any payment which would not have been made but for the misrepresentation or failure to disclose. It is a precondition to recovery that the determination pursuant to which the payment was made has been reversed or varied on appeal, or revised or superseded.

15. Regulation 32 of the Social Security (Claims and Payments) Regulations 1987 makes provision for information to be given and changes to be notified by claimants to the SSWP. This includes in Regulation 32(1B)“any change of circumstances which he might reasonably be expected to know might affect a) the continuance of entitlement to benefit; or b) the payment of benefit”.

The parties’ submissions

16. In neither the FtT nor the UT proceedings has there been an issue about non-entitlement to SDP in respect of the period between 6th September 2019 and 6th February 2020, as it is common ground that TT was entitled to and in receipt of CA during that time. Mr Pennington has not challenged the FtT's decision that there was a recoverable overpayment of SDP in respect of that period.

17. The issue in these appeals solely concerns ST's entitlement to SDP from 7th February to 26th November 2020. In their initial submissions to the Upper Tribunal the parties were in agreement that the FtT had erred in deciding that ST was not entitled to SDP during that period, the argument being as follows. The impact of regulation 4(5)(a) of the Social Security (Overlapping Benefits) Regulations 1979 was that the ESA(NS) to which TT had become entitled (this was a contributory benefit) was to be deducted from her CA (a non-contributory benefit) and only the balance of the CA, if any, was payable. As the amount of ESA(NS) was greater than that of CA, the effect was that no CA was payable. Moreover, pursuant to regulation 5 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988, the amount that had already been paid as CA during the period 7th February to 26th November 2020 should be treated as properly paid as ESA(NS). In consequence, TT had an underlying entitlement to CA but she had not been in receipt of it, and so ST was entitled to SDP for the period between 7th February 2020 and 26th November 2020 and there was no overpayment in respect of that period.

18. I made written Observations on 14th December 2023. I noted the position of the parties but observed that in the present case CA had in fact been paid to TT for the period in question. I directed further submissions on this point.

19. The Secretary of State's further submissions were that TT had received both CA and ESA(NS) throughout the period 7th February – 26th November 2020, the ESA arrears were not and have not since been offset against the amount of CA paid and so TT was in receipt of CA (as that term was explained in *DB (as executor of the estate of OE) v SSWP and Birmingham CC (SPC)* [2018] UKUT 46) throughout the period. Upon consideration of those submissions, Mr Pennington on behalf of ST also invited the Upper Tribunal to dismiss the appeal.

Discussion and conclusions

20. The FtT acknowledged that, following the award of ESA(NS) to TT from 7th February 2020 to 26th November 2020, the effect of Schedule 4 paragraph 6(2)(a)(iii) was that a person might be entitled to but not in receipt of CA and that the underlying entitlement to CA would not in those circumstances affect the entitlement to SDP of the person being cared for. However, the FtT found that during this period TT was actually in receipt of CA and so ST was not entitled to SDP.

21. As set out above, the effect of regulation 4(5)(a) of the Overlapping Benefits Regulations was that no CA was payable in period in question. However, paragraph 6(2)(a)(iii) is not concerned with whether CA was payable, it is concerned with whether the person was "in receipt of" CA.

22. The Upper Tribunal discussed the meaning of "in receipt of" in *DB (as executor of the estate of OE) v SSWP and Birmingham CC (SPC)* [2018] UKUT 46 (AAC) as follows:

“52. In my judgment, “in receipt of”, as used in paragraph 1 of Schedule 1 to the 2002 Regulations, means what it says. It is not in this context synonymous with ‘payable’ a concept which has tended to be interpreted as meaning properly or lawfully payable (*SMcH v Perth & Kinross Council* [2015] UKUT 126 (AAC); *JF v Secretary of State for Work & Pensions and DB (CSM)* [2014] AACR 3). The legislator could have used the term ‘payable’ in the 2002 Regulations and, by so doing, made a clear link with section 67(2) of the Social Security Contributions and Benefits Act 1992. The term ‘payable’ is fairly often encountered in this legislative field (see *SMcH* and *JF* for examples).

53. The literal meaning of ‘in receipt of’ is simply that Attendance Allowance payments are received. Departing from this meaning would only be legitimate if the legislative context demanded it (*SB v HMRC* [2015] UKUT 0286 (AAC)). In my judgment, giving ‘in receipt of’ its natural and literal meaning does not result in an unworkable or irrational result. And, in fact, the DWP do not argue for the term to be interpreted other than literally. I conclude that the legislator intended to link the additional amount for severe disability to factual receipt of attendance allowance rather than its payability.”

23. I respectfully agree. The legislative context does not demand a different meaning in this case, and no party has suggested otherwise. It follows that TT had been in receipt of CA during the relevant period.

24. Regulation 5 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations do not assist ST. I have only set out Case 1 at paragraph 13 above because it is clear that the other Cases are of no possible application. Although Case 2 appears at first sight to be possibly applicable, on analysis it is not. TT was paid CA under the original award and it was subsequently determined that she was entitled to ESA(NS). However to fall within Case 2 the award of ESA(NS) would have to be in lieu of CA or a determination that it was payable in lieu of CA. Neither of those conditions applied here. The consequence of the award of ESA(NS) was that CA was no longer payable but the entitlement to CA remained, and there was no determination that ESA(NS) was payable in lieu of CA. Accordingly none of the cases within regulation 5 applied in this case.

25. This conclusion is consistent with the obvious intention of regulation 5(1). It provides a mechanism by which benefit which has been wrongly paid can be treated as paid on account of a benefit which should have been paid. It avoids the need for a claimant to repay the wrongly paid benefit only to have the same sum of money paid to them by way of the correct benefit. But in the present case there was no call for this to happen because ESA(NS) was paid. It was not possible to treat the sums paid by way of CA as payments towards ESA because TT had received both benefits in full. It follows therefore that regulation 5(1) cannot convert the actual receipt by TT of CA into the receipt of ESA(NS).

26. In the light of the above, during the period in issue TT was both entitled to and in receipt of CA and so ST had not been entitled to SDP. It follows therefore that the FtT correctly found that SDP had been overpaid for the entirety of the period in question.

27. No issue has been taken by the Appellant as to recoverability, rightly so in my view. The FtT found as a fact that TT had received letters requiring disclosure of

changes in circumstances and in her own claim for CA she was made aware that payment of CA was likely to affect ST's entitlement. The FTT found that "She did fail, on his behalf, to disclose receipt of CA from 02/09/2019 and she could reasonably be expected to know it would affect her son's benefit. As Appointee she stood in his shoes and she was in breach of the duty to disclose. The overpayment arose as a direct consequence of the failure to disclose. Accordingly, applying Section 71 of the Social Security Administration Act 1992, the amount overpaid to [ST] is recoverable". This conclusion was justified on the evidence.

28. For the above reasons, the appeals are refused.

Kate Markus KC
Judge of the Upper Tribunal
Authorised for issue on 6th June 2024