MMcG-v-Department for Communities (AA) [2021] NICom 8

Decision No: C1/20-21(AA)

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 30 March 2012

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. In this decision the appellant is the appointee of her late aunt who is the claimant. The Department as respondent, has, laterally, been represented by Mr Clements.

2. I grant leave to appeal and proceed to determine all questions arising thereon as though they arose on appeal.

3. The decision of the appeal tribunal dated 30 March 2012 is in error of law. The error of law identified will be explained in more detail below.

4. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

5. I am able to exercise the power conferred on me by Article 15(8)(a)(ii) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so having made fresh or further findings of fact.

6. My decision is that an overpayment of Attendance Allowance (AA) amounting to £9464.55 for the period from 22 September 2008 to 24 April 2011 has been made which is recoverable from both the appellant and the estate of the late claimant.

Background

7. In the Case Summary prepared for the remote oral hearing, Mr Clements set out the following factual background:

> 'The claimant was in receipt of the lower rate of AA from 12 February 1996 according to the screen prints of the computer system in the file. An AA decision maker stated in a decision dated 12 August 2008 that there were grounds to "supersede the decision dated 10/06/92", which indicates that the claimant may have been in receipt of the lower rate of AA from an earlier date than 12 February 1996. As the claimant unfortunately passed away some time ago, details of her award are no longer held on the Department's computer systems. At any rate, the claimant was in receipt of the lower rate of AA when the Department issued a DBD138 form to the applicant on 15 May 2008 enquiring about the claimant's level of care needs.
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> The applicant's response and subsequent enquiries by the Department revealed that the claimant had stayed in … Nursing Home from 4 April 1998 to 8 May 1998 and that at least part of the cost of her stay was borne by the Western Health & Social Care Trust. The applicant also notified the Department that the claimant required supervision at night, and in a telephone call with an officer of the Department she agreed to apply to become the claimant's appointee. The applicant applied to be appointed to act on the claimant's behalf by completing a BF56 application form issued to her on 29 July 2008. The Department subsequently authorised her appointment under regulation 33 of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 on 12 August 2008.
>
> The Department superseded the claimant's award of AA on 12 August 2008. The decision maker decided that she was entitled to the higher rate of AA from 14 May 2008. The decision maker also decided that AA was not payable to the claimant from 5 May 2008 to 11 May 2008 as she had stayed in a nursing home for more than 28 days and the cost of her stay was borne out of public funds (the Department decided on 20 August 2008 not to recover the resulting overpayment of £44.85 due to a policy of not pursuing recovery of overpayments totalling less than £65). Notice of the decision was issued to the applicant on 20 August 2008.

The decision notice states, under the heading "Changes you must tell us about", that "Examples of the changes are listed in the leaflet "Notes for people getting Attendance Allowance" that we have sent you with this letter." This refers to the AA95(NI) leaflet (a specimen copy is at Tab 31). The Department's submission to the appeal tribunal also confirms that "When the decision dated 12.8.08 to increase (the claimant's) award of Attendance Allowance was issued to (the applicant) on 20.8.08 information leaflet AA95(NI) 2006 was enclosed." The AA95(NI) leaflet instructed the applicant to "please tell us straight away if you, or the person you are acting for … go into or come out of a residential care home, nursing home or an independent hospital."

The Attendance Allowance office received a telephone call from the Pension Credit office on 22 April 2011 advising that the claimant had been admitted to (… nursing home) on 20 August 2008 and that her stay was funded by a trust. The Department suspended payment of her AA award after the call. Subsequent investigations confirmed that the claimant was admitted to (… nursing home) on 20 August 2008 (initially for respite, and then her stay was "made permanent" on 4 September 2008) and that at least part of the cost of her stay was borne by the Western Health & Social Care Trust.

The Department made a supersession decision on 11 April 2011 that AA was not payable to the claimant from 22 September 2008 as she had stayed in a nursing home for more than 28 days and the cost of her stay was borne out of public funds. Notice of the decision was issued to the applicant on 11 May 2011.

The Department subsequently decided on 14 June 2011 that the resulting overpayment of £9,464.55 from 22 September 2008 to 24 April 2011 was recoverable from the applicant as the overpayment was in consequence of her failure to disclose the material fact that the claimant had been admitted to a nursing home on 20 August 2008. It was also decided on 14 June 2011 that the overpayment of £73.60 for the period 25 April 2011 to 1 May 2011 was not recoverable from the applicant. Notice of the decision was issued to the applicant on 16 June 2011.

The applicant applied for a revision on 7 July 2011. The Department reconsidered the decision on 17 October 2011 but did not revise it. A letter from the applicant's solicitor was received on 10 November 2011 which

> disputed the decision on the ground that the applicant had notified the Social Security Agency (SSA) of the claimant's admission on three separate occasions and that SSA representatives had attended the claimant in person at the nursing home. The letter was treated as an appeal against the 14 June 2011 decision.'

8. The appeal tribunal hearing took place on 30 March 2012. The appellant was present and was represented by her solicitor. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision of 14 June 2011.

9. On 20 April 2012 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 2 July 2012 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

10. On 2 August 2012 a further application for leave to appeal was received in the office of the Social Security Commissioners. On 24 October 2012 observations on the application were requested from Decision Making Services ('DMS'). In written observations dated 22 November 2012, Mr McGrath, for DMS, opposed the application for leave to appeal. The written observations were shared with the appellant and her representative on 3 December 2012.

11. The file was forwarded to me on 22 January 2013. On 29 January 2013 I directed the Legal Officer to produce an additional note on the question of liability of the appointee for failure to disclose and recovery from her. The file was returned to me on 14 August 2015 some two years and six months later. I issued a further direction to the Legal Officer on 7 September 2015 and expressed concern at the lengthy delays in the case.

12. The records for this case show that the Legal Officer undertook some further work on the file between 17 September 2015 and 20 July 2016. There was no further work undertaken on the file until 18 May 2020 when the file was sent to me. This means that there have been significant periods of file inactivity. On 16 June 2020 the Business Operations Manager of the Tribunals Hearing Centre wrote to the appellant and her representative and expressed his apologies for the 'unacceptable' delay in the processing of the application.

13. On 8 July 2020 I indicated that I was minded to hold an oral hearing of the application and directed that, due to the restrictions imposed as a result of the Covid-19 pandemic, enquiries should be made as the possibility of holding an oral hearing on a 'remote' basis. A reply was received from the Department on 6 August 2020. Three separate email enquiries were sent to the appellant's representative. Our administrative

support staff received ‘read receipts’ in respect of the emails which had been sent but did not receive a substantive reply.

14. On 9 October 2020 I directed a remote oral hearing. The parties to the proceedings were notified of the date and time of the remote oral hearing and were given instructions as to how to participate.

15. The remote oral hearing was held on 24 November 2020. Mr Clements joined the hearing on behalf of the Department. There were no other participants.

Errors of law

16. 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?

17. 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;
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> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
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> (iv) giving weight to immaterial matters;
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> (v) making a material misdirection of law on any material matter;
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> (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.”

The relevant legislative provisions

18. Section 5(1)(g) of the Social Security Administration (Northern Ireland) Act 1992, ('the 1992 Act'), as amended, provides that:

> '5.—(1) Regulations may provide—
>
> …
>
> (g) for enabling one person to act for another in relation to a claim for a benefit to which this section applies …

19. Section 69(1) of the 1992 Act provides that:

> (1) where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure –
>
> (a) a payment has been made in respect of a benefit to which the section applies;
>
> (b) any sum recoverable by or on behalf of the Department in connection with any such payment has not been recovered,
>
> the Department shall be entitled to recover the amount of any payment which the Department would not have made or any sum which the Department would have received but for the misrepresentation or failure to disclose.

20. Regulation 32(1A) and (1B) of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987, ('the 1987 Regulations'), as amended, provide that:

> '(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Department may determine such information or evidence as it may require in connection with payment of the benefit claimed or awarded.
>
> (1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall notify the Department of 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 the benefit,

as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office—

(i) in writing or by telephone (unless the Department determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or

(ii) in writing if in any class of case it requires written notice (unless it determines in any particular case to accept notice given otherwise than in writing).'

21. Regulation 33(1) of the 1987 Regulations provides that:

'33.—(1) Where—

(a) a person is, or is alleged to be, entitled to benefit, whether or not a claim for benefit has been made by him or on his behalf;

(b) that person is unable for the time being to act; and

(c) no controller has been appointed by the High Court with power to claim or, as the case may be, receive benefit on his behalf,

the Department may, upon written application made to it by a person who, if an individual, is over the age of 18, appoint that person to exercise, on behalf of the person who is unable to act, any right to which that latter person may be entitled and to receive and deal on his behalf with any sums payable to him.'

What did the appeal tribunal decide?

22. In the statement of reasons for its decision, the appeal tribunal stated the following:

'It is not disputed between the parties that a relevant change of circumstances occurred when (the claimant) was admitted to the Nursing Home on a permanent basis and that the cost of her stay or part thereof was met from public funds. The Department have grounds to supersede earlier decisions by virtue of Regulation 6(2) of the Social Security and Child Support (Decision and Appeals) Regulations (NI) 1999. The result of the supersession decision was that following her admission to

the Nursing Home in August 2008, Attendance Allowance was no longer payable from September 2008. The Department have sought to recover payments which were incorrectly made subsequent to that date. The Department's case is that (the appellant), the appointee, failed to disclose to the Department the material fact regarding (the claimant's) admission to the home. (The appellant) is the niece of (the claimant) (now deceased). In the letter of appeal dated 27/10/2011 the case was made that the Department were fully notified of (the claimant's) admission and it was claimed that Social Security Agency representatives attended at the Nursing Home. We have heard the Appellant's evidence on the issue. While we can accept that the Appellant did have conversations with personnel at the Nursing Home we find that the personnel referred to were not representative of the Department. It appears that the Appellant accepts that this is the case. She has identified a number of people by name and has said that they were Social Workers who had made a number of arrangements regarding (the claimant's) admission to the home. She states that they said that all would be sorted out and she understood that to mean that they would take care of everything. However, the difficulty for the Appellant is that she accepts in evidence that during the discussions there was 'no real mention of benefits'.

The legislative mechanism for the recovery of all social security benefits which have been overpaid is contained in S69(l) of the Social Security Administration (NI) Act 1992 as amended. Regulation 32 (b) of the Social Security (Claims and Payments) Regulations 1987 imposes a duty on the Appellant to notify the Department of any change of circumstances which the Claimant might reasonably be expected to know might affect the right to benefit.

In our view, the Appellant's understanding that the Social Workers would sort all matters out is clearly not sufficient to discharge her duty to disclose relevant matters to the Department. The Appellant accepts that no other form of disclosure was made by her. The Appellant accepts that she had received previous correspondence from the Department and she accepts that the correspondence, as documented in the papers does refer to the importance of reporting such matters to the Department. She states that she didn't know very much about the system and that she didn't really know the difference between Attendance Allowance or Pension payments. Nevertheless the Appellant should have been alerted to her obligations and

> duties as there had been a previous overpayment in the case (subsequently not recoverable) and the importance of reporting changes and providing information was conveyed to her in correspondence dated 20/8/2008 (Tab 10). We find that (the appellant), acting as appointee did not act with the requisite due care and diligence. In the circumstances we find that a failure to disclose the material fact regarding (the claimant's) admission to the home has been established. We find that the Appellant had been informed in clear terms of her obligations to report the relevant changes in circumstances. An overpayment has arisen resulting from the failure to disclose. The amount of overpayment and the period during which the overpayment has arisen is not in dispute. Accordingly the amount of £9,464.55 is recoverable.'

The submissions of the parties

23. In the original application for leave to appeal, the appellant's representative set out the following grounds of appeal:

> 'The tribunal accepted submissions from SSA and ruled in their favour. I believe that the tribunal did not fully consider my position in that notice was given to SSA regarding the payment of Attendance Allowance not being required. The tribunal accepted no wrongdoing on my part. Article 14 of the Social Security (NI) Order 1998. The SSA misapplied the law.'

24. In further correspondence dated 2 December 2015, the appellant's representative added the following:

> 'We would further emphasise that on the hearing of this matter before the Tribunal … it was accepted that our client's approach in this matter was at all times proper and there was no suggestion of any impropriety on her part. The matter quite clearly in our view arose out of a misdirection of information received via a Nursing Home to the Department which resulted, on our instructions, to payments being made.'

25. The Department's present position is set out in the submissions made by Mr Clements in the Case Summary prepared for the remote oral hearing as follows:

> 'The applicant and her solicitor had submitted to the tribunal that three different officers of the SSA were notified of the nursing home admission, and that representatives of the SSA had attended with the claimant at the nursing home. The tribunal's record of

proceedings shows that the applicant identified two of these persons as social workers and the other as being from the 'Social Work Department' or 'Welfare Department'. The applicant also stated that during these discussions there was "no real mention of benefits". The tribunal subsequently found that "the personnel referred to were not representative of the Department."

I submit that the tribunal was entitled to reach this conclusion based on the evidence before it. To the best of my knowledge there neither is nor was a government Department in Northern Ireland named the Social Work Department or the Welfare Department. It may be possible that the applicant is referring to a particular branch of the Department of Health, Social Services and Public Safety. However social work did not come within the purview of the Department of Social Development ("the Department") so it is unlikely that these persons were officers of the Department, much less officers of the SSA.

I submit that persons who are not officers of the Department are not capable of modifying an instruction given by the Department to disclose a change of circumstances under regulation 32(1A) of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987. The tribunal in this instance has found that the duty to disclose comes from regulation 32(b) of those Regulations (this is a slip of the pen and should read regulation 32(1B)). I will make further submissions on the duties to disclose flowing from regulation 32 later but for now I submit that the interaction between the applicant and the persons identified would not have altered a duty to disclose a change of circumstances under regulation 32(1B) to the appropriate office, given that these persons were not officers of the Department and, in any case, the applicant has stated that the discussions did not involve a 'real mention' of benefits.

Article 14 of the Social Security (Northern Ireland) Order 1998 concerns the tribunal's power to set aside a decision that is erroneous in point of law and refer the case for redetermination. The chairman of a tribunal may do this where he or she considers that the decision was erroneous in point of law, or where each of the principal parties to the case expresses the view that the decision was erroneous in point of law. As the chairman of the tribunal did not grant leave to appeal in this case, it is evident that he did not consider the decision to be erroneous in point of law. The Department did not

express the view that the decision was erroneous in point of law. Therefore I submit that the tribunal has not erred in point of law with respect to article 14.

Consequently I do not support the application for leave to appeal on the grounds advanced by the applicant. However, I do support the application on alternative grounds which I will outline below.

The tribunal found that regulation 32(1B) of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 imposed a duty on the applicant to notify the Department of any change of circumstances which she might reasonably be expected to know might affect the right to benefit.

…

Regulation 32(1B) only imposes a duty on the applicant to disclose the material fact in this case if she could have reasonably been expected to know that the claimant's admission to a nursing home might affect the continuance of entitlement to, or payment of, AA. I acknowledge the applicant's lack of familiarity with the benefits system in Northern Ireland, and I believe the tribunal erred when it found that "the Appellant should have been alerted to her obligations and duties as there had been a previous overpayment in the case (subsequently not recoverable) and the importance of reporting changes and providing information was conveyed to her in correspondence dated 20/8/2008." The claimant was admitted to the … Nursing Home on 20 August 2008. The applicant would not have received the correspondence issued by the Department on 20 August 2008 (including the overpayment decision notice) until after the claimant's admission i.e. after the change of circumstances had occurred.

I submit that the relevant question with respect to regulation 32(1B) is whether the applicant might have reasonably been expected to know that the change of circumstances would affect the continuance of entitlement to, or payment of, AA when the change of circumstances occurred. I do not consider correspondence received after the change of circumstances occurred to be relevant to the question of whether the claimant was under a duty to disclose when the change of circumstances happened.

I submit that it is nonetheless arguable that regulation 32(1B) did impose a duty on the applicant to disclose the

claimant's nursing home admission. This is because she completed a DBD138 form (Tab 2) received by the Department on 23 May 2008 which enquired, at part 9 of the form, about periods spent in hospital or a care home. The applicant completed that section of the form, noting that the claimant had been admitted to … from April 2008 to May 2008. The Department would not have asked that question in the DBD138 form if it had no relevance to entitlement to, or payment of, AA. Therefore I submit that it was reasonable to expect the applicant to know that the claimant's admission to a care home might have affected the continuance of entitlement to, or payment of, AA. However the tribunal did not refer to the DBD138 in its statement of reasons. I submit that the tribunal has failed to give adequate reasons for its finding that regulation 32(1B) imposed a duty on the applicant to disclose the claimant's admission to a nursing home to the appropriate office and this amounts to an error in point of law.

My former colleague Mr David McGrath submitted in his observations dated 22 November 2012 that the tribunal erred in law (albeit not materially) by finding that the applicant's duty to disclose came within regulation 32(1B). He argued that regulation 32(1A) of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 imposed a duty on the applicant to disclose the nursing home admission as the Department had instructed her to do so in the AA95(NI) leaflet and in the annual uprating letter issued every April.

…

However, I note that the AA95(NI) leaflet was issued on 20 August 2008 and would not have been received by the applicant until after the claimant's admission to a nursing home. Likewise the uprating letters would not have been received until after the claimant's admission. I have consulted the BF56 appointee form but its instructions are general in nature and do not specifically instruct the applicant to report a nursing home admission. Consequently it appears that the applicant had not been specifically instructed by the Department to report the claimant's admission to the nursing home at the time of the admission.

I submit that regulation 32(1A) did impose a duty on the applicant to disclose the claimant's change of address from 4 September 2008, albeit I am of the view that the change of address was not a "material fact" for the purpose of section 69 of the Social Security

Administration (Northern Ireland) Act 1992, in which case the claimant's failure to disclose the change of address cannot form the basis of recovery.

The claimant's admission to … was initially for respite care and was only 'made permanent' on 4 September 2008 according to the notes of a telephone call made by an officer of the Department to … on 11 May 2011 (Tab 14) and a letter from … dated 23 March 2012 enclosed with the application for leave to appeal to the tribunal chairman, which states that the claimant was no longer resident at home from 4 September 2008. The AA95(NI) leaflet was, in likelihood, received by the applicant before 4 September 2008 and page 2 of the leaflet instructs the applicant "please tell us straight away if you, or the person you are acting for … change address." I further note that the applicant signed a BF56 form prior to 20 August 2008 declaring that "I have read, understood and accept the conditions mentioned in Part 8 of this form." Part 8 of the form states "You will have to tell the person's Department for Social Development/HM Revenue and Customs office straight away if there is a change in the person's circumstances which could affect their benefit." Later in part 8, the form states "examples of changes you must tell us about are when the person … changes address."

If the applicant had complied with the duty imposed by regulation 32(1A) to disclose the claimant's change of address to the Attendance Allowance office, it is likely that the overpayment would not have occurred as the branch would have conducted further investigations upon receiving notification that the claimant was now residing in a nursing home. It is therefore arguable that the overpayment occurred in consequence of this failure to disclose. However, I have doubts whether the change of address is a "material fact" for the purpose of section 69 of the Social Security Administration (Northern Ireland) Act 1992.

A Tribunal of Commissioners in Great Britain (GB) in the decision CIS/4348/2003 (later affirmed by the GB Court of Appeal in R(IS) 9/06) noted decisions of the higher courts in GB which considered the construction of section 71 of the Social Security Administration Act 1992 and found it to be common ground that "material fact" means a fact that is objectively material to the decision of the Secretary of State to make an award of benefit.

This section has been considered by the higher courts in several cases, and a number of propositions of construction are well settled and were common ground before us.

The words "fraudulently or otherwise" cover the entirely innocent, and the phrase applies to "failure to disclose" as well as to "misrepresentation": see, for example, Jones v Chief Adjudication Officer [1994] 1 WLR 62 at page 65B (also reported as R(IS) 7/94), and Page and Davis v Chief Adjudication Officer (1991) (reported as R(SB) 2/92). Consequently, a wholly innocent failure to disclose may result in a recovery. It has been said that the innocent in this context include those who fail to disclose a matter because of a failure to appreciate that matter's materiality: R v Medical Appeal Tribunal (North Midland Region) ex p Hubble [1958] 2 QB 228 at page 242, approved in Jones at page 65F.

"[A] person cannot be held liable for failing to disclose what he does not know" (Jones per Evans LJ at page 65D). Consequently, one cannot "fail to disclose" a matter unless one knows of it. Whether one a particular person "knows" of a matter is determined by a subjective test.

"Material fact" means a fact that is objectively material to the decision of the Secretary of State to make an award of benefit (Jones at page 68D-F, and Hinchy v Secretary of State for Work and Pensions [2003] 1 WLR 2018 at paragraph 11). Whether the particular claimant considers the matter material is of no relevance. This test is entirely objective.

"Failure to disclose" does not mean simply "non-disclosure". It imports a breach of some obligation to disclose.

I am unconvinced that the change of address was material to the Department's decision to make (or not make) an award of benefit in this case. AA ceases to be payable to a claimant who stays in a nursing home for more than 28 days and at least part of the cost of the stay is borne out of public funds – this is the case whether the claimant changes address or not. The claimant's stay in … from 4 April 2008 to 8 May 2008 is an example of this; the claimant did not change address and yet she was not entitled to receive payment of AA from 5 May 2008 to 11 May 2008. Conversely a change of address does not, in itself, normally affect entitlement to, or payability of, AA.

The supersession decision was made under regulation 7 of the Social Security (Attendance Allowance) Regulations (Northern Ireland) 1992, which concerns care home admissions and not changes of address. The effective date of the decision does not take effect from the date of the change of address (or indeed from the date 28 days after the change of address); it is instead linked to the date that the claimant was first admitted to the nursing home. I submit that the admission to a nursing home was objectively material to the Department's supersession decision, and that the change of address was not. I nonetheless believe it worthwhile to bring the matter to the Commissioner's attention, in case he takes a different view.

I further submit that the decision maker erred by making the overpayment solely recoverable from the applicant. A leading authority in social security case law where an appointee has obtained benefit by failing to disclose a material fact is the decision R(IS) 5/03 made by a Tribunal of Commissioners in GB. At paragraph 63 the Tribunal of Commissioners states:

63. In the overwhelming majority of cases where an appointee has obtained a social security benefit by misrepresenting or failing to disclose a material fact, the Secretary of State may recover the overpaid benefit from both the appointee and the claimant. This is subject to two exceptions. Where the appointee has retained the benefit instead of paying it to, or applying it for the benefit of, the claimant, only the appointee is liable. Where the appointee has acted with due care and diligence, only the claimant is liable.

There was no evidence before the decision maker that the applicant retained the overpaid benefit instead of applying it to the benefit of the claimant. The decision maker should therefore have made the overpayment recoverable from both the claimant and the applicant. The tribunal also decided that the overpayment was solely recoverable from the applicant. The record of proceedings shows the applicant explaining that overpaid benefit was used to pay for the claimant's expenses, such as the claimant's house insurance and payments to the nursing home. The tribunal did not make any findings in the statement of reasons which cast doubt on the applicant's account of events. I therefore submit that the tribunal should have decided that the overpayment was recoverable from both the applicant and the estate of the

deceased claimant. It has erred in point of law by finding the overpayment to be solely recoverable from the applicant.

Summary

I do not support the application for leave to appeal on the grounds raised by the applicant. However I do support the application on other grounds, as I submit that the tribunal's decision is erroneous in point of law as (a) it incorrectly found the overpayment to be solely recoverable from the applicant and (b) it failed to give adequate reasons for its finding that regulation 32(1B) of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 imposed a duty on the applicant to disclose the claimant's admission to a nursing home to the appropriate office. I therefore submit that the Commissioner should set the tribunal's decision aside.

If the Commissioner is of a mind to decide the case himself, I would submit that regulation 32(1B) imposed a duty on the applicant to disclose the claimant's admission to a nursing home to the appropriate office as she had previously received a DBD138 form which enquired about periods spent in a care home. It was therefore reasonable to expect the applicant to know that the claimant's admission to a care home might affect the continuance of entitlement to, or payment of, AA. The overpayment of AA occurred in consequence of the applicant's failure to disclose this fact to the appropriate office. Therefore the overpayment of AA is recoverable from both the applicant and the estate of the deceased under section 69 of the Social Security Administration (Northern Ireland) Act 1992.'

Analysis

26. For the reasons which have been set out by Mr Clements in his carefully prepared Case Summary, I agree that there is no substance to the appellant's primary grounds of appeal.

27. In *B v Secretary of State for Work & Pensions* (reported as *R(IS)9/06*), the Court of Appeal for England & Wales upheld the decision of the Tribunal of Commissioners in Great Britain in *R(IS)9/06*. In that latter decision, the Tribunal of Commissioners had considered, in depth, the nature of the legal test in respect of failure to disclose, by analysing the relationship between section 71 of the Social Security Administration Act 1992 (the Great Britain equivalent to section 69 of the Social Security Administration (Northern Ireland) Act 1992) and regulation 32 of the Social Security (Claims and Payments) Regulations 1987 (which has an

equivalence in regulation 32 of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987).

28. In summary, the Tribunal of Commissioners found that:

> '1. Section 71 does not purport to impose a duty to disclose, but rather presupposes such a duty, the actual duty in this case being in regulation 32 of the Social Security (Claims and Payments) Regulations 1987, which provides for (a) a duty to furnish information and evidence pursuant to a request from the Secretary of State, and (b) a duty to notify the Secretary of State of any change of circumstance which the claimant might reasonably be expected to know might affect the right to benefit.
>
> 2. In relation to the duty to furnish information and evidence pursuant to a request, whilst there is no duty to disclose that which one does not know, if a claimant was aware of a matter which he was required to disclose, there was a breach of that duty even if, because of mental incapacity, he was unaware of the materiality or relevance of the matter to his entitlement to benefit, and did not understand an unambiguous request for information, and a failure to respond to such a request triggered an entitlement to recovery under section 71 of any resulting overpayment.
>
> 3. Insofar as *R(SB) 21/82* imported words from regulation 32 into the construction of section 71 in stating that the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected, that decision and subsequent decisions that have relied on it were wrongly decided.
>
> 4. The form INF4 supplied to claimants contained an unambiguous request by the Secretary of State to be informed if a claimant's children went into care and by not disclosing the fact to the Department, the claimant was in breach of her obligation under regulation 32, so that the Secretary of State was entitled under section 71 to recover the overpayment resulting.'

29. In *C6/08-09(IB)*, I said the following, at paragraphs 40 to 42:

> '40. Firstly, as was noted above, the practical outcome of the cases referred to above is that an appeal tribunal, when determining whether an overpayment of a social security benefit is recoverable on the basis of a failure to disclose, will have to consider where the requirement to

> provide the relevant information came from. This will necessitate identifying whether the case comes within the first or second duty in regulation 32.
>
> 41. In the case of the first duty, it will also require the provision of proof by the Department that the requirement to provide information was made to the claimant. That proof may be in the form of receipt of an information leaflet such as Form INF4 or instructions in an order book. It will not be enough, however, for the information leaflet or order book to be produced. The wording of the relevant instructions will have to be looked at in close detail to ensure that the instructions to disclose were clear and unambiguous.
>
> 42. In the case of the second duty, the requirement is that the change of circumstances is one which the claimant might reasonably be expected to know would affect his entitlement to benefit.'

30. The appeal tribunal in the instant case sought to rely on the second duty in regulation 32(1). As such, it would have to identify a change of circumstances which the appellant might reasonably be expected to know might affect the claimant's entitlement to AA. In its statement of reasons the appeal tribunal has focused on what it identified as a 'previous overpayment in the case' and correspondence dated 20 August 2008 which had been sent to the appellant.

31. I return to the correspondence dated 12 August 2020 below. Before that, I examine the significance of two other items of documentation. The first is a Departmental Form 'DBD138' which was sent to the appellant on 15 May 2008. The appellant was requested to complete this form and return it to the Department. The completed form is date-stamped as having been received in the Department on 23 June 2008. A copy of the completed form was attached to the original appeal submission as Tab No 2.

32. The sending of the form by the Department appears to be in response to an enquiry by the appellant about the claimant's level of entitlement to AA. The appellant was requested to provide additional evidence to the Department about the claimant's care needs and the assistance which she might require at night. I say 'appears to be' because the correspondence dated 20 August 2008 to the appellant states 'You contacted us on 14/05/08 about a change in your circumstances for Attendance Allowance.' There is no item of correspondence dated 14 May 2008 in the file which is before me and no formal record of a telephone call by the appellant to the Department. Mr Clements, in his summary of the factual background to the case, also stated that:

> 'The applicant also notified the Department that the claimant required supervision at night, and in a telephone call with an officer of the Department she agreed to apply to become the claimant's appointee.'

33. Part 3 of the form is headed 'About treatment or help you receive'. The appellant was then asked to answer the following question on behalf of the appellant - 'If you have seen anyone in connection with your illnesses or disabilities in the past 12 months, please give their details. For example, hospital doctor, specialist nurse, community psychiatric nurse, district nurse, physiotherapist, occupational therapist or social doctor.' The appellant replied by stating that the claimant had been in a general hospital and a 'Nursing rest home' as a result of falls leading to arm fractures.

34. Part 9 is headed 'About periods spent in hospital or a care home'. The appellant was asked to provide details of any periods spent by the claimant in the care home in the previous 12 months. The appellant replied in the positive giving the name of the care home and the period during which the appellant had been there.

35. The second additional document is a Departmental Form 'BF56' sent to the appellant on 29 July 2008. The form is an application for an appointment under regulation 33 of the 1987 Regulations. The form was completed by the appellant but is undated. On the signature page of the form, at page seven, the person seeking appointment is asked to make a declaration by agreeing to several statements. Two of these are as follows:

> 'I understand that I must promptly tell the relevant office that pays the benefit, pension, allowance or credit anything that may affect the entitlement to, or amount of, that payment.
>
> I undertake to the best of my ability to give the Department/Board all the information required by them about the circumstances of the person named in Part 1 and give information about any relevant changes in their circumstances which may affect the entitlement to, or amount of, the benefit or tax credit claimed.'

36. Part 8 of the form is headed 'Roles and responsibilities'. This Part sets out a range of roles and responsibilities that the appellant, as appointee for the claimant, assumes. Two of these are as follows:

> 'Any money that you receive on their behalf must be used in their and their dependents' interest. For example
>
> - Paying their fees for a nursing or care home or carer

- Towards meeting everyday living costs

However, if they are in a nursing or care home, you must ensure that the specified amount of personal allowance is paid over each week for the benefit of the person named in Part 1.

You will have to tell the person's Department for Social Development/HM Revenue and Customs office straight away if there is a change in the person's circumstances which could affect their benefit. A list of changes, which must be reported, is given in the notes issued with the first payment of benefit. If you not have a copy of the list, you can get one from your Jobs & Benefits office/Social Security office/HM Revenue and Customs (HMRC).'

37. Part 8 then gives examples of the changes which an appointees must disclose. I note, at this stage that while one change is the claimant going into hospital, there is no mention of going into a care or nursing home. Part 8 does indicate, however, that the list of examples is not exhaustive.

38. As was noted above, Mr Clements has submitted that the 'instructions are general in nature and do not specifically instruct the applicant to report a nursing home admission'. Further he has asserted that while it could be argued that Part 8 imposed a duty on the appellant to notify the office administering AA of the fact of the claimant changing her address when she moved into the nursing home (or, more likely, when the move to the nursing home became permanent) a change of address is not a material fact for the purposes of section 69 of the 1992 Act.

39. I return to the correspondence of 20 August 2008. This was a letter informing the appellant about changes to the claimant's entitlement to AA. It was, in essence, correspondence informing her of a decision which had been made by a decision maker of the Department on 12 August 2008. A copy of the decision dated 12 August 2008 was attached to the original appeal submission as Tab No 7. In formal legal terms the decision maker superseded an earlier decision of the Department. The date of the earlier decision is not known but it had awarded entitlement to the lower rate of AA from and including 6 April 1992. The supersession decision of 12 August 2008 changed the earlier entitlement decision in two ways. The first was by increasing the entitlement from the lower rate of AA to the higher rate of AA from 14 May 2008 and restricting payability for the period from 5 May 2008 to 11 May 2008. The reason for the restriction in payability for this latter period is stated as 'More than 28 days in certain accom'.

40. It is unlikely that the appellant was sent a copy of the formal supersession decision dated 12 August 2008. She was, however, sent the correspondence dated 20 August 2008. A copy of that correspondence was attached to the original appeal submission as Tab

No 10. The correspondence informs the appellant (as appointee to the claimant) that:

> 'You are dealing with the claim for (the claimant).
> Remember the information in this letter is about them.
>
> …
>
> You are entitled to Attendance Allowance at the high rate from and including 14/05/08.
>
> …
>
> However we cannot pay you Attendance Allowance for any day that you are in a care home from 05/05/08 to 11/05/08 (both dates included).
>
> This is because you have been in a care home for more than 28 days altogether. We cannot pay Attendance Allowance after 28 days in a care home which is fully or partly paid for by a Health and Social Services Trust or certain government departments.
>
> …
>
> **Changes you must tell us about**
>
> You must tell us straight away if anything changes that may affect your Attendance Allowance. If you do not tell us straight away it may affect the amount of benefit you are entitled to.
>
> Examples of the changes are listed with the leaflet 'Notes for getting Attendance Allowance' that we have sent you with this letter.'

41. The leaflet referred to is what Mr Clements has described as the 'AA95 Leaflet'. As Tab Nos 29 and 31 there are two specimen copies of 'AA95' leaflets. They are different in terms of style and content probably reflective when they were published and applicable. The specimen copy at Tab 31 is described as 'AA95 (NI) from December 2006'. Page 2 of the leaflet sets out a range of changes which the recipient was obliged to tell the Department. One of these is as follows:

> 'Please tell us straight away if you or the person you are acting for:
>
> …

Go into or come out of a residential care home, nursing home or an independent hospital.'

42. Page 4 of the leaflet contains the following:

'**The changes you must tell us about**

Residential care home, nursing home or independent hospital

By *residential care home* or *nursing home* we mean a place where you can get accommodation as well as nursing or personal care.

An *independent hospital* is not a NHS hospital.

By independent hospital we mean a place where

- you can get medical or psychiatric treatment for an illness or mental disorder, or
- you can get palliative care.

If you go into a residential care home, nursing home or an independent hospital **you must** phone us or write to us straight away.

If you are in a residential care home, nursing home or an independent hospital for less than 28 days **you must** tell us the date that you leave.

If you have to go back into a residential care home, nursing home or an independent hospital within 28 days of coming out, **you must** let us know **straight away** as it could affect your benefit.

You must tell us if the residential care home, nursing home or independent hospital is owned or managed by a Health Service Trust or government department.

You must tell us if the Health Service Trust, government department or the National Health Service start paying for you to live in a residential care home, nursing home an independent hospital. Even if you pay the Health Service Trust or government department back or they do not pay all the cost, you should still tell us.

You must also let us know if they start to pay for you when you have previously paid for yourself.'

43. As was noted above, the appeal tribunal in the instant case sought to rely on the second duty in regulation 32(1). As such, it would have to identify a change of circumstances which the appellant might reasonably be expected to know might affect the claimant's entitlement to AA. In its statement of reasons the appeal tribunal has focused on what it identified as a 'previous overpayment in the case' and correspondence dated 20 August 2008 which had been sent to the appellant. In his Case Summary Mr Clements noted that the claimant had been admitted to the nursing home on 20 August 2008 and submitted that the appellant would not have received the correspondence issued by the Department on 20 August 2008 (including the overpayment decision notice relating to the period of admission to the nursing home in May 2008) until after the claimant's admission on 20 August 2008 i.e. after the change of circumstances had occurred. I return to that submission below.

44. Before that, I consider whether the appellant was under any duty to disclose a change of circumstances before 20 August 2008. If any duty arose, the source would have to be the Departmental Forms 'BF56' and 'DBD138'. I think that it is arguable that the collective clear instructions on these forms, combined with the interactions which the appellant was having with Departmental officials gave rise to a regulation 32 (1B) duty on the appellant to disclose that the claimant had been admitted to the nursing home.

45. It is important to note that the appellant did not have to make a claim to AA on behalf of the claimant. After she had contacted the Department to report that the claimant had a requirement for night time supervision, it was the Department, on its own initiative, which decided to undertake an examination of the extant AA entitlement and determine whether this could be increased. I have examined the scenario where there was no extant award of entitlement to AA and the appellant had made a claim to AA on behalf of the claimant. To do so, she would have to complete an AA claim form. While accepting that the AA claim form which I have accessed on the Department's website is a 2021 version I cannot see why it would have been radically different from 2008. On the signature page are a number of declarations including the following:

> 'I understand that I must promptly tell the office that pays my Attendance Allowance of anything that may affect my entitlement to, or the amount of, that benefit.'

46. Much more significantly, the AA claim for is accompanied by 'Claim Notes' which provide guidance to anyone claiming AA. The 'Claim Notes' contain the following:

> 'About time spent in hospital, a care home or a similar place
>
> By care home, we mean a home such as a residential care home, nursing home, hospice or similar place.

We need to know if:

- you are in a hospital, a care home or similar place when you make your claim, and

- a Health and Social Care Trust or a government department pay anything towards the cost of your stay.

If you are awarded Attendance Allowance when you are in hospital, a care home or a similar place, we cannot pay you until you come out. But if you are a private patient or resident, paying for your stay without help from public funds, we will be able to pay you.

We may still be able to pay you if you are claiming under the special rules and you are in a hospice.'

47. Accordingly, if the appellant had made a claim to AA on behalf of the claimant and before the claim had been decided a change of circumstances such as admission to a nursing home had occurred, then I have no doubt that the appellant would have been under a duty to disclose it. Accordingly I cannot see why the appellant in the instant case should be allowed to be in a more advantageous position merely because the decision-making process was by way of the Department's own initiative rather than by her claim.

48. In any event, I do not have to decide whether the appellant was under a duty to disclose to a change of circumstances before receipt of the correspondence dated 20 August 2008 for the following reasons. The appellant in her evidence to the appeal tribunal accepted that she 'probably' got the 'AA95 (NI)' leaflet like the one attached to the appeal submission as Tab No 31. The correspondence of 20 August 2008 and the contents of the 'AA95 (NI)' leaflet are in the clearest possible terms. In particular, the correspondence of 20 August 2008 specifies a clear link between payability of AA and periods of admission to a nursing home. The appellant was informed that no claimant can be paid AA after a 28 day period of admission to a nursing home which is fully or partly paid for by a Health and Social Services Trust or certain government departments. The notes in the 'AA95 (NI)' leaflet specify a duty to inform the Department of changes involving and mission to a nursing or care home.

49. The key change of circumstances affecting the payability of AA when a claimant is admitted to a nursing home is the claimant being there for more than 28 days and that the nursing home is one which is fully or partly paid for by a Health and Social Services Trust or certain government departments. I accept that the correspondence dated 20 August 2008 would not have been received by the appellant for some

days after it was issued. That period would not have extended to 28 days, however, and I determine that well in advance of the expiry of the 28 day period from the date of the claimant's admission to the nursing home, the appellant was aware of the link between a 28 day period of admission to a nursing home and payability of AA. As such, I also determine that it was reasonable to expect the appellant to know that the claimant's 28 day period of admission might affect the continuance of entitlement to, or, more accurately, payment of AA. I also determine that the appellant was under a regulation 32(1B) duty to notify the Department of this change of circumstances. The overpayment of AA occurred in consequence of the appellant's failure to disclose.

50. I turn to the issue of recoverability. Mr Clements has submitted that the decision of the appeal tribunal that the overpayment was only recoverable from the appellant renders its decision as being in error of law. I agree.

51. In *R(IS) 5/03*, a decision of a Tribunal of Social Security Commissioners in Great Britain, the facts were that the appellant was appointed by the Secretary of State to act on behalf of her daughter who was a claimant of income support. From May 1997 until she died in April 2000, the claimant lived in a nursing home. Whilst there she had received disability living allowance and incapacity benefit as well as income support, such benefits being paid by direct credit transfer into the claimant's bank account over which the appellant had power of attorney. On 7 April 1999 the relevant county council informed the incapacity benefit section of the Department that a health authority had taken over responsibility for the claimant's nursing home fees from 8 October 1998. On 12 April 1999 the adjudication officer reviewed the award of income support and revised it with effect from 6 October 1998 on the basis that the claimant had ceased to be entitled to income support, once her nursing home fees were fully funded by the health authority, because her incapacity benefit exceeded her applicable amount. In June 2000 two separate overpayment decisions were made with respect to the appointee. The appointee appealed, arguing that the overpayment was not recoverable because she could not reasonably have been expected to tell the Department about the change of funding and, relying on CIS/332/93, that, in any event, a failure to disclose or a misrepresentation by an appointee grounded recovery against the claimant alone and not against the appointee unless the latter was acting in a personal capacity rather than in the capacity as appointee. The tribunal dismissed her appeal, preferring R(IS) 5/00 to CIS/332/93. The claimant appealed to the Commissioner. The Chief Commissioner directed that the appeal be determined by a Tribunal of Commissioners.

52. After analysing the relevant principles and jurisprudence, the Tribunal of Commissioners said the following, at paragraphs 57 to 61 of its decision:

> '57. We therefore reject Mr Maurici's submission that, save only in cases of fraud, the application of the

principles underlying the law of agency relieves an appointee of the liability imposed by section 71(3). In our view, CIS/332/1993 was wrongly decided.

58. We prefer the reasoning in R(IS) 5/00. Generally, both the appointee and the claimant are liable where an appointee misrepresents, or fails to disclose, a material fact. However, two qualifications must be made to that general rule. Both qualifications arise out of the fact that appointees derive their authority from the Secretary of State and not from the claimant.

59. First, if the appointee has retained the overpaid benefit, the overpayment cannot be recovered from the claimant (save in the case of a claimant who, having sufficient mental capacity, is a party to the misrepresentation or failure to disclose). This is because the common law principles mentioned above must be applied on the basis that the appointee acts without the authority of the claimant, so that the overpayment is recoverable from the claimant only to the extent that the money has been paid to, or applied for the benefit of, the claimant.

60. Secondly, it seems to us that, in appointing a person to act on behalf of a claimant, the Secretary of State must be taken to grant the appointee a degree of immunity from personal liability in respect of the reasonable exercise of the authority to act. In agency, every agent has a right against his or her principal to be indemnified against liabilities incurred in the exercise of his or her authority as an agent, subject to a number of exceptions which include the agent's own negligence, default or breach of duty ("Bowstead and Reynolds on Agency" paras. 7-056 and 7-059). The indemnity is implied from the nature of the agreement between the principal and the agent. In the absence of any indication to the contrary, an agent is presumed not to have agreed to accept liability for failing to do more than is reasonable. Having particular regard to the lack of remuneration for appointees, we consider that the same indemnity should be implied into an appointment under regulation 33. Where it arises, that right to an indemnity may be set off against the Secretary of State's right of recovery under section 71(3) and, save to the extent that the appointee has retained the overpaid benefit, the right of recovery is extinguished.

61. There is unlikely to be any right to an indemnity in a case where it has been determined that the appointee

> has failed to disclose a material fact, because such a determination implies a finding that it was reasonable for the appointee to disclose the material fact and so there will have been default by the appointee and, in particular, breach of the duty imposed by regulation 32. However, section 71(1) appears to have been interpreted as imposing strict, no-fault, liability in respect of representations. Thus a person may make a misrepresentation in circumstances where he or she is not only innocent in the sense of not being dishonest but is also wholly without fault because he or she could not reasonably have been expected to discover the falsity of the representation. That may be an appropriate approach where the misrepresentation is made by a claimant, but we accept Mr Maurici's submission that it could cause injustice where the representation is made by an appointee who may have more difficulty checking the accuracy of information he or she is providing and who derives no personal advantage from receipt of the benefit. The indemnity has the effect that, where benefit has been paid in consequence of a misrepresentation made by an appointee and it has been paid to, or applied for the benefit of, the claimant, the overpayment may not be recovered from the appointee if the appointee used due care and diligence in making the representation. It is recoverable only from the claimant.'

53. These principles have never been doubted and I accept that they represent the law in Northern Ireland. Applying the general rule set out in paragraph 58 I determine both the appointee and the claimant are liable, as I have also determined that the appointee has failed to disclose a material fact. Neither of the subsequent qualifications apply in this case.

54. For the sake of completeness, I have not considered the relevant of the appellant receiving annual 'up-rating' correspondence from the Department.

Disposal

55. I grant leave to appeal and proceed to determine all questions arising thereon as though they arose on appeal.

56. The decision of the appeal tribunal dated 30 March 2012 is in error of law. The error of law identified will be explained in more detail below.

57. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

58. I am able to exercise the power conferred on me by Article 15(8)(a)(ii) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so having made fresh or further findings of fact.

59. My decision is that an overpayment of Attendance Allowance (AA) amounting to £9464.55 for the period from 22 September 2008 to 24 April 2011 has been made which is recoverable from both the appellant and the estate of the late claimant.

(signed): K Mullan

Chief Commissioner

3 February 2021