THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSTC/76/06

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Appellant: The Commissioners for Her Majesty's Revenue & Customs *Respondent:*

Tribunal: Galashiels *Tribunal Case No:*

DECISION OF SOCIAL SECURITY COMMISSIONER

Decision

1. The decision of a tribunal sitting in Galashiels on 6 September 2005 (the tribunal) is wrong in law. I therefore set that decision aside and substitute for it the one which I consider the tribunal ought to have given. **This is that there is no entitlement to the disability element of working tax credit in the present case.**

The issue

2. A husband and wife made a joint claim for working tax credit for the period 6 April 2004 to 5 April 2005. The husband works 30 hours per week or more and his wife, who does not work, is in receipt of disability living allowance at the highest rate of the care component.

3. The tribunal considered regulation 9 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 SI No 2005 (the regulations), which regulation sets out the qualifications for entitlement to the disability element; it concluded that as the factual circumstances of the husband fell within regulation 9(1)(a) and those of the wife fell within both regulation 9(1)(b) and (c) (none of which is contested), then a disability element should be included in the calculation of their tax credit.

4. Regulation 9 of the regulations states:

> "(1) The determination of the maximum rate must include the disability element if the claimant, or, in the case of a joint claim, one of the claimants –
>
> (a) undertakes qualifying remunerative work for at least 16 hours per week;
>
> (b) has any of the disabilities listed in Part I of Schedule 1, or in the case of an initial claim, satisfies the conditions in Part II of Schedule 1;
>
> and
>
> (c) is a person who satisfies any of Cases A to G on a day for which the maximum rate is determined in accordance with these Regulations.
>
> …
>
> (4) Case C is where the person is a person to whom at least one of the following is payable –
>
> (a) a disability living allowance;
>
> …"

5. The Commissioners for Her Majesty's Revenue & Customs (HMRC), however, dispute the tribunal's interpretation of regulation 9, arguing that the same individual in the couple must satisfy all three conditions set out in regulation 9. A district chairman granted leave to appeal.

The tribunal's reasoning

6. The tribunal accepted the arguments of the representative at the hearing on behalf of the husband (the representative) and in its full statement said:

> "… He argues that the fact there is no word 'and' between 1(a) and 1(b) in the Regulations is of paramount importance and should be interpreted as stating that one of the claimants must work at least 16 hours per week, but does not state that needs to be this member of the couple who needs also to satisfy conditions 1(b) and 1(c). It is accepted by [the representative] that Regulation 1(b) and 1(c) have to be satisfied by the same member of the couple.
>
> It is [the representative's] contention that the wording of the regulation does not state that it needs to be the worker in the couple applying for WTC who meets conditions 1(b) and 1(c) but simply that one of the claimants must be working and that one of the claimants must meet the disability conditions.
> …
> The tribunal were persuaded by the well argued written submission of [the representative] when comparing the wording of Regulation 9 of the 2002 Regulations with other Social Security Regulations which rely on certain conditions being met and where the word 'and' is used between each paragraph to indicate that all the conditions have to be met …".

Appeal to the Commissioner

7. HMRC relies on the terms of the legislation enabling regulation 9 of the regulations as making it undoubted "… that the disability element is for the disabled *worker*, and that the same individual must satisfy all three conditions set out in regulation 9".

8. Section 11(3) of the Tax Credits Act 2002 (the Act) provides as follows:

> "(1) The maximum rate at which a person or persons may be entitled to working tax credit is to be determined in the prescribed manner.
> …
> (3) The prescribed manner of determination must also involve the inclusion of an element in respect of the person, or either or both of the persons, engaged in qualifying remunerative work –
>
> (a) having a physical or mental disability which puts him at a disadvantage in getting a job, and
> (b) satisfying such other conditions as may be prescribed.
>
> (4) The element specified … in subsection (3) is to be known as the disability element of working tax credit.
> …
> (7) A person has a physical or mental disability which puts him at a disadvantage in getting a job, … for the purposes of this section only if –
>
> (a) he satisfies prescribed conditions, or
> (b) prescribed conditions exist in relation to him."

9. It is further submitted on behalf of HMRC that:

> "…this is a classic example of not only legal drafting but the basic principles of English grammar. The word 'and' is only required between the penultimate and final sub-paragraph in order to make a list cumulative. The writer uses 'or' to indicate otherwise. Consequently I submit that the word 'and' between each sub-paragraph is not required in order to make the list cumulative. Rather the writer would insert 'or' between one or more of them to indicate otherwise. To illustrate simply, if one ordered a meal consisting of 'fish, chips and peas' one would expect to receive all three."

10. In particular, HMRC argues that it is inappropriate to determine the "strict meaning" of regulation 9 merely by comparing it with other unrelated social security legislation.

11. The representative relies, however, on instances where, in such legislation, "and" has been used between each paragraph to indicate that all the conditions have to be met. Several examples are given, such as s.73(3) of the Social Security Contributions and Benefits Act 1992:

> "A person falls within this subsection if –
> (a) he is severely mentally impaired; and
> (b) he displays severe behavioural problems; and
> (c) he satisfies both the conditions mentioned in section 72(1)(b) and (c) above."

12. This shows, the representative argues, that an "and" is necessary between each paragraph if a list is to be regarded as cumulative. Likewise, the word "or" is essential between each paragraph if only one of a list of alternatives has to be met; thus s.73(1) of the Social Security Contributions and Benefits Act 1992 in contrast reads:

> "Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the relevant age and throughout which –
> (a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so; or
> (b) he falls within subsection (2) below; or
> (c) he falls within subsection (3) below; or
> (d) he is able to walk but… ."

13. Therefore, it is contended that, as the conjunction "and" is used *only* between regulation 9(b) and (c), those two conditions alone have to be satisfied by the same member of the couple.

14. The representative further refers to an example given in the 2004 edition of Tax Credits and Employer-paid Social Security Benefits (volume IV of the annotated Social Security Legislation 2004) at page 388 (page 454 in the 2005 edition) where, under Route 2, it is baldly stated that entitlement for a "married couple, one working 35 hours a week, the other needing day and night care for which disability living allowance at the highest rate has been awarded" includes, among other elements such as the 30 hour element and the severe disability element, also the disability element.

My conclusion and reasons

15. So far as the ordinary grammatical construction is concerned, I agree with the submission on behalf of HMRC. Where one has a list, it is usually only necessary to insert "and" or "or" between the two last items on the list to make clear that the list is in the former instance cumulative or, in the latter, a set of alternatives. One may offer a child, for example, "vanilla, strawberry and chocolate ice cream" (in which case the normal inference is that all three ice cream flavours will be provided) or, on the contrary, "vanilla, chocolate or strawberry ice cream", in which case the child is put to a choice.

16. A statutory example of the legislative use of the former linguistic convention is regulation 12(6) of the Social Security (Disability Living Allowance) Regulations 1991 SI 2890 (as amended) which reads:

> "A person falls within subsection (3)(b) of section 73 of the Act (severe behavioural problems) if he exhibits disruptive behaviour which –
> (a) is extreme,
> (b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property, and
> (c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake."

It was neither argued to, nor suggested by, Mr Commissioner Turnbull in R(DLA) 7/02 that the first two of the above three conditions were alternatives; nevertheless, that commas were used rather than semi colons strengthens the inference that they were not.

17. Moreover, it is the case that, in the examples cited by the representative, an "and" or "or" has been inserted between *each* listed condition. However, this is in order to place the matter beyond doubt. It is safer, therefore, and I now do so, to consider the statutory context of the list in dispute, as legislation must be read as a whole in order to construe it correctly. (Having done that, Mr Commissioner Williams in CI/1884/2004 interpreted prescribed disease C24 so as to hold that it was several in its reference to the three separate physical conditions listed, rather than cumulative, even though the statutory prescription was that the disease was "characterised by (i)…, (ii)…, and (iii)…". This was because of the disjunctive use of the phrase 'characterised by' and because the report of the Industrial Injuries Advisory Council which had preceded its introduction aimed at widening the scope of the prescription).

18. Such considerations are absent in the present case. S.3(3) of the Act ensures that a husband and wife *must* make a joint tax credit claim and there are several reasons why I judge that any disability element included in a couple's award must be justified by one and the same individual in the partnership satisfying all three of the regulation 9(1) conditions.

19. The respondent's argument depends not simply on whether the regulation 9(1) list is alternative in part rather than cumulative but, additionally and crucially, whether the necessary conditions for entitlement may be aggregated between the two members of the couple. However, the plain wording of regulation 9, and particularly when compared with other statutory provisions in the tax credit scheme, makes patent this is not the situation.

20. Firstly, the enabling power under section 11(3) of the Act, as HMRC submits, makes apparent that a worker must satisfy the additional conditions in order to qualify for a disability element. This is reinforced by regulation 3(3) of the regulations which allows two disability elements in an award where both members of the couple satisfy the conditions under regulation 9(1); regulation 3(3) reads:

> "If the claim for working tax credit is a joint claim and both members of the couple satisfy the conditions of entitlement for –
>
> (a) the disability element;
> (b) the severe disability element; or
> (c) the 50 Plus element,
>
> the award must include two such elements."

21. Moreover, the terms of section 11 of the Act with respect to the disability element would have been different were they to cover the situation where the circumstances of the two members of the couple may be combined to satisfy the criteria for entitlement. It will be noted from the terms of regulation 3(3) above that, as with the disability element, an award may also include two severe disability elements (the wife in the present case was eligible for such) but not, for example, two 30 hour elements. This is because regulation 10 of the regulations, covering the 30 hour element, specifically allows aggregation of the circumstances of a couple, which necessarily means that only one element is appropriate for that couple, while regulation 17, in contrast, governing entitlement to the severe disability element, does not.

22. Thus regulation 10 of the regulations says:

> "(1) The determination of the maximum rate must include a 30 hour element if the claimant, or in the case of a joint claim, at least one of the claimants, is engaged in qualifying remunerative work for at least 30 hours per week.
>
> (2) The determination of the maximum rate must also include the 30 hour element if –
>
> (a) the claim is a joint claim,
> (b) at least one of the claimants is responsible for one or more children or qualifying young people,
> (c) the aggregate number of hours for which the couple engage in qualifying remunerative work is at least 30 hours per week, and
> (d) at least one member of the couple engages in qualifying remunerative work for at least 16 hours per week.
>
> …"

23. Whereas regulation 17 reads:

> "(1) The determination of the maximum rate must include the severe disability element if the claimant, or, in the case of a joint claim, one of the claimants satisfies paragraph (2).
>
> (2) A person satisfies this paragraph if a disability living allowance, attributable to the care component payable at the highest rate …
>
> (a) is payable in respect of him; or
>
> …"

24. This is in accordance with the markedly varying enabling powers under section 11 of the Act which, in the case of those who are severely disabled, mirror those authorising regulation 9 and the disability element, as contrasted with the very different wording allowing the aggregation under regulation 10 for the 30 hour element. Thus section 11(5), (6) and (7) of the Act provide as follows:

> "(5) The prescribed manner of determination may involve the inclusion of such other elements as may be prescribed.
> (6) The other elements may (in particular) include –
> (a) an element in respect of the person, or either of the persons or the two taken together, being engaged in qualifying remunerative work to an extent prescribed for the purposes of this paragraph.
> …
> (d) an element in respect of the person, or either or both of the persons, being severely disabled; …
> (7) A person … is severely disabled, for the purposes of this section only if –
> (a) he satisfies prescribed conditions, or
> (b) prescribed conditions exist in relation to him."

Neither the Act nor the regulations permit, for example, the two members in a couple to qualify together for a single severe disability element where each receives disability living allowance at the middle rate of the care component.

25. Against this background, where two members of the couple may each separately qualify for the disability element or the severe disability element as part of their joint award if the necessary criteria are satisfied in the individual circumstances of each; that there can be only one 30 hour element but it may be satisfied by combining the circumstances of the couple where appropriate; and the critically different wording of the empowering legislation which carefully distinguishes between criteria applicable "in respect of the person, or either or both of the persons…" and those obtaining "…in respect of the person, or either of the persons or the two taken together…"; all these factors point to the significant difference between the disability and severe disability elements when contrasted with the 30 hour element.

26. Moreover, the lack of any mention of aggregation of a couple's circumstances in regulations 9 and 17, as compared to the express terms of regulation 10, put the matter beyond doubt. If the respondent's contention was correct, subsections 11(3) and 11(6)(d) respectively of the Act would reflect s.11(6)(a) in their terms and, likewise, regulations 9 and 17 of the regulations would specifically allow combining the circumstances of the couple in order to meet the qualifying criteria for a single element. It is, perhaps, particularly significant, that the enabling paragraph, s.11(6)(e) of the Act, for the 50 plus element (the third one along with those for disability and severe disability where regulation 3(3) permits two such elements in a joint claim), is in these terms:

> "An element in respect of the person, or either or both of the persons, being over a prescribed age, satisfying prescribed conditions and having been engaged in qualifying remunerative work…".

27. In the light of my conclusions above, I regard the example given in the annotated legislation as misleading in not making clear that a disability element is only included in the example given, if the same member of the couple who is eligible for the highest rate of the care component is also working for at least 16 hours per week.

Summary

28. For the above reasons my decision on this appeal is as follows:

1. I set aside the tribunal's decision as erroneous in law;

2. in exercise of the power in s.14(8)(a)(i) of the Social Security Act 1998, as applied by regulation 6 of the Tax Credits (Appeals) Regulations 2002 SI 2926, I make the decision which in my judgement the tribunal ought to have made; this to confirm as correct the decision under appeal to it, to the effect that there is no entitlement to a disability element where only one member of a couple making a joint claim for a tax credit works and he is not the one in receipt of disability living allowance at the highest rate.

(Signed)
L T PARKER
Commissioner
Date: 27 March 2006