Casebase Number: G0133

Title of Payment: Invalidity Pension

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Organisation who represented the Claimant: Community Law & Mediation

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Case Summary

This case concerns an appeal of a decision of an Appeals Officer (**AO**) which had upheld the original decision of a Deciding Officer (**DO**). Those decisions asserted that the Appellant had been overpaid Invalidity Pension (**INVP**) from 30 June 2016 to 3 February 2021, as a result of her having returned to work as a carer during that period. As a consequence, it was asserted that the Appellant was liable to pay the Department of Social Protection (**Department**) the sum of €55,829.70. On appeal, the Appellant asserted that she had been informed by a Limerick officer of the Department that she could continue to receive INVP if she returned to work; that the Revenue and Department had been made aware on various occasions that she was working and still in receipt of INVP and had failed to act in a reasonable time, and therefore the date of effect of the decision of overpayment should take effect from the date she became aware of her mistake in February 2021 (and not the date she commenced work in June 2016).

In April 2016, the Appellant was deemed entitled to INVP as she was prevented from working due to a depressive illness. In 2016, she visited a Department Intreo office in Limerick, where she spoke with a Department work (**Officer**) and applied for and was granted a training grant with a view to returning to work. The Appellant claimed that she was advised at this meeting that she could continue to claim INVP if she returned to work. The Appellant was a walk-in visitor, meaning she had not booked an appointment in advance of attending the Intreo office. The Appellant claimed that she subsequently called the same Officer to tell him that she received a job offer, and that she was again advised by him that she could continue to claim INVP when she returned to work, though she would pay a higher level of tax. The Appellant commenced work as a carer in June 2016.

In October 2016, the Appellant completed a medical questionnaire relating to her continued entitlement to INVP. On the questionnaire, she declared to the Department that she was in employment. The Appellant continued to receive INVP from the Department, and she was again deemed to still be eligible for INVP following a Department review in 2017.

During her period of employment, the Appellant continued to declare her INVP income to Revenue and made seven treatment benefit claims (which she was entitled to as a result of her employment).

In February 2021, the Appellant ceased working due to a relapse. She was informed by a friend that she could be entitled to partial capacity benefit (**PCB**) if she returned to work. The Appellant applied for and was awarded partial capacity benefit at 50% (though she never claimed this as she did not return to work. It was around this time that she became aware of her mistake as to her entitlement to INVP. On 11 March 2021, the DO issued a decision that the Appellant had not been entitled to INVP during her period of employment with effect from 30 June 2016, and as such she had received an overpayment of INVP of €55,829.70.

The Appellant appealed this decision to the AO. While she accepted that she had not in fact been entitled to INVP during the period of employment, she argued the DO had not taken the circumstances of her case into account when deciding the decision effective date (as required by s.302(b)), in particular her *"innocent mistake and the Department's failure to notice it notwithstanding the information she provided it"*. The appeal failed and the AO upheld the decision of the DO (**Revised Decision**).

The Appellant originally sought to appeal the AO's decision to the Chief Appeals officer under s.318 on the basis that the AO had erred in law or in fact in deciding that the Officer would not have provided the advice claimed by the Appellant, in the absence of an oral hearing or any evidence from that Officer.

On 29 June 2022, in light of the Appellant's submissions and request for an oral hearing, the Chief Appeals Officer considered that a review of the AO's decision should in the first instance be conducted by an appeal officer (**Second AO**) under s.317. It would then be open to the Appellant to appeal such a decision to the Chief Appeals Officer under s.318 if she wanted to.

The key question for the Second AO to consider was whether the Revised Decision should be upheld, and the correct effective date of that decision.

Key Conclusions

The Second AO partially allowed the appeal but partially upheld the Revised Decision. The Second AO confirmed that based on all the evidence and governing law, 30 June 2016 (i.e. the date the Appellant returned to work) was the correct effective date for the purposes of calculating the overpayment, and that the Appellant had been aware that she was in receipt of INVP from that date.

However, the Second AO found that while the Appellant was not entitled to INVP during her period of employment, she would likely have been entitled to PCB at a rate of 50%. Therefore, the Second AO deducted that amount from the overall overpayment sum due.

Relevant Legislation

Article 246(1) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (Statutory Instrument 142 of 2007) (s.246(1)): an overpayment may be reduced or cancelled where the overpayment arose because of a failure by the Department to act within a reasonable period on information which was provided by or on behalf of the person concerned or an error by the Department and where the person concerned could not reasonably have been expected to be aware that an error had occurred.

Section 302(b) of the Social Welfare Consolidation Act 2005 (s.302(b)): "A revised decision given by a deciding officer shall take effect as follows:

where any benefit, assistance, child benefit, family income supplement or continued payment for qualified children will, by virtue of the revised decision be disallowed or reduced and the revised decision is given in the light of new evidence or new facts (relating to periods before and after the commencement of this Act) which have been brought to the notice of the deciding officer since the original decision or determination was given, **it shall take effect from the date that the deciding officer shall determine having regard to the new facts or new evidence and the circumstances of the case**…"

Section 317 of the Social Welfare Consolidation Act 2005 (s.318): "An appeals officer may, at any time revise any decision of an appeals officer, where it appears to the appeals officer that the decision was erroneous in the light of new evidence or of new facts brought to his or her notice since the date on which it was given, or where it appears to the appeals officer that there has been any relevant change of circumstances since the decision was given"

Section 318 of the Social Welfare Consolidation Act 2005 (s.318): "The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts".

Section 319(b) of the Social Welfare Consolidation Act 2005 (s.319(b)): "A revised decision given by an appeals officer shall take effect as follows:

where any benefit, assistance, child benefit, family income supplement or continued payment for qualified children will, by virtue of the revised decision, be disallowed or reduced and the revised decision is given in the light of new evidence or new facts (relating to periods before and after the commencement of this Act) which have been brought to the notice of the appeals officer since the original decision was given, **it shall take effect from the date the appeals officer shall determine having regard to the new facts or new evidence and the circumstances of the case**…"

Section 341 of the Social Welfare (Consolidation) Act 2005: all sums due to the Minister under the above Act shall be recoverable as a debt to the State.

Key Arguments

The appellant argued:

1. The AO's finding that the Officer would not have told *"a person that they were entitled to work and claim Invalidity Pension at the same time"* was not based on evidence, but rather on *"speculation and conjecture as to what an Intreo officer would or not do"*, particularly as the AO had made the decision without an oral hearing. New evidence that had not been available for the original decisions had now been obtained under the Freedom of Information Act 2014 and Article 15 GDPR. This new evidence rendered the original decision "erroneous" for the purposes of s.317, and included:

    1.1 Evidence of a review questionnaire dated 24 October 2016 where the Appellant confirmed that she was working as a Care Assistant from June 2016;

    1.2 Evidence of four claims for optical and dental benefit that would have highlighted to the Department that the Appellant was working;

    1.3 Evidence that the Appellant had declared her Invalidity Pension for tax purposes;

    1.4 Evidence that the Invalidity Pension desk reviewed the Appellant's medical eligibility for INVP on 27 September 2017;

    1.5 Evidence that the Appellant called to the Limerick Intreo office in April 2016 looking for a grant for a course.

2. The above evidence, and therefore the circumstances of the Appellant's situation, had not been taken into account by the AO in determining the effective date of the overpayment, and therefore the AO had failed to comply with the requirements of section 319(b) in determining the effective decision date.

3. The Appellant had innocently but mistakenly believed that she was entitled to INVP while in employment. The Department had been made aware on numerous occasions that she was both in employment and in receipt of INVP and had failed to act within a reasonable time to remedy that situation. The Department should have advised the Appellant that she was entitled to PCB while working. On that basis, the Appellant could not have reasonably been aware the INVP was being made in error. Therefore, the overpayment amount should be reduced.

4. The Appellant suffers from medical issues and is unable to work. She has no savings, and she and her spouse's joint income is below the poverty line for a two-person household. She worked as a frontline worker during the Covid-19 pandemic.

5. Based on all the above, the AO should now use their discretion under section 319(b) to have the Revised Decision take effect from 3 February 2021 when the misunderstanding came to the Appellant's attention. This would have the effect of reducing the overpayment sum to €0.

The respondent argued:

1. The Appellant's evidence that the Officer advised her that she was entitled to continue receiving INVP while working was inaccurate. As the Appellant was a walk-in appointment, she would not have been assigned a Case Officer and therefore the meeting would have been limited to discussing her application for funding for training.

2. The Officer did not receive any further correspondence from the Appellant after the initial meeting at the Limerick Intreo office. It is normal practice to record any meeting with a customer on the IT recording system, but there was no further note of any correspondence from the Appellant. In any event, the Appellant could not produce a record of having made that phone call, as she claimed to no longer have the phone from which she had made the call.

3. As an experienced official in the Department for many years, the Officer would not have advised the Appellant that she was entitled to continue receiving INVP while in employment, and would not have given any advice as to tax as this was outside his scope of expertise.

Decision

The Second AO considered all the evidence, including the new evidence. This evidence confirmed that the Appellant was not entitled to INVP for the period 30 June 2016 to 3 February 2021 as she was in employment during that time.

While the Second AO accepted that the Appellant innocently believed that she was entitled to work and receive INVP, there was no evidence that she had been misinformed by the Department. In the absence of any such evidence, the Second AO accepted the evidence and arguments of the Department and determined that the Officer had not informed the Appellant that she was entitled to continuing claiming INVP while working.

While the Second AO noted that the Department had been provided with information on various occasions that the Appellant was both working and receiving INVP and had failed to act upon that information, the Appellant had received the relevant rules of behaviour when she had been awarded INVP. Those rules advise recipients to immediately notify the Department if returning to work.

Having reviewed all the evidence, including the new and oral evidence, the Second AO was satisfied that the effective decision date of 30 June 2016 was correct for the purposes of section 319(b).

However, the Second AO did note that the Appellant was awarded 50% PCB in on 26 March 2021, though the Appellant did not avail of it as she did not subsequently return to work. The Second AO found it was reasonable to assume that the Appellant's medical condition would have been similar in 2016 as when she applied for PCB in March 2021. Therefore, she would have been entitled to PCB at 50% during the period of her employment. In light of the Department being informed of her employment and not informing her of the PCB scheme during her employment, the Second AO decided that the amount of PCB the Appellant would have been entitled to during the employment period should be deducted from the overall sum of overpayment due to be paid by the Appellant for the period of 30 June 2016 to 3 February 2021, thereby reducing the overpayment amount due.

Analysis

The decision appears to give deciding officers and appeals officers a wide discretion under s.302(b) and s.319(b) respectively to decide the effective date of a decision. Even taking all the new evidence into account, including accepting that the Appellant had been innocently mistaken as to her entitlement to INVP and that the Department had been made aware on numerous occasions that she was both in employment and receiving INVP, the Second AO still upheld the effective date of the AO as the date the Appellant commenced employment. This suggests that in the absence of extraordinary circumstances, the effective date of such a decision will most likely be set at the date the appellant ceased to be entitled to the relevant benefit.

The Second AO in this decision took a strict and narrow interpretation of the power under s.246(1) to reduce or cancel an overpayment where the Department has failed to act within a reasonable period. It suggests that (i) because the Appellant was aware that she was receiving INVP while in employment, (ii) the evidence indicated that the Department had not misinformed her as to her entitlement, and (iii) she had been provided with the relevant rules of behaviour when she had been awarded INVP – it could not be said that the Appellant was a person who *"could not reasonably have been expected to be aware that an error had occurred".* This was in spite of the Department having carried out reviews of the Appellant's entitlement to INVP and its failure to act on the mistake for a period of almost five years. This reinforces that the failure of the Department to act within a reasonable time period is not sufficient to obtain a reduction or cancellation of overpayment – it is essential that the Appellant could not reasonably have been expected to be aware of the error.

The Second AO's decision to accept the evidence of the Officer over that of the Appellant shows the importance of having clear evidence to support a claim that the Department has provided you with incorrect advice.

The decision of the Chief Appeals Officer to have the decision reviewed by an appeals officer under s.317 in the first instance suggests that where an appeal is sought on the basis of new evidence, the correct course is for the appeal to first be reviewed under s.317 rather than s.318. If the appellant is dissatisfied with the outcome of the s.317 appeal, they can then seek an appeal to the Chief Appeals Officer under s.318, if they believe the second appeals officer made an error in fact or law in reviewing the original appeals officer's decision.

However, the fact that new evidence is now available that was not available for the original decision does not in and of itself mean that *"the circumstances of the case were not taken into account"* for the purposes of s.302(b) / s.319(b), and does not itself mean that the original decision was erroneous for the purposes of s.317.

An interesting element of this decision is that the Second AO deducted the 50% PCB that the Appellant would likely have been entitled to during her employment period, from the overall overpayment sum. This was the case even though the Appellant had never actually applied for or been awarded PCB for that particular period. This decision may have been influenced by the fact that the Department had failed to inform the Appellant of her possible entitlement to PCB at the time.

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