

Supplementary benefit - backdating of claim
- good advice for late claim ✓

RAS/BC

Commissioner's File: CSB/1111/1985

C A O File: AO 3248/85

Region: North Eastern

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: J Rudham (Mrs) on behalf of Julie Rudham

Social Security Appeal Tribunal: Cleveland

Case No: 020/15

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 23 April 1985 is erroneous in point of law and I set it aside. As I am satisfied that it is expedient to do so I give the decision that the tribunal should have given. My decision is that the claimant is entitled to a supplementary allowance from 7 June 1978.

2. The claimant now aged 24 has been mentally and physically handicapped since childhood. She has been in receipt of a non-contributory invalidity pension since 7 June 1978 and attendance allowance since 12 June 1978. On 2 January 1985 the claimant's mother was appointed by the Secretary of State to exercise on her behalf any rights which she might have under the Supplementary Benefits Act 1976. A claim for a supplementary allowance was made on 17 December 1984. - It appears that subsequently the claimant's mother asked that entitlement should be backdated to the date of the claimant's 16th birthday, 7 June 1978. It then seems that an adjudication officer made two decisions. The first awarded benefit from 20 December 1984. The second awarded benefit as from 27 November 1980. It may just be that that was all one decision. But nothing turns on that. No decision was made, at least in terms, in respect of the period from 7 June 1978. On 11 February 1985 the claimant's mother wrote asking for what she referred to as a review of the decision in respect of the earlier period. An adjudication officer then made a further decision, not expressed to be by way of review, refusing benefit for the earlier period. The claimant appealed against that decision. The tribunal disallowed the appeal. This present appeal is with leave of a Commissioner. The claimant's request for an oral hearing was granted. At the hearing the claimant was represented by Mr R Parker of the Cleveland Welfare Rights Service. The adjudication officer was represented by Mrs G Huka of the Solicitor's Office of the Department of Health and Social Security.

3. The matter before the tribunal was the decision not to pay a supplementary allowance for the period from 7 June 1978. The tribunal, for reasons which at this stage are not material, applied a provision to the situation that was in my view not in point. That provision was regulation 87(1) of the Social Security (Adjudication) Regulations 1984 which provides so far as relevant that a determination in respect of a supplementary benefit matter may not be revised on review so as to make benefit payable for a period falling

more than 52 weeks before the date on which the review was requested. That was misconceived. It was a decision refusing benefit for the earlier period that was in question: see paragraph 19 of R(SB) 9/1984. And Regulation 87(1) had no application to that situation. The adjudication officer now concerned with the case had submitted that the tribunal were right to apply regulation 87(1), notwithstanding that that was not what the adjudication officer then concerned had submitted to them. However at the hearing before me Mrs Huka abandoned the adjudication officer's written submission on the point and conceded that the tribunal were wrong in law to deal with the case by reference to regulation 87(1). Given the circumstances as referred to above, it is quite clear and R(SB) 9/84 makes it clear that Mrs Huka's approach was the correct one. There is of course no restriction on the period in respect of which an award of supplementary benefit can be given retrospective effect. What the tribunal should have considered was whether there were exceptional circumstances which would justify the determining authority in treating the claim in respect of the period from 7 June 1978 as having been made on an earlier date.

4. It was, as emerged at the hearing, not in issue before me that the tribunal's decision was wrong in law for the reasons mentioned. Nor was there any dispute as to the material facts as referred to in paragraph 2. What was in issue was the meaning of "exceptional circumstances" in relation to those facts. The point arises in this way. Regulation 5(2) of the Supplementary Benefit (Claims and Payments) Regulations 1980 provides in effect that a claim may be backdated where the claimant proves that throughout the period in question there was good cause for failure to make the claim before the day on which it was made. Those Regulations came into operation on 24 November 1980. And it was because the adjudication officer then concerned took the view that the claimant had shown the requisite good cause that he decided that benefit was payable as from 27 November 1980. The 1980 Regulations repealed the Supplementary Benefits (Claims and Payments) Regulations 1977. Regulation 5 of those Regulations was similar in its purpose to regulation 5 of the 1980 Regulations but instead of the requirement to prove "good cause" there was a requirement that the determining authority should be satisfied that there were "exceptional circumstances". Now the effect of regulation 3 of the Supplementary Benefit (Transitional) Regulations 1980, so far as relevant, is that in respect of the period in issue in this case it is the exceptional circumstances provision of the repealed Regulations that applies. And it was because the adjudication officer then concerned took the view that "exceptional circumstances" was a sterner test to pass than "good cause" that he refused benefit for that period.

5. It was held by a Tribunal of Commissioners in R(SB) 9/84 that the test of "exceptional circumstances" in the 1977 Regulations was not the same as the test of "good cause" in the 1980 Regulations and of course I am bound by that. R(SB) 56/83 involved facts which were almost identical to those before me. The claimant was severely mentally handicapped. A representative had been appointed by the Secretary of State. A claim had been made for benefit about 2½ years after the claimant had become eligible. The Commissioner said, at paragraph 18 -

".....The establishing of good cause suffices to carry the claim back to 24 November 1980. Prior to that date the relevant provision was regulation 5 of the Supplementary Benefits (Claims and Payments) Regulations 1977;

'5(1) Subject to paragraph (2), a claim to a pension or allowance shall be made not later than the beginning of the first period for which it is payable.

(2) Where they are satisfied that there are exceptional circumstances justifying it in any particular case or class of cases, the determining authority may treat a claim as having been made on such earlier date as they may determine.'

It will be noted that -

- (a) the key phrase is 'exceptional circumstances'; and
- (b) the determining authority had a discretion.

I have no hesitation in holding that the matters which I have found constitute 'good cause' satisfy the criterion of 'exceptional circumstances'. So far as discretion is concerned, Mr Quereshi submitted to me that I ought not to exercise it in the claimant's favour unless I found that failure so to do would cause hardship. I am not satisfied that that is correct. The discretion as set out in the regulation, is wholly unfettered. Be that as it may I consider that it would import hardship were I to deprive a severely mentally handicapped youth of benefit which he would have received had it been claimed on his behalf. I exercise my discretion in his favour."

It was contended before me that that conflicted with R(SB) 9/84. That as is made clear in the latter case is not so. The Commissioner was satisfied that the facts satisfied both tests, not that the tests were the same.

6. In the present case the facts adequately appear from the papers and are not in dispute. It is accordingly expedient that I should give the decision which the tribunal should have given. Like the Commissioner in R(SB) 56/83 I have no hesitation in deciding that the facts satisfy both tests and I exercise my discretion under regulation 5 of the 1977 Regulations in favour of the claimant. The claimant's appeal succeeds. My decision is as set out in paragraph 1.

(Signed) R A Sanders
Commissioner

Date: 20 October 1986