

JGM/GJB

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON
A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

*diet addn -
definition of special diet
Should travel costs
be included?
CSB 1148/82*

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 20 September 1982 allowing the claimant's appeal against the decision of the benefit officer that the claimant was not at the time entitled to a supplementary allowance was erroneous in point of law, and the matter must be reconsidered by a fresh tribunal.
2. The claimant in or about the month of July 1982 made a claim for a supplementary allowance and a claim for single payments for a variety of items. The benefit officer decided that a supplementary allowance was not payable and that being so it followed that no single payments could be made (see regulation 4 of the Supplementary Benefit (Single Payments) Regulations 1981). The claimant appealed against both decisions, and her appeal on the question of an allowance was allowed. The appeal on the single payments question was adjourned. The benefit officer now appeals against the decision on the allowance.
3. The original claim for an allowance was rejected on the ground that the claimant's resources exceeded (albeit by not very much) her requirements. They would not have done so if she had been entitled to the so-called long-term rate. The circumstances in which the long-term rate is payable are various, the most common cases being those of persons who have been in receipt of a supplementary allowance without having to register for employment for 12 months and persons of pensionable age. The claimant according to the form LT206 was at the relevant time aged 49, but she is not required to register for employment (indeed she is in receipt of invalidity benefit) and if only she could qualify for a supplementary allowance she would in 12 months qualify for the long-term rate. Her problems is that of breaking into the charmed circle out of the "invalidity trap". The regulations have been amended with effect from 21 November 1983 by regulation 2 of the Supplementary Benefit (Requirements, Resources, and Single Payments) Regulations 1983, and it may be that (whatever is decided in relation to the claimant's additional requirements for a special diet) a supplementary allowance can be awarded by the tribunal to whom the matter is referred back from that date.

26

4. The claimant's notice of appeal to the tribunal made the point that she has been in receipt of invalidity benefit for many years and that it was not right to assess her requirements like those of a person who is able to work most of the time. In other words she was saying that she ought to get the long-term rate. The tribunal however did not expressly deal with the question of the long term rate, which was not in terms before them. The allowed the claimant's appeal by concluding that the claimant was entitled to an additional requirement for diet in terms of paragraph 13 of Schedule 3 to the Supplementary Benefit (Requirements) Regulations 1980 as amended.

5. Paragraph 13 of Schedule 3 contains five sub-paragraphs (a), (b) (c), (d) and (e) providing for different rates of additional requirements for diet. Of these paragraph (a) provided at the time in question for an additional requirement of £3.05 per week for persons suffering from certain illnesses that the claimant does not suffer from, while paragraph (b) provided for a more general dietary additional requirement of £1.30 per week, which was in fact included in the claimant's requirements. Paragraphs (c) and (d) are not relevant to this appeal while paragraph (e) relates to a person who needs a special diet because he or she;-

"suffer from a condition, other than one specified in sub-paragraph (a), for which he or she has to follow a diet which involves extra cost, substantially in excess of the amount specified in sub-paragraph (a)"

The additional requirement allowed in such a case is

"the weekly extra cost of the diet except in so far as it consists of proprietary foods or substances available under the National Health Service Act 1977"

6. The tribunal, who had evidence that the claimant suffered from a number of conditions, found that she had arthritis and was underweight that she had been prescribed a high protein diet and that she bought 3 whole wheat loaves per week, drank one pint of milk per day and ate fruit, cheese and lean meat. They found the extra cost of the diet for each week to be: £1.02½, the cost of 5 pints of milk per week, £0.90 per week the cost of 3 loaves of wholewheat bread and £1.08 per week for fares to purchase this bread. These they added up wrongly to £3.10½, whereas the correct figure was £3.00½. This total was before the claimant bought the fruit cheese and lean meat and they concluded that with these the extra cost must be £5.00 per week, which was substantially in excess of £3.05 per week, In consequence they awarded an additional requirement for diet of £5 instead of the £1.30 that had been allowed under sub-paragraph (b). With this addition she qualified under their decision for a small supplementary allowance and would at the end of twelve months have qualified for the long-term rate if the allowance continued for that time. It also opened the door to the possibility of single payments.

7. The benefit officer has appealed against this decision contending that it is erroneous in point of law inasmuch as (1) there was no evidence on which they could reach the conclusion, and (2) that the provisions of sub-paragraph (e) were wrongly applied. He was represented at the oral

27

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hearing before me by Mr D James of the Solicitors' Office or the Department of Health and Social Security. The claimant did not attend.

8. As to the matter of lack of evidence the claimant submits that relevant matters are the subject of common knowledge and need not be demonstrated by evidence, as for instance that stoneground flour contains all the husks with nutritious value that white bread lacks. I do not doubt that it is commonly known what foods according to current expert opinion are of higher food value. But what the tribunal had to determine was whether the claimant was a person who needed a special diet because she was suffering from a condition for which she had to follow a diet which involved extra cost etc. It was not enough that the claimant was in fact eating what are reputedly more wholesome foods than those that other people might choose. Diet is a common English word though it has a number of dictionary meanings. The Shorter Oxford Dictionary defines it among other things as "a prescribed course of food restricted in kind or quantity". While this is the shade of meaning that the word has in the present context, I consider that a diet (or at all events a special diet) need not necessarily be restricted in kind or quantity but may demand a particular kind or kinds of food. Dorland's Medical Dictionary contains the following definition

"The customary allowance of food and drink taken by any person from day to day, particularly one especially planned to meet specific requirements of the individual, and including or excluding certain items of food"

The latter part of this definition from the word "particularly" is in my judgment apt to define the words "special diet" in the context of the regulation under consideration. A diet is at least planned if not prescribed and should not be identified with the common habit of selecting foods which are reputedly healthy and rejecting those which are not. A person who eats brown bread because he has been told that it is better for him than white cannot be said for that reason alone to be on a diet. Still less is he or she suffering from a condition for which he is required to follow a diet.

9. In the present case the only finding about a diet made by the tribunal was that the claimant had been prescribed a high-protein diet. There was no expert evidence of what a high protein diet consisted of or could consist of. And although most people have an idea what foodstuffs contain significant protein and what do not, I do not consider that it is common knowledge what has to be eaten as part of a high protein diet. In particular I am not aware that wholewheat bread or fruit are elements in a high protein diet. And there does not on the evidence before the tribunal seem to have been any evidence that these or other items constituted any part of the high protein diet which the claimant was required to follow on account of the conditions of arthritis or underweight, though the claimant gave evidence that she had to have them. If the claimant suffered from other relevant conditions, there was no finding about them. I have read in letters written since the tribunal hearing more detailed lists of what the claimant eats. But I cannot look at those in order to justify the course taken by the tribunal who had not the particulars before them. They can of course be put before the fresh tribunal. The claimant would be well advised to furnish evidence of what a high-protein diet contains that a normal diet does not, and what items of normal diet will be omitted by one on a high protein diet. The same should be done in relation to any other special diet that the claimant contends she is required by any condition to follow.

28

10. The importance of these matters will be seen when one comes on to consider the effect of the diet on the assessment of additional requirements under sub-paragraph (e). For that sub-paragraph to apply it has to be shown that the extra cost of the diet substantially exceeds the figure under sub-paragraph (a), which at the time of the decision was £3.05. The extra cost means the excess over normal. Regulation 4 of the regulation lists the categories of normal expenditure that go to comprise a claimant's normal requirements. These include in particular food and normal travel. The extra cost of a diet is the cost over and above this normal. Thus if it be right that a pint of milk per day is part of a high-protein diet whereas 2 pints per week is a person's normal requirement of milk the tribunal rightly included 5 pints of milk as the extra cost of the diet. When it came to the bread however, then even if wholewheat bread was part of the diet it would seem that consideration should have been given to the deduction of something for normal bread. I do not consider that the cost of travelling to the town centre to purchase the wholewheat bread was properly treated as a cost of the diet at all. Such journeys are undertaken for multiple purposes and the journeys for the sole purpose of buying bread would seem unnecessarily frequent. In any event the extra cost would entail some deduction for normal travel. Similar considerations apply to the questions of fruit, cheese and lean meat, and what ought to be deducted in arriving at the extra cost. The figures determined by the tribunal on this aspect of the case seem to me to have been pure speculation, and even if they represent an informed calculation they are not expressed in terms that indicate that proper weight was given to the words "extra cost", and the grounds of the decision could not be regarded as adequately expressed. For this reason I am bound to set the decision aside.

11. If the fresh tribunal on whatever evidence is before them come to the conclusion that the extra cost of some diet or diets does substantially exceed the figure under paragraph (a) the amount of the award is not just the amount of the excess. It is the whole cost of the diet. The word "extra" included in square brackets in the citation at the end of paragraph 5 appeared in the regulations as originally enacted but was struck out by amendment, so that it is not possible to identify the word "cost" which appears in that citation with the "extra cost" in the earlier citation in that paragraph. (See the Decision on Commissioner's file CSB 517/82 (not reported) at paragraph 13(3)). It will be for the tribunal to decide (if it comes to that) what precisely is the cost of a diet. I cannot think that it would be right to include the cost of every item of food that contains a morsel of protein as part of the cost of a high-protein diet. It would just be the cost of those items which are in a high-protein diet but are not in a normal diet, but without the need to deduct the cost of what is left out of a high protein diet but is included in a normal diet. With this limited guidance I must leave the matter to a fresh tribunal. The benefit officer's appeal succeeds.

(Signed) J G Monroe
Commissioner

Date: 19 September 1983

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Region: North Eastern