

C.P.A.G.

RAS/1/LM

Commissioner's File: CSB/1153/89

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. In my interim decision in this case I set aside the decision of the social security appeal tribunal dated 10 April 1989. That decision was erroneous in law because the findings and reasons were insufficient. However, my final decision which I now give is to the same effect as that of the tribunal namely that the claimant's contention that he was entitled to the long-term rate of supplementary benefit before 17 February 1986 does not succeed.

2. In my interim decision I decided that regulation 72(1) of the Social Security (Adjudication) Regulations 1987 (as in force at the material time) could assist a claimant notwithstanding that the events in question had happened before that provision commenced. The issue with which I am now concerned is whether on the facts this claimant is assisted by regulation 72(1)(a) and, if he is, whether regulation 72(2) applies. The point of course is that if regulation 72(1)(a) applied and 72(2) did not, it would be possible for the claimant to have the long-term rate of benefit from a date before 17 February 1986 when, having attained 60, he became entitled to that higher rate of benefit by virtue of regulation 6(p) of the Social Security (Conditions of Entitlement) Regulations 1981.

3. Regulation 72, as amended from 1 September 1987 so as to add paragraph 2, provides as follows -

"72.-(1) Subject to paragraph (2), nothing in this section shall operate so as to limit the amount of benefit or additional benefit that may be awarded on a review of a decision if the adjudicating authority making the review is satisfied either -

(a) that the decision under review was erroneous by reason only of a mistake made, or something

done or omitted to be done by an officer of the Department of Social Security or of the Department of Employment acting as such, or by an adjudicating authority or the clerk or other officer or such an authority, and that the claimant and anyone acting for him neither caused nor materially contributed to that mistake, act or omission; or

(b) not relevant.

(2) This regulation shall not apply to a review of a decision by an adjudication officer or, on a reference by an adjudication officer, by an appeal tribunal, where the ground for review is that the decision was erroneous in point of law by virtue of a determination by a Commissioner, the High Court, the Court of Appeal, the Court of Session, the House of Lords or the Court of Justice of the European Communities given subsequent to the decision."

It will immediately be seen that for paragraph (1)(a) to apply the decision under review must be shown to be erroneous by reason of a mistake etc. The claimant in this case first became entitled to supplementary benefit in 1974 when he was 48 years old. There must then have been a decision awarding benefit but any record of it has long since been destroyed. I must assume that when the award was made the condition of availability for work was imposed by the Supplementary Benefits Commission because otherwise the claimant would have been entitled to and no doubt would all along have been in receipt of the long-term rate of benefit. But he did not go onto the long-term rate until he turned 60 in accordance with regulation 6(p) of the Conditions of Entitlement Regulations. In June 1988 the claimant asked that his entitlement to the long-term rate should be backdated to his 50th birthday. He said -

"By reason of physical or mental disablement I have no further prospect of employment.

Please note the local employment situation. Also, that neither medical certificates or registration with the disablement resettlement officer is essential, see CSSB/94/85, CSSB/232/85.

The above two reasons do not apply to my situation, but my "circumstances are analogous" to those above and hence I believe that it is unreasonable for the Department to require me to be available for employment.

I believe my age to be of importance in this context, see CSSB/189/85 which is to be reported as R(SB) 5/87. Please backdate. This has applied since my 50th birthday."

Now what the claimant appeared to be saying that was from his 50th birthday, on 16 February 1976, paragraph (u) of regulation 6 of the Conditions of Entitlement Regulations applied to him because the circumstances to which he referred were analogous to those in paragraph (e). Those two paragraphs which are among the twenty or so which, if they apply, give exemption from the availability condition provide -

"(e) by reason of physical or mental disablement he has no further prospect of employment and in the 12 months immediately preceding has -

- (i) on average worked less than 4 hours a week,
- (ii) been available for employment under section 5 for not less than 39 weeks,
- (iii) made reasonable efforts to find employment and not refused any suitable employment;

(u) the preceding paragraphs do not apply to him, but the circumstances are analogous to any circumstances mentioned in one or more of those paragraphs and in the opinion of the benefit officer it would be unreasonable to require him to be available for employment."

And in R(SB) 5/87, to which the claimant referred, it had been decided, contrary to what had previously been said to be the case, that

"... it cannot be asserted as a matter of principle that age can never under any circumstances be analogous to "physical or mental disablement" for the purposes of regulation 6(e), as age may affect the claimant's ability to perform work, as opposed to employment opportunities not being available to him by reason of his age."

Now it was not until the commencement of the Social Security Act 1980 that the supplementary benefit scheme was subject to the statutory provisions to which I have referred. Prior to then it was a largely discretionary scheme. So if the 1974 decision by which the claimant was first awarded benefit is the material decision for the purpose of regulation 72(1)(a) of the Adjudication Regulations it could hardly be said that that decision was erroneous because of any failure in respect of the application of paragraphs (e) and (p) of regulation 6 of the Conditions of Entitlement Regulations or of R(SB) 5/87. Those provisions and principles simply did not apply. Regulation 72(1)(a) is, according to my interim decision, capable of assisting a claimant even though the events in question happened say in 1974. But one still has to be able to conclude that the 1974 decision awarding benefit was

erroneous by reason of a mistake etc. and, as it seems to me, there is absolutely nothing in this case to suggest that there was anything at all wrong or erroneous in relation to the 1974 decision. Mr Orr, without I think much conviction, suggested that that decision might have been wrong because it did not take account of the possibility that future events might show that the claimant had become entitled to the long-term rate. That is simply not a sustainable argument.

4. Since the original award in 1974 there has been at least one other decision affecting the claimant's benefit entitlement. That was the decision, apparently in February 1976, entitling the claimant to the long-term rate from 17 February 1986 when he turned 60. There does not seem to be any record of that decision or indeed of any other decision relevant to the claimant's benefit entitlement until the decision issued on 17 August 1988 which is the subject of this appeal.

5. Mr Orr's contention is to the effect that the claimant's circumstances were known to the Department because of information obtained by their visiting officers on different occasions and that either there was a decision which failed to take account of those circumstances or there should have been a decision which did take account of them. Now the relevant circumstances, apart from the claimant's age, appear to be no more than that the claimant has not worked since 1974 and that he developed high blood pressure in 1981. And it seems to me that those circumstances are a long way from establishing, even having regard to the claimant's age, that at any particular time before he turned 60, the claimant should have been on the long-term rate if the circumstances had been sufficiently taken into account. Those circumstances, considered now, do not, as it seems to me, go far enough to establish that any actual decision in respect of the claimant's benefit entitlement was erroneous in any respect.

6. Furthermore the claimant cannot succeed by saying that his benefit position ought to have been reviewed. In CSB/1331/89, paragraph 11, the Commissioner said -

"In my judgment, where regulation 72(1)(a) of the above cited Social Security (Adjudication) Regulations 1986 refers to a decision under review being "erroneous by reason only of a mistake made, or of something done or omitted to be done by an officer of the Department of Health and Social Security ..." etc., that refers only to clear mistakes of fact or law in relation to an actual issue in a given case at a time when the officer of the relevant Department etc. was actively required by his duties or take some administrative act. It certainly does not impose a general duty on the officers etc of the Department of their own accord constantly to keep all cases under review in order to see whether or not any particular exempting regulation might apply. The wording of regulation 72(1)(a) does not in my judgment bear that

construction and to hold otherwise would be to place an impossible burden upon officers of the Department etc."

I agree with that. Regulation 72(1)(a) does not impose a duty to watch out for events which might justify a review. For that provision to apply there must be a decision which is erroneous by virtue of a mistake etc. No such decision has been identified in this case. Regulation 72(1)(a) does not assist the claimant whose claim for backdating of the long-term rate for any period before 17 February 1986 must therefore fail. That being the case, I do not need to consider regulation 72(2).

(Signed) R A Sanders
Commissioner

Date: 20 April 1992