

AWEW/SH/2

Commissioner's File: CSB/1250/1989

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal ("the appeal tribunal") was not erroneous in law and that this appeal fails.

2. This is a claimant's appeal from the decision of the appeal tribunal dated 3 May 1989, affirming the decision of the adjudication officer, that the claimant was entitled to payment of the long-term scale rate of supplementary benefit from 16 February 1987 and not earlier.

3. The facts are not in dispute. The claimant is a married man born on 10 April 1929. He has not worked since March 1976 when he gave up his job as an insurance broker. Since then, he has been either in receipt of supplementary benefit or income support. From 18 February 1982 he was only required to sign on as being available for employment on a quarterly basis. In both 1983 and 1984 he was considered for the long-term scale rate of supplementary benefit but was not successful. The fact that he suffered from psoriasis and a bowel problem emerged in January 1988. On 18 February 1988 the claimant's request for a review of his supplementary allowance was received and this time the adjudication officer decided, on 23 March 1988, that the claimant's age was a major factor in his continuing unemployment and that in all the circumstances he had no realistic prospects of securing further employment and, indeed, had had none since 18 February 1982. The Adjudication Officer then proceeded to rule that, pursuant to the provisions of regulation 69 of the Social Security (Adjudication) Regulations 1986, the claimant was only entitled to arrears of benefit from 16 February 1987 on the footing that the appropriate cut-off date for payment of arrears was 52 weeks back from the date the application for review was received.

4. Aggrieved by the decision on backdating, the claimant appealed to the appeal tribunal. He challenged the adjudication officer's decision on the ground that further backdating of the award was justified by virtue of regulation 72 of the Social Security (Adjudication) Regulations 1986. Regulation 72, as in force at all times material to this case, provided that -

- " 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 of something done or omitted to be done by an officer of the Department of Health and Social Security (now the Department of Social Security) or of the Department of Employment acting as such, or by an adjudicating authority or the clerk or officer of 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) that where the grounds for review are that the decision was given in ignorance of or was based on a mistake as to the material fact, those grounds are established by evidence which was not before the adjudicating authority which gave the decision; that a claimant and anyone acting for him could not reasonably have produced that evidence to that authority at or before the time the decision was given, and that it has been produced as soon as reasonably practicable.
- (2) This regulation shall not apply to 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 Community given subsequent to the decision.".

5. The claimant's contention that regulation 72 applied to his case was based on two grounds, first, that it was an error of

adjudication that no review of the claimant's position was undertaken for some 20 months after he was placed on quarterly signing on 18 February 1982 and, secondly, that a mistake in adjudication had been made as the claimant did in fact fall within regulation 6(e) of the Supplementary Benefit (Conditions of Entitlement Regulations 1981) by analogy, when read with regulation 6(u) by reason of his age and the decision of a Tribunal of Commissioners in R(SB) 5/87.

6. The appeal tribunal in dismissing the appeal gave their reasons as follows:-

" 4. It was submitted on behalf of the appellant that arrears of the long term scale rate, for which it was common ground the appellant was entitled, should be paid for more than the 12 months for which they had been awarded because Regulation 72(1)(a) of the Adjudication Regulations applied in that there had been an error on the part of the department. The tribunal do not accept this submission. It is clear from the appeal papers that the question of the appellant's eligibility for long term scale rate was considered in 1983 and that it was not then granted but the tribunal find that this was a reasonable decision properly made at the time in the light of the facts then known to the department, those facts being both in relation to the appellant's personal circumstances ie. age, state of health etc and the state of the law. It was not until the decision of the Commissioners in 1987 that age could clearly be taken into account as being analogous to a physical disablement and it was not until 1988 that the appellant claimed exemption from the requirement to register for employment. At that time the matter was considered further and since further evidence as to the appellant's health had then come to light the decision was made to award long term scale rate. This does not however mean that the decision made in 1983 constituted an official error which would enable backdating of the award, it was simply that the circumstances had changed, both in relation to the appellant who was of course by then 5 years over, it was then known that he had bowel problems, and it was also then known that age could be taken into account. (Even if there had been an error in 1983 the tribunal feel that regulation 72(2) would still prevent any further payment of arrears by virtue of R(SB) 5/87).".

7. The adjudication officer now concerned with the case has submitted that the decision of the appeal tribunal was correct and that regulation 72 of the Adjudication Regulations cannot avail the claimant in this case. I accept that submission. It is for the claimant to bring his case within the terms of that regulation and I agree with the appeal tribunal that he has not succeeded in doing so.

8. I have an easier task than the task which faced the appeal tribunal which, as it was, gave a carefully reasoned decision, as it now happens that both points advanced by the claimant's

representative in his written submissions to the appeal tribunal are covered by authority. This enables me to deal with them shortly. As to the quarterly signing point, it is now well settled that there is no obligation on the Department of Social Security to review a claimant's claim, when the Department of Employment puts him on quarterly signing, in order to see whether he can claim exemption from availability for employment under regulation 6 of the 1981 Regulations and so qualify eventually for the long-term scale rate of benefit. This question was considered by a Commissioner in CSB/1331/1989. He said at paragraph 11 of his decision -

"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 (Social Security) ... , that refers only to clear mistakes of fact and law in relation to an actual issue in a given case at the time when the officer of the relevant Department was actively required by his duties under the social security legislation to arrive at a decision or take some administrative act. It certainly does not impose a general duty on the officers 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."

I concur in that statement of the position and it follows that in my view there is no substance in the claimant's first point.

9. As to the point that in the light of the decision of a Tribunal of Commissioners in R(SB) 5/87 that a claimant's age is capable of constituting an analogous circumstance within the meaning of regulation 6(u) of the 1981 Regulations, the decision of the adjudication officer back in 1983 regarding the claimant's eligibility to the long-term scale rate of benefit was wrong, apart from the obvious fact that the claimant was then some five years younger and in better health, it is sufficient to dispose of this submission by referring to the decision of a Tribunal of Commissioners in R(SB) 11/89, by which I am bound. In that case it was decided (*inter alia*) that regulation 72(2) means what it says and does not permit relaxation of the limitation of arrears where a decision is shown to be wrong by virtue of a subsequent decision of a Court or of a Commissioner.

10. In the result my decision is that this appeal fails and is dismissed and the decision of the appeal tribunal is affirmed.

(Signed) A.W.E Wheeler
Commissioner

(Date) 23 April 1992