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Commissioner's File: CSB/1356/1985

C A O File: AO 2048/SB/86

Region: London South

**SUPPLEMENTARY BENEFITS ACT 1976
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION
OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name: John Joseph Fahy
Social Security Appeal Tribunal: Brixton
Case No: 05/24/04

[ORAL HEARING]

Decision

1. This claimant's appeal succeeds. My decision is that the decision of the social security appeal tribunal dated 17 July 1985 is erroneous in point of law. I set it aside and refer the case to another social security appeal tribunal for determination in accordance with my directions.

Representation

2. I held an oral hearing of this appeal. The claimant, who attended, was represented by Mr M. Evans, Solicitor, of North Lambeth Law Centre. The adjudication officer was represented by Mr E. O. F. Stocker.

Nature of the appeal

3. This appeal by the claimant relates to a request by the claimant for an increase in his supplementary allowance in respect of a diet which had been recommended in order to lose weight.

The relevant statutory provisions

- 4. (1) In order to obtain this addition the claimant must satisfy one of the sub-paragraphs of paragraph 14 of Schedule 4 to the Social Security (Requirements) Regulations 1983, as amended.
- (2) The addition is not excluded on the ground that it is a medical requirement: see regulation 11(3). Regulation 13(2) provides that no more than one amount and, if there is a choice, the higher or highest amount, shall be applicable under paragraph 14 of Schedule 4 in respect of any one person.
- 5. Paragraph 14 is set out in the Appendix to this decision.

The adjudication officer's decision

6. By a decision issued on 26 September 1984 an adjudication officer decided "not to award a dietary addition". (There is also a reference to a heating addition in that decision, but that addition is not in point in this appeal).

7. The claimant appealed against this decision to a social security appeal tribunal.

The decision of the social security appeal tribunal

8. The tribunal had before them a letter from the claimant's doctor about the claimant which states:

"He suffers from arthritis in his hips and his back and I can confirm that I have advised him to lose weight and this will help to relieve some of the pain that he is experiencing"

They also had before them a letter dated 15 July 1984 from a dietician of the London Food Commission setting out the claimant's recommended diet and stating:

"I have now costed his diet as prescribed by the hospital dietician.....and am horrified at the cost of the diet.....I have calculated the weekly cost of [the claimant's] prescribed diet to be approximately £18.40 giving him about 1,100 kcal a day".

9. (1) The claimant was present at the oral hearing but no oral evidence appears to have been given. The chairman's "note of evidence" on Form AT3 is in these terms:

"claimant's representative produced a letter dated 15th July 1985 of Dietician (copy attached). Representative submits the diet to which claimant is subject is much more expensive than if he was not on diet. Presentation [sic] Officer states that schedule 4 para 14(b) does not apply because claimant is not suffering from a major illness, in that the diet is not a result of a major illness but results from a recommendation to lose weight. Presentation officer states the diet sheet (marked Doc 5A) and the various items mentioned therein have not been costed on the Dietitian's sheet. Further a number of items on sheet are all parts of a normal diet and only certain items which will produce extra costs. Presentation officer states that claimant is not on a special diet and that most of the items listed on the diet sheet are the normal requirements of the claimant and further there are [sic] no extra cost to the claimant in complying with the diet."

(2) The tribunal's recorded findings of fact were:

"(1) This is not a special diet in relation to any specific illness.

(2) This is a general diet to lose weight as recommended by the claimant's doctor"

Their recorded decision was:

"Appeal dismissed - claimant not entitled to an award of a dietary allowance"

Their recorded reasons for decision were:

"Schedule 4, paragraph 14(b) of the S B (Requirements) Regulations does not apply because claimant is not on a special diet".

Was the decision of the tribunal erroneous in law?

10. This is not in dispute. It clearly was. First, not one single primary fact has been

found. The record of the tribunal's decision does not comply with regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984 . Secondly, the reasons given for the decision are unsound and have no logical basis. It does not follow that a diet is not special because it is a weight reducing diet. Nor does it follow that it is not related to an illness simply because it will enable the person following it to reduce his or her weight. Where, as here (if the doctor's evidence is accepted), the purpose of reducing weight is to alleviate the pain from the claimant's arthritis (an illness) it would be a wholly perverse construction of the paragraph to say that the diet was not needed "because" of the illness.

11. I set the decision of the social security appeal tribunal aside. In the absence of adequate findings of fact, it is not possible for me to give the decision that the social security appeal tribunal should have given. The case must accordingly be referred to another social security appeal tribunal which should, in accordance with the usual practice, be entirely differently constituted.

Directions to the fresh tribunal

12. It is for the claimant to show, and the onus is on him, that

- (1) the claimant, as from the date of his request, "needs a special diet" in terms of paragraph 14 and
- (2) that the reason for that need is that the claimant falls within one or other of sub-paragraphs (a) to (e) of paragraph 14. At the previous hearing, the sole argument was on the question whether sub-paragraph (b) applied. But the fresh hearing will be a complete re-hearing at which it will be open to the claimant's representative to argue, if so advised, that other sub-paragraphs (e.g. sub-paragraph (a) or (e) applied).

13. "Special diet" in the context of paragraph 14 is clearly used in contrast to a "normal" diet: see paragraph 14 of Commissioner's decision on file CSB/560/1985 (a decision of my own). In this respect I am in agreement with paragraph 12(1) of Commissioner's decision on file CSB/517/82. Nor is it a "general" diet. Thus while a diet prescribed by a qualified doctor or dietician to meet the needs of a particular individual could, it was held in paragraph 7 of Commissioner's decision CSB/915/1985, properly to be held to be a special diet of the kind contemplated by paragraph 14 of the regulation, a diet put forward as suitable for persons or classes of persons generally (e.g. pregnant women) without reference to the needs of a particular individual, would not be a special diet.

14. In the present case, if the tribunal accept the doctor's evidence as quoted in paragraph 8 above and are satisfied that the hospital dietician who prescribed the diet referred to in that paragraph prescribed it to meet the claimant's needs in the light of the doctor's advice, the tribunal should conclude that the claimant is a "person who needs a special diet because" he suffers from arthritis. It is the claimant's arthritis which, on the doctor's evidence, causes the pain which weight reduction will alleviate. Hence the weight reduction is directly necessitated by the arthritis. There is a sufficiently close causal connection to meet the opening condition of paragraph 14. ||

15. It is then necessary for the tribunal to consider whether the claimant can bring himself within one of the sub-paragraphs of paragraph 14. There is nothing to suggest that sub-paragraphs (c) or (d) can apply. I consider the remaining sub-paragraphs in turn.

16. In order to bring him within sub-paragraph (a), the tribunal must be satisfied on evidence adduced before it that arthritis is an "illness for which [the claimant] requires a diet analogous to that required for the other illnesses specified in this sub-paragraph". The case papers already contain detailed evidence showing the diet recommended for the claimant by reason (assuming that the evidence already in the case papers is accepted) of arthritis. It remains to be shown, by evidence, that the diet for one of the other illnesses specified in sub-paragraph (a) is "analogous". Reasons should be given for the tribunal's

conclusion on this point. If they conclude that it is analogous, an award of the weekly sum specified in column 2 of Schedule 14 opposite that sub-paragraph can be made for the weeks in question at the rate then in force during those weeks. There is no requirement here that the special diet should involve any extra cost.

17. There can, in my judgment, be no overlap between sub-paragraph (a) and sub-paragraph (b). In other words, if the claimant establishes that he is suffering, in terms of sub-paragraph (a) "from some illness for which he requires a diet analogous to that required for the other illnesses specified in this sub-paragraph" the claimant will obtain the higher rate specified in column 2 of Schedule 4 opposite paragraph 14(a) and not the lower rate referred to opposite paragraph 14(b). For the purposes of sub-paragraph (b) an illness requiring an analogous diet in terms of sub-paragraph (a) is "specified" in that sub-paragraph and therefore cannot meet sub paragraph (b)'s requirement of "an illness not specified in sub-paragraph (a)". It cannot have been intended that the claimant should be entitled to one of two weekly rates, the lower of which entails satisfying the additional condition that it must involve, as sub-paragraph (b), but not sub-paragraph (a) stipulates, "extra cost"!

18. As already explained, in order to bring himself within sub-paragraph (b), it must be shown that the special diet involves "extra cost". In my judgment, this means cost in excess of the normal diet for a person of the claimant's age and other circumstances. In the absence of special features (e.g. that a claimant suffers from a psychological or other abnormal aversion to food which prevents him from eating normally) the cost of what a claimant has normally been eating prior to undertaking the special diet can properly be accepted by the tribunal as the sum with which the cost of the special diet should be compared. If the cost of the special diet is the greater, then the claimant will be entitled from week to week to the sum currently specified in column 2 of sub-paragraph (b) of paragraph 14. //

19. (1) The construction of sub-paragraph (e) is fraught with difficulty.

(2) First, in order to bring himself within this sub-paragraph, the claimant must establish that he "suffers from a condition other than that specified in sub-paragraph (a)". As to the meaning of this expression, see paragraph 15 of decision on file CSB/560/1985. In my judgment, for the reasons given in paragraph 18 above in relation to sub-paragraph (b), if the claimant's illness satisfies the conditions of sub-paragraph (a), it is an illness "specified" in that sub-paragraph. In other words, the claimant can only succeed under sub-paragraph (e) if he cannot succeed under sub-paragraph (a).

(3) Secondly, the cost must be "substantially" in excess of that referred to in sub-paragraph (a). What is a substantial excess is in my judgment a matter for the tribunal to decide in accordance with the ordinary use of English language and the exercise of their judgment. If, therefore the tribunal accepts the costing of the dietician for the recommended diet referred to in the existing evidence (some £18.40 a week in July 1985) and accepts evidence given to them that the claimant was at that date consuming a "normal" diet costing £x then, if the £18.40 a week exceeds £x by an amount found by the tribunal to be substantially in excess of the sum specified in sub-paragraph (a) as in force during the weeks in question, the claimant will have qualified for an award under sub-paragraph (e).

(4) Thirdly, the weekly amount of the award requires to be calculated. In this respect, the tribunal should refer to paragraph 13 of decision CSB/517/82 with which, after some hesitation, I express my agreement.

20. My decision is set out in paragraph 1. Before parting with this case, it is appropriate to draw the attention to the difficulties encountered by the Commissioner in its construction: see the present decision and decisions on files CSB/517/1982, CSB/285/1985, CSB/560/1985, CSB/777/1985, CSB/915/1985 and CSB/1205/1985. These decisions, not all of

which are reconcilable one with another, make a start on the construction of the regulation but are by no means exhaustive. The adjudication officer is asked to draw these remarks to the attention of the authorities concerned.

(Signed) V G H Hallett
Commissioner

Date: 16 September 1986

THE APPENDIX (see paragraph 5 of this decision)

Items and cases applicable (1)	Weekly amount (2)
.....	
Diet	
14. Person who needs a special diet because he-	
(a) suffers from diabetes; a peptic, including stomach and duodenal, ulcer; a condition of the throat which causes serious difficulty in swallowing; ulcerative colitis; a form of tuberculosis for which he is being treated with drugs; or from some illness for which he requires a diet analogous to that required for the other illnesses specified in this sub-paragraph;	(a) £3.35 (as from 22.11.83) £3.60 (as from 26.11.84) £3.70 (as from 25.11.85)
(b) is convalescing from a major illness or operation or suffering from an illness not specified in sub-paragraph (a), and the diet involves extra cost;	(b) £1.45 (as from 22.11.83) £1.55 (as from 26.11.84) £1.60 (as from 25.11.85)
(c) is a dependant and is living in the same accommodation as a person suffering from a form of respiratory tuberculosis for which he is being treated with drugs;	(c) £1.45 (as from 22.11.83) £1.55 (as from 26.11.84) £1.60 (as from 25.11.85)
(d) suffers from renal failure for which he is treated by dialysis; or	(d) £9.60 (as from 22.11.83) £10.35 (as from 26.11.84) £10.65 (as from 25.11.85)
(e) suffers from a condition other than one specified in sub-paragraph (a), for which he has to follow a diet which involves extra cost, substantially in excess of the amount specified in sub-paragraph (a) in column (2).	(e) the weekly cost of the diet except in so far as it consists of proprietary foods or substances available under the National Health Service Act 1977 or, in Scotland, the National Health Service (Scotland) Act 1978.