CPAG

JM/SH/2

Commissioner's File: CSB/030/1991

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 23 March 1990 which confirmed a decision issued by the adjudication officer on 1 December 1989. My decision is as follows:

(1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.

(2) Pursuant to section 101(5) of the Social Security Act 1975 (as amended) the case is referred to the appeal tribunal for determination in accordance with the principles of law set out and referred to in this decision.

2. Incredible as it may seem, this appeal concerns a benefit which was abolished very nearly four years ago. The claimant himself must bear some responsibility for the delay. Supplementary benefit had been off the statute book for more than a year when, through his representative, he sought a review of his erstwhile entitlement to that benefit. At the root of the case lies section 5(1) of the Supplementary Benefits Act 1976, which made the right of any person to a supplementary allowance subject to the condition that that person was available for employment. Provision was made for the exception of prescribed cases. Those prescribed cases were the subject of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. That was a long regulation. There were 23 paragraphs directed to the specific circumstances of those who were to be exempted from the requirement of availability for employment. And there was a 24th paragraph (which retained the designation (u) which it had been given in the Regulations as

they were originally enacted). That was the well-known "analogous" provision which gave rise to innumerable decisions by the Commissioner and to two decisions by a Tribunal of Commissioners. Regardless of which paragraph or paragraphs were invoked by a claimant, the circumstances calling for examination obtained, of necessity, prior to 11 April 1988. I have been astonished at the number of claimants who waited until after 11 April 1988 before applying for a review which involved such consideration. (In the case now before me the delay was no less than 13 months.) Such delay inevitably increased the difficulties facing the adjudicating authorities. In the case now before me the appeal tribunal (sitting on 23 March 1990) was called upon to consider circumstances which had ceased to obtain almost two years earlier. The social security system in this country was never tailored to absolve claimants from all responsibility for looking after their own interests. (Where they are incapable of so doing, of course, the system provides for an appointee.) Certain facets of the legislation are - and, no doubt, always will be - complex. But this claimant lives in the Merseyside area. From my experience as a Commissioner, I am aware that that area is well furnished with bodies which offer free advice in respect of social security issues.

3. In a submission dated 29 April 1991 the claimant's appeal is supported by the adjudication officer now concerned. In paragraph 4 of that submission he correctly - in my view - identifies an error of law into which the appeal tribunal fell. Moreover, I accede to his suggestion that the case should be referred to a fresh tribunal for rehearing. As appears below, I consider that there are aspects of this case which call for further factual investigation. That can most conveniently be done before the appeal tribunal in Liverpool. What I set out below is not intended to be a complete exposition of the relevant law. I seek merely to furnish guidance to the fresh tribunal in respect of certain aspects of the law. And for those purposes I need quote only three paragraphs of regulation 6 of the Conditions of Entitlement Regulations:

> " 6. A claimant shall not be required to be available for employment under section 5 in any week in which one or more of the following paragraphs apply and regulation 8 [which has no bearing upon this appeal] does not apply to him:-
>
> .....
>
> (c) he is a person -
>
> (i) to whom regulation 9(2)(b) applies or,
>
> (ii) who, by reason of some disease or bodily or mental disablement, is incapable of work, or
>
> (iii) who is engaged in work for the number of hours a week (being, in

the case of a person to whom regulation 9(1)(a)(i) applies, less than 35 hours or, in any other case, less than 30 hours) which, having regard to some such disease or disablement suffered by him, he is usually capable of working;

.....

(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 for 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 [now to be read as the adjudication officer] it would be unreasonable to require him to be available for employment."

4. The claimant was born on 14 April 1942. He appears to have worked as a labourer. He was laid off from employment in February 1970; and by the time that the appeal tribunal gave its decision he had never been in work since. There is medical evidence in the papers indicating that the claimant suffers from Scheuermann's disease (a degenerative condition of the spine). But the medical evidence in the papers suggests that that disease was not diagnosed until May 1983; and there is no medical evidence in the papers to suggest that the claimant was in any way disabled before 1983. What is certain is that he was fully fit at the time when he ceased employment and was awarded supplementary benefit.

5. In or about 1983 (the date does not appear from the papers) the claimant was awarded sickness benefit which passed to invalidity benefit. On 14 May 1984 he was examined by a medical officer of the Department of Health and Social Security. That medical officer reported:

"He is capable of light manual work without bending or lifting."

In consequence, the award of invalidity benefit was terminated and the claimant registered for employment. He appears to have remained capable of employment until 2 October 1989 - a date which is, of course, too late to be material in this appeal.

6. It appears that on 11 May 1989 the claimant's representative wrote to the local office of the Department requesting a review of the claimant's erstwhile assessment of entitlement to supplementary allowance. Somewhat surprisingly, no copy of that letter is in the papers which are before me. It seems clear, however, that what was in issue was entitlement to the long-term scale rate which, in turn, involved the requirement to be available for employment. As I have said, the relevant letter is not before me; but paragraph 3 of the Summary of Facts in the submission which the local adjudication officer made to the appeal tribunal indicates that it was upon paragraph (u) that the representative, at that stage, founded the claimant's case. By the decision issued on 1 December 1989 the local adjudication officer decided as follows:

> "The claimant is not entitled to the long-term rate of benefit."

The claimant appealed to the appeal tribunal. A copy of the letter of appeal, dated 14 December 1989, is in the papers. That letter is not clearly directed to any particular paragraph or paragraphs of regulation 6. It does, however, contend that any waiver of the requirement to be available for employment should be backdated to May 1984.

7. The claimant appeared and was represented before the appeal tribunal. It is clear from the entries on the relevant Form AT3 that the representative there founded upon paragraph (e) of regulation 6. The appeal tribunal confirmed the decision of the local adjudication officer. But its reasons, as recorded on Form AT3, were clearly erroneous in law:

> "Tribunal considered Conditions of Entitlement R 6 and decided prior to 11/4/88 appellant could not satisfy any of the subsections [sic] in particular 6(e) as appellant signed fit within limits by DMO 14/5/84 and no further reports as to health conditions prior to 1989."

8. As the adjudication officer now concerned points out, the reasons recorded by the tribunal would have been highly material if the claimant had been founding upon regulation 6(c)(ii) (see paragraph 3 above). But they were not apt in the context of regulation 6(e). The error is equivalent to the error which was considered in paragraph 8 of R(SB) 6/87, the decision of a Tribunal of Commissioners. The fresh tribunal will be assisted by referring to that paragraph. It will also take note of the opening of paragraph 9 of that decision:

> " 9. If the tribunal find that the claimant does not succeed by reference to paragraph (e) they should go on to consider

paragraph (u) relating to circumstances analogous to any of the circumstances mentioned in one or more of the preceding paragraphs. It seems to us to be unlikely that, if the claimant cannot succeed under (e), he will be able to succeed under (u). But the possibility cannot be ignored by the tribunal."

9. It is, of course, a matter for the fresh tribunal - but I am bound to say that if this case cannot be brought under (e), it is difficult to see how it can be brought under (u). The claimant had not attained his 46th birthday by the date when the supplementary benefit system was swept away. Any attempt, accordingly, to argue that his age rendered his circumstances analogous to the circumstances contemplated by paragraph (e) would seem doomed to failure.

10. The fresh tribunal will bear in mind that if paragraph (e) is to be satisfied, any lack of realistic prospects of employment must be "by reason of physical or mental disablement". I cannot myself regard that as an open and shut issue in this case. The claimant had had no employment since early in 1970. As I have indicated in paragraph 4 above, there is not in the papers any evidence of physical disablement prior to 1983. Between 1970 and 1983 there were many years when the state of the labour market was substantially healthier than it has been in the years since 1983. Yet in those 13 years the claimant did no work whatever. The fresh tribunal will obviously have to satisfy itself that the claimant's Scheuermann's disease had any material effect upon his prospects of employment from 1983 to 1988.

11. The claimant's representative is, of course, correct in stressing that the appeal tribunal is at liberty to review and revise to the extent of finding waived the requirement to be available for employment from a date which falls more than 12 months before the date upon which the review was requested. The restriction imposed by regulation 69(1) of the Social Security (Adjudication) Regulations 1986 is confined to such a revision on review as increases the amount of benefit payable. That restriction, accordingly, can only bite upon the process of translating the waiver of the aforesaid condition into benefit at the long-term scale rate. Such "biting" can be avoided only if the claimant can bring himself within the provisions of the erstwhile regulation 72 of the Adjudication Regulations. In the circumstances of this case, that would appear to be a very long shot. The fresh tribunal must refer to decision on Commissioner's file CSB/1331/1989 (to be reported as R(SB) 10/91), and, in particular, paragraphs 8 to 11 thereof. As I indicated in paragraph 2 above, it is, in essence, a claimant's responsibility to look after his own interests in the social security field.

12. The claimant's appeal is allowed.

(Signed) J. Mitchell
Commissioner

(Date) **4 March 1992**