T/AJ

CSB 349/1983

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

[ORAL HEARING]

1. This is a claimant's appeal against the decision dated 28 June 1982 of a supplementary benefit appeal tribunal ("the tribunal") which confirmed the decision dated 29 April 1982 of a benefit officer awarding the claimant a single payment of £16.00 towards her fuel costs. The present appeal is brought by leave of a Commissioner and upon the contention that the tribunal's decision has been given in error of law. As the benefit officer's written submissions on the present appeal included suggestions that the decision of a Tribunal of Commissioners reported as R(SB)26/83 embodied certain observations which did not correctly represent the law upon the point to which they were directed, the Chief Commissioner directed an oral hearing of the present appeal by a Tribunal of Commissioners.

2. (1) The oral hearing was held on 18 January 1984. The claimant did not attend and was not represented. The benefit officer was represented by Mr E O F Stocker of the Solicitor's Office, DHSS, to whom we are indebted for cogent and helpful submissions as to the proper construction and application of regulation 26 of the Supplementary Benefit (Single Payments) Regulations 1981 as in force at the date material to the present appeal ("the Regulations") - a subject matter which, we say at once, raises questions of considerable complexity.

(2) Shortly summarised, regulation 26 makes provision for the award of monies by way of "single payment", in prescribed circumstances and in prescribed amount, with which to meet the expense of fuel costs incurred to an extent in excess of that expected to be discharged out of weekly supplementary allowance as the normal requirement in respect of fuel costs.

(3) The claimant's case before the tribunal, which did not prevail, was that the £16.00 which she was awarded by the benefit officer's decision above cited did not fully reflect the amount due to her upon a proper application of regulation 26.

3. We would preface our decision by recording that by an amendment of regulation 26 operative from 15 August 1983 the most important of the several questions of construction and application of regulation 26 arising in the present case has been resolved in respect of cases falling for determination, as the present does not, in accordance with the regulation as so amended, the effect of the amendment appearing to us to be unequivocal. But the amendment has no retroactive effect, whilst our present decision also deals with questions in regard to regulation 26 other than that to which such amendment was directed.

4. The appeal succeeds. We set aside the tribunal's decision as given in error of law and direct that the claimant's appeal from the benefit officer's decision be re-heard by a differently constituted tribunal in accordance with our directions set out as an Appendix to this decision. The need for findings of fact additional to those made by the tribunal precludes us from giving ourselves the decision which the tribunal should have given.

5. (1) The basic facts in point are relatively simple and have not been in controversy. They are as follows:

(i) On 6.4.1982 the claimant made a claim for help with her fuel costs. She was at that date some 60 years of age and in receipt of supplementary allowance. She was living in a house of which she had become the owner in or about December 1981. It did not have central heating. It was equipped with a fireplace for heating by open coal fire, but though that installation had at some earlier date operated in conjunction with a back boiler by which hot water was supplied, she indicated (and it does not appear to have been in dispute) that all material times the back boiler was disconnected from the hot water supply system and the operative method of water heating was by an electric immersion heater installed in the hot water tank.

(ii) The claimant did not in the circumstances use the coal fire, and during the winter period of 1981/82 after she had moved into the house relied for room heating upon electric fires.

(iii) The 1981/82 winter was severe, and on that account a single payment in respect of abnormal fuel costs was awarded in many cases besides hers.

(iv) The quarterly electricity bill in respect of the claimant's winter quarter was rendered in the sum of £113.92.

(v) It can properly be inferred that such sum was substantially in excess of that for which the claimant had been prepared.

(vi) Between the date of receipt of such account and 14 May she paid off £25 of this bill, but the balance remained outstanding at that date. It is not clearly apparent from the case file whether or not she had made

that payment before the date of her claim, though there is some support for thinking she had not.

(vii) In response to an enquiry by the Department she had in April indicated that she had put aside £25 to meet the bill.

(viii) Although she was on 19.4.1982 sent the £16.00 awarded by the benefit officer, in the form of a giro cheque, she did not encash that, but returned it to the Department - because she considered the amount so awarded to be less than her proper entitlement.

(ix) The claimant did not attend the tribunal's hearing.

(x) The award of £16.00 was made on the basis of the claimant's fuel cost in respect of the heating of her home being the cost of coal, It represented the cost of 4 bags of coal, and the benefit officer has explained that such was a standard amount paid to all successful claimants under the same head whose main source of heating was a coal fire.

(2) The tribunal were told on behalf of the benefit officer that had the claimant's award been based upon fuel costs in respect of electricity the award would have been in a lesser sum than £16.00 because it would have been made on the basis of 15% of the outstanding balance (£88.92) on the winter quarter's electricity bill, in the absence of data for the corresponding quarter in the previous year due to the claimant not having then resided at the relevant premises.

6. Regulation 26 appears in Part VII of the Regulations, headed "Items to which the categories of Normal, Additional and Housing Requirements relate", itself introduced below the sub-heading "Fuel Costs", and is in the following terms:-

"26. - (1) A single payment shall be made in respect of a claimant's fuel costs where they are greater than the amount which he has put aside to pay for them because -

(a) a period of exceptionally severe weather has resulted in consumption greater than normal, having regard to any available information on previous levels of consumption; or

(b) he is unfamiliar with the cost of running the heating system in his home because he has recently moved to that home or the system has recently been installed.

(2) The amount payable in a case to which paragraph (1) applies shall be -

(a) in a case to which paragraph (1)(a) applies, the cost of the amount of the excess over normal consumption;

(b) in a case to which paragraph (1)(b) applies, on half of the aggregate amount of the claimant's costs in respect of the fuel during the first 6 months of his use of the heating system."

7. After recording that the claimant had appealed against the adequacy of the £16 awarded the tribunal's findings of fact are expressed as follows:-

"On 6.4.82 she had requested help with fuel costs. She does not have central heating the main source being coal fires, however, at the time she had made her request for help she was not using her coal fire, but was heating by means of electric fires. Her entitlement was based on the main source of heating being a coal fire and an allowance of £16 being the cost of 4 bags of coal had been made. If her entitlement had been based on her electricity bill as she was using electric fires in preference to coal she would have received £11.60 being 15% of the bill of £88.92 which had been submitted to the Department. There was no bill for the equivalent quarter of previous year provided".

Their stated reasons for decision were:-

"The tribunal are satisfied on the evidence presented that the appellant had received the maximum amount that could be paid to her in respect of fuel costs under Regulation 26 of the Single Payment Regulations. A further single payment was not therefore warranted".

[In the same "box" of the record they then go on to make a suggestion as to the claimant making payments direct to the "Fuel Board" by way of deductions from her weekly allowance, but it is not germane to the present appeal to set that passage out in full.]

8. (1) It was, very properly, conceded by Mr Stocker before us that the tribunal's decision was in error of law and must be set aside on several separate grounds. We can in the circumstances take those quite shortly:-

(i) First, the tribunal (who were plainly dealing with the case under the "first limb" of regulation 26, as to "exceptionally severe weather") have made no finding as to that - though recognition that this element of the qualifying conditions was satisfied might reasonably be implied from the tenor of their decision.

(ii) Secondly, the tribunal failed to find as a fact whether the claimant had set aside any or what sum to meet her fuel costs for the period in point.

(iii) Thirdly, the tribunal gave no consideration to the provisions of regulation 26(1)(b) or to any possible application to her circumstances of the provisions in regulation 30 of the Regulations.

(2) In the light of our present decision - though perhaps not as the tribunal saw the matter - it was additionally material to make a finding as to when the £25 payment was made.

9. It is convenient to record at this point that the claimant has upon her present appeal put in a considerable volume of written material (much of it in manuscript difficult to decipher); but that after careful analysis we have concluded the content of this to be in the main wholly irrelevant to the present appeal and, for the rest, to add nothing to the simple contention that she has not been paid the full amount which should have been awarded to her upon a proper evaluation of her claim and a proper application to her circumstances of the provisions of regulation 26.

10. We have, on the grounds indicated in paragraph 8 above, no doubt that the tribunal's decision must be set aside. But whilst all questions of fact will again be at large before the tribunal re-hearing the appeal, we consider it requisite (in a due implementation of our obligation to give all necessary directions for the re-hearing) to express, in conjunction with a direction that they be heeded at the re-hearing, our views on the correct construction of regulation 26 as in force at the relevant time.

11. (1) The Tribunal decision R(SB)26/83 embodies two separate decisions, the first of which alone has any relevance to the present appeal. In reference to that the important question which occupied the time and attention of the Tribunal of Commissioners was as to what was the correct date at which to determine whether or not "need" was established for the purpose of the Single Payments Regulations; and it was held that the relevant date was the date of claim. But the immediate context in which that aspect of the case arose concerned, in fact, the refusal of a single payment in respect of a gas bill which that claimant had incurred, and as to which she had made a claim for a single payment. She had in fact paid it subsequently to the date of claim but prior to the matter coming before the tribunal whose decision was in issue.

(2) The tribunal's decision in that case was set aside on grounds of error of law with which we are not here concerned - but the Tribunal of Commissioners also sought to give the tribunal who would be concerned with its re-hearing some guidance with regard to the construction of regulation 26. The formulation of that guidance, coming as it did at the end of a decision on an important but different question, had not been the subject of any extensive argument at the hearing.

(3) Having heard full argument in the present case the two members of the present Tribunal who were parties also to decision R(SB)26/83 are satisfied that insofar as the views expressed in paragraphs 23 and 24 of R(SB)26/83 conflict with those herein expressed the latter are to be preferred, and the former are to be treated as expressed per incuriam. And the third Commissioner party to decision R(SB)26/83, who has read our present decision in draft, authorises us to record that he concurs in that treatment.

12. (1) It is convenient to mention at this point that it is not in dispute that regulation 26 of the Regulations has effect subject to the "overriding provision" in regulation 3(2)(a) of the Regulations that a single payment is to be made only where:

"There is a need for the item in question".

(2) Whilst, in view of the many different subject matters in reference to which a single payment may be awarded under the Regulations, the draftsman's choice for regulation 3(2)(a) of the word "item" as the generic term for the subject matters as to which need must subsist as a convenient compendious term, it tends to mask a very real necessity to evaluate in reference to each individual claim, and with a sufficient accuracy, what is the "item" as to which it is contended that a need subsists.

(3) In the simple case of, say, a pair of boots it may with equal felicity be said that the need subsists in respect of "a pair of boots" or in respect of "the wherewithal with which to purchase a pair of boots". But no one "needs" fuel costs - they are an unwelcomed fact of life. Any "need" in reference to "fuel costs" must in our view properly be formulated as a need for the wherewithal with which to pay them. And, so proceeding, "need" in reference to "fuel costs" can subsist only if and so far as at the claim date the fuel costs relied upon in support of the claim have not been met by payment.

(4) Accordingly we preface what we say later below in reference to regulation 26 by confirming our acceptance of Mr Stocker's submission to the effect last mentioned.

13. (1) It is readily apparent that, whatever else may be the qualifying requirements and "work out" of regulation 26, it is a primary qualifying condition for any successful claim that the claimant's fuel costs upon which the claim is founded are "greater than the amount with which he has put aside to pay for them". In the decision on Commissioner's File CSSB 117/82 (unreported) the learned Commissioner considered in this context the requirement of "putting aside" and, in terms with which we wholly agree and upon which we cannot usefully improve, indicated as follows:-

> "It would in my opinion be ludicrous to suggest that a claimant had to prove that he had placed money in an envelope marked "fuel costs" behind the clock in the kitchen in order to qualify under the regulations. On the other hand the need to establish, for the purposes of the operation of the regulation, a definite amount "put aside" precludes the application of any purely hypothetical or notional meaning. I consider that it is necessary to establish some form of earmarking or allocation of an amount for this purpose. This may take various forms. In cases where actual money cannot be shown to have been physically segregated for the purpose it should nevertheless be sufficient if it can be shown that in the allocation and application of a claimant's resources some amount had been genuinely allowed for under this head".

(2) Though expressed in reference to a different regulation, we accept and approve also the indication in the decision on Commissioner's file CSB 683/1982, cited and adopted in paragraph 7 of R(SB)36/83, that what constitutes "setting aside" is not to be viewed restrictively - though the concept of "mentally setting aside" there also mentioned may have limits of practical application which it is unnecessary for us to explore further in our own decision.

14. (1) We were initially attracted by the concept that the embodiment of this requirement in the regulation was directed to confining eligibility to the thrifty claimant who had indeed put monies aside to meet his fuel costs but who, in unexpected circumstances of the nature with which the succeeding provisions of regulation 26(1) go on to deal, found them insufficient to meet the bill when it was rendered; but to exclude the feckless who had made no provision whatsoever.

(2) However, in the light of the close analysis of the regulation developed before us by Mr Stocker we are satisfied that this is not the correct interpretation.

(3) The starting point for such conclusion is that the regulation does not postulate that a claimant must set aside any particular amount or any particular proportion of what turns out to be the eventual cost.

(4) Next, it is to be observed that it is inconsistent with an underlying recognition of the virtues of thrift that the most thrifty of claimants, namely the claimant who has put aside sufficient to meet the whole of what proves to be liability, should be precluded from a successful claim by the circumstance that there will then be no excess of liability over the amount that has been put aside, whilst at the opposite pole a claimant who has set aside a nominal 5p only would seemingly be eligible for the maximum measure of assistance which the regulation is capable of affording to him. Furthermore, as between a claimant who has put aside nothing and a claimant who has put aside a qualifying nominal 5p, whatever might be the marks to be awarded to the latter for acumen in "benefit planning" he has achieved no more than token superiority by the criterion of thrift.

(5) Lastly, and as Mr Stocker rightly stressed to us, a claimant who has put aside nothing towards his fuel costs can, when the bill for them is rendered, as truly be said to have fuel costs "greater than the amount which he has put aside to pay for them" as can a claimant who has put aside something, but less than the full amount to discharge the liability.

15. Thus the conclusion to which we are driven is that, properly construed, there is within the compass of regulation 26 itself (but we will next below deal with another possible approach) in fact no qualifying requirement that a claimant shall have put aside anything. The force of the words "put aside" is limited to shutting out a claimant who, although faced with an unsatisfied liability for fuel costs at the date of claim, has in fact set aside a sum sufficient to satisiy that liability.

16. We have next to consider whether the position might be that although the effect of regulation 26 considered in isolation was as we have last above indicated, regulation 3(2)(a) might so bear, in conjunction with regulation 26, that a need for the wherewithal to meet fuel costs should be held to exist only to the extent that the cost to be met exceeded the amount (if any) set aside. This approach appeared to us to carry at least the force

of commonsense. However, Mr Stocker has now satisfied us that it is one not justified upon a proper application of the established canons of construction. But to explain that conclusion it is necessary for us to start by contemplating on a broader approach the structuring of the present supplementary benefits code.

17. (1) The basic concept around which the present supplementary benefits code is framed is the provision of financial assistance in circumstances in which requirements exceed resources. The code does, however, embody important qualifications and exceptions to the otherwise logical concept that financial assistance cannot be provided under the code if a claimant has any resource by which the cost of meeting a particular need could be defrayed. For there are under the Supplementary Benefit (Resources) Regulations significant "disregards", and though there is a set "ceiling" of reckonable capital resources, possession of any excess over which will preclude qualification for any supplementary benefit, the possession of reckonable capital resources which do not in aggregate exceed the ceiling for the time being in force does not (with certain qualifications not material to our concerns) distinguish between the case of a claimant with significant resources, though within the prescribed "ceiling" amount, and the case of a claimant "without a penny to his name". So regarded, it becomes apparent that there is no "equity" to be spelt out of an application of regulation 3(2)(a) which in the context of regulation 26 will regard a claimant who has "set aside" a sum towards fuel costs but has no other savings as "needing" only the excess of the cost of the fuel over the amount set aside, but will regard a claimant who has "set aside" towards this liability for fuel costs little or nothing, but has within the prescribed ceiling (but without any such "earmarking") reckonable resources amply sufficient to discharge the entire liability, as nevertheless eligible to receive a maximum award in respect of the liability for fuel costs (or indeed the excess of such liability over any sum actually "earmarked" by setting aside).

(2) That there may be no such equity is not, of course, conclusive of regulation 3(2)(a) not so operating as to have that effect; but it is persuasive and cogent.

18. (1) In the light of what we have last indicated we are brought back to the heading of Part VIII of the Regulations, and the sub-heading to regulation 26 to which we have already referred, and to the use of the word "item" in regulation 3(2)(a) itself. So proceeding, it appears to us that a claimant who can demonstrate that he fully meets the specific qualifying requirements set out in regulation 26(1) (in particular in the respect of demonstrating an outstanding liability for fuel costs at the date of claim) has a "need for the item in question".

(2) We recognise that this conclusion is itself open to the criticism that, so proceeding, there will still be such "inequity" as that a claimant who has "set aside" sufficient, or more than sufficient, to meet the liability for fuel costs cannot successfully claim - in common with the claimant who has done likewise and has actually satisfied the liability for the date of claim - whereas a claimant who at the claim date has an outstanding liability in excess of that, if anything, which he has set aside can steer through at least this

opening requirement of regulation 26. But any element of anomaly so attributable cannot in our judgment deflect us from accepting Mr Stocker's submission that regulation 3(2)(a) cannot be brought in "on a bye wind" to displace the clear meaning of regulation 26 in accordance with its own tenor and the established canons of construction. Accordingly, as we see it, a claimant who can bring himself within the prescriptions in regulation 26(1) and has at the claim date an outstanding liability for fuel costs will succeed, regulation 3(2)(a) having no operation to preclude such result either alone or in any conjunction with regulation 26.

19. It is also the case, in our view, that there cannot be construed out of regulation 26 itself any limitation of award thereunder by reference to the excess only of the relevant fuel costs over the amount which the particular claimant has set aside to meet them. Once the claimant, being otherwise eligible for supplementary benefit, has steered through the initial gateways of regulation 26 (1), the amount of award prescribed by regulation 26(2) takes no account of the amount (if any) he has set aside to meet the relevant fuel costs. And though neither decision states the contrary in terms, any inference to the contrary which might be drawn from Decision R(SB)26/83 or the decision on Commissioner's File 117/1982 is, in our judgment, to be rejected as at variance with a correct interpretation of the law in point.

20. In the circumstance that regulation 26(1) by its sub-paragraphs (a) and (b) respectively postulates two separate sets of circumstances each capable - in practical contemplation - of giving rise to greater than expected fuel costs, and that paragraph (2) of regulation 26 then goes on to postulate a separate and different formula for quantifying the amount of award under those two qualifying heads respectively, the next question we have had to consider is whether in a given case a claimant can by a single claim qualify for 2 awards, one under each head, or whether they are mutually exclusive - and if the former, whether the awards are independent of each other, or whether some modification of the otherwise quantification is to operate if the claim is advanced under both heads and eligibility is established under both.

21. (1) We may conveniently here take as the starting point that it is in our view beyond dispute the case that a particular claimant can claim more than once in a lifetime by reference to regulation 26(1)(a), and, similarly, more than once in a lifetime by reference to regulation 26(1)(b).

(2) Next, there is in regulation 26 nothing which can in our judgment be taken to preclude a particular claimant from making two separate claims on the same date, one by reference to regulation 26(1)(a) and the second by reference to regulation 26(1)(b). In particular, the word "or" which appears between regulation 26(1)(a) and regulation 26(1)(b) cannot in our view (reached in the light of our clear conclusion above that successive successful claims under the separate heads can be made) be taken as making mutually exclusive in the individual case concurrent separate claims under regulation 26(1)(a) and regulation 26(1)(b) respectively.

(3) Proceeding thence, and in recognition of the established legal principle that (in the absence of compelling provision to the contrary) it is unnecessary to go through two stages in order to achieve what can be no less effectively achieved by one, we therefore

conclude also that there is no procedural or substantive objection to a claimant embracing within a single claim, appropriately framed, a claim under both regulation 26(1)(a) and regulation 26(1)(b); and in saying "appropriately framed" we have in mind no special formality, but merely what the claimant is upon a fair evaluation properly to be considered as claiming for.

22. (1) The point last made is of importance in the present case because, in our judgment, upon a fair evaluation the present claimant was in fact claiming award both by reference to a period of exceptionally severe weather and by reference to having recently moved home.

(2) We will next deal separately and successively with the operation of regulations 26(2)(a) and (b).

23. (1) As regards regulation 26(2)(a) we start with a claimant who has demonstrated a subsisting liability for fuel costs greater than the amount he has put aside to pay for them and demonstrated also (as to which a finding of fact by the adjudicating authority is required) that a period of exceptionally severe weather has resulted in consumption greater than normal. (We pause briefly to indicate here that whilst at first sight the latter could not be achieved without the claimant establishing a "norm" by reference to antecedent consumption figures, the additional reference in regulation 26(1)(a) to "having regard to any available information on previous levels of consumption", by its embodiment of the word "any", in our view clearly enables the adjudicating authority to hold that the requirements under regulation 26(1)(a) are satisfied notwithstanding that the individual claimant has been unable to establish a "norm" in such manner and then to apply - as the benefit officer in the present case did - a "yardstick" by reference to the particular period and to information provided from other sources).

(2) What in terms of regulation 26(2)(a) is "the excess" there referred to? In our judgment it is the excess of the greater than normal consumption referred to in regulation 26(1)(a) over "normal consumption". We reject, as ill-fitting the language used, the alternative that the excess is the excess of the cost of fuel over the amount put aside by the claimant to pay fuel costs.

24. (1) As to regulation 26(2)(b) the starting point is a claimant who has satisfied the prescriptions applicable under regulation 26(1)(b) and who, either because he has recently moved to the home in respect of which the fuel costs have been incurred, or because the heating system in the home has recently been installed, (as to the substantiation of one of which a finding of fact will be required) "he is unfamiliar with the cost of running the heating system in his home" (a finding as to this also is, of course requisite).

(2) In any such case the operation of regulation 26(2)(b) is in our judgment to admit an award, in total, (we say "in total" for a reason later below explained) amounting to one half of the aggregate costs of fuel incurred by the claimant from his use of the heating system during the first 6 months of its use. Our construction has taken account of, but rejected, the possibility that the phrase "costs in respect of fuel" might extend to fuel costs incurred otherwise than by use of the heating system - eg on cooking - on the ground that this conclusion is repudiated by the sequence of the wording employed.

25. (1) It is a matter of common knowledge that bills for gas and electricity consumption to the domestic consumer are normally rendered (whether exactly or approximately) on a quarterly basis, as also that whilst some domestic heating systems are fuelled by coal or oil (as to which different financial arrangements may well apply) a large number of homes are heated by gas or electricity. It is also common knowledge that default in paying a quarterly bill in respect of gas or electricity consumption can give rise to possible enforcement proceedings, and indeed to risk of the cutting off of supply, even before the next quarter's bill is rendered - and the more so after it has been. There is also, inevitably, some element of administrative time-lag before a claim instituted on a particular date for a "single payment" by way of supplementary benefit can, however well merited, result in the making of a payment in respect of it.

(2) Nevertheless, it appears on first impression (at least) that regulation 26(2)(b) has been so framed that the availability of information as to 6 months consumption is a necessary pre-requisite to an award in reliance upon regulation 26(1)(b) and 26(2)(b). And that view was taken by the Tribunal of Commissioners in Decision R(SB)26/83, and also by the learned Commissioner in the decision on Commissioner's File CSB 117/82.

(2) In the light of written submissions by the benefit officer now concerned, developed by Mr Stocker at our oral hearing, we are, however, ourselves now satisfied that although there is nothing to be found in regulation 26(2)(b) so stating in terms, its true effect is to permit, subject to the overall ceiling of 6 months consumption costs, either a single claim made in reference to 6 months consumption or two successive claims made in aggregate in respect of 6 months consumption, the first by reference to the first quarter's consumption only and the second by reference to the later known 6 months consumption - provided that the total award does not exceed the above mentioned 6 months consumption costs.

(3) We reach this conclusion in recognition, first, that one half of the first quarter's consumption must as a matter of - compelling - arithmetic necessarily be no greater than one half of the total consumption over the 6 months of which that quarter forms part; secondly, by reason of the reference in the terms of the provision to "the aggregate amount" - since the use of the word "aggregate" adds nothing to the sense conveyed by "one half of the amount of the claimant's costs in respect of fuel during the first 6 months..." - unless the conclusion we have reached is correct; and thirdly - but by no means least - by reason of the otherwise major failure of the provision to deal aptly with the practical consequences with which otherwise eligible claimants are confronted if the full 6 months has to have run before the computation can be made and any award result.

(4) Whilst this has not been a consideration of which, proceeding in accordance with the established canons of legal construction, we have been able to take account in arriving at the foregoing conclusion, we may here add also that with effect from 15.8.83 regulation 26(2)(b) has been amended in terms which by express reference to "any period during the first 6 months" demonstrate

as intended the effect we have above held to be achieved by the earlier wording with which we are concerned.

(5) In consequence of the decision at which we have arrived it is our view (see also paragraph 11 above) that decision R(SB)26/83 is not to be followed insofar as it adopts a construction of regulation 26(2)(b) in the unamended form at variance with that which we have ourselves adopted; and for the same reason, and, to the same extent only, the decision on Commissioner's File CSB 171/82 should not be followed.

26. (1) We turn now to the practical "work out" where a claim falls properly to be regarded as a claim under both regulation 26(1)(a) and regulation 26(1)(b) and where the claimant satisfies the qualifying requirements under both heads. As a starting point we accept Mr Stocker's submission that where a claimant claims under both regulation 26(1)(a) and regulation 26(1)(b), and satisfies the prescriptions under each, he must at least be entitled to a payment under whichever of regulations 26(2)(a) and (b) will yield him the greater amount - though this might not always be easy to determine, having regard to the "two bites at the cherry" which we have already held above to be permissible under regulation 26(2)(b). However, in our judgment the matter does not truly rest there. For there are the two "independent" heads of qualification, with their own co-relative formulae as to quantum, but nothing is spelt out as to any adjustment in cases of dual qualification. And, in our view, we must find either express wording or a necessary implication that a claimant who claims under both heads of claim and satisfies the qualifying requirement under each can be limited to award in respect of one only of them, and cannot be the subject of cumulative awards, if that is to be the effect of the provision.

(2) But we have found neither express provision nor any tenable implication to that effect.

27. (1) Furthermore, we take note that under regulation 26(2)(b) there is no question of award in any larger amount than <u>one half</u> of the of the <u>aggregate</u> costs of running the heating system over the six months period, and recognise also that the level of expenditure likely to be incurred on fuel costs for the running of the heating system with which a claimant is unfamiliar is likely to be exacerbated if and so far as the initial period of six months of its use embraces a period of exceptional severe weather.

(2) Thus, while there falls to be recognised an "arithmetic possibility" that in a given case a claimant might by cumulative award under both heads receive more than the total cost of the six months consumption (one half under regulation 26(1)(b) and the rest under regulation 26(1)(a)) we think that this is remotely unlikely to result in practice and that the practical maximum will fall significantly short of 100% of the six months total.

(3) However - and be the point last taken as it may - it is our own firm conclusion that a claimant can succeed concurrently in qualifying for awards under regulations 26(1)(a) and 26(1)(b), and that the awards then to be made fall to be made as separate and cumulative awards

computed in straightforward implementation of regulations 26(2)(a) and (b) respectively in the manner we have indicated, and without set-off of any sums "put aside"; and what we have already indicated in regard to decision R(SB)26/83 and the decision on Commissioner's File CSB 117/82 applies again here.

Signed I O Griffiths
Chief Commissioner

Signed D G Rice
Commissioner

Signed I Edwards-Jones
Commissioner

Date: 27 February 1984

Commissioner's File: CSB/349/1983
CSBO File: 1203/82
Region: Midlands

CSB 349/1983

IEJ/SH

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Dorothy Dyer (Mrs)

Supplementary Benefit Appeal Tribunal: Croydon

Case No: 01/24

1. (1) This is a claimant's appeal from the decision dated 25 October 1982 of a supplementary benefit appeal tribunal ("the tribunal") upholding the decision dated 14 May 1982 of a benefit officer given pursuant to section 20 of the Supplementary Benefits Act 1976 as amended ("the Act") to the effect that supplementary allowance amounting to £921.75 had been over-paid to the claimant and was recoverable from her. The present appeal is brought by my leave and upon the contention that the tribunal's decision was given in error of law. I can express my decision more briefly than might otherwise be necessary because - very properly, if I may say so - the benefit officer now concerned concedes that the tribunal's decision is erroneous in law in the respect identified below. The claimant has been assisted on her present appeal by the Child Poverty Action Group, to whom I am indebted for helpful submissions.

(2) The claimant has requested an oral hearing of her appeal, but I am refusing that request because I am satisfied that the appeal can properly be determined without one.

(3) The appeal succeeds. I set aside the tribunal's decision as erroneous in law and direct that the claimant's appeal from the benefit officer's decision be re-heard by a differently constituted tribunal. I do not consider it expedient to seek to give myself the decision which the tribunal should have given, as a proper determination will require additional findings of fact.

2. The claimant was at all material times living in local authority accommodation with 3 dependant children, and the matters relevant to the appeal have proceeded on the footing that she was married. On the basis that her only income was Child Benefit and following the sentencing of the man regarded as her husband to 6 month's imprisonment the claimant, on 30 March 1981, claimed supplementary allowance as a single parent, and benefit was awarded accordingly.

3. It is not in dispute that for a period following such man's release in July 1981 he did not return to live in the family home. Differing grounds have been stated by the claimant as the reason for that at different times, one being that he was not ready to return to family life and another that she was unwilling to forego the financial security which receiving direct payment of supplementary allowance in her own right conferred on herself and the children by comparison with the situation if he was the head of the household and accordingly the only qualifying claimant. It is unnecessary for me to reach a conclusion on that question; but I should also mention - though, again, it is unnecessary for me to decide - that it has been indicated to me that during this period of living apart the man was also claiming supplementary allowance on his own account.

4. (1) It is also not in dispute that there came a time - it is suggested (but this also is unnecessary to my immediate decision to resolve ) that it was in October 1981 - when the man returned to live in the same home as the claimant and her children. That time was certainly before 13 January 1982, for on the occasion of a home visit to the claimant on that date it became apparent to a visiting officer that the claimant and the man had become re-united and that he was again living at her home, and was thus the apparent head of household, and the eligible claimant to the exclusion of the claimant. In the light of that information a benefit officer took what was clearly in the circumstances a Draconian course - but one which may well have been on the facts as known to him the proper course in implementation of his duty in the matter - of giving a decision that the whole of the supplementary allowance, totalling £921.75, which had been paid to the claimant since the date (which the decision put at 12.10.81) at which the man regarded as her husband had returned to the claimant's home constituted over-payment of benefit and was recoverable under section 20 of the Act. And the decision of 14.5.82 was given accordingly. I have used the word "Draconian" because upon the premise that the "husband" was in his own right qualified to receive supplementary allowance and upon the assumption (which I make for the purposes of this observation only) that he did return to the household to live with the claimant as husband and wife on the predicated date, it would appear to follow that

if what, on the same official view, was a proper course had been followed he would have been entitled to supplementary allowance at a rate which reflected the dependency of the claimant and the 3 children and, whether or not so applied, a substantial part of the benefit which would have been awarded to him would have represented the requirements of his dependants and have been intended for application to the like needs as were in fact the subject of payments made to the claimant claiming in her own right.

5. However, assuming there to have been overpayment in the amount so determined (the arithmetical computation of which does not appear to have been contested by the claimant on her appeal from the benefit officer's decision to the tribunal), that is - as I made clear in my decision R(SB)21/82, - the beginning of the matters relevant under section 20 of the Act, not the end. For, in brief summary, a proper determination that an amount of benefit is recoverable pursuant to section 20 of the Act requires, in addition to the mere fact that there has been an overpayment of benefit, discharge by the benefit officer of the burden of proving that the expense incurred by the Secretary of State which that represents has resulted from - ie. is causally consequent upon - either a mis-representation (fraudulent or innocent) on the part of the claimant concerned, or a failure on the part of the claimant concerned to disclose a material fact. Furthermore, as was indicated in the decision on Commissioner's file CSB 688/1982 (unreported) - and as I myself have observed in unreported decisions - the obligation to disclose a material fact, in reliance upon which section 20 proceeds with respect to a "failure to disclose" constituting breach of obligation, does not import any requirement that disclosure must be made <u>in writing.</u> As it was put by the learned Commissioner in the decision last cited "There is nothing in the section to suggest that the disclosure has to be in writing. It is just as effectively made if it is made orally, albeit it may be considerably more difficult for the claimant to establish that he did in fact make an oral disclosure." Thus, if it be held that disclosure was made (whether in writing or orally), but the disclosure has been administratively overlooked and account has not been taken of it in computing a claimant's proper entitlement to benefit subsequent thereto, there can be no question of a liability for recovery being imposed on a claimant under Section 20 by reference to that alleged failure to disclose.

6. (1) The benefit officer's decision does not state in terms in reliance upon what misrepresentation or failure to disclose under section 20 of the Act it was given, and I would pause here to indicate my view that it would be better practice if in all section 20 cases the benefit officer's decision did so indicate, as was substantially the requirement prior to changes in the law in 1980.

(2) However, it would appear that the decision did not proceed on the footing of any misrepresentation, and that the breach relied upon was an alleged failure on the part of the claimant to report the changes in circumstances constituted by a return of the "husband" to live with her as husband and wife in the family home. At all events the matter so proceeded before the tribunal.

7. The error of law into which the tribunal fell was in conceiving that the material disclosure was required to be made in writing, which it was not. The claimant's case before the tribunal was that she had been told and had understood that she was to make disclosure of the "husband's" return if and when it took place, and that, so soon as it did, she reported the fact by telephone to the local office of the DHSS.

8. The benefit officer's case before the tribunal was that there had been no such notification, and in particular that there was no official record of any such notification as the claimant asserted. The tribunal clearly felt concern over the claimant's case, for they adjourned the first hearing of the appeal in order that additional enquiries might be made at the DHSS end; and, learning on the resumed hearing that none had been found, they confirmed the benefit officer's decision. Whilst the record of their decision does not indicate this in terms - indeed the "Box" in the record of their decision provided for the intimation of their reasons for decision contains only a statement of their decision - it is, upon reading the record of the decision as a whole, in my view readily apparent that they so decided in the (erroneous) belief that there needed to be a written notification. For their findings of fact include the following:-

> "An adjournment was made from the first hearing for a further search of documents to be made but the Supplementary Benefit Officer has found nothing. The tribunal thought that the appellant may have notified the Supplementary Benefit Officer of the change of circumstances but did not do so in writing".

9. I should at this point stress once more the need for a supplementary benefit tribunal adjudicating upon a claimant's appeal to pay close regard to the statutory provisions - whether under the Act or under Regulations made pursuant thereto - which bear on the case before them. For, in addition to the error of law above cited it would appear (although it is unnecessary for me so to hold) that the tribunal "failed to ask themselves the right questions" in another respect. They appear to have proceeded on the footing that since the "husband" was referred to as such and since it was not in dispute that he had returned to what had earlier been the family home it followed automatically that, as from the date upon which he had returned to the home, aggregation of his and her requirements and resources applied and that he was, to the exclusion of her, the only eligible claimant - so that the whole benefit paid to her since his return constituted over-payment. But, as I see it, the position is considerably more complex than that. In the first place the tribunal needed to consider whether or not the claimant and the man in question were legally married, and make a finding in that respect. If they were, then various further matters needed to be determined on the footing that they constituted a married couple. And if they were not legally married certain further questions also needed to be posed and answered in

the context of "unmarried couples"; and in both cases findings were needed in regard to what "household" each was to be taken as living in at all material times, for the purposes of the Act. Moreover, even upon the assumption that the claimant and the "husband" were legally married (and I am not to be taken as either inferring or holding that they were not - but the facts before me leave this open) there were further questions of complexity for them to consider. For on that footing, and excluding his time in prison, (over the duration of which he would under the operation of the Aggregation Regulations have been excluded from counting as a member of the same household as the claimant), the claimant would under the ordinary operation of those regulations have been treated as a member of the husband's household even during the time for which they were temporarily absent from each other, and her requirements would, it is true, be included with his. But, contrary to the impression that the claimant appears to have received, there is provision under the Claims and Payments Regulations for a benefit officer to determine that all or part of an award of supplementary allowance may be made to the partner of a claimant who, as it is put in the Supplementary Benefits Handbook "because of improvidence or eccentricity neglects his responsibilities to support his partner or dependant children". I express no opinion as to whether such was or was not the case, or whether there was or was not overpayment - these will all be matters for the tribunal concerned with the re-hearing. But there were in my view clearly matters to be covered in the context of the "first limb" of the necessary ingredients for the application of section 20 of the Act as well as upon the issue as to disclosure or non-disclosure and upon their necessary inter-relationship by causation.

10. (1) Finally I would like to refer to a submission by the benefit officer now concerned as to "burden of proof". It is put in the following terms:-

> "Although the burden of proof rests on the benefit officer ... he discharges at least the initial burden by his evidence that he has no record of any disclosure. The claimant must then give his account of what happened and the tribunal then come to a positive finding whether the benefit officer has discharged the burden of proof."

(2) Though it contains much that is sound, the submission as so stated is in my judgment over-stated. True it is that the burden of proof rests on the benefit officer. True it is (as is implicit though not stated in the submission) that it is a burden of proof upon a simple balance of probabilities. True it is that if the benefit officer lays a proper foundation for establishing that:

(i) there is no official record of a disclosure by the claimant;

(ii) there was a material change of circumstances; and

(iii) had that been disclosed, there would, on the balance of probabilities, be extant a record of that disclosure held by the Department;

it could then properly be said that a prima facie case had been established, and the burden of proof resting upon the benefit officer would stand discharged unless the claimant (or his representative) was - by evidence or submission - to displace the prima facie case.

(3) But such foundations must be properly laid - and until they are there is nothing for a claimant or his representative to rebut. It may well be - I do not know one way or the other - that there is a standing instruction to officers of the Department who deal by telephone with members of the public that a contemporary record is to be made of each conversation, and sufficient information elicited to enable it to be attached to a claimant's file, and that there are appropriate administrative arrangements for this to be done; so that the absence of a written report of a telephonic communication by a claimant upon a claimant's case file has a certain probative value. Even if there was such a procedure, the weight of such evidence might be affected by how far it could be shown to have been in practice carried out, and to what extent not. But, be that as it may, mere assertion that "there is no record" is plainly insufficient to discharge the requisite burden of proof, nor is its insufficiency cured by assertion also that a search has been made for a written record and none can be found.

(4) That was, I think, appreciated by the benefit officer who formulated the above cited submission - see his closing phrasing. But let it be supposed that a claimant has died and his personal representatives are contesting the section 20 decision - in which case the claimant cannot be present to give any further account, although he has asserted prior to his death that he made oral disclosure. I would not wish to place any intolerable practical burden upon benefit officers concerned with section 20 cases, but it should, I think, be apparent from what I have above indicated that a much more refined balance will, in the interests of justice, need to be struck than the above cited formulation would suggest. What is required to be shown in order to discharge the burden of proof will of course depend on the facts of the particular case - but whilst the balance of probability must in the case of a deceased claimant be struck with due regard to his inability to give any further account, that does not mean that the other considerations I have above referred to, using the case of a deceased claimant for illustration, are not as well applicable in the cases of living claimants. There is, however, no warrant for personal representatives to exploit the circumstance that the claimant has died: see R(SB)28/83 and R(SB)34/83.

(5) So also, in my judgment, it is incumbent on the presenting officer seeking to discharge the burden of proof in such a case as the present to put before the tribunal the best evidence he can upon each ingredient in the chain of substantiation, and not just "mere assertions" attributed to some unidentified other DHSS officer. I appreciate that there are practical limits to what can in this respect be done to prove that something alleged to have been done by a claimant was not done. But in the sort of situation I have postulated in (3) it would at least be practicable to put forward a copy of any material instruction and a written statement by a responsible officer at the relevant local office at the material times dealing with such points as I have there identified. See also decision R(SB)5/82 as to a tribunal's obligations in regard to "hearsay evidence".

11. (1) I direct that the tribunal re-hearing the claimant's appeal be furnished with a copy of my present decision in order to see some of the pitfalls to be avoided. I further direct that they record in their decision a finding of fact as to disclosure having or not having been made orally by the claimant, and if made as to when to be taken as having been made.

(2) Whilst I do not so direct, I think it would also be helpful to the tribunal if the benefit officer was equipped to address the tribunal fully on the relevant provisions of law as to aggregation upon which his case is founded.

(3) Should the tribunal hold that there was no disclosure they should additionally record as findings of fact, and deal in their reasons for decision with, all relevant matters which they consider to arise on the issue of overpayment and as to the causal link between the non-disclosure and the overpayment, if any, they hold to have taken place.

12. My decision is as indicated in paragraph 1(3) above.

(Signed) I Edwards-Jones
Commissioner

Date: 6 December 1983

Commissioner's File: CSB/347/1983
C SBO File: 342/83
Region: London South

T/AJ

CSB 349/1983

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

[ORAL HEARING]

1. This is a claimant's appeal against the decision dated 28 June 1982 of a supplementary benefit appeal tribunal ("the tribunal") which confirmed the decision dated 29 April 1982 of a benefit officer awarding the claimant a single payment of £16.00 towards her fuel costs. The present appeal is brought by leave of a Commissioner and upon the contention that the tribunal's decision has been given in error of law. As the benefit officer's written submissions on the present appeal included suggestions that the decision of a Tribunal of Commissioners reported as R(SB)26/83 embodied certain observations which did not correctly represent the law upon the point to which they were directed, the Chief Commissioner directed an oral hearing of the present appeal by a Tribunal of Commissioners.

2. (1) The oral hearing was held on 18 January 1984. The claimant did not attend and was not represented. The benefit officer was represented by Mr E O F Stocker of the Solicitor's Office, DHSS, to whom we are indebted for cogent and helpful submissions as to the proper construction and application of regulation 26 of the Supplementary Benefit (Single Payments) Regulations 1981 as in force at the date material to the present appeal ("the Regulations") - a subject matter which, we say at once, raises questions of considerable complexity.

(2) Shortly summarised, regulation 26 makes provision for the award of monies by way of "single payment", in prescribed circumstances and in prescribed amount, with which to meet the expense of fuel costs incurred to an extent in excess of that expected to be discharged out of weekly supplementary allowance as the normal requirement in respect of fuel costs.

(3) The claimant's case before the tribunal, which did not prevail, was that the £16.00 which she was awarded by the benefit officer's decision above cited did not fully reflect the amount due to her upon a proper application of regulation 26.

3. We would preface our decision by recording that by an amendment of regulation 26 operative from 15 August 1983 the most important of the several questions of construction and application of regulation 26 arising in the present case has been resolved in respect of cases falling for determination, as the present does not, in accordance with the regulation as so amended, the effect of the amendment appearing to us to be unequivocal. But the amendment has no retroactive effect, whilst our present decision also deals with questions in regard to regulation 26 other than that to which such amendment was directed.

4. The appeal succeeds. We set aside the tribunal's decision as given in error of law and direct that the claimant's appeal from the benefit officer's decision be re-heard by a differently constituted tribunal in accordance with our directions set out as an Appendix to this decision. The need for findings of fact additional to those made by the tribunal precludes us from giving ourselves the decision which the tribunal should have given.

5. (1) The basic facts in point are relatively simple and have not been in controversy. They are as follows:

(i) On 6.4.1982 the claimant made a claim for help with her fuel costs. She was at that date some 60 years of age and in receipt of supplementary allowance. She was living in a house of which she had become the owner in or about December 1981. It did not have central heating. It was equipped with a fireplace for heating by open coal fire, but though that installation had at some earlier date operated in conjunction with a back boiler by which hot water was supplied, she indicated (and it does not appear to have been in dispute) that all material times the back boiler was disconnected from the hot water supply system and the operative method of water heating was by an electric immersion heater installed in the hot water tank.

(ii) The claimant did not in the circumstances use the coal fire, and during the winter period of 1981/82 after she had moved into the house relied for room heating upon electric fires.

(iii) The 1981/82 winter was severe, and on that account a single payment in respect of abnormal fuel costs was awarded in many cases besides hers.

(iv) The quarterly electricity bill in respect of the claimant's winter quarter was rendered in the sum of £113.92.

(v) It can properly be inferred that such sum was substantially in excess of that for which the claimant had been prepared.

(vi) Between the date of receipt of such account and 14 May she paid off £25 of this bill, but the balance remained outstanding at that date. It is not clearly apparent from the case file whether or not she had made

that payment before the date of her claim, though there is some support for thinking she had not.

(vii) In response to an enquiry by the Department she had in April indicated that she had put aside £25 to meet the bill.

(viii) Although she was on 19.4.1982 sent the £16.00 awarded by the benefit officer, in the form of a giro cheque, she did not encash that, but returned it to the Department - because she considered the amount so awarded to be less than her proper entitlement.

(ix) The claimant did not attend the tribunal's hearing.

(x) The award of £16.00 was made on the basis of the claimant's fuel cost in respect of the heating of her home being the cost of coal, It represented the cost of 4 bags of coal, and the benefit officer has explained that such was a standard amount paid to all successful claimants under the same head whose main source of heating was a coal fire.

(2) The tribunal were told on behalf of the benefit officer that had the claimant's award been based upon fuel costs in respect of electricity the award would have been in a lesser sum than £16.00 because it would have been made on the basis of 15% of the outstanding balance (£88.92) on the winter quarter's electricity bill, in the absence of data for the corresponding quarter in the previous year due to the claimant not having then resided at the relevant premises.

6. Regulation 26 appears in Part VII of the Regulations, headed "Items to which the categories of Normal, Additional and Housing Requirements relate", itself introduced below the sub-heading "Fuel Costs", and is in the following terms:-

"26. - (1) A single payment shall be made in respect of a claimant's fuel costs where they are greater than the amount which he has put aside to pay for them because -

(a) a period of exceptionally severe weather has resulted in consumption greater than normal, having regard to any available information on previous levels of consumption; or

(b) he is unfamiliar with the cost of running the heating system in his home because he has recently moved to that home or the system has recently been installed.

(2) The amount payable in a case to which paragraph (1) applies shall be -

(a) in a case to which paragraph (1)(a) applies, the cost of the amount of the excess over normal consumption;

(b) in a case to which paragraph (1)(b) applies, on half of the aggregate amount of the claimant's costs in respect of the fuel during the first 6 months of his use of the heating system."

7. After recording that the claimant had appealed against the adequacy of the £16 awarded the tribunal's findings of fact are expressed as follows:-

"On 6.4.82 she had requested help with fuel costs. She does not have central heating the main source being coal fires, however, at the time she had made her request for help she was not using her coal fire, but was heating by means of electric fires. Her entitlement was based on the main source of heating being a coal fire and an allowance of £16 being the cost of 4 bags of coal had been made. If her entitlement had been based on her electricity bill as she was using electric fires in preference to coal she would have received £11.60 being 15% of the bill of £88.92 which had been submitted to the Department. There was no bill for the equivalent quarter of previous year provided".

Their stated reasons for decision were:-

"The tribunal are satisfied on the evidence presented that the appellant had received the maximum amount that could be paid to her in respect of fuel costs under Regulation 26 of the Single Payment Regulations. A further single payment was not therefore warranted".

[In the same "box" of the record they then go on to make a suggestion as to the claimant making payments direct to the "Fuel Board" by way of deductions from her weekly allowance, but it is not germane to the present appeal to set that passage out in full.]

8. (1) It was, very properly, conceded by Mr Stocker before us that the tribunal's decision was in error of law and must be set aside on several separate grounds. We can in the circumstances take those quite shortly:-

(i) First, the tribunal (who were plainly dealing with the case under the "first limb" of regulation 26, as to "exceptionally severe weather") have made no finding as to that - though recognition that this element of the qualifying conditions was satisfied might reasonably be implied from the tenor of their decision.

(ii) Secondly, the tribunal failed to find as a fact whether the claimant had set aside any or what sum to meet her fuel costs for the period in point.

(iii) Thirdly, the tribunal gave no consideration to the provisions of regulation 26(1)(b) or to any possible application to her circumstances of the provisions in regulation 30 of the Regulations.

(2) In the light of our present decision - though perhaps not as the tribunal saw the matter - it was additionally material to make a finding as to when the £25 payment was made.

9. It is convenient to record at this point that the claimant has upon her present appeal put in a considerable volume of written material (much of it in manuscript difficult to decipher); but that after careful analysis we have concluded the content of this to be in the main wholly irrelevant to the present appeal and, for the rest, to add nothing to the simple contention that she has not been paid the full amount which should have been awarded to her upon a proper evaluation of her claim and a proper application to her circumstances of the provisions of regulation 26.

10. We have, on the grounds indicated in paragraph 8 above, no doubt that the tribunal's decision must be set aside. But whilst all questions of fact will again be at large before the tribunal re-hearing the appeal, we consider it requisite (in a due implementation of our obligation to give all necessary directions for the re-hearing) to express, in conjunction with a direction that they be heeded at the re-hearing, our views on the correct construction of regulation 26 as in force at the relevant time.

11. (1) The Tribunal decision R(SB)26/83 embodies two separate decisions, the first of which alone has any relevance to the present appeal. In reference to that the important question which occupied the time and attention of the Tribunal of Commissioners was as to what was the correct date at which to determine whether or not "need" was established for the purpose of the Single Payments Regulations; and it was held that the relevant date was the date of claim. But the immediate context in which that aspect of the case arose concerned, in fact, the refusal of a single payment in respect of a gas bill which that claimant had incurred, and as to which she had made a claim for a single payment. She had in fact paid it subsequently to the date of claim but prior to the matter coming before the tribunal whose decision was in issue.

(2) The tribunal's decision in that case was set aside on grounds of error of law with which we are not here concerned - but the Tribunal of Commissioners also sought to give the tribunal who would be concerned with its re-hearing some guidance with regard to the construction of regulation 26. The formulation of that guidance, coming as it did at the end of a decision on an important but different question, had not been the subject of any extensive argument at the hearing.

(3) Having heard full argument in the present case the two members of the present Tribunal who were parties also to decision R(SB)26/83 are satisfied that insofar as the views expressed in paragraphs 23 and 24 of R(SB)26/83 conflict with those herein expressed the latter are to be preferred, and the former are to be treated as expressed per incuriam. And the third Commissioner party to decision R(SB)26/83, who has read our present decision in draft, authorises us to record that he concurs in that treatment.

12. (1) It is convenient to mention at this point that it is not in dispute that regulation 26 of the Regulations has effect subject to the "overriding provision" in regulation 3(2)(a) of the Regulations that a single payment is to be made only where:

> "There is a need for the item in question".

(2) Whilst, in view of the many different subject matters in reference to which a single payment may be awarded under the Regulations, the draftsman's choice for regulation 3(2)(a) of the word "item" as the generic term for the subject matters as to which need must subsist as a convenient compendious term, it tends to mask a very real necessity to evaluate in reference to each individual claim, and with a sufficient accuracy, what is the "item" as to which it is contended that a need subsists.

(3) In the simple case of, say, a pair of boots it may with equal felicity be said that the need subsists in respect of "a pair of boots" or in respect of "the wherewithal with which to purchase a pair of boots". But no one "needs" fuel costs - they are an unwelcomed fact of life. Any "need" in reference to "fuel costs" must in our view properly be formulated as a need for the wherewithal with which to pay them. And, so proceeding, "need" in reference to "fuel costs" can subsist only if and so far as at the claim date the fuel costs relied upon in support of the claim have not been met by payment.

(4) Accordingly we preface what we say later below in reference to regulation 26 by confirming our acceptance of Mr Stocker's submission to the effect last mentioned.

13. (1) It is readily apparent that, whatever else may be the qualifying requirements and "work out" of regulation 26, it is a primary qualifying condition for any successful claim that the claimant's fuel costs upon which the claim is founded are "greater than the amount with which he has put aside to pay for them". In the decision on Commissioner's File CSSB 117/82 (unreported) the learned Commissioner considered in this context the requirement of "putting aside" and, in terms with which we wholly agree and upon which we cannot usefully improve, indicated as follows:-

> "It would in my opinion be ludicrous to suggest that a claimant had to prove that he had placed money in an envelope marked "fuel costs" behind the clock in the kitchen in order to qualify under the regulations. On the other hand the need to establish, for the purposes of the operation of the regulation, a definite amount "put aside" precludes the application of any purely hypothetical or notional meaning. I consider that it is necessary to establish some form of earmarking or allocation of an amount for this purpose. This may take various forms. In cases where actual money cannot be shown to have been physically segregated for the purpose it should nevertheless be sufficient if it can be shown that in the allocation and application of a claimant's resources some amount had been genuinely allowed for under this head".

(2) Though expressed in reference to a different regulation, we accept and approve also the indication in the decision on Commissioner's file CSB 683/1982, cited and adopted in paragraph 7 of R(SB)36/83, that what constitutes "setting aside" is not to be viewed restrictively - though the concept of "mentally setting aside" there also mentioned may have limits of practical application which it is unnecessary for us to explore further in our own decision.

14. (1) We were initially attracted by the concept that the embodiment of this requirement in the regulation was directed to confining eligibility to the thrifty claimant who had indeed put monies aside to meet his fuel costs but who, in unexpected circumstances of the nature with which the succeeding provisions of regulation 26(1) go on to deal, found them insufficient to meet the bill when it was rendered; but to exclude the feckless who had made no provision whatsoever.

(2) However, in the light of the close analysis of the regulation developed before us by Mr Stocker we are satisfied that this is not the correct interpretation.

(3) The starting point for such conclusion is that the regulation does not postulate that a claimant must set aside any particular amount or any particular proportion of what turns out to be the eventual cost.

(4) Next, it is to be observed that it is inconsistent with an underlying recognition of the virtues of thrift that the most thrifty of claimants, namely the claimant who has put aside sufficient to meet the whole of what proves to be liability, should be precluded from a successful claim by the circumstance that there will then be no excess of liability over the amount that has been put aside, whilst at the opposite pole a claimant who has set aside a nominal 5p only would seemingly be eligible for the maximum measure of assistance which the regulation is capable of affording to him. Furthermore, as between a claimant who has put aside nothing and a claimant who has put aside a qualifying nominal 5p, whatever might be the marks to be awarded to the latter for acumen in "benefit planning" he has achieved no more than token superiority by the criterion of thrift.

(5) Lastly, and as Mr Stocker rightly stressed to us, a claimant who has put aside nothing towards his fuel costs can, when the bill for them is rendered, as truly be said to have fuel costs "greater than the amount which he has put aside to pay for them" as can a claimant who has put aside something, but less than the full amount to discharge the liability.

15. Thus the conclusion to which we are driven is that, properly construed, there is within the compass of regulation 26 itself (but we will next below deal with another possible approach) in fact no qualifying requirement that a claimant shall have put aside anything. The force of the words "put aside" is limited to shutting out a claimant who, although faced with an unsatisfied liability for fuel costs at the date of claim, has in fact set aside a sum sufficient to satisiy that liability.

16. We have next to consider whether the position might be that although the effect of regulation 26 considered in isolation was as we have last above indicated, regulation 3(2)(a) might so bear, in conjunction with regulation 26, that a need for the wherewithal to meet fuel costs should be held to exist only to the extent that the cost to be met exceeded the amount (if any) set aside. This approach appeared to us to carry at least the force

of commonsense. However, Mr Stocker has now satisfied us that it is one not justified upon a proper application of the established canons of construction. But to explain that conclusion it is necessary for us to start by contemplating on a broader approach the structuring of the present supplementary benefits code.

17. (1) The basic concept around which the present supplementary benefits code is framed is the provision of financial assistance in circumstances in which requirements exceed resources. The code does, however, embody important qualifications and exceptions to the otherwise logical concept that financial assistance cannot be provided under the code if a claimant has <u>any</u> resource by which the cost of meeting a particular need could be defrayed. For there are under the Supplementary Benefit (Resources) Regulations significant "disregards", and though there is a set "ceiling" of reckonable capital resources, possession of any excess over which will preclude qualification for any supplementary benefit, the possession of reckonable capital resources which do not in aggregate exceed the ceiling for the time being in force does not (with certain qualifications not material to our concerns) distinguish between the case of a claimant with significant resources, though within the prescribed "ceiling" amount, and the case of a claimant "without a penny to his name". So regarded, it becomes apparent that there is no "equity" to be spelt out of an application of regulation 3(2)(a) which in the context of regulation 26 will regard a claimant who has "set aside" a sum towards fuel costs but has no <u>other</u> savings as "needing" only the excess of the cost of the fuel over the amount set aside, but will regard a claimant who has "set aside" towards this liability for fuel costs little or nothing, but has within the prescribed ceiling (but without any such "earmarking") reckonable resources amply sufficient to discharge the entire liability, as nevertheless eligible to receive a maximum award in respect of the liability for fuel costs (or indeed the excess of such liability over any sum actually "earmarked" by setting aside).

(2) That there may be no such equity is not, of course, conclusive of regulation 3(2)(a) not so operating as to have that effect; but it is persuasive and cogent.

18. (1) In the light of what we have last indicated we are brought back to the heading of Part VIII of the Regulations, and the sub-heading to regulation 26 to which we have already referred, and to the use of the word "item" in regulation 3(2)(a) itself. So proceeding, it appears to us that a claimant who can demonstrate that he fully meets the specific qualifying requirements set out in regulation 26(1) (in particular in the respect of demonstrating an <u>outstanding</u> liability for fuel costs at the date of claim) <u>has</u> a "need for the item in question".

(2) We recognise that this conclusion is itself open to the criticism that, so proceeding, there will still be such "inequity" as that a claimant who has "set aside" sufficient, or more than sufficient, to meet the liability for fuel costs cannot successfully claim - in common with the claimant who has done likewise and has actually satisfied the liability for the date of claim - whereas a claimant who at the claim date has an outstanding liability in excess of that, if anything, which he has set aside can steer through at least this

opening requirement of regulation 26. But any element of anomaly so attributable cannot in our judgment deflect us from accepting Mr Stocker's submission that regulation 3(2)(a) cannot be brought in "on a bye wind" to displace the clear meaning of regulation 26 in accordance with its own tenor and the established canons of construction. Accordingly, as we see it, a claimant who can bring himself within the prescriptions in regulation 26(1) and has at the claim date an outstanding liability for fuel costs will succeed, regulation 3(2)(a) having no operation to preclude such result either alone or in any conjunction with regulation 26.

19. It is also the case, in our view, that there cannot be construed out of regulation 26 itself any limitation of award thereunder by reference to the excess only of the relevant fuel costs over the amount which the particular claimant has set aside to meet them. Once the claimant, being otherwise eligible for supplementary benefit, has steered through the initial gateways of regulation 26 (1), the amount of award prescribed by regulation 26(2) takes no account of the amount (if any) he has set aside to meet the relevant fuel costs. And though neither decision states the contrary in terms, any inference to the contrary which might be drawn from Decision R(SB)26/83 or the decision on Commissioner's File 117/1982 is, in our judgment, to be rejected as at variance with a correct interpretation of the law in point.

20. In the circumstance that regulation 26(1) by its sub-paragraphs (a) and (b) respectively postulates two separate sets of circumstances each capable - in practical contemplation - of giving rise to greater than expected fuel costs, and that paragraph (2) of regulation 26 then goes on to postulate a separate and different formula for quantifying the amount of award under those two qualifying heads respectively, the next question we have had to consider is whether in a given case a claimant can by a single claim qualify for 2 awards, one under each head, or whether they are mutually exclusive - and if the former, whether the awards are independent of each other, or whether some modification of the otherwise quantification is to operate if the claim is advanced under both heads and eligibility is established under both.

21. (1) We may conveniently here take as the starting point that it is in our view beyond dispute the case that a particular claimant can claim more than once in a lifetime by reference to regulation 26(1)(a), and, similarly, more than once in a lifetime by reference to regulation 26(1)(b).

(2) Next, there is in regulation 26 nothing which can in our judgment be taken to preclude a particular claimant from making two separate claims on the same date, one by reference to regulation 26(1)(a) and the second by reference to regulation 26(1)(b). In particular, the word "or" which appears between regulation 26(1)(a) and regulation 26(1)(b) cannot in our view (reached in the light of our clear conclusion above that successive successful claims under the separate heads can be made) be taken as making mutually exclusive in the individual case concurrent separate claims under regulation 26(1)(a) and regulation 26(1)(b) respectively.

(3) Proceeding thence, and in recognition of the established legal principle that (in the absence of compelling provision to the contrary) it is unnecessary to go through two stages in order to achieve what can be no less effectively achieved by one, we therefore

conclude also that there is no procedural or substantive objection to a claimant embracing within a single claim, appropriately framed, a claim under both regulation 26(1)(a) and regulation 26(1)(b); and in saying "appropriately framed" we have in mind no special formality, but merely what the claimant is upon a fair evaluation properly to be considered as claiming for.

22. (1) The point last made is of importance in the present case because, in our judgment, upon a fair evaluation the present claimant was in fact claiming award both by reference to a period of exceptionally severe weather and by reference to having recently moved home.

(2) We will next deal separately and successively with the operation of regulations 26(2)(a) and (b).

23. (1) As regards regulation 26(2)(a) we start with a claimant who has demonstrated a subsisting liability for fuel costs greater than the amount he has put aside to pay for them and demonstrated also (as to which a finding of fact by the adjudicating authority is required) that a period of exceptionally severe weather has resulted in consumption greater than normal. (We pause briefly to indicate here that whilst at first sight the latter could not be achieved without the claimant establishing a "norm" by reference to antecedent consumption figures, the additional reference in regulation 26(1)(a) to "having regard to any available information on previous levels of consumption", by its embodiment of the word "any", in our view clearly enables the adjudicating authority to hold that the requirements under regulation 26(1)(a) are satisfied notwithstanding that the individual claimant has been unable to establish a "norm" in such manner and then to apply - as the benefit officer in the present case did - a "yardstick" by reference to the particular period and to information provided from other sources).

(2) What in terms of regulation 26(2)(a) is "the excess" there referred to? In our judgment it is the excess of the greater than normal consumption referred to in regulation 26(1)(a) over "normal consumption". We reject, as ill-fitting the language used, the alternative that the excess is the excess of the cost of fuel over the amount put aside by the claimant to pay fuel costs.

24. (1) As to regulation 26(2)(b) the starting point is a claimant who has satisfied the prescriptions applicable under regulation 26(1)(b) and who, either because he has recently moved to the home in respect of which the fuel costs have been incurred, or because the heating system in the home has recently been installed, (as to the substantiation of one of which a finding of fact will be required) "he is unfamiliar with the cost of running the heating system in his home" (a finding as to this also is, of course requisite).

(2) In any such case the operation of regulation 26(2)(b) is in our judgment to admit an award, in total, (we say "in total" for a reason later below explained) amounting to one half of the aggregate costs of fuel incurred by the claimant from his use of the heating system during the first 6 months of its use. Our construction has taken account of, but rejected, the possibility that the phrase "costs in respect of fuel" might extend to fuel costs incurred otherwise than by use of the heating system - eg on cooking - on the ground that this conclusion is repudiated by the sequence of the wording employed.

25. (1) It is a matter of common knowledge that bills for gas and electricity consumption to the domestic consumer are normally rendered (whether exactly or approximately) on a quarterly basis, as also that whilst some domestic heating systems are fuelled by coal or oil (as to which different financial arrangements may well apply) a large number of homes are heated by gas or electricity. It is also common knowledge that default in paying a quarterly bill in respect of gas or electricity consumption can give rise to possible enforcement proceedings, and indeed to risk of the cutting off of supply, even before the next quarter's bill is rendered - and the more so after it has been. There is also, inevitably, some element of administrative time-lag before a claim instituted on a particular date for a "single payment" by way of supplementary benefit can, however well merited, result in the making of a payment in respect of it.

(2) Nevertheless, it appears on first impression (at least) that regulation 26(2)(b) has been so framed that the availability of information as to 6 months consumption is a necessary pre-requisite to an award in reliance upon regulation 26(1)(b) and 26(2)(b). And that view was taken by the Tribunal of Commissioners in Decision R(SB)26/83, and also by the learned Commissioner in the decision on Commissioner's File CSB 117/82.

(2) In the light of written submissions by the benefit officer now concerned, developed by Mr Stocker at our oral hearing, we are, however, ourselves now satisfied that although there is nothing to be found in regulation 26(2)(b) so stating in terms, its true effect is to permit, subject to the overall ceiling of 6 months consumption costs, either a single claim made in reference to 6 months consumption or two successive claims made in aggregate in respect of 6 months consumption, the first by reference to the first quarter's consumption only and the second by reference to the later known 6 months consumption - provided that the total award does not exceed the above mentioned 6 months consumption costs.

(3) We reach this conclusion in recognition, first, that one half of the first quarter's consumption must as a matter of - compelling - arithmetic necessarily be no greater than one half of the total consumption over the 6 months of which that quarter forms part; secondly, by reason of the reference in the terms of the provision to "the aggregate amount" - since the use of the word "aggregate" adds nothing to the sense conveyed by "one half of the amount of the claimant's costs in respect of fuel during the first 6 months..." - unless the conclusion we have reached is correct; and thirdly - but by no means least - by reason of the otherwise major failure of the provision to deal aptly with the practical consequences with which otherwise eligible claimants are confronted if the full 6 months has to have run before the computation can be made and any award result.

(4) Whilst this has not been a consideration of which, proceeding in accordance with the established canons of legal construction, we have been able to take account in arriving at the foregoing conclusion, we may here add also that with effect from 15.8.83 regulation 26(2)(b) has been amended in terms which by express reference to "any period during the first 6 months" demonstrate

as intended the effect we have above held to be achieved by the earlier wording with which we are concerned.

(5) In consequence of the decision at which we have arrived it is our view (see also paragraph 11 above) that decision R(SB)26/83 is not to be followed insofar as it adopts a construction of regulation 26(2)(b) in the unamended form at variance with that which we have ourselves adopted; and for the same reason, and, to the same extent only, the decision on Commissioner's File CSB 171/82 should not be followed.

26. (1) We turn now to the practical "work out" where a claim falls properly to be regarded as a claim under both regulation 26(1)(a) and regulation 26(1)(b) and where the claimant satisfies the qualifying requirements under both heads. As a starting point we accept Mr Stocker's submission that where a claimant claims under both regulation 26(1)(a) and regulation 26(1)(b), and satisfies the prescriptions under each, he must at least be entitled to a payment under whichever of regulations 26(2)(a) and (b) will yield him the greater amount - though this might not always be easy to determine, having regard to the "two bites at the cherry" which we have already held above to be permissible under regulation 26(2)(b). However, in our judgment the matter does not truly rest there. For there are the two "independent" heads of qualification, with their own co-relative formulae as to quantum, but nothing is spelt out as to any adjustment in cases of dual qualification. And, in our view, we must find either express wording or a necessary implication that a claimant who claims under both heads of claim and satisfies the qualifying requirement under each can be limited to award in respect of one only of them, and cannot be the subject of cumulative awards, if that is to be the effect of the provision.

(2) But we have found neither express provision nor any tenable implication to that effect.

27. (1) Furthermore, we take note that under regulation 26(2)(b) there is no question of award in any larger amount than one half of the of the aggregate costs of running the heating system over the six months period, and recognise also that the level of expenditure likely to be incurred on fuel costs for the running of the heating system with which a claimant is unfamiliar is likely to be exacerbated if and so far as the initial period of six months of its use embraces a period of exceptional severe weather.

(2) Thus, while there falls to be recognised an "arithmetic possibility" that in a given case a claimant might by cumulative award under both heads receive more than the total cost of the six months consumption (one half under regulation 26(1)(b) and the rest under regulation 26(1)(a)) we think that this is remotely unlikely to result in practice and that the practical maximum will fall significantly short of 100% of the six months total.

(3) However - and be the point last taken as it may - it is our own firm conclusion that a claimant can succeed concurrently in qualifying for awards under regulations 26(1)(a) and 26(1)(b), and that the awards then to be made fall to be made as separate and cumulative awards

computed in straightforward implementation of regulations 26(2)(a) and (b) respectively in the manner we have indicated, and without set-off of any sums "put aside"; and what we have already indicated in regard to decision R(SB)26/83 and the decision on Commissioner's File CSB 117/82 applies again here.

Signed I O Griffiths
Chief Commissioner

Signed D G Rice
Commissioner

Signed I Edwards-Jones
Commissioner

Date: 27 February 1984

Commissioner's File: CSB/349/1983
CSBO File: 1203/82
Region: Midlands