

Pregnancy related

VGHH/BC

Commissioner's File: CSB/560/1985

C A O File: AO 2641/85

Region: North Western

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONERName: ~~XXXXXXXXXX~~

Social Security Appeal Tribunal: Rochdale

Case No: 28/13

[ORAL HEARING]

Decision

1. This appeal succeeds. My decision is that the decision of the social security appeal tribunal dated 25 March 1985 is erroneous in point of law. I set it aside and refer the case to another social security appeal tribunal for determination in accordance with my directions.

Representation

2. I held an oral hearing of this appeal. The claimant, who attended, was represented by Mr Mark Rowland of counsel, instructed by the Child Poverty Action Group. The adjudication officer was represented by Mr E O F Stocker.

Nature of the appeal

3. This appeal by the claimant relates to a request by the claimant for an increase in his supplementary allowance in respect of a diet which had been recommended to his wife to follow during her pregnancy.

The relevant statutory provisions

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

The adjudication officer's decision

6. By a decision issued on 3 December 1984 an adjudication officer decided that the claimant was not entitled to an additional requirement for his wife.

7. The claimant's grounds of appeal against this decision are set out in a letter dated 4 January 1985 from the Consultant Obstetrician and the District Dietician of Oldham Health Authority, which is set out on form AT2 and is in these terms:

"We are writing to appeal against your decision to refuse an additional requirement for diet for [the claimant's wife].

The diet this woman is consuming has been described as grossly inadequate by D.H.S.S. standards for pregnant women. However, it is of the highest priority that [the claimant's wife] receives an excellent diet in terms of nutrition for the following reasons:- Firstly, this is her fifth pregnancy in 6 years. Her 3 young children were born 1979, 1981 and 1982 and her fourth pregnancy resulted in a stillborn child in 1984. Obviously, repeated pregnancies in close succession take their toll on a woman's nutritional status.

Secondly the fourth, stillborn child suffered a Neural Tube defect. In view of good research in recent years linking the incidence of Neural Tube defects with poor diet it is incumbent upon all concerned with [the claimant's wife] to minimise a recurrence of this tragic event."

8. According to the adjudication officer's written submission on form AT2, the facts before him were those now set out in the Second Appendix to this decision.

9. The reasons for the adjudication officer's decision were that the diet recommended to the claimant was not considered to be a "special" diet as it was one recommended to all pregnant women. He considered that it was a diet which did not consist of any extra items of food in addition to a normal pattern of eating and therefore need not be more expensive than any normal diet. It was one she would be recommended to follow for the sake of her general health irrespective of whether she was pregnant or not. He was also of the opinion that as pregnancy was a normal physiological condition it could not be said that it was a condition from which one suffered, therefore it did not come within the scope of sub-paragraph (e) of paragraph 14 of Schedule 14 [sic] of the Requirements Regulations.

The decision of the social security appeal tribunal

10. (1) The claimant appealed against this decision but the social security appeal tribunal, who heard the appeal on 25 March 1985, unanimously disallowed it and upheld the adjudication officer's decision.
- (2) The tribunal had before them oral evidence from Mrs Hanes, the district dietician who signed the grounds of appeal, that (according to the chairman's note) there could be anaemia and calcium deficiency as a result of the number of pregnancies over a short period (in this case, 6 years). Mrs Hanes gave details of effects of insufficient diet, health, birth complications etc.
- (3) The tribunal's recorded findings of fact were:

"The claimant is not entitled to an additional requirement for a diet for his wife.

It would not appear from the evidence that the claimant's wife required anything more than the normal diet specified for pregnant women. There was no evidence that she suffered any 'special' condition other than normal pregnancy.

The additional requirements under para 14(e) did not therefore apply in this case."

Their recorded reasons for decision were:

"Although the claimant's diet in October 1984 was declared inadequate the diet supplied was not of any special quality but was the diet prescribed for all pregnant women.

Vitamins etc could be prescribed for."

Was the decision of the tribunal erroneous in-law?

11. This is not now in dispute. It clearly was. The grounds of appeal to the tribunal (see paragraph 7), after allowing that the diet of the claimant's wife was inadequate by DHSS standards for pregnant women then goes on to state that repeated pregnancies in close succession had taken their toll on her nutritional status (ie in plain language that she was suffering from malnutrition). It then refers to the dangers of poor diet in relation to neural tube defects and the need (since her last child was stillborn with such a defect) to minimise the recurrence of this tragic event. The essential question that the tribunal should have, but failed, to ask themselves was:

"Did the claimant's wife require a special diet because of malnutrition?"

It was only if the answer to this question was "No", that it was necessary to consider the more general question as to whether the claimant as a healthy pregnant woman could obtain an additional allowance under paragraph 14 of Schedule 4 of the Requirements Regulations on the ground that such a woman needed a special diet. The failure to ask, and make findings on, the essential question for determination was an error of law; and for this reason I set the decision of the tribunal aside.

Is it expedient to give the decision that the tribunal should have given?

12. Mr Stocker submitted that it was, because the tribunal had found that it did not appear from the evidence that the claimant's wife required anything more than the normal diet specified for pregnant women, therefore she could not need a special diet. But this finding was made on the basis that the claimant did not suffer any special condition other than normal pregnancy. A consultant obstetrician and the district dietician stated, however, in her grounds of appeal, that she did so suffer. The tribunal, as an adjudicating authority with inquisitorial functions, should have made specific enquiry (if satisfied that the claimant was suffering from malnutrition) as to whether, because of that condition, the claimant required any special diet. The findings of fact as to diet made in ignorance of the essential question that was for determination by the tribunal are not to be relied upon in this case. Accordingly, the case must be reheard by another tribunal which should, in accordance with the usual practice, be entirely differently constituted.

Directions to the fresh tribunal

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

- (1) his wife, as from the date of his request, "needs a special diet" in terms of paragraph 14 and
- (2) that the reason for that need is that she falls within one or other of sub-paragraphs (a) to (e) of paragraph 14, of which sub-paragraph (e) is the only one that it has so far been suggested is in point on the present case.

14. "Special diet" in the context of paragraph 14 is clearly used in contrast to a "normal" diet. It includes, in view of the reference to extra cost in sub-paragraph (e) both an addition as well as a restriction in character and/or quantity: see decision CSB/517/82 at paragraph 12(1), with which I am in agreement. According, however, to decision CSB/1205/85 that comment cannot be construed as establishing that a mere increase in volume of the general food items consumed by an ordinary person constitutes a "special diet" (paragraph 14). In so far as this passage indicates that an increase in the general quantity of all foodstuffs normally eaten does not constitute a "special diet", but is a general diet, I agree. An increase in one or more particular items of food normally taken (e.g. milk) is capable, however, in my judgment, of constituting a special diet; and in so far as this passage implies the contrary, I disagree with it. Its author has authorised me to say that the quoted passage is not intended to imply the contrary. The tribunal should construe "special diet" in accordance with this explanation.

15. Sub-paragraph (e) requires the person to be one who "suffers from a condition other than one specified in sub-paragraph (a)". "Suffer" and "condition" are both ordinary words in the English language, which should be construed in the context in which they occur. "Suffer", in its transitive sense means according to the Shorter Oxford English Dictionary (1933) "to go or pass through, be subjected to, undergo, experience (now usu. something evil or painful)" and, accordingly to the more modern Oxford Paperback Dictionary (1979) "to undergo or be subjected to (pain, loss, grief, damage etc.)". "Condition" has different meanings according to context. In the present context, where the condition in question must be other than one specified in sub-paragraph (a), all of which relates to illnesses, some similar sort of condition must be in mind and the dictionary sense of "an ailment or physical disability" (Collins English Dictionary (1979) and "an abnormality" (Oxford Paperback), both of which give as an example "a heart condition", is clearly appropriate. For these reasons, a normal healthy pregnant woman is not a person who "suffers from a condition other than one specified in sub-paragraph (a)". Normal pregnancy cannot be described as an ailment nor a disability nor an abnormality. Two other Commissioners have reached the same clear conclusion by different routes: see decision CSB/915/85 (Mr J G Monroe) and CSB/285/1985 (Mr D G Rice); and I adopt their reasoning in reinforcement of my own.

16. The original grounds of appeal, as already explained, relied on the rapid succession of pregnancies, the defects from allegedly poor diet relating to the last child, who was born dead, and, it seems, from under-nutrition of the claimant. A person who is under or badly nourished may, though clearly it is a matter of degree which is for the tribunal to evaluate, properly be described as "suffering from a condition other than one specified in sub-paragraph (a)". But as already explained, a woman who is having a normal pregnancy is not suffering from a condition in terms of sub-paragraph (e) and any claim on that ground alone must fail.

17. (1) Before any award can be made under paragraph 14, the tribunal should have evidence before them, which they accept, of malnutrition (or some other ailment, disability or abnormality) falling within sub-paragraph (e) by reason of which a special diet is required. If the evidence conflicts, the tribunal should indicate which they accept and which they reject and why. In this connection, it should be emphasised that "chapter and verse" for quoted expert medical advice given to the adjudication officer (or to the claimant) ought to be given: see paragraph 8 of decision CSB/517/82 with which I agree. A copy of this decision should be before the tribunal. If it is established that the claimant did need a special diet for a reason falling within sub-paragraph (e) (ie not normal pregnancy but, for example, malnutrition) it will then be necessary to consider evidence as to its cost and to decide whether that cost is substantially in excess of that referred to in sub-paragraph (a). In this respect, I express my agreement with paragraphs 12 to 14 of decision CSB/517/82.

(2) "special diet" in paragraph 14 of Schedule 4 to the Social Security (Requirements) Regulations 1984, as amended, is clearly used in contrast to a normal diet. It includes, in view of the reference to extra cost in sub-paragraph (a), both an addition as well as a restriction in character and/or quantity: see decision CSB/517/82 at paragraph 12(1).

18. My decision is set out in paragraph 1.

(Signed): V G H Hallett
Commissioner

Date: 12 August 1986

THE FIRST APPENDIX

Items and cases applicable (1)	Weekly amount (2)
.....	
Diet	
14. Person who needs a special diet because he-	
(a) suffers from diabetes; a peptic, including a stomach and duodenal, ulcer; a condition of the throat which causes serious difficulty in swallowing; ulcerative colitis; a form of tuberculosis for which he is being treated with drugs; or from some illness for which he requires a diet analogous to that required for the other illnesses specified in this sub-paragraph;	(a) £3.35 as from 25.11.85 [£3.60 as from 26.11.84] £3.70;
(b) is convalescing from a major illness or operation or suffering from an illness not specified in sub-paragraph (a), and the diet involves extra cost;	(b) £1.45 as from 25.11.85 [£1.55 as from 26.11.84] £1.60;
(c) is a dependant and is living in the same accommodation as a person suffering from a form of respiratory tuberculosis for which he is being treated with drugs;	(c) £1.45 as from 25.11.85 [£1.55 as from 26.11.84] £1.60;
(d) suffers from renal failure for which he is treated by dialysis; or	(d) £.60 as from 25.11.85 [£10.35 as from 26.11.84] £10.65;
(e) suffers from a condition other than one specified in sub-paragraph (a), for which he has to follow a diet which involves extra cost, substantially in excess of the amount specified in sub-paragraph (a) in column (2).	(e) the weekly cost of the diet except in so far as it consists of proprietary foods or substances available under the National Health Service Act 1977 or, in Scotland, the National Health Service (Scotland) Act 1978.

THE SECOND APPENDIX

Facts before the Adjudication Officer

1. [The claimant] is a married man aged 40 years with 4 dependant children aged 2, 3 and 5 and 15 years. His wife Brenda is aged 21 years and is expecting her fifth baby on 1 June 1985. [The claimant] is receiving a supplementary allowance at the ordinary rate. On 12 November 1984 he requested an increase in his benefit in respect of a diet which had been recommended to his wife for her to follow during her pregnancy (see pages 1 and 2).

2. [The claimant's wife's] diet was analysed during the period 17.10.84 by Mrs F A Hanes, District Dietitian and she found that it was grossly inadequate compared to a diet recommended for pregnant woen. [The claimant's wife's] diet was costed at £5.93 per week, which included milk provided by milk token for one of her children. She was also being prescribed folic acid supplements by her doctor. (See page 3). The diet recommended for all pregnant women to follow was costed at £13.34 per week (see pages 4 and 5).

3. The Medical Officer for the Department of Health and Social Security in Manchester was contacted and his opinion concerning the diet, was requested. His comments were -

1. Pregnancy is a normal physiological condition and the diet recommended by the dietitian is the type which it would be wise for any normal adult to follow.

2. The diet does not consist of any extra items in addition to the normal pattern of food.

With [the claimant's wife's] history of five pregnancies in 6 years it is possible that extra items would be required, namely vitamin C, folic acid and/or iron but these can be supplied on prescription and in fact some obstetricians prescribe these routinely for all pregnant women.

4. [The claimant] notified the Local Office that his wife was pregnant on 17 October 1984. Arrangements were made on 19 October 1984 for her to obtain a free pint of milk per day and free vitamins.

SHORTER Oxford English Dictionary

suffer; to undergo, endure 2. "to go or pass THROUGH, BE SUBJECTED TO, UNDERGO, EXPERIENCE (now usu. something evil or painful)

condition; mode or state of being; characteristic, attribute

Oxford Paperback (1979)

suffer: to undergo or be subjected to (pain, loss, grief, damage etc.)

condition: an abnormality (she has a heart condition)

Chambers: a particular manner of being

suffer: to undergo, to ensure; to be affected by condition*

Collins: an ailment or physical disability: a heart condition

SUFFER* TO UNDERGO OR BE SUBJECT TO (tr. to undergo or experience (anything)).