Conditions of Entitlement – reg 6(e)(u) & (c)(ii). – Failure to distinguish between ability to work and prospects of employment under reg 6(e). General failure to make adequate findings of fact & give adequate reasons.

WMW/JOB

Commissioner's File: CSSB/69/88
LO: Anniesland
LO Ref No: 139959

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Glasgow West

Case No: 5/51/00277

1. I hold the decision of the Glasgow West Social Security Appeal Tribunal dated 18 September 1987 to be erroneous in law. Therefore I set it aside. I direct that the claimant's appeal be heard anew by a differently constituted tribunal.

2. On 2 February 1987 the claimant, then in receipt of a supplementary allowance, sought release from the condition attached to his entitlement to that allowance, namely that he be available for employment. That is the statutory condition attached by section 5(1)(a) of the Supplementary Benefits Act 1976 and it applies to all except prescribed cases. The prescribed cases are contained in regulation 6 of the Supplementary Benefits (Conditions of Entitlement) Regulations 1981 as amended. The adjudication officer considered the claimant's request under all the heads of that regulation and on 13 February 1987 issued his decision that the claimant remained under the requirement to be available for employment as a condition of receiving supplementary benefit. The claimant appealed that decision.

3. The case came before the tribunal on 18 September 1987. At that hearing a number of matters are recorded in the note of evidence as having been advanced for the claimant. In particular regulation 6(e) and (u) were pointed to and, as grounding consideration under those parts of the regulation, evidence was given about a minor stroke in 1980 causing a lack of confidence, slurred speech and other problems. His previous employment was in high pressure jobs. He had been made redundant from his last such employment. He had successfully passed various courses and had been actively seeking employment. He found it hard to concentrate and if under pressure his speech was slurred. He had pain in his leg and required medication to sleep. He had not worked since 1980. Arising out of that the tribunal made the following findings of fact -

"(1)/

NOTES

1. There is provision for an appeal against the Commissioner's decision to the Court on a question of law only. If you wish to appeal, you must first have leave (permission) of the Commissioner, and if this is refused, you can ask for leave from the Court itself. Any application for leave to appeal against the decision should be made to this office within three months from the date of this letter. The Commissioner may extend this time if there are special reasons. The application should be in writing, and should contain a statement of the question of law in respect of which you think the decision is wrong.

2. If the Commissioner in his decision has referred the case back to a local tribunal, the arrangements for the new tribunal hearing will be made by the tribunal clerk concerned, who will be in touch with you in due course.

3. If the Commissioner has referred the case back to the adjudication officer, or the Secretary of State's representative to implement his decision, an officer from the appropriate department will be in touch with you in due course.

"(1) Was made redundant in 1980 and suffered minor stroke same year.

(2) Sometimes stiffness in legs, speech said to be slurred during stress.

(3) Attended audit clerk course lasting six months and two week course at Strathclyde University. Seven week rehabilitation course.

(4) States he feels he could do any job offered but has not been offered any.

(5) Previous employed as a buyer.

(6) Has not worked since 1980.

(7) Stated to Department he would like job as head buyer.

(8) Forgetful."

Upon the basis of those facts the tribunal unanimously decided to uphold the decision of the adjudication officer and recorded their reasons as follows -

> "The tribunal considered the prescribed cases mentioned in section 5(1)(a) as set out in paragraphs (a) - (u) of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations. The tribunal consider that the appellant does not fall into any of the paragraphs a - t and that u does not apply the circumstances are not analogous. [The claimant] himself stated he feels he could [do] any job offered to him."

Against that decision the claimant again appeals, with leave of the chairman. The grounds of appeal refer to a medical certificate which was before the tribunal indicating the loss of confidence and inability to return to former employment due to the 1980 stroke. The grounds go on to deal with the claimant's other disabilities vis-a-vis obtaining employment and then contend that his age and health amount to a disability under regulation 6 of the Conditions of Entitlement Regulations. The adjudication officer now concerned supports this appeal but upon the basis that the tribunal have not made sufficient findings in fact nor set out adequate reasons for their decision. Broadly I accept all those submissions, to the extent that afterwards appears.

4. As a preliminary matter, the adjudication officer now concerned quite properly has drawn to my attention a manuscript by the tribunal chairman dated 12 December 1987 and headed "Request for leave to appeal" followed by the claimant's name. For my part I would regard that as an attempt by the chairman to set out the reasons why he granted leave to appeal although I derive that more from the heading than from the content, which I agree tends to be more suggestive of an attempt to elaborate the reasons for the tribunal decision. If the document was in fact the latter then I would certainly take the view that it was both

incompetent/

incompent and indeed improper for the chairman to seek to add to what was recorded in the record of proceedings and which had been copied to parties as part of the decision. Clearly the document in question was prepared after the decision had been promulgated and as matter of principle I have no doubt that once the tribunal decision has been promulgated that tribunal is functus officio and can play no further part in the proceedings, save so far as there are reserved to it certain minor powers limited to correction of accidental errors under regulation 10 of the Social Security (Adjudication) Regulations 1986 or, where there is an application to that effect, the consideration and determination of a question of setting aside of the decision on the grounds mentioned in, and within the powers set out in, regulation 11. This document, however, goes far beyond that. However, because of the view that I am prepared to take about it I say no more than to sound a cautionary warning against seeking to elaborate a tribunal's decision once grounds of appeal have been intimated. I may add that even if this document had formed part of the tribunal's reasoning it would not by one whit have affected my decision.

5. In his intimation of appeal to the tribunal the claimant seemed to be founding, apart from (e) and (u), on regulation 6(c)(ii) and (f). In his submissions to the tribunal the adjudication officer drew attention to two decisions by Tribunals of Commissioners, which are now reported as R(SB)5/87 and R(SB)6/87. As noted, at the hearing it seemed that it was regulation 6(e) and (u) that were particularly being founded upon. Nonetheless the four paragraphs of regulation 6 were properly before the tribunal. There is insufficient in the record of proceedings to indicate precisely how the tribunal regarded any of them. It is nothing to the point to say that they considered the case under all paragraphs. What were required were findings of fact and reasons sufficient to indicate to the claimant how the evidence presented under each particular paragraph was viewed, whether accepted or not, and if not why not, and then by reasoning how, so far as accepted, that was yet judged to have failed to satisfy the particular paragraph. Thus there was evidence, and there were indeed findings of fact, indicating that the claimant suffered, as a result of a stroke, some physical disability. It is not enough to say, for example, that speech was said to be slurred during stress: what is required is an indication as to whether that evidence was accepted or not. If it was then the finding should be positive. If not the finding should be clearly negative and the reason for the rejection of the evidence explained in the reasoning.

6. But then so far as regulation 6(c)(ii) is concerned the tribunal should have set out within the reasons and in light of proper and precise findings of fact, whether they were holding such facts to amount to, for present purposes, a bodily disablement - and again if they were not so holding then why not. Then it should have been determined with appropriate reasoning whether, if there was a bodily disablement, that meant that the claimant was being held to be incapable of work or not. Then finally it should have been considered whether paragraph (u) came in to make up a sufficient disablement to amount to an incapacity for work - by analogy from, in this case, the claimant's age. I note that his age has not been found as a fact as it should have been. There seems to have been no dispute that at the date of claim at least he was aged 55. It may well be that a 55 year old man with a history of heart

trouble/

trouble of a minor nature might be thought, partly because of direct bodily disablement and partly because of an analogous disablement, being his age, to be incapable of work where a younger man with the same medical history would not have been so held. These are matters on which the tribunal should have made positive findings. That is one error in law - a failure properly to deal with and set out facts and reasonings dealing with regulation 6(c)(ii).

7. I turn next to paragraph (f) because it is clear, from the finding that the claimant had not worked since 1980, that he could not possibly satisfy that paragraph so far as its head (ii) is concerned, since that required him not to have been in employment in the previous ten years. But that has not been properly reasoned in the decision. That is another error in law. The reasoning involved would have been of the simplest and is contained in the first sentence of this paragraph.

8. Finally turning to 6(e), it seems to have been common ground that the three particular qualifications required by that paragraph were all met, although again there are no findings in fact to that effect. That is a further error in law. But the real question under (e) is as to whether by reason of, in this case, physical disablement - again directly or by analogy through the provisions of (u) - the claimant had no further prospect of employment. As was pointed out in the Tribunal decisions to which this tribunal was referred, prospects are a quite different matter from ability. Thus in given circumstances a young man may have future prospects of employment which do not exist for an older man simply on account of the latter's age - or it may be, of course, partly on account of his age. No doubt because they have not made a finding about his age this tribunal do not appear to have considered the effect of that upon his prospects for employment. Indeed I am doubtful whether they have really considered prospects of employment at all. As I read the record of their proceedings, and in particular their finding of fact 4 and the last sentence of their reasoning, this tribunal seem to have been more concerned with the claimant's ability to work than the question of his prospects of getting employment. I rather suspect the adjudication officer originally concerned was equally so preoccupied and that may be the source of the problem. It matters not. This failure properly to approach the central question under paragraphs (e) and (u) is a further error in law.

9. The new tribunal will require to consider any matters put before them, but I would be surprised if regulation 6(f) again arises. In dealing with 6(c) the new tribunal will require to consider carefully the two Tribunal decisions referred to above and then, in the first place viewing the matter realistically, whether the claimant, with regard to all relevant circumstances including his age and health has any realistic prospects of future employment - that is of course something different from merely poor prospects. If they are persuaded that that is the situation then the next question is as to whether those poor prospects result from a disability - either directly under (e) having regard to the various matters of his health referred to or, it may be additionally, under (u) having regard also to his age. I draw attention to the fact that, however the disablement may be made up, it is not necessary that it be the sole cause of the claimant having poor prospects of employment but it must be judged as at least a significant

cause/

cause of the lack of prospects. I draw attention in particular to paragraph 23 at (e) of R(SB)5/87 and paragraph 8, towards the end, of R(SB)6/87. The whole of paragraph 23 in the former decision is a useful guide to the general approach to regulation 6(e) and (u) cases, and, indeed, to (c)(ii) and (u) cases. But I have endeavoured to particularise the questions in regard to the circumstances as they appear at this stage in this case. The final question then for the tribunal, if (u) is at all involved and only if so, is to decide whether it would be unreasonable, given the conclusions thus far, to require the claimant yet to remain available for employment. It is only if that last question is also answered favourably to the claimant, of course, that he can be relieved of the statutory condition which attaches to his right to supplementary benefit.

10. The appeal succeeds.

(signed) W M Walker
Commissioner
Date: 20 January 1989