JGMi/HJD

Commissioner's File: CSSB/544/89
* 47/91

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Glasgow North

Case No: 555 06956

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 11 September 1989 is erroneous in law and is set aside. The claimant's case is referred to another tribunal for reconsideration.

2. This is one of four appeals by claimants (the others being the cases on Commissioner's files CSSB/238/89, CSSB/540/89 and CSSB/470/89) heard before me on 23, 24 and 25 April 1991. The issues discussed mainly arose out of views expressed by another Commissioner in the Common Appendix annexed to his decisions on Commissioner's files CSSB/297/89, CSSB/308/89, CSSB/433/89, CSSB/298/89 and CSSB/281/89. (I shall hereafter merely refer to it as "the Common Appendix") In that connection an oral hearing of 5 cases before a Tribunal of Commissioners had been requested by the adjudication officer but that request was not acceded to by the Chief Commissioner. Instead, the hearing before me proceeded in 2 of the cases referred to by the adjudication officer and 2 others selected by myself. The issues arising in the 4 appeals inevitably overlapped to some extent but I have found it preferable to issue full decisions in all of the appeals. The claimants were represented by Mr Orr and Mr Ross Cameron, welfare rights officers of Strathclyde Social Work Department and the adjudication officer was represented by Mr D Cassidy of the Office of the Solicitor to the Secretary of State for Scotland. I am obliged to these representatives for their very considerable assistance. During the hearing Mr Orr asked me to adjourn this appeal in order that he might make an application to have the tribunal decision of 11 September 1989 set aside by reason of the absence of the original decision but I refused that request which I considered came far too late in the day.

3. The claimant in this case is a single man who was aged 51 at the date of the request for review under consideration. He had been in receipt of supplementary benefit since 18 November 1984. That followed a lengthy period of some 9 years when the claimant was in receipt of invalidity benefit due to disease of the kidney requiring prolonged treatment. Eventually although a degree of residual disability remained the claimant was found fit for work within limits in 1983 by a regional medical officer of the Scottish Home and Health Department and he claimed unemployment benefit for a year prior to claiming supplementary benefit. The award of supplementary benefit was subject to the condition that the claimant be available for employment in terms of section 5 of the Supplementary Benefits Act 1976. On 22 June 1987

the claimant made a request for the waiver by way of review of the requirement of availability. The ground stated for qualifying for relief from the requirement was satisfaction of regulation 6(e) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 (S.I. 1981 No. 1526). No ground of review was specified under section 104 of the Social Security Act 1975. It appears that the same question may have been previously raised on behalf of the claimant in 1985 and not dealt with. At all events an adjudication officer on 6 September 1987 refused the claimant's application for review and held that the claimant should continue to be available for employment as a condition of his entitlement to supplementary benefit.

4. On 25 March 1988 a further review request was made by the claimant on the same grounds. The request actually sought the payment of the long-term scale rate of benefit, which could only be applicable under regulation 7 of the Supplementary Benefit (Requirements) Regulations 1983 (S.I. 1983 No. 1399) if the requirement of availability were removed with effect from a date prior to the previous review decision. No ground of review was specified. On 12 August 1988 an adjudication officer refused to review the previous decision that the claimant should continue to be available for employment. The claimant appealed to a social security appeal tribunal.

5. The first tribunal hearing was adjourned but the chairman gave a direction under regulation 3(6) of the Social Security (Adjudication) Regulations 1986 (S.I. 1986 No. 2218) requiring the claimant's representative to amplify his grounds of appeal which merely said that they were "as stated". The claimant's representative did not see fit to do so but at the subsequent hearing before another tribunal on 11 September 1989 he founded upon the provisions of regulation 6(e), (c) or (u) of the Conditions of Entitlement Regulations, maintaining in particular that the claimant had satisfied the provisions of regulation 6(e) from the outset of the award of supplementary benefit or alternatively from a later date. The provisions of those paragraphs of regulation 6 are for convenience set out in the appendix to this decision.

6. The tribunal unanimously refused the claimant's appeal. They held that the decision that the claimant should continue to be available for employment as a condition of receiving supplementary benefit should not be reviewed and referred to regulation 6 of the Conditions of Entitlement Regulations and section 104. The tribunal made the following findings of fact:-

> "Claimant asked for waiver of availability on 22.6.87. In response to a DSS telephone inquiry he said he had been troubled by incontinence for some years but otherwise he had no health problems. Received no medication, and considered himself capable of most types of work other than heavy labouring. Waiver was refused, and on later application for review the refusal was maintained. There had been no appeal against the decision of 22.6.87."

The tribunal gave the following reasons for their decision:-

> "As will be seen from the appeal papers, this matter has been bedeviled and delayed by the representative's contemptuous disregard for the relevant Adjudication Regulations and today for the first time we have heard some grounds for the appeal against refusal to review. These grounds however do not rest on any evidence (medical, relating to 6(e), market/prospects, or analogy (u)), and although certain Commissioners

> decisions subsequent to 22.6.87 have elaborated on the factors to be examined in relation to a waiver application, these in no way invalidate the decision of that date. We agree with the Adjudication Officer's view that the decision was not given in ignorance of any material fact, that there was no mistake or error in fact or law and that there had been any subsequent relevant change in circumstances. Decision upheld."

7. The claimant's written grounds of appeal were that the tribunal decision was erroneous because they had failed to record the claimant's case and had made inadequate findings and given inadequate reasons. They also criticised the tribunal's view of the effect of recent Commissioners' decisions upon the availability issue. The claimant's case at the hearing before me was based on the proposition that there had been an error of law by the original adjudication officer who imposed the requirement of availability and that the subsequent decision in 1987 refusing review was not material. Mr Orr also maintained that the original decision should have been produced in connection with the appeal in order to enable the claimant's case to be properly formulated. The adjudication officer's attitude was that there was always an onus upon the person making application for review to show grounds for alteration of the existing decision. It was maintained that the role of the adjudication officer was not inquisitorial and that he was quite entitled to decide on the material, if any, put before him, especially where there was an absence of specific grounds of review. As regards this particular tribunal decision the adjudication officer accepted that the tribunal ought to have satisfied themselves as to the basis of the original decision requiring the claimant to be available in order to deal properly with the request for review. In failing to do so it was submitted that the tribunal had erred in law. I propose to deal first with the more general questions raised by this appeal regarding (1) the effect of a prior unappealed adjudication officer's decision refusing to review a decision requiring a claimant to be available for employment, (2) the related question of against what decision or decisions must a particular review application be directed and (3) questions of onus in review cases and the role of the adjudication officer.

8. As to the first of these questions, the issue of whether an adjudication officer's unappealed decision was res judicata which was discussed in the Common Appendix was raised before me but it was, I think, accepted by both representatives that it was perhaps unnecessary to discuss that common law concept when under Social Security Law the decision of an adjudication officer was, in terms of section 117(1) of the Social Security Act 1975, final unless subjected to appeal under section 100 or review under section 104. Section 117(1) provides:-

> "117. - (1) Subject to the provisions of this Part of this Act, and to section 14 of the Social Security Act 1980 (appeal from Social Security Commissioners etc. on a point of law) the decision of any claim or question in accordance with this Act shall be final; and subject to the provisions of any regulations under section 114, the decision of any claim or question in accordance with those regulations shall be final."

In the present case the decision of the adjudication officer in 1987 refusing the claimant's review application and holding that he should continue to be available for employment was thus final in the absence of appeal unless it could be successfully subject to further review. It was suggested by Mr Orr

that a refusal to review (as distinct from a refusal to revise on review) would not be an operative decision through which any future review would have to pass. Whether or not that is a sound view in relation to a decision merely finding no grounds for review it is not in my judgment applicable in the present case where the decision in question also expressly continued the application of the availability requirement so that at the date of request for review in 1988 that was the operative decision on that matter.

9. That leads me to the second question, which is related both to the finality issue examined above and to the question of the proper scope of a review, namely whether it is always and only the last operative decision that is subject to review. That is a matter which arose also in the associated appeal CSSB/238/89. It arises of course in the present case by reason of the adjudication officer's decision of 6 September 1987. Section 104 of the Social Security Act enables review of "any decision" but also makes clear that the grounds of review must be shown to be applicable to that decision. It was noted before me that the Adjudication Officer's Guide in paragraph 4334 takes the view in reliance on reported decision R(P) 1/82, that in overpayment cases there can be a 2 stage review, namely immediate review to correct the award of benefit for the future upon the changed circumstances which have emerged and secondly a later review to correct the award for the past. This approach has the obvious implication of leaving the previously operative decision undisturbed and so available for further review as regards the period prior to the occurrence of the relevant change of circumstances. It may however be consistent with the conclusion reached by me in the associated case CSSB/238/89 in agreement with the view of the Commissioner in the Common Appendix that in supplementary benefit cases review only justifies revision of a prior decision upon the consequences of the ground of review accepted. At all events my conclusion, as is more fully explained in paragraphs 6 to 11 of my decision in that case, is that by reason of the multiplicity of decisions commonly affecting particular elements of continuing awards of supplementary benefit review applications in such cases fall to be directed at least in the first instance against the last operative decision dealing with or covering the matter to which the ground of review is relevant. Review of <u>that</u> decision may of course in turn entail reconsideration by review of an earlier decision or decisions. That could prove to be the situation in the present case since review of the decision of September 1987 as the last relevant operative decision might necessitate review also of the original decision on availability.

10. As regards the question of onus it was common ground between the parties that the initial onus in review cases is upon the party seeking review to justify that review with appropriate grounds coming within the scope of section 104 of the Social Security Act 1975. A difficulty was pointed out by Mr Orr in those cases where only the bare terms of a previous decision, if that, are known to a claimant seeking review. The theoretical remedy of a claimant to ask for reasons for a decision on being given the decision in the first place is unlikely to have been availed of when the initial decision was not the subject of an appeal. However I see no escape from the obligation upon the party applying for review to state the grounds upon which this is claimed to be justified.

11. Discussion on that matter led on to consideration of the question whether the role of an adjudication officer is inquisitorial. The adjudication officer concerned with these appeals went so far in written submissions as to dispute on a general basis the inquisitorial role of an adjudication officer,

placing any obligation to obtain further information upon the Secretary of State. As a general proposition however this will not stand. It is certainly the case that no statutory provision is made for enquiries by an adjudication officer and that the person with power to require additional information is the Secretary of State under the Social Security (Claims and Payments) Regulations 1987 (S.I. 1987 No. 1968) and their antecedents. However it has long been accepted that the adjudication officer may make such enquiries as are necessary to enable him to discharge his duty to determine questions referred to him. It is only necessary to refer to the observations of Lord Diplock in Ex Parte Moore 1965 1 QB 456 at page 486 and to those of Glidewell LJ in Jones v The Department of Employment 1988 1 ALL ER 725 at page 733. The matter is in fact neatly put in paragraph 03013 of the Adjudication Officer's Guide which states:-

> "Although the responsibility for providing evidence to support a claim rests in general upon the claimant, the AO should bear in mind that it is for the AO to do as much as possible to see that the evidence needed for a case to be properly considered is brought to light."

It is of course the case that such observations have in general been made with reference to the duties and powers of an adjudication officer on receiving a claim rather than a request for review and it may be that a somewhat heavier onus rests upon the claimant in the latter instance. I am in no doubt that an adjudication officer may be entitled in many instances to decide a review application simply on the basis of the material put before him. In the present case the adjudication officer who dealt with the previous application for review clearly did make his own direct inquiries. As regards the production of the decision under review for the purposes of a subsequent appeal this should no doubt be done in all cases where it is possible to do so and the adjudication officer should in my view submit any evidence available as to the grounds of that decision so far as applicable to the point under review.

12. Applying the above considerations to the present case I conclude that the decision of the adjudication officer of 6 September 1987 was final subject to possible further review and that the claimant's subsequent review application required to demonstrate that there was a relevant ground of review available to justify revision of that decision, which at least on the claimant's main case would, if well-founded, extend to justify revision also of the original decision on availability. Upon what ground was the claimant putting that forward? That was the question to which the first tribunal vainly sought an answer. Mr Orr now says it was error of law in terms of section 104(1A), which failing, a subsequent relevant change of circumstances under section 104(1)(b).

13. Now it seems to me that the tribunal in the present case correctly appreciated that the review application which was under appeal to them required to be directed against the adjudication officer's decision rejecting the claimant's previous application in 1987 and continuing the requirement of availability. If in refusing to review the requirement of availability that adjudication officer fell into an error of law which had also affected the original decision it would of course follow that the original decision would also have to be reviewed and, it might be, revised to the appropriate extent. On the other hand if he did not so err, and the only ground of review available was the assertion of a relevant change of circumstances occurring after the decision of September 1987, represented for instance by the

claimant's advancing age removing any realistic prospects of further employment, then the only decision falling to be reviewed would be the decision continuing the requirement after September 1987.

14. As regards error of law Mr Orr's argument was that the original adjudication officer (and presumably the adjudication officer who refused review in 1987) had erred in law by confusing the issue of capacity for work relevant under regulation 6(c) of the Conditions of Entitlement Regulations with the issue of prospects of employment relevant under regulation 6(e). It appears to me from a consideration of the local adjudication officer's submission to the tribunal at paragraph 3(c) on page 3 of the appeal file that there was a measure of confusion between capacity for work and prospects of employment in the mind of the adjudication officer in September 1987. Certainly in a review apparently relating to prospects of employment the submission indicates that he referred only to the issue of capacity. I have come to the conclusion that on this issue at any rate the tribunal of 11 September 1989 were not entitled just to say that there was no error of law, even if in the end of the day they might have come to the conclusion that no revision of the requirement of availability was justified upon the basis of such error.

15. I set aside the decision of the tribunal as erroneous in law. The claimant's case will be referred to another tribunal for reconsideration. That tribunal should in the first instance consider whether a valid ground of review has been put forward against the decision of September 1987. If they consider that such a valid ground has been put forward it will be for them to decide if the circumstances warrant revision of that decision and, possibly, of the decision requiring the claimant's availability for employment which it reviewed and continued.

16. The appeal of the claimant is allowed.

(signed) J G Mitchell
Commissioner
Date: 26 June 1991

APPENDIX/

APPENDIX

Regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations contains the following material provisions:-

"6. A claimant shall not be required to be available for employment under section 5 in any week in which one or more of the following paragraphs apply and regulation 8(1)(a) does not apply to him:-

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(c) he is a person -

(ii) who, by reason of some disease or bodily or mental disablement, is incapable or work, or

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(e) by reason of physical or mental disablement he has no further prospects of employment and in the 12 months immediately preceding has -

(i) on average worked for less than 4 hours a week,

(ii) been available for employment under section 5 for not less than 39 weeks,

(iii) made reasonable efforts to find employment and not refused any suitable employment;

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(u) the preceding paragraphs do not apply to him, but the circumstances are analogous to any circumstances mentioned in one or more of those paragraphs and in the opinion of the benefit officer it would be unreasonable to require him to be available for employment."