SUPPLEMENTARY BENEFIT

Correction and setting aside of tribunal decisions.

Owing to a mistake by the claimant as to the date, he was not present at the hearing of his appeal by a Supplementary Benefit Appeal Tribunal which upheld the decision of the supplementary benefit officer. His letter of complaint was treated as an application to have the tribunal's decision set aside under the Social Security (Correction and Setting Aside of Decisions) Regulations 1975. The application was heard by a differently constituted tribunal, the claimant not being present at the hearing, and was refused. The claimant appealed to the Commissioner against the decision of the first tribunal on the ground that he was not present at the hearing and wished to be present at a hearing.

Held that:

1. a Commissioner's jurisdiction to set aside a tribunal's decision because of a breach of the rules of natural justice where there is a denial to a party of the right to be heard is additional to the jurisdiction of the person or body which gave the decision. A refusal by that person or body in no way binds the Commissioner nor precludes him from considering an appeal on the point (paragraph 3);
2. under the 1975 Regulations the person or body that gave the decision can set the decision aside "in a case where it appears just", whereas a Commissioner's jurisdiction to set aside on the ground of breach of natural justice depends on a denial to a party of the right to be heard (*"audi alteram partem"*) (paragraph 4);
3. tribunals should always ascertain in cases where the claimant does not appear and is not represented whether the claimant has stated that he wishes to be present (paragraph 6);
4. regulation 4(3) of the 1975 Regulations prohibits the appeal of a decision made under those regulations. The 1975 Regulations were made under the National Insurance Act 1974 and regulation 4(3) is therefore not *ultra vires* (paragraph 10).

The appeal was dismissed.

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1. I dismiss the claimant's appeal against the decision of the supplementary benefit appeal tribunal dated 7 December 1981, as that decision is not erroneous in law: Supplementary Benefits Act 1976, section 15A and the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980, [S.I. 1980 No 1605] (as amended by S.I. 1982 No 40), rules, 5, 6 and 10.

2. The claimant is a single man living in an owner-occupied house. He appealed to the supplementary benefit appeal tribunal against a decision of the supplementary benefit officer issued on 19 October 1981 as to the amount of his weekly supplementary allowance. No point of law arises in connection with the assessment of that supplementary allowance, as indeed the tribunal found in their decision of 7 December 1981, and I confirm their decision. However the claimant appeals to the Commissioner also on the ground that he was not present at the hearing on 7 December 1981 owing to a mistake by him as to the day of the hearing (he thought it was on the next day, 8 December 1981) and that he wished to be present at a hearing.

3. His original letter of complaint to that effect was treated as an application to have the tribunal's decision of 7 December 1981 ("the first tribunal") set aside under the Social Security (Correction and Setting Aside of Decisions) Regulations 1975, [S.I. 1975 No 572] ("the 1975 Regulations"—see below). That application was heard by a differently constituted tribunal (which is permissible in the circumstances mentioned in regulation 4(5) of the 1975 Regulations) on 25 January 1982 and the application was refused by the tribunal ("the second tribunal"). In view of that refusal, a question arises whether the Commissioner still has jurisdic-

tion to consider an appeal from the first tribunal's decision on the ground that the claimant did not attend the hearing, as that is of course a ground for setting aside the first tribunal's decision under the 1975 Regulations (see regulation 3(1)(b)) and had been adjudicated on by the second tribunal. The benefit officer now concerned asks for the Commissioner's guidance on this point. In my judgment the jurisdiction of a Commissioner to set aside a tribunal's decision on the ground of a breach of the rules of natural justice where there is a denial to a party of the right to be heard (see below) is additional to the jurisdiction conferred on the body or person which gave the decision, under the 1975 Regulations. A refusal by that person or body to set aside a decision in no way binds the Commissioner nor precludes him from considering an appeal on the point.

4. Regulation 4(4) of the 1975 Regulations provides:

> "4(4) Nothing in these regulations shall be construed as derogating from any power to...set aside decisions which is exercisable apart from these regulations".

The Commissioners have always had the power to set aside decisions of tribunals where an error of law is shown by a breach of the rules of natural justice. That jurisdiction is unaffected by the 1975 Regulations. Under those Regulations the body or person that gave the decision can set the decision aside "in a case where it appears just to set the decision aside" (regulation 3(1)) but the Commissioner's jurisdiction to set aside on the ground of breach of natural justice depends on a denial to a party of the right to be heard (*"audi alteram partem"*), a fundamental rule of natural justice.

5. Consequently I hold that I have jurisdiction to consider the claimant's appeal against the decision of the first tribunal. As a result of a direction by me evidence has now been brought as to the circumstances in which the claimant came not to attend the first tribunal's hearing on 7 December 1981. The claimant was sent notification of the hearing on 23 November 1981 on form LT212 in which the claimant was requested to indicate whether or not he would be coming to the hearing. The claimant signed form LT212 on 1 December 1981 (received by the tribunal clerk on 4 December 1981) and indicated that he would be coming to the hearing.

6. There is no indication in the record (on form LT235) of the tribunal's proceedings on 7 December 1981 of whether the tribunal's attention was drawn to the fact that the claimant had stated that he wished to be present at the hearing. All that the record shows is that the claimant was not present and the tribunal proceeded with the hearing. As to the tribunal's decision to go ahead with the hearing I must assume, in the absence of any evidence to the contrary, that this was done consciously, i.e. that the chairman and members of the tribunal were aware that the claimant had said that he wished to be present. If there was any evidence that the tribunal was unaware of the claimant's desire to be present, then I might have had to set the tribunal's decision aside but there is no such evidence. Tribunals should of course always ascertain, in cases where the claimant does not appear and is not represented, whether the claimant has stated that he wishes to be present. I must therefore assume that the tribunal exercised the power conferred upon it by rule 5(3) of the above cited Appeals Rules, namely that, "If any interested person fails to appear either in person or by representative at the hearing the tribunal may proceed to consider and determine the case notwithstanding his absence" (rule 5(3) as in force at that time—the words "proceed to consider and determine the case" have now been replaced by S.I. 1982 No 40 as from 15 February 1982 by the words "proceed with the case".)

7. Rule 6(1) of the Appeals Rules provides that the procedure in connection with the consideration and determination of any matter by the tribunal shall be such as the chairman of the tribunal shall determine. On the assumption that the tribunal in this case knew that the claimant had stated that he wished to be present, the tribunal's decision to proceed with the hearing was one properly made in exercise of the discretion conferred by rules 5(3) and 6(1) of the Appeals Rules (cited above) and I would not interfere with the exercise of that discretion. It appears that the claimant made a mistake as to the day of the hearing, i.e. he thought it was the next day. However, he had been properly notified of the date and time of the hearing in accordance with rule 5(2) of the Appeals Rules and I see no breach of the rules of natural justice in the circumstances by the tribunal deciding to proceed in his absence. I note from a reason for decision given by the tribunal which considered the application to set aside that the claimant lived within easy distance of the tribunal and I agree with their comment that "there was no true justification why he should not have attended the hearing on the correct date".

8. It is not entirely clear from the claimant's appeal to the Commissioner whether it is against the decision of the first or of the second tribunal that the claimant appeals to the Commissioner. I ought therefore also to deal with the possibility canvassed by the benefit officer now concerned that the claimant seeks to appeal to the Commissioner against the decision of the second tribunal refusing to set aside since the claimant asserts that he wished to attend that hearing also and also made a mistake as to its date—an unfortunate coincidence. The difficulty about such an appeal is that regulation 4(3) of the 1975 Regulations provides:

> "4(3) There shall be no appeal against a determination given under... these regulations".

9. In a direction dated 6 October 1982, I requested a submission from the benefit officer:

> "Whether regulation 4(3) of the [1975 Regulations] prohibiting appeals, is ultra vires, being made under section 6(1) and (3) of the National Insurance Act 1974, which subsections contain no express power to prohibit appeals. Alternatively, is it inconsistent with section 15A of the Supplementary Benefits Act 1976 and the Rules made thereunder?"

10. In a written submission (dated 1 December 1982) the benefit officer submits as follows:

> "I submit that regulation 4(3) of the [1975 Regulations] is not ultra vires. Section 6(1) and (3) of the National Insurance Act 1974 and the regulations made thereunder (of which regulation 4(3) is one) constitute, in my submission, a self-contained code governing the power to correct or set aside decisions, which is not subject to the appeal provisions of, inter alia, the Supplementary Benefits Act 1976 and the rules made thereunder.
>
> It is observed that section 8(3)(a) and (b) of the National Insurance Act 1974 provide that that Act is to be construed as one with the National Insurance Acts 1965 to 1973 and the National Insurance (Industrial Injuries) Acts 1965 to 1973, but that in each case section 6(1) and (3) are excepted. There is, in any event, no such provision in respect of the Supplementary Benefits Acts 1966 to 1975 (the forerunners of the Supplementary Benefits Act 1976). Accordingly I submit that a decision to set aside or not to set aside an earlier decision is not a 'decision' within the meaning of section 15A of the Supplementary Benefits Act 1976 and the rules made thereunder.

> If an appeal were to lie, specific provision to that effect would have been necessary in the regulations. Regulation 4(3) was inserted ex abundante cautela to make plain that no such provision was to be implied''.

I accept that submission of the benefit officer as being entirely correct in law and consequently the claimant's appeal to me (if such it was) against the decision of the tribunal dated 27 January 1982 not to set aside the decision of the tribunal of 7 December 1981 cannot be the subject of appeal to the Commissioner.

11. In my direction of 6 October 1982, I also raised the question of whether a decision by a tribunal not to set aside an earlier tribunal's decision could itself be the subject of an application for setting aside. The benefit officer now concerned has made submissions on the point but, on reflection, I consider that I ought not to express an opinion on this matter, as it does not arise for determination in this appeal and is hypothetical. I therefore leave the point open.

(Signed) M. J. Goodman
Commissioner