

SUPPLEMENTARY BENEFIT

Resources—distinguishing business and personal assets—date to which decision operates—appeals covering overlapping periods.

The claimant's business as a property developer ran into difficulty and he claimed supplementary benefit on 10 June 1982. Benefit was refused on the ground that the claimant had capital resources in excess of the then limit in regulation 7 of the Supplementary Benefit (Resources) Regulations 1981. The claimant appealed to the tribunal on the basis that certain investments were business not personal assets and should have been disregarded under regulation 6(1)(a)(v) of the Resources Regulations. On 25 August 1982 the tribunal confirmed the decision refusing benefit but its decision was set aside by a Social Security Commissioner on 1 November 1983. At the remitted hearing on 8 February 1984 the tribunal again confirmed the original decision. The claimant had been granted leave to appeal to the Commissioner against the tribunal's decision of 8 February 1984 but an appeal had not yet been made. On 21 September 1982 the claimant had made a further claim for a supplementary allowance which was the subject of the present appeal to the Commissioner. This claim had been rejected for broadly the same reason as the earlier claim. On 29 March 1983 the tribunal confirmed the decision. The claimant appealed to a Social Security Commissioner.

Held that:

1. the test to distinguish between business assets and personal assets is whether the asset is part of a fund employed and risked in the business. The manner in which the item is treated or not treated in the accounts (if any) of the business is not conclusive (paragraph 11);
2. the tribunal erred in law in considering the position as at the date of claim. A claim for supplementary allowance is open-ended and, where the situation is fluid, it must be looked at week by week. A refusal by an adjudication officer given on a particular day operates down to that day, and if confirmed on appeal operates down to the date of the appeal decision (paragraph 13);
3. a tribunal is not bound by a decision of a previous tribunal if the periods covered by the two decisions do not coincide. This applies even where there is no noticeable difference between the facts before the first tribunal and those before the second tribunal (paragraph 14);
4. where there are two outstanding appeals which cover all or part of the same period it is best that they are heard together. The appeal on the earlier claim should be treated as the effective appeal and a decision given on that. The decision on the other appeal should be that the question has already been decided (paragraph 15).

The appeal was allowed.

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 29 March 1983 is erroneous in point of law and, save so far as it may have been revised on review (see paragraph 15 below) it is set aside. The matter must be referred back to a social security appeal tribunal. For reasons outlined in paragraph 14 below it should not come before such tribunal until the claimant's intended appeal in the case on file CSB 622/84 has been disposed of.

2. The claimant made a claim (not the subject of the present appeal) for a supplementary allowance on 10 June 1982. The benefit officer by a decision issued on 11 June 1982 refused to award the allowance on the ground that the claimant had capital resources in excess of the statutory figure in regulation 7 of the Supplementary Benefit (Resources) Regulations 1981 [S.I. 1981 No. 1527] (then £2,000). The claimant appealed against this decision and it was confirmed on appeal by a decision of the supplementary benefit appeal tribunal dated 25 August 1982. The claimant appealed to the Commissioner against this latter decision and it was set aside by a decision of the Commissioner dated 1 November 1983. The matter came again

before the appeal tribunal on 8 February 1984 when the benefit officer's decision was again confirmed. The claimant has been granted leave to appeal against this decision (on file CSB 622/84) but he had not at the time of the oral hearing of the present appeal actually appealed against it, though he assured me of his intention to do so.

3. The claimant made a further claim for an allowance (which is the subject of the present appeal) on, I think, 21 September 1982. By a decision issued on 12 December 1982 the benefit officer rejected the claim broadly for the same reason as the other claim had been rejected. By the date of this rejection the statutory figure of £2,000 had been increased with effect from 22 November 1982 to £2,500. The claimant appealed against this rejection also but it was confirmed by the decision of the supplementary benefit appeal tribunal dated 29 March 1983 which is the subject matter of the present appeal. On the appeal to me the claimant presented his own case while the benefit officer was represented by Mrs. G. M. V. Leslie.

4. I should add that I was informed at the hearing that the claimant has been awarded (by a decision given on what I shall call "the award date") a supplementary allowance with effect from a date which I shall call "the payment date". I am not quite certain of the dates but I believe that the payment date was 10 February 1983 while the award date was 31 May 1983. The benefit officer making the award concluded that by the payment date the claimant no longer had capital resources in excess of the statutory figure.

5. The claimant's basic complaint about the decisions of the benefit officer and the appeal tribunal was that they included in his capital resources certain investments (which were undeniably of a capital value in excess of the statutory figure), when they ought to have been disregarded on the ground that came within the terms of regulation 6(1)(a)(v) of the Resources Regulations, which provides for the disregard of:—

"the assets of any business which is owned, in whole or in part, by a member of the assessment unit, for such period as in the opinion of the benefit officer it would be reasonable to disregard them."

6. The claimant had had a business as property developer which had run into grave financial trouble. His evidence recorded by the tribunal included the following:—

"He had owned a piece of land where he was providing roads and sewers and selling off plots to builders. Due to the recession builders had not been able to proceed and he had been left with a liability for road works. Rather than spend money on materials which would have laid on the site for a long time, he had invested money in shares"

It does not appear from the note of evidence, though the claimant told me that it was the fact, that the money so invested was derived from the sale of business land that he had been forced to sell.

7. The tribunal made no express finding on the question whether they accepted the recorded evidence. They made findings as to the value of the investments and other assets of the claimant and his wife as at 21 September 1982 and of the amount charged on them. They found also that since the date of the claim the claimant had sold shares to pay debts. The reasons for confirming the decision of the benefit officer were expressed as follows:—

"The claimant at the date of claim had capital in excess of £2,000 and having regard to all the circumstances it did not fall to be disregarded under Resources Regulation 6(1)(a)(v) and thus he is precluded from receiving Supplementary Benefit by Resources Regulation 7."

8. I do not consider that there were findings of fact sufficient to enable the tribunal to reach a proper conclusion on the question whether the investments could and should be disregarded under regulation 6(1)(a)(v); or to enable me to determine whether they applied the right principles in reaching their conclusion. I do not even know whether they considered that the investments were not business assets, or whether they considered that they were business assets which it was no longer reasonable to disregard. I do not consider the requirements of rule 7(2) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1980 No. 1605] were satisfied; and I find the decision to have been erroneous in point of law on that ground and I remit the matter to a social security appeal tribunal for redetermination.

9. It is necessary that I attempt to give that tribunal some rough guidance on the criteria for distinguishing between a person's business assets and his personal assets. This is not an easy matter. If a person carries on a business in partnership with another he has a duty to that partner to keep the business assets severed from and not mixed in with his own assets, and it is reasonably easy in the case of a person who fulfils this duty to distinguish the two classes of assets. But a sole trader has no such duty and commits no crime if he mixes his own and his business assets together; and he can freely transfer an item from his business to his personal assets and vice versa, as where a person carrying on business as a grocer goes and takes a pound of butter out of the shop for use in his household. The distinction does however sometimes matter, as in the present case. How is it to be drawn?

10. The claimant and Mrs. Leslie put forward diametrically opposed and extreme alternative solutions. The claimant submitted that as a creditor of a business could have recourse to all a trader's assets, all were business assets. Mrs. Leslie submitted that everything that was in the trader's name was a personal asset. I reject both these submissions. The claimant's submission would mean that the assets of a claimant who owned a business could all be disregarded however prosperous it was. And I do not consider that it makes a difference that in this case the business was insolvent. This factor does not make, say, the claimant's toothbrush into a business asset. Conversely Mrs. Leslie's submission would mean that no asset would be a business asset unless it were put into some name other than that of its owner.

11. The question is one that has arisen in other contexts, as where a person leaves his business by will to A and his other assets to B (see *Re Rhagg* [1938] Ch 828 and *Re White* [1958] Ch 762). It has arisen also in relation to income tax where the question is whether income is income from an investment or earnings of a business. In this last connection it has even arisen in relation to social security (see Decision R(U) 3/77 at paragraphs 14 and 15), where the income tax cases are considered and it was said (adopting the phraseology of one of the cases cited) that the test was whether the relevant income was "fruit derived from a fund employed and risked in the business". In the case of a capital asset it has to be considered whether the asset is part of the fund employed and risked in the business. Findings of fact should be directed to this issue. It emerges from the above decision also that the manner in which the item is treated or not treated in the accounts (if any) of the business is not conclusive.

12. Should the tribunal find that the investments in question are not business assets there can be no question of disregarding them. Moreover liabilities, whether of the business or otherwise, cannot be deducted from them in arriving at the value of the resources unless charged or otherwise secured on them (see Decision R(SB) 2/83). If on the other hand the

investments or any of them are found to be business assets it will be for the tribunal to express an opinion on how long (if at all) it is reasonable to disregard them, since matters which in terms of the regulations turn on the opinion of the benefit officer (or adjudication officer) turn on appeal on the opinion of the appeal tribunal (see Decision R(SB) 5/81 at paragraph 8). It may be regarded as reasonable to disregard such an asset at any particular time if it would not be reasonable to expect the claimant to have disposed of it by that time for the purpose of maintaining himself instead of husbanding it for the purpose of meeting his creditors' claims.

13. Quite apart from the question of business assets there is in fact another ground on which the decision was erroneous. The claim was an open-ended claim for an allowance. In the national insurance field it has been held that a decision refusing benefit under an open-ended claim operates as a refusal of benefit down to the date of the decision unless otherwise stated (see Decision R(I) 8/68); and that in particular a decision of a person or tribunal refusing benefit given on a particular day operates down to that day, and if confirmed on appeal operates down to the date of the appeal decision. (This last proposition does not apply in the case of the decision of a Commissioner with a limited jurisdiction only on supplementary benefit see Decision R(SB) 22/83 at paragraph 9.) It follows that the benefit officer's decision in this case operated down to 12 November 1982 and the appeal tribunal's down to 29 March 1983. The appeal tribunal however clearly looked at the position only as at the date of the claim, whereas with a claim for a continuing benefit like a supplementary allowance the facts must, if the situation is fluid, be looked at week by week (see Decision CSB 1120/83 (not yet reported)). The tribunal found that the claimant had disposed of investments since the date of claim and discharged debts and the position should have been considered to see if the assets had been reduced below the statutory figure at some time before the date of their decision. This omission has now to some extent been remedied by the subsequent award of an allowance from the payment date.

14. I come now to a submission made on behalf of the adjudication officer now concerned with the appeal with which I have been specifically asked by Mrs. Leslie to deal. It will be in view that at the time that the decision was given there was outstanding a decision on the other claim refusing a supplementary allowance, which on the principles enunciated in the preceding paragraph operated as a refusal down to the date of the decision (25 August 1982). The adjudication officer submits (relying on Decision R(I) 9/63) that this decision was conclusive of the matter and that the only decision that the tribunal should have given was that the matter was covered by the decision already given on that date. I reject this submission, as the periods covered by the two decisions did not coincide (see Decision R(I) 3/65). Even in cases where there is in fact no noticeable difference between the position during period A and the position during period B a decision concerning period A, however likely it is to be repeated in relation to period B, does not automatically govern it; in technical language there is no estoppel and the matter is not *res judicata* (see R(P) 1/65). In the present case where obviously there was every possibility of the position changing from one week to the next any other rule could work serious injustice.

15. The point made is not however without its relevance to the present case because by now there is in existence a decision on the other appeal dated 8 February 1984; against which the claimant intends to appeal. The claimant is interested in the present appeal only in respect of a period to the payment date, and if the decision of 8 February 1984 already extends to cover the entire period to the payment date and beyond it, it will be useless

for the claimant to take the matter back to an appeal tribunal while the decision in the other appeal stands. The matter should wait until the claimant's proposed appeal in the other case is disposed of. If the decision is set aside and the matter again referred to an appeal tribunal the two cases can come up together. If it is not set aside the only conclusion that the appeal tribunal can reach on the present appeal is that the question has already been decided in relation to the period before them. Indeed if the claimant's proposed appeal succeeds and the two matters come before a fresh tribunal together it will be best if they treat one appeal (preferably that on the earlier claim) as the effective appeal and give their ruling on that and simply decide on the other appeal that the question has already been decided. All this follows from the rule that it is not permissible to have two inconsistent decisions relating to the same period (as to which see Decisions R(I) 9/63 at paragraph 18, R(U) 5/63 at paragraph 7 and R(I) 3/65 at paragraph 14); the cited paragraph from R(I) 9/63 indicates that it is undesirable to have two consistent decisions relating to the same period because of the danger that one may be revised on review while the other is overlooked.

16. I must mention last the decision of the benefit officer given on the award date under which an allowance was awarded from the payment date. If the award date was subsequent to the decision of 29 March 1983 hereby set aside by me it was given at a time when there was an inconsistent decision extant. At first sight at least this would seem to conflict with what was said in the preceding paragraph. The decision making such award was however the decision of a benefit officer, and a benefit officer (like the adjudication officer now) had power to initiate a review, a power not possessed, in supplementary benefit cases, by an appeal tribunal. It may be therefore that the benefit officer's decision in question operated by way of review and revision, with effect from the payment date, of the decision hereby set aside. If it was not, and was for that reason erroneous in law, the adjudication officer could now put the record straight by reviewing it as erroneous in point of law and substituting a correct review decision. I would not think it necessary to do this.

17. The claimant's appeal succeeds.

(Signed) J. G. Monroe
Commissioner
