

pls ✓ whole cost diet addition.

RECEIVED 18 MAY 1986

TOC/1/LS

Commissioner's File: CSB/0688/1986

C A O File: AO 2609/SB/86

Region: North Western

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF A TRIBUNAL OF COMMISSIONERS

Name:

Social Security Appeal Tribunal: Rochdale

Case No: 41/13

[ORAL HEARING]

1. We allow this appeal by the claimant. The decision of the appeal tribunal dated 25 November 1985 was erroneous in law and we set it aside. The case must be reheard and redetermined by a differently constituted tribunal.

2. The claimant is divorced and has a dependant son who was born in 1983. The claimant receives supplementary allowance at the long term rate. Her son suffers from asthma and is allergic to certain foods. On 25 October 1984 the claimant claimed as an additional requirement a dietary allowance for her son. Initially she stated that the foods required were not available on the National Health Service and that there was no particular diet sheet - "It is all trial and error...Only what I find he is allergic to". On 21 December 1984 she was visited at her home and was asked to provide confirmation from her doctor that her son was following a special diet, and to provide a diet sheet. She forwarded a certificate from her doctor dated 15 January 1985; and a letter dated 15 March 1985 was sent to the local office of the DHSS by a district dietician. In that letter the district dietician set out the claimant's son's symptoms, and a list of the substances and foods which "trigger allergic reactions"; and a list of the foods which the son was allowed. The dietician included a sample menu costing £9.82 per week. By a decision dated 29 March 1985 the adjudication officer decided that the claimant was entitled to a diet addition for her son at the lower rate, backdated to 29 October 1984: see form AT2 "Facts before the adjudication officer" at paragraph 7 (at page 5 of the file). By a letter dated 10 April 1985, received 17 April 1985, the claimant appealed against that decision, stating (at page 9 of the file) that the cost of the diet was £9.82 "on top of what I would reasonably spend on my son's diet" and that that had now been increased by a further £5.25, totalling £15.07, which was the sum she claimed. On 4 June 1985 the diet sheet was submitted to a senior medical officer of the DHSS for his advice as to whether or not the son was suffering from an illness or condition which required him to follow the diet recommended and as to whether or not the diet was analogous to that required for the other illnesses specified in paragraph 14(a) of Part II of Schedule 4 to the Supplementary Benefit (Requirements) Regulations 1983. The senior medical officer replied:

- "1. The condition which [the claimant's son] is suffering from is one which requires him to follow the recommended diet.
2. The diet is analogous to that required for diabetes.

3. None of the substances or foods mentioned can be prescribed on the NHS."

On 4 July 1985 the adjudication officer reviewed and revised his decision dated 29 March 1985 and awarded the claimant "an additional requirement for diet for her son...at the rate of £3.60 per week". The adjudication officer has stated that that award was backdated to 9 February 1984: see form AT2 "Facts before the adjudication officer" at paragraph 10 (at page 5 of the file). The claimant appealed to the appeal tribunal against the revised decision of 4 July 1985 on the grounds (i) that the dietary allowance had been allowed only from 3 September 1984 [whereas the adjudication officer has stated that it was awarded from 9 February 1984] when in fact her son had started his diet on 9 February 1984, and (ii) that she wished to ask for a full cost diet as from 9 February 1984 of £15.07 "as per my original appeal". On 25 November 1985 the appeal tribunal confirmed "the determination of the adjudication officer" (which must, of course, be taken to mean the revised determination of 4 July 1985). The claimant now appeals with leave of a different tribunal chairman.

3. On 15 January 1987 the Chief Commissioner directed that the questions under paragraph 14 of Part II of Schedule 4 to the Requirements Regulations arising in the claimant's appeal should be decided by a Tribunal of Commissioners.

4. We held an oral hearing on 25 February 1987. The claimant was present and was represented by Mr Calder, a welfare rights officer. The adjudication officer was represented by Mr Stocker of the Solicitor's Office of the Department of Health and Social Security. We are grateful to them for their assistance.

5. The law.

Paragraph 14 of Part II of Schedule 4 to the Requirements Regulations sets out the circumstances in which an allowance for a special diet may be an additional requirement under regulations 11 and 13 of those Regulations. Paragraph 14 is in the following terms:

"Person who needs a special diet because he

- (a) suffers from diabetes; a peptic, including 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;
- (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;
- (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;
- (d) suffers from renal failure for which he is treated by dialysis; or
- (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)."

The amounts specified in column 2 at the material time were:

"(a) £3.60;

(b) £1.55;

- (c) £1.55;
- (d) £10.35;
- (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."

Regulation 13(2) of the Requirements Regulations provides:

"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."

6. The adjudication officer's decision dated 29 March 1985 would appear to have been made under paragraph 14(b). His revised decision of 4 July 1985 was made under paragraph 14(a). It is the claimant's contention that the award should be made under paragraph 14(e).

Mr Stocker submitted that regulation 13(2) makes it clear that a person could qualify under one or more paragraphs of regulation 14 and that "if there is a choice" the higher or highest amount shall be applicable under paragraph 14 in respect of any one person. Accordingly, he submitted, a claimant may succeed under, for example, paragraph 14(a) and paragraph 14(e), and that, in so far as the Commissioner in Decision CSB/1356/1986 decided otherwise, we should not follow that decision. That argument is of crucial importance in the present case, and we shall revert to it in paragraph 10 below.

7. In their unanimous decision the appeal tribunal, as we have indicated, merely confirmed the determination of the adjudication officer. That, as we have said, must have been the revised decision - but nothing turns on that. In their reasons, form AT3 box 4, they stated:

"The tribunal accepts the opinion of the Departmental Senior Medical Officer that the diet recommended for [the claimant's son] was analogous to a diet recommended for a diabetic and that the weekly additional requirement of £3.60 is correct in accordance with Requirements Regulations Part II Schedule 4 para 14(a)."

In their findings of fact, form AT3 box 2, they stated:

"...On 17.5.85 [the claimant] appealed and requested a review of her addition to cover an amount of £15.07 a week. On her behalf it was represented that the diet for a diabetic was not similar to that followed by [her son]. (See copy attached). An examination of the diet which [the son] followed discloses that it is largely a normal diet which in the opinion of the tribunal might well be followed by a diabetic. On 4.6.85 the Department Senior Medical Officer was asked for his advice and in reply certified...That the boy's condition necessitated a diet analogous to that required for diabetes."

8. In our judgment the decision of the appeal tribunal was erroneous in law for the following reasons:

- (1) In their findings of fact the appeal tribunal have set out the rival contentions but have not made any finding that the son required a diet "analogous to that required for the other illnesses specified in" sub-paragraph (a). They have merely recorded in their findings of fact that that is what the senior medical officer certified. It is true that in their reasons they "accepted" the opinion of the departmental senior medical officer; but we think that they should have made a proper finding of fact in relation to that matter.

(2) They have failed to make any finding or reach any decision as to the date from which the amount allowed for the special diet was payable: in particular, whether it was payable from 9 February 1984 or 3 September 1984 (as to which compare form AT2 with the claimant's notice of appeal: paragraph 2 above) or from any other date.

(3) More importantly, they have failed to make any finding or reach any decision under paragraph 14(e). It is clear from the findings of fact that they appreciated that the claimant was seeking an addition "to cover an amount of £15.07 a week" but it is clear that they have failed to consider sub-paragraph (e). Mr Calder and Mr Stocker are agreed in their submissions that the failure to consider the case under paragraph 14(e) constituted an error of law. We agree. In our judgment, the decision of the appeal tribunal was erroneous in law and the case must be reheard and redetermined by a differently constituted tribunal.

9. We make the following observations for the guidance of the new tribunal.

10. Paragraph 14.

We have no doubt that a claimant may sustain a claim under more than one sub-paragraph of paragraph 14. In other words, a claimant may succeed under paragraph 14(a) and also under paragraph 14(e); in which event the claimant will be entitled to the higher of the two amounts by virtue of regulation 13(2) of the Requirements Regulations. We appreciate that in Decision CSB/1356/1985 the Commissioner stated in paragraph 17:

"...For the purposes of sub-paragraph (b) an illness requiring an analogous diet in terms of sub-paragraph (a) is 'specified' in that sub-paragraph and therefore cannot meet sub-paragraph (b)'s requirement of 'an illness not specified in sub-paragraph (a)'. It cannot have been intended that the claimant should be entitled to one of two weekly rates, the lower of which entails satisfying the additional condition that it must involve, as sub-paragraph (b), but not sub-paragraph (a) stipulates, 'extra cost!'"

In paragraph 19(2) he put the matter quite explicitly:

"...In my judgment, for the reasons given in paragraph 18 [which must be a slip for 17] above in relation to sub-paragraph (b), if the claimant's illness satisfies the conditions of sub-paragraph (a), it is an illness 'specified' in that sub-paragraph. In other words, the claimant can only succeed under sub-paragraph (e) if he cannot succeed under sub-paragraph (a)."

We are unable to agree with those observations. In our judgment "some illness" which requires "a diet analogous" to a diet required for the other illnesses specified in sub-paragraph (a) is not in fact an illness "specified" in sub-paragraph (a). It is merely an illness requiring a diet analogous to a diet required for one of the specified illnesses. Accordingly, a claimant who suffers from some illness for which he requires a "diet analogous" to that required for one of the specified illnesses (i.e. one of the "other illnesses specified" in sub-paragraph (a)) will come within sub-paragraph (a). Such a person will be "suffering from an illness not specified in sub-paragraph (a)", and may, therefore, come within sub-paragraph (b). Such a person may also be suffering from "a condition other than one specified in sub-paragraph (a)", and may (if he satisfies the other conditions in (e)) come within sub-paragraph (e). We note that for the purpose of sub-paragraph (b), the particular claimant must be suffering from "an illness" not specified in sub-paragraph (a), but that for the purposes of sub-paragraph (e), the claimant must be suffering from "a condition" other than one specified in sub-paragraph (a). We do not think that for the purposes of the present case it is necessary for us to reach any decision as to the significance of that difference in the wording. We draw attention to the fact that in sub-paragraph (a) there are a number of illnesses specified - but only one "condition", namely "a condition of the throat which causes

serious difficulty in swallowing". For the purposes of the present case, we need only say that the claimant's son clearly does not suffer from one of the "specified" or listed illnesses in sub-paragraph (a) nor does he suffer from the "condition" specified in that sub-paragraph. Accordingly, he may have a need for a special diet under (a) and/or (b) and/or (e). If he has a need under (a) and/or (e), it is perhaps unnecessary to consider (b) since that provides the lowest weekly amount. If there is a need for a special diet under both (a) and (e), the new tribunal will award the higher amount: regulation 13(2). We now turn to sub-paragraphs (a) and (e).

11. Paragraph 14(a).

The new tribunal must make a finding of fact as to whether or not the claimant's son is suffering "from some illness for which he requires a diet analogous to that required for the other illnesses specified in this sub-paragraph". It is not sufficient for the new tribunal to set out the contention on behalf of the claimant, on the one hand, and what the senior medical officer has certified, on the other hand. It is necessary to make a finding of fact. The senior medical officer certified that the diet "is analogous to that required for diabetes", but gave no reasons why he came to that conclusion. The difficulty, of course, is to know what is meant by the phrase "a diet analogous". The word "analogous" is usually used in connection with cases or circumstances - e.g. "an analogous case" or "analogous circumstances". We have never heard it used in connection with a diet. Thus regulation 6(u) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 provides that a claimant shall not be required to be available for employment where, although the preceding paragraphs of regulation 6 do not apply to him, "the circumstances are analogous to any circumstances mentioned in one or more of those paragraphs" and in the opinion of the adjudication officer it would be unreasonable to require him to be available for employment. In Decision CSSB/189/1985, a Tribunal of Commissioners, in paragraph 8, referred to the definition in the Shorter Oxford Dictionary of the word "analogous" as meaning, among other things, "similar in attributes", and stated:

"In our view the draughtsman of the regulation inserted paragraph (u) to include those circumstances similar in attributes to those qualifying under earlier paragraphs which ought to be covered, but which he had not expressly mentioned."

Various tests of diet analogy were suggested by the representatives of the parties in the present case, but it is a question of fact in each case whether one diet can be regarded as analogous to another for the purposes of sub-paragraph (a). We think that, as a matter of common sense, "a diet analogous to that required for the other illnesses specified in this sub-paragraph" must be understood to mean a diet of a similar type to that required for the other illnesses. In our judgment, it is not possible to lay down criteria for determining that question, although we accept that the similarity of attributes relevant to sustain a finding of analogy between two diets could well embrace or include such matters as similarity in the extent to which they differ from a normal diet, similarity in costs, and similarities in the degree of difficulty attaching to the choosing, obtaining, or preparing of the diet or aspects of it.

12. Paragraph 14(e).

Under this sub-paragraph the new tribunal must make findings of fact as to whether or not

- (i) the claimant's son has a need for a special diet;
- (ii) whether he suffers from "a condition other than one specified in sub-paragraph (a)";
- (iii) whether or not the diet involves "extra cost";

- (iv) whether that "extra cost" is substantially in excess of the amount specified in sub-paragraph (a) in column (2), namely (at the relevant time) £3.60.

As we have already pointed out, the particular claimant must, for the purpose of sub-paragraph (e), suffer from "a condition". We think that the new tribunal, however, will have little difficulty in finding that the claimant's son suffers from "a condition other than one specified in sub-paragraph (a)". More difficulty may occur in relation to the requirement that the diet involves "extra cost". As the Commissioner said in CSB/1356/1985, at paragraph 18, in relation to the phrase "extra cost" in sub-paragraph (b):

"In my judgment, this means cost in excess of the normal diet for a person of the claimant's age and other circumstances. In the absence of special features (e.g. that a claimant suffers from a psychological or other abnormal aversion to food which prevents him from eating normally) the cost of what a claimant has normally been eating prior to undertaking the special diet can properly be accepted by the tribunal as the sum with which the cost of the special diet should be compared."

We think that those words apply with equal force to the phrase "extra cost" in sub-paragraph (e). The difficulty in the present case arises from the fact that, since the claimant's son began his special diet in infancy, it is not possible to compare the cost of the special diet with the cost of what he had normally been eating prior to undertaking the special diet. In those circumstances, the claimant must seek to adduce some evidence of the probable cost of a normal diet for a person of the claimant's son's age and other circumstances against which the "extra cost" of the claimant's son's diet can be measured - for example, evidence of the cost of feeding the sons of friends or relatives at a comparable age. It must be noted that the extra cost under (e) has to be "substantially" in excess of £3.60 per week. What is "substantially in excess" is a matter for the new tribunal to decide. If the new tribunal finds that the claimant's son is in need of a special diet under (e), they must award "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". The senior medical officer has certified that none of the substances or foods mentioned can be prescribed on the NHS and, accordingly, the new tribunal must determine "the weekly cost of the diet". In other words, the weekly cost allowed is not the "extra cost" but the whole weekly cost of the diet.

13. Date.

If the new tribunal decide that the claimant is entitled to an award of an additional requirement for a special diet for her son under paragraph 14(a) or (e), they must also make the necessary findings of fact and reach a decision as to the date from which the amount awarded is payable.

14. By her letter dated 25 October 1984 (at page 18 of the file) the claimant raised other claims but there appears to have been no appeal before the appeal tribunal and there was no appeal before us in relation to those items and we say no more about them.

15. For the above reasons, we allow this appeal. The new tribunal must make the relevant findings of fact and reach decisions in accordance with the guidelines that we have indicated above.

(Signed) J G Mitchell
Commissioner

J B Morcom
Commissioner

A T Hoolahan
Commissioner

Date: 21 April 1987