

JSW/BP

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON
A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

*of law - question**Reported**R (SB) 22/82*Decision C.S.B. 5/82

1. My decision is that the decision of the Hertford supplementary benefit appeal tribunal, dated 19 August 1981, is erroneous in law and is set aside.
2. This is an appeal, with leave, by the supplementary benefit officer. Since the submission on the appeal raised questions affecting entitlement of the claimant's mother (or parents) to child benefit, I directed that the chief insurance officer be informed of the appeal as a person interested in accordance with rule 10(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 and he was so informed.
3. At the oral hearing before me, the supplementary benefit officer was represented by Miss L Shuker and the chief insurance officer by Mrs M A Morgan, both of solicitor's office of the Department of Health and Social Security. The claimant was represented by Mr R Smith, solicitor, of the Child Poverty Action Group. The claimant and his parents were present.
4. The claimant, then aged 16, was living as a member of his parents' household. He was receiving full-time education, not being advanced education, at a school which was of a type recognised by the Secretary of State. At the end of the Spring term 1981 he ceased to attend school as a pupil but returned on 15 May 1981 to sit a two-hour CSE woodwork examination. He name remained on the school register until 18 May 1981 when it was removed.

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5. The claimant registered for employment at an unemployment benefit office on 27 April 1981 and claimed a supplementary allowance from 29 April 1981, which was disallowed by the benefit officer. The claimant's appeal, after an adjournment for the benefit officer to obtain evidence that the claimant was attending school up to 17 May 1981, was determined by the tribunal on 19 August 1981. The majority of the tribunal decided that the claimant was entitled to supplementary benefit from 29 April 1981 and did not consider that his mother would be eligible for child benefit under regulation 11 of the Supplementary Benefit (Conditions of Entitlement) Regulation 1980 since the claimant failed to satisfy the conditions and that he did not comply with section 6(2) and (3) of the Supplementary Benefits Act 1976. The dissenting member considered that child benefit would be payable in respect of the claimant.

6. The three legal representatives were all agreed that the decision of the tribunal could not be supported and that a question having arisen as to whether the claimant was a person in respect of whom child benefit would be payable, if a claim were made for it, should have been referred to an insurance officer and not decided by the tribunal. In my opinion, the submissions on that aspect of the appeal are correct. Instead of dealing with the facts as to whether the claimant was to be treated as receiving full-time education, the question should have been referred as required by the regulations. The benefit officer who appeared before the appeal tribunal should have made this clear to the tribunal instead of embarking on questions as to when the claimant left school and whether child benefit might be payable.

7. Section 6 of the Supplementary Benefits Act 1976, as amended, provides -

"6. - (i)

(ii) A person who has not attained the age of 19 and is receiving relevant education shall not be entitled to supplementary benefit except in prescribed circumstances.

(iii) Regulations may make provision as to the circumstances in which a person is or is not to be treated for the purposes of the preceding sub-section as receiving relevant education; and in this section "relevant education" means full-time education by attendance at an establishment recognised by the Secretary of State as being, or as comparable to, a college or school."

8. Regulation 5 of the Supplementary Benefit (Determination of Questions) Regulations 1980 provides -

"5. - (i) This regulation shall apply to the following questions -

(a)

(b)

(c)

(d) whether regulation 11 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 (circumstances in which persons are to be treated as receiving relevant education) applies to a person as being a person in respect of whom child benefit would, if a claim were made for it, be payable under Part I of the Child Benefit Act 1975 or would, but for failure to satisfy conditions as to residence and presence pursuant to section 13(2) and (3) of that Act, be so payable; and

(e) "

Paragraphs (f) and (g), added by amendment as from 27 July 1981, have no bearing on this appeal.

"(2) Where it appears -

(a) to a benefit officer that a question arises to which any of sub-paragraphs (b) to (e) of paragraph (1) applies:

(b) to an Appeal Tribunal that a question arises to which paragraph (1) applies, other than one which has been referred under sub-paragraph (a) of this paragraph,

that question shall forthwith be referred for decision to an insurance officer appointed in pursuance of section 97(1) of the Social Security Act.

(3) Nothing in paragraph (2) shall require the reference of a question which it appears to the benefit officer or, as the case may be, the Tribunal can be determined on an assumption as to which there is no dispute.

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- (4) Where a question is referred under paragraph (2) the benefit officer or Tribunal making the reference shall (subject to the provisions of regulation 4(6)(b) as to review) proceed to determine the supplementary benefit entitlement of the claimant on the assumption that the decision on the question referred will be adverse to him".

9. Regulation 11 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 provides -

- "11. For the purposes of section 6(2) (persons under 19 receiving relevant education not to be entitled to supplementary benefit) a person shall be treated as receiving relevant education for any period during which child benefit is, or would, if a claim were made for it, be payable in respect of him under Part I of the Child Benefit Act 1975, or would, but for words inserted as from 27 July 1981 not applicable failure to satisfy conditions as to residence and presence pursuant to section 13(2) and (3) of that Act, be so payable".

Regulation 12 of the Condition of Entitlement Regulations has no application to this case.

10. Regulation 5(1) of the Determination of Questions Regulations deals in the sub-paragraphs with a number of questions which may arise on a claim for supplementary benefit. That under (d) arose in this case, and it was not the function of the benefit officer or the tribunal to determine the circumstances in which the claimant was to be treated as receiving full-time education. The benefit officer should have referred that question to an insurance officer initially, or if it was not appreciated at the time, the appeal tribunal should have referred it when it arose on the appeal. If the question arose, or became apparent, after the claimant had appealed, I see no objection to the benefit officer reviewing the decision that supplementary allowance was not payable under regulation 4(1) of the Determination of Questions Regulations on the ground that it was based on a mistake as to the law or was made in ignorance of, or was based on a mistake as to, some material fact. The revised decision would then refer the question arising. It occurs to me that to invoke the review process after an appeal has been made might give the appearance of frustrating the claimant's appeal. However, since the duty to refer is mandatory - "shall forthwith be referred" - it makes no difference whether the benefit officer reviews his decision and refers the question or whether the appeal tribunal refer it. The guiding consideration should be which, in the circumstances of each case, is the speedier process rather than nicety of procedure.

11. If the tribunal had referred the question under regulation 5(1)(d), as they should have done, the question arises as to how the appeal against the decision disallowing supplementary benefit should have been dealt with under regulation 5(4), which is a mandatory provision. Mr Smith submitted that the interim position had to be dealt with by the tribunal and that "the decision on the question referred will be adverse to him" means, in the circumstances of this appeal, that child benefit would not be awarded in respect of him; therefore the tribunal were right in deciding that supplementary benefit was payable. He submitted that such an interpretation would not leave the claimant and his mother without benefit pending a decision on the question referred. Should the decision be that child benefit was payable, then the benefit officer could review the decision awarding supplementary benefit.

12. On first impression, that submission is attractive but I do not think it is correct. The question referred under regulation 5(1)(d) of the Determination of Questions Regulations is whether regulation 11 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 applies to a person as being a person in respect of whom child benefit would, if a claim were made for it, be payable. The provision as to residence and presence does not arise in this case.

13. Regulation 11 of the Conditions of Entitlement Regulations refers to section 6(2) of the Act and provides as stated. Both Miss Shuker and Mrs Morgan submitted that the requirement of regulation 5(4) of the Determination of Questions Regulations, namely "to determine the supplementary benefit entitlement of the claimant on the assumption that the decision on the question referred will be adverse to him" means that the decision on the question referred would be adverse to his claim for supplementary benefit and not that the decision on the question referred need be adverse to him, should he be the claimant in the question referred. In this case, for instance, a decision that child benefit would be payable to his mother because he was receiving full-time education would be a decision adverse to him since he would not be entitled to supplementary benefit. A decision in his favour would be that child benefit is not payable in respect of him since he would then qualify for supplementary benefit. When one considers the other questions to which any of the sub-paragraphs (b) to (e) of regulation 5(1) apply, it becomes clearer that when regulation 5(4) refers to the question referred being decided adversely to the claimant, it means adverse to his claim for supplementary benefit. The language of regulation 5(4) might have been clearer but I am persuaded that the submissions of Miss Shuker and Mrs Morgan are correct.

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14. The benefit officer, in the written submission on the appeal, has made a submission as to when the claimant ceased to receive full-time education and as to the terminal date thereof. It is not necessary for me to decide that issue and none of the representatives invited me to do so. It is an issue under the Child Benefit Act 1975 and regulations made thereunder and it is inappropriate for me to decide it, which might involve findings on issues of fact on an appeal in a supplementary benefit case confined to matters of law. Moreover, I am not empowered to decide it on this appeal in view of the mandatory provision to refer the question of child benefit to an insurance officer. The claimant's parents, however, in a letter dated 30 June 1981, maintain that the claimant left school at the end of the Easter term. They maintain that he should not be regarded as receiving full-time education up to the time when he returned to school to sit a 2-hour examination on 15 May 1981. They state that had it been known that he was still to be regarded as receiving full-time education he would have withdrawn from the examination, which was in no way vital or necessary, and no benefit problem would then have arisen. They contend that that was not explained to them.

15. No doubt it would suit the claimant's case if he was not treated as receiving full-time education from 29 April 1981 but his case cannot be treated in isolation. Child benefit replaced child allowances for income tax purposes and it would be to the advantage of some parents that the person should be treated as receiving the relevant education during the time before another examination is taken. A person is not **in fact receiving full-time education when not actually attending school, e.g. during school holidays.** ~~It seems to me that the date when a pupil's name is removed from the school register should be the determining factor, after which regulation 7 of the Child Benefit (General) Regulations 1976, as substituted by regulation 3 of the Child Benefit (General) Amendment Regulations 1980 (S.I. 1980 No 1045) applies to determine the "terminal date".~~ I can well understand that a person leaving school and having only an examination or examinations to take at some future date might well wish to register for employment and obtain employment. It was recently stated by the Parliamentary Secretary for Social Security that the government will not allow those leaving school to claim supplementary benefit immediately after they leave school. I have made these observations because of the parents' letter, although I agree with the submissions that they do not arise on this appeal and I have not had the advantage of submissions on the subject. As far as the benefit officer and appeal tribunal are concerned, the statutory provisions to which I have referred require such questions to be referred to an insurance officer.

16. I have no authority myself to refer the question to the insurance officer for his decision or to deal with it as an issue of fact. I therefore remit the appeal to be determined by an appeal tribunal in accordance with the law stated in my decision. If, however, this decision is issued on or after 15 February 1982, I refer the question to the insurance officer myself, which is the decision the tribunal should have given, and which I can give in accordance with the amendment to rule 10(8) of the Appeals rules by rule 6(2) of the Supplementary Benefit and Family Income Supplements (Appeals) Amendment Rules 1982 /S.I. 1982 No 40/

17. The appeal of the benefit officer is allowed.

(Signed) J S Watson
Commissioner

Date: 23 February 1982

Commissioner's File: C.S.B. 695/1981
CSBO File: S.B.O. 923/81