

JG/SH/41

actua co diet - prescription
items only taken into account only
insofar as they are actually obtained
(paras 4 & 6). Please see below

Commissioner's File: CSB/738/1989

Region: Wales & South Western

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Cardiff

Case No: 4530

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 31 October 1988 as that decision is erroneous in law and is set aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to a differently constituted social security appeal tribunal: Social Security Act 1975, section 101 (as amended).

2. This is an appeal to the Commissioner by the claimant a divorced woman aged 34 at the relevant time. She has three dependent children David then aged 15, Alexandra then aged 8, and Julia then aged 3. The appeal against the unanimous decision of a social security appeal tribunal dated 31 October 1988, which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 10 February 1988. That decision was, that in calculating the claimant's requirements for supplementary benefit purposes, the claimant was entitled to an additional requirement of only £1.65 weekly in respect of a special diet necessary for her daughter Julia. That diet has to be gluten free because Julia suffers from "coeliac disease", which necessitates a gluten free diet.

3. The controversy in this case is as to the amount which is in fact payable under paragraph 14 of Part II of Schedule 4 to the Supplementary Benefit (Requirements) Regulations 1983. That paragraph provides as follows,

"Diet

14. Person who needs a special diet because he -

In deciding whether there were "extra costs substantially in excess -" under 14(e), SSAT not entitled to make discounts for foods available from NHS. Only if 14(e) was applicable, could they then calculate amount of addition, take into acc such foods & then only if actually obtained.

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| <p>(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;</p> | <p>(a) £3.80 [per week];</p> |
| <p>(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;</p> | <p>(b) £1.65 [per week];</p> |
| <p>(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;</p> | <p>(c) £1.65 [per week]</p> |
| <p>(d) suffers from renal failure for which he is treated by dialysis; or</p> | <p>(d) £10.85 [per week];</p> |
| <p>(e) suffers from a condition other than one specified in sub-paragraph (a), for which she has to follow a diet which involves extra cost, substantially in excess of amounts specified in sub-paragraph (a) in column (2)</p> | <p>(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."</p> |

4. The original tribunal in this case clearly took considerable trouble with the case and their record of decision (on Form AT3) is a model in its completion. However, I must set the tribunal's decision aside because they clearly erred in law when considering paragraph 14(e) of Schedule 4. In deciding whether or not there were "extra costs substantially in excess of the amount specified in sub-paragraph (a) in column (2) [i.e. £3.80 per week]" the tribunal erred by making a discount because the claimant "did not take up the full availability of gluten free products on prescription, thus involving herself in extra expense" (tribunal's reasons for decision). When deciding whether the condition of the left-hand column of

paragraph 14(e) was satisfied i.e. whether the extra cost exceeded £3.80 a week they could not make such a discount. It was only if they had, on taking the actual figures into account, come to the conclusion that paragraph 14(e) was applicable that they would be able to, under the right-hand column of paragraph (e), take into account proprietary foods or substances available under the National Health Service Act 1977 and even then only in so far as such foods or substances were actually obtained (see below).

5. Because of their error the tribunal concluded that paragraph 14(e) did not apply at all but it might apply depending on the new calculation which the new tribunal will have to make, bearing in mind my direction on the point of law above. As new calculations need to be made and the facts need reinvestigation this is not a case where I can myself give the decision which the tribunal should have given. I must therefore remit it for rehearing and redetermination to a social security appeal tribunal which, in accordance with the usual practice and no reflection on the original tribunal, should be differently constituted from that original tribunal.

6. Because the original tribunal concluded that paragraph 14(e) did not apply it merely awarded the standard amount of £1.65 per week under paragraph 14(b). However, if the new tribunal decides that paragraph (e) is fulfilled, it should award the actual weekly cost of the diet (and not merely the excess cost above that of a normal diet -see the decision of a Tribunal of Commissioners to this effect on file CSB/552/1988). They must make no discount for items that could be obtained under the National Health Service that in fact have not been purchased at all but must make a discount for any items which have been purchased which could in fact have been obtained free under the National Health Service.

(Signed) M.J. Goodman
Commissioner

Date: 25 September 1989