

RFMH/SH/4



Commissioner's File: CSB/777/1985

C A O File: AO 2801/85

Region: North Western

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 27 March 1985 is erroneous in point of law and accordingly I set it aside. I direct that the matter be reheard by a differently constituted tribunal in accordance with the directions in this decision.

2. This is the adjudication officer's appeal against the unanimous decision of a social security appeal tribunal dated 27 March 1985. The claimant asked for an oral hearing of the appeal, a request to which I acceded. At the hearing held before me the claimant attended and was represented by Mr N Warren, Solicitor, from the Birkenhead Resource Unit. The adjudication officer was represented by Mrs Stanton of the Chief Adjudication Officer's Office of the Department of Health and Social Security. I am grateful to them both for their detailed submissions.

3. At the material time the claimant was aged 32 and was separated from his wife and two children. He lived with Miss D and had been in receipt of supplementary benefit in respect of himself and Miss D since 10 March 1984. On 1 August 1984 he claimed an additional requirement for diet, which he said he followed because of his height and weight, which were 6ft 10ins and approximately 23 stone respectively. The claim was supported by a letter from the claimant's own doctor stating "I confirm this pt [patient] justifies a dietary supplementary allowance". The adjudication officer rejected the claim and thereupon the claimant appealed to the tribunal.

4. In his written observations on the claimant's appeal the adjudication officer considered paragraph 14 of Schedule 4 to the Supplementary Benefit (Requirements) Regulations 1983 and submitted that the claimant was not entitled to a dietary addition because he satisfied none of the conditions referred to in sub-paragraphs (a) to (e).

5. On 27 March 1985 the tribunal allowed the appeal and decided that the claimant was entitled to "a dietary allowance of £12.50 each week with effect from 10 March 1984 in accordance with item 14(e) Requirement Regulations". Their findings on questions of fact

were:-

"The appellant is generally a fit young man aged 32 measuring 6 ft 10 ins in height and weighing 23 stones. His doctor advised him to eat more to maintain his health. Because of his size he has been prescribed medication to deal with his injured shoulder at a rate which is twice that which would normally be prescribed because of his size. He was not overweight. His dietary needs are much greater than the normal person and at the present time is relying on eating regularly with his parents (two days each week) and Miss D's parents (one day each week) to supplement his eating needs."

The tribunal's reasons for the decision were:-

"Dictionary defines "condition" as "a state in which things exist" or "a particular manner of being". To suffer can be defined as to undergo or be subject to. Diet is defined as "a way of feeding" or "habitual food". Applying definition appellant is within provisions of item 14(e) Requirements Regulations. R(SB)3/83 considered but does not assist with definition for purposes of item 14(e).

Tribunal assessed appellant's weekly dietary costs as the excess of the required expenditure in food (£37.50 - based on £5.00 per day) after deducting £25 being the tribunal's estimate of the food content of the basic weekly allowance of £43. R4 Requirements Regulations considered."

The adjudication officer now appeals to the Commissioner on a point of law, leave having been granted by me.

6. Paragraph 14 of Schedule 4 to the Requirements Regulations provides as follows:-

"14. Person who needs a special diet because he -

- (a) suffers from diabetes; a peptic, including stomach or 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 sum specified in sub-paragraph (a) was at the relevant time £3.35 (£3.60 as from 26 November 1984). It should be noted that regulation 13(2) precludes the award of a dietary addition under more than one sub-paragraph in respect of any one person.

7. It is not contended that the claimant is entitled to an award of a dietary addition

under sub-paragraphs (a) to (b) of paragraph 14. What is contended is that he is a person who needs a special diet because of his height and weight and that he is entitled to such an award under sub-paragraph (e).

8. It is not in dispute that in order to be entitled to a dietary addition under sub-paragraph (e) the claimant has to satisfy three conditions: (1) that he "suffers from a condition"; (2) as a result of that condition he needs a special diet, (3) such a diet involving extra cost substantially in excess of the prescribed amount referred to in sub-paragraph (a). The conditions are cumulative and not in the alternative so that a claimant will not succeed if he can satisfy only one or two of the conditions.

9. Mrs Stanton submitted that while she appreciated that sub-paragraph (e) referred to "a condition" as opposed to "an illness" nevertheless the fact that sub-paragraph (e) specifically excluded the illnesses and a condition of the throat referred to in sub-paragraph (a) carried with it the implication that the condition to be taken into account was a pathological one. She found support for this interpretation in the unreported Commissioner's decision on file CSB/285/1985 in which he stated, in considering pregnancy, (paragraph 6):

".. admittedly pregnancy is a condition, but, in my judgment, it is not the kind of condition envisaged by paragraph 14(e). The words "other than one signified in sub-paragraph (a)" made it clear that the kind of condition contemplated is a pathological condition, that is to say, a deviation from the healthy norm which is amenable to medical intervention in the form of the prescription of a special diet of a kind to cure or ameliorate the effects of that condition. Normally a pregnancy is not a pathological condition.."

Mrs Stanton argued that although the claimant's height and weight were above average it was normal in his case. Further the tribunal had found as fact that he was "generally a fit young man" and there was no medical evidence to the contrary. Accordingly his height and weight were not the kind of condition envisaged by sub-paragraph (e). Conversely Mr Warren argued that as the word "condition" was not defined in the Requirements Regulations it should be given its ordinary everyday meaning. He submitted that it referred to any type of condition provided it required a special diet which involved extra cost substantially in excess of the amount prescribed in sub-paragraph (a). I reject this interpretation and accept Mrs Stanton's submission.

10. In my view the tribunal erred in law in concluding that the claimant's height and weight was a "condition" in terms of sub-paragraph (e) of paragraph 14. They considered the dictionary definitions of "condition" and "to suffer" and interpreted these in isolation and not in conjunction and without reference to their context. Sub-paragraphs (a) to (d) provide for an award of a dietary addition to persons whose state of health is below the usual norm or who are potentially so by living in close proximity with such a person in given circumstances. In that context it would be difficult to suppose that an interpretation which leads to the conclusion that any condition falls into the category envisaged by sub-paragraph (e), whether or not deviating from the healthy norm, accords with the intention of Parliament. Further the phrase "suffers from a condition" has to be read as a whole and denotes a condition with an adverse effect which might be termed "a disorder". In my view sub-paragraph (e) is limited to a class of pathological conditions analogous to those specified in sub-paragraph (a) where the special diet required as a result involves extra cost substantially in excess of the amount prescribed in sub-paragraph (a). In Decision R(SB)3/83 the Commissioner held, albeit in a different context, that a person who was outsize was not physically disabled unless medical evidence showed that his size was due to illness. Similarly in the present case the claimant's height and weight is not "a condition" in terms of sub-paragraph (e) in the absence of medical evidence indicating that they are due to illness. Accordingly in my view the tribunal's decision was erroneous in law in that they misinterpreted the word "condition". It will be for the new tribunal to find as fact whether the claimant suffers from such a condition having regard to any medical evidence

before them. If they conclude that he does not, that is an end to the matter. However if they conclude that he does, they should then proceed to consider whether he has to follow a special diet as a result of that condition.

11. It is not in dispute that the claimant is not restricted in the type of food he eats. Mr Warren submitted that a "special diet" in terms of paragraph 14 was not limited to quality but included quantity generally. He argued that as a result of his height and weight the claimant was required to follow a special diet in terms of sub-paragraph (e). He referred me to sub-paragraph (b) and (c) which were in the form of "build up" diets and submitted that the tribunal were justified in concluding that the claimant required a similar "build up" diet to maintain his health. I do not agree and in my view the fact that a claimant consumes a more than average quantity of food does not constitute a "special diet" for the purposes of sub-paragraph (e). The word "special" qualifies the nature of the food comprised in the diet or the proportions in which the varying elements in such food are required to be taken. A special diet may be either a positive or an excluding diet provided it is needed by reason of, and medically prescribed by reference to, the pathological condition. In a positive diet the medical advice is directed to the consumption of particularised foodstuffs and to the amount thereof, for instance "a high fibre diet". An excluding diet is one where the medical advice is not to consume certain particularised foodstuffs, for instance "a no fat diet". However, a diet of this sort would by definition not involve any extra expense unless, by way of compensation for the items to be abstained from, it called for the consumption of some new specific foods or classes of foods or, if the same were already included in the person's current intake, a greater quantity thereof. But in this event the special diet would in effect be a positive one. I do not consider that a person can establish that he needs a special diet merely by showing that he consumes "across the board" a greater amount of foodstuffs than a normal person requires.

12. Mr Warren relied on the unreported Decision on Commissioner's file CSB/517/1982 and referred me to paragraph 12(1) which reads as follows:

"Little difficulty appears to me to arise upon the text in column (1) of paragraph [13]. It is apparent from the introductory wording of paragraph [14] that the reference in sub-paragraph (e) to "a diet which involves extra cost" contemplates the excess of cost of a "special" diet over that of a "normal" diet; and I would add in that context only that whilst in many usages the basic concept of "diet" is an intake of food and/or drink which is restricting (in character and/or quantity) by reference to the norm, the term "diet" is in my view in context as well as application where the difference consists in some addition to such intake in excess of what is the normal (as eg. "a high protein diet")."

I agree with the Commissioner in the unreported decision on Commissioner's file CSB/1205/1985 (paragraph 11) who in considering a case involving similar facts explained the effect of the above quoted passage in the following terms:-

"Manifestly, that comment is not directed to establishing that a mere increase in the volume of the general food items consumed by an ordinary person constitutes a special diet. All that the Commissioner was there indicating was that in the context of paragraph 14 the adjudicating authorities are only concerned with the case where there is an addition to the normal range of foodstuffs. I agree with this. As stated there would only be an increase in cost where there is an addition to, not where there is an exclusion from, a normal diet, unless, of course, such an exclusion led to a compensating addition. Accordingly, the unreported decision CSB/517/1982 has no bearing on the present case."

13. If the new tribunal conclude that the claimant needs a "special diet" as a result of his "condition" in terms of sub-paragraph (e), they should then proceed to consider whether this diet involves extra cost substantially in excess of the amount specified in connection with

sub-paragraph (a). Both Mrs Stanton and Mr Warren agreed that if the diet required extra cost but not substantially in excess of the amount specified in sub-paragraph (a), nothing could be awarded under sub-paragraph (e). What may entail a cost "substantially" in excess of the cost of normal diet is a matter of fact for the tribunal to decide in accordance with the ordinary use of the English language and the exercise of their judgment.

14. Clearly, the tribunal erred in point of law in deciding that the claimant was entitled to an additional requirement for a special diet, and accordingly I must set aside their decision. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned above.

15. I allow this appeal.

(Signed) R F M Heggs
Commissioner

Date: 25th June 1986