

WHO IS RELEVANT PERIOD?
AGGREGATION REG. 1A(2)
(EQUAL TREATMENT)

MASTER

JJS/3/LS

Commissioner's File: CSB/0836/1986

C A O File: AO 2726/SB/86

Region: Midlands

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Archibald B. [REDACTED]

Social Security Appeal Tribunal: Greater Birmingham

Case No: 162/09

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal is erroneous in point of law. I set it aside and refer the case to a differently constituted social security appeal tribunal for determination in accordance with my directions.

2. I held an oral hearing of this appeal. The claimant was represented by Mr Charles Beton, a legal executive with Rust and Company, Solicitors of Birmingham. Mr J. Latter of counsel, instructed by the Solicitor's Office of the Department of Health and Social Security, appeared for the adjudication officer.

3. This is a claimant's appeal against a decision of the Birmingham social security appeal tribunal that he was not entitled to supplementary allowance. It was held that the Department of Health and Social Security had correctly treated the claimant as the claimant rather than his wife.

4. On 26 August 1985 the claimant claimed both unemployment benefit and supplementary benefit, he had left his employment on 16 August 1985. He completed a postal claim form for supplementary benefit, B1, (the form is at pages 28 - 35 of the case papers). In box 4 of the form he declared that he had got a partner who was living with him. The next question read as follows

"Does your partner agree to you making this claim for both of you?"

If you are not sure, tick No."

The claimant ticked "no", thereby indicating that his partner did not agree to his making the claim for both of them, or in any event indicating that he was not sure whether she was agreeable to his making the claim for both of them. The claim was put before the adjudication officer as it stood, without any further investigation by the Department to determine who would be the claimant for the couple. It is common case that either the claimant or his wife could have claimed benefit on behalf of both, the wife had been in receipt of invalidity benefit for about 7 years prior to the application. Entitlement to supplementary allowance was assessed at the long term rate and payment was made through the unemployment benefit office, where the claimant was required to register each fortnight as unemployed. On 5 November 1985 the local office of the Department of Health

and Social Security was informed by the unemployment benefit office that unemployment benefit at the rate of £28.45 weekly had been awarded to the claimant and the adjudication officer reviewed his decision. He decided inter alia that the ordinary rate of normal requirements was applicable, both at the date of the review and from the outset of the claim. By a later decision issued on 29 November 1985 the adjudication officer decided that the claimant had no entitlement at all to supplementary benefit. It was this decision which was the subject of the appeal to the tribunal.

5. The claimant's appeal to the tribunal resulted in the adjudication officer's decision being upheld. It was argued on behalf of the claimant before the tribunal that the Department had treated his wife as the claimant initially by applying the long term scale rate and thus were accepting that the Supplementary Benefit (Aggregation) Regulations, paragraph 1A(1)(b) applied. In their findings of fact the members of the tribunal found that no written election under the Supplementary Benefit (Aggregation) Regulations 1981 paragraphs 1A(4) had been made, the claim form B1 signifying availability for employment had been signed by the claimant and the application of long term scale rate initially was an error and not an assumption that the claimant's wife was to be treated as the claimant. The appeal was dismissed as the members of the tribunal were unanimously of opinion that the Department had correctly treated the claimant as the claimant in the case as there was no evidence to contradict this as being the intention of the couple. In the opinion of the tribunal if the claimant's wife was to be treated as the claimant there had to be a written election under regulation 1A(4) and from then on an aggregation of their requirements and resources would result in the long term scale rate being applicable.

6. Either the claimant or his wife in this case could have claimed benefit on behalf of both. If the claimant's wife had claimed or been jointly nominated or jointly elected she would have satisfied regulation 1A(1)(b)(iv). Equally well the claimant at the date of the claim was eligible to be treated as the relevant person. The importance to the family of this point is that the entitlement to benefit will depend on the circumstances of the claimant. If the husband were to be the claimant then there would be no entitlement to supplementary benefit, whereas if the wife were there would be an entitlement (all entitlement apart from any question of housing benefit supplement would cease when he got his unemployment benefit).

7. Section 1(1) of the Supplementary Benefits Act 1976 provides for the right to supplementary benefit and sub-section (2) of the same section deals with the aggregation of requirements and resources; that has to be read with paragraph 3 of Schedule 1 to the Act and regulation 1A of the Supplementary Benefit (Aggregation) Regulations 1981 deal with the circumstances in which the requirements and resources of one partner of a married or unmarried couple are to be aggregated with and treated as those of the other and in effect prescribe the conditions that have to be satisfied for one of the partners to claim. In the present case each would satisfy a condition. They are not in receipt of benefit under the provisions of the Family Income Supplement Act 1970 and regulation 1A(1)(a) is not applicable so it would be open to the claimant and his wife to nominate which of them was to be the claimant in the manner provided for by regulation 1A(2). I set out the paragraph

"(2) If, in any case where sub-paragraph (a) of paragraph (1) does not apply to a couple, sub-paragraph (b) of that paragraph applies to both partners or to neither partner, their requirements and resources shall be aggregated and treated -

- (a) as those of whichever partner has been jointly nominated in writing as claimant; or
- (b) where one partner has not been jointly nominated in accordance with sub-paragraph (a), as those of whichever partner the Secretary of State may in his discretion determine."

8. I now turn to the argument advanced on behalf of the parties. It is submitted that as there was no joint nomination it fell to the Secretary of State to determine the question in accordance with regulation 1A(2)(b). It is said that all the evidence before the tribunal was that the Secretary of State had determined that the claimant's resources should be aggregated with those of his wife, this is so because the long term rate was applicable to her and not to him. Consequently the initial decision of the adjudication officer was correct and the revised decision was erroneous. It is contended that the adjudication officer could not award supplementary benefit unless the Secretary of State had determined in accordance with regulation 1A(2). It is further said that the adjudication officer wears two hats; first that of the Secretary of State's representative and second that of an adjudication officer dealing with the judicial aspect of a claim. I am asked to infer that he must have determined that the wife was to be the relevant person in his first capacity and that in his second capacity he then decided that her requirements and resources include those of the husband by virtue of paragraph 3(1) of Schedule 1 to the Act. Mr Latter agrees that there was no joint nomination in writing, and says that without it or a determination by the Secretary of State the claimant's application could not be properly determined by the adjudication officer and consequently the initial decision was invalid. He continues by saying that the error was compounded because the revised decision did not decide which of the couple was the relevant person. It was not correct to treat the claimant as the relevant person unless some evidence of joint intention was available.

9. It seems to me that the tribunal ignored a piece of evidence which was provided by boxes 4 and 6 of the form B1. After the claimant declared that his partner did not agree to his making the claim for both of them, he answered a further question about his partner, namely whether she had ever claimed supplementary benefit and he answered it in the affirmative and said that the last day when she got any was 20 August 1985. It will be remembered that this form was completed on 27 August 1985. If the answers were correct, then the wife may well have been a claimant and for that matter nominated to be the claimant; and to treat the husband as a claimant would require a written election under regulation 1A(4). This piece of evidence also raised the question of whether or not an initial decision had been made in respect of the wife as the relevant person. It seems to me that this put the tribunal on enquiry and that it was impossible to reach a conclusion without looking at the previous history and inviting the parties to lead evidence on it. It would appear that the tribunal decided the matter on the basis that there was no suggestion that the wife made any claim, but the answers on the form, to which I have referred, suggest that she did make a claim for supplementary benefit, previous to that made by the husband, and was paid supplementary benefit on it within days of the husband making the claim on B1. This brings me to another point arising on the initial decision. It is submitted by the claimant that there must have been a determination by the Secretary of State. It does not seem to me that the tribunal could make such an inference but the facts before them were such that they should have enquired into whether such determination had been made. They did not do so. Both failures constituted errors in law.

10. It will be remembered that the tribunal in the reasons for their decision stated that the Department had correctly treated the husband as the claimant as there was no evidence to contradict this as the intention of the couple. This was a case where both husband and wife satisfied the prescribed conditions and their requirements and resources were to be those of such one of them as they may have jointly nominated in accordance with regulation 1A(2)(a). It must be borne in mind that the nomination is a joint one and must be in writing. The nominated claimant must be nominated by both partners and there is no presumption that the man is the claimant or that the person who signs the claim form is the claimant. Where both parties qualify there must be a joint nomination signed by both. In the circumstances of the instant case the tribunal were wrong in law in directing themselves that the husband should be treated as the claimant on the basis that there was no evidence to contradict this as the intention of the couple.

11. The new tribunal to whom the case is referred for determination will have to bear in

mind what I have said in the preceding paragraphs. If the members find that there was no determination by the Secretary of State then the whole case will have to be referred back to the adjudication officer and it will be necessary for him to consider who is the claimant and to look for a joint nomination. ??

12. I would invite the attention of the parties to the provisions of regulation 5(2)(aa) of the Supplementary Benefit (Claims and Payments) Regulations which may provide a more expeditious method of dealing with the matter. ???

(Signed) J J Skinner
Commissioner

Date: 10 April 1987