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Commissioner's File: CSB/985/1989

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 5 December 1988 is erroneous in point of law and accordingly I set it aside. I direct that the matter be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is the claimant's appeal against the decision of the social security appeal tribunal of 5 December 1988, leave having been granted by the tribunal chairman.

3. The facts set out in box 5 of Form AT2 record that at the material time the claimant was divorced. His date of birth was 19 March 1934. He had been a self-employed haulage contractor for 20 years up to 1982. He also held a Heavy Goods Class III driving licence. He had no health problems. On 5 April 1988 he requested that the requirement that he be available for employment as a condition of his entitlement to supplementary benefit be waived for a retrospective period. He submitted that he satisfied the conditions contained in regulation 6(u) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981, as amended (the Regulations) because of his age.

4. The question was important to the claimant because under regulation 7 of the Supplementary Benefit (Requirements) Regulations 1983 as amended, a claimant who has been entitled to benefit without being required to be available for employment for over a year qualifies for benefit at the long-term (higher) scale rate. The adjudication officer rejected the claim and the claimant appealed to the tribunal.

5. In his written observations on the claimant's appeal the adjudication officer had regard to regulation 6 of the

Regulations with particular reference to paragraphs (f), (e) and (u). The adjudication officer failed to consider the question of backdating.

6. The claimant and his representative attended the hearing of the appeal before the tribunal on 5 December 1988. The claimant gave evidence as to his employment history and the claimant's representative submitted that the claimant's age was analogous to a disability. In the event the tribunal decided that "claimant is not to be required to be available for employment as a condition of receiving supplementary allowance from 5 April 1988 but this should not be backdated beyond 5 April 1988". In their reasons for decision the tribunal had regard to the Tribunal of Commissioners Decision R(SB) 5/87 and concluded that the claimant satisfied the conditions of paragraph (u) by analogy with the conditions in paragraph (e) because of "his age and work experience and economic conditions currently prevailing and that the appellant's age and lack of general fitness were analogous to physical or mental disablement". The tribunal rightly had regard to the position in the 12 months immediately preceding 5 April 1988.

7. Regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 provides that every tribunal chairman shall record a statement of the reasons for the tribunal's decision and of their findings on material questions of fact. In the present case the findings of fact read "Tribunal accepted facts per form AT2 and appellant's verbal evidence". The phrase "appellant's verbal evidence" does not constitute a finding of facts. The decision is inadequate because it is impossible to ascertain whether the law was applied correctly to the facts. Further the tribunal gave no reasons why they rejected the claimant's request to have the review of availability waived from 5 April 1983, which was the date given on the original request for review. It is not enough to state merely that "this should not be backdated beyond 5 April 1988". Manifestly the tribunal's decision did not comply with the statutory requirements and was erroneous in law in consequence. I should put on record that the adjudication officer now concerned supports the appeal on this ground.

8. Section 104(1)(a) of the Social Security Act 1975 provides that any decision of an adjudication officer may be reviewed at any time by an adjudication officer, or, on a reference from an adjudication officer, by a social security appeal tribunal if the decision was given in ignorance of, or was based on a mistake as to, some material fact. The tribunal that rehears this case should establish what the claimant's grounds of review are and consider in the light of such information whether the conditions for review were satisfied and, if so, from what date.

9. The new tribunal should then proceed to consider whether the adjudication officer's decision fell to be revised from that date. Section 5(1)(a) of the Supplementary Benefits Act 1976 (the Act) provides that the right of any person to supplementary benefit is subject to the condition that he is available for employment except in prescribed cases. Regulation 6 of the

Regulations made pursuant to section 5(1)(a) of the Act, lists the cases in which a person is not required to be available for employment as a condition of title to supplementary benefit. The claimant's representative sought to base his case under regulation 6(u) by analogy with regulation 6(e).

10. The paragraphs in regulation 6 are alternatives and the claimant need bring himself within any one. But a tribunal may in my judgment properly reject a claim based on regulation 6 if it disposes of all paragraphs which a party has put forward and without considering the possibility of basing a claim upon other paragraphs, unless the facts presented to them are such as ought to suggest the possibility that some of the paragraphs should be considered. The new tribunal should first consider paragraph (e). It should be noted that "no further prospect of employment" must be "by reason of physical or mental disablement". Further, in my view the words "no further prospect of employment" should be read to mean "no reasonable prospect of employment in the foreseeable future". If the new tribunal accept that the claimant satisfies the conditions, they should proceed to consider whether he satisfied sub-paragraph (i), (ii) and (iii) in the 12 months immediately preceding the period in issue. The claimant should be prepared to submit evidence showing that he made reasonable efforts to find employment.

11. If the new tribunal conclude that the claimant is unable to satisfy the conditions of paragraph (e) they should proceed to consider paragraph (u). The new tribunal should refer to the said Decision R(SB) 5/87 which provides guidelines on the interpretation of this paragraph. A copy of this decision should be included in the document before the new tribunal who should refer in particular to paragraphs 11, 17 and 23. It is to be noted that under paragraph (u) a value judgment has to be made as to whether it would be unreasonable to require the claimant to be available for employment.

12. If the new tribunal conclude that the claimant was entitled to payment of the long-term scale rate for any period prior to 5 April 1988, the date of the claimant's application for review, they should proceed to consider whether the claimant is caught by the limitation imposed under regulation 69 of the Social Security (Adjudication) Regulations 1986 so that any payment is limited to 5 April 1987 i.e. 52 weeks back from the date of the application for review made by the claimant on 5 April 1988. The tribunal should consider whether the 12 months limitation on backdating contained in regulation 69 should not apply on the facts of the case because the claimant is assisted by regulation 72(1)(a) providing so far as relevant to the present appeal:-

"Exemption from limitations on payment of arrears of benefit

72. (1) Subject to paragraph (2) [not relevant to this case] nothing in this section shall operate so as to limit the amount of benefit or additional benefit that may be awarded on a review of a decision if the adjudicating authority making the

review is satisfied either -

(a) that the decision under review was erroneous by reason only of a mistake made, or of something done or omitted to be done by an officer of the Department of Health and Social Security or of the Department of Employment acting as such, or by an adjudicating authority or the clerk or other officer of such an authority, and that the claimant and anyone acting for him neither caused nor materially contributed to that mistake, act or omission;

(b) [not relevant to this case]."

The new tribunal should refer to Decision CSB/1331/1989 for guidance on the interpretation on the above quoted regulation. If the new tribunal conclude that the claimant is not assisted by regulation 72 of the Adjudication Regulations, it follows that the 12 months limitation on backdating contained in regulation 69 of the Adjudication Regulations will apply. The request for review was received on 5 April 1988 and arrears in consequence cannot be paid prior to a date 12 months earlier i.e. 5 April 1987.

13. I should add for completeness that the claimant's representative sought to limit the claimant's appeal to the period prior to 5 April 1988. In a Direction dated 7 June 1991 I drew attention to the following:-

"The claimant and his representative should note that if the case is remitted to another social security appeal tribunal for rehearing, the whole of the period in issue will be considered afresh. It is not possible to limit appeals to only a part of a tribunal's decision."

The tribunal that rehears this case should consider the period from 5 April 1983 for 11 April 1988, when the claimant's supplementary benefit was replaced by income support pursuant to the Income Support (General) Regulations 1987.

14. For the reasons stated above the tribunal's decision was erroneous in law. The claimant's appeal is allowed and I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs
Commissioner

(Date) 7 February 1992