CSB 118/1981

JM/JCB

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.S.B. 8/81 KSB 6/81

1. This is an appeal brought, by my leave, by the supplementary benefit officer against a decision of the supplementary benefit appeal tribunal dated 12 February 1981, which decision varied a decision of the supplementary benefit officer issued on 14 January 1981.

2. The claimant is a married man living with his wife in local authority property. At the material time he was in receipt of a supplementary allowance because he was unemployed. Accordingly, he satisfied the basic condition of entitlement to a single payment.

3. On 29 December 1980 the claimant claimed a single payment to meet the cost of -

(a) two pairs of long underpants, two vests and one pair of slippers for himself, and

(b) two brassieres, one corset, one pair of slippers and two jumpers for his wife.

Unsurprisingly, he made no attempt to relate this claim to any particular provision of the Supplementary Benefit (Single Payments) Regulations 1980 [S.I. 1980 No 985]. In common with most claimants for single payments he simply stated that the items were needed and that he could not afford them.

4. The supplementary benefit officer rejected the claim in toto. He took the view that the need to replace the various items had arisen solely by reason of normal wear and tear. The claimant appealed to the supplementary benefit appeal tribunal ("the tribunal"). He and his wife gave evidence thereto. I quote the entry in box 3 on the relevant form LT235:

> "The appellant's wife said that she is unable to go to the toilet unaided and often has a mishap. This results in excessive washing of underwear. She has applied for

> attendance allowance. The appellant said that because of the need to use a lot of hot water they are spending a large part of their small income on this and cannot afford to save more than the £1.00 per week, which is insufficient to cover all their clothing needs."

This, of course, reads like a note of evidence. Box 3 is headed "Findings of Tribunal on question [sic] of fact material to decision". I am prepared, perhaps over-generously, to assume that the entry in box 3 is intended to indicate that the tribunal accepted the evidence thus recorded.

5. The tribunal's decision was:

> "To award a payment amounting to £17.20 under the Single Payments Regulations No 27."

Its reasons were recorded thus:

> "In view of the wife's disability there is heavy wear on her underwear and clothing and in view of this the tribunal consider that at this time a payment for pants, bra and jumper for the appellant's wife should be awarded." (The underlining is mine.)

6. Neither the recorded decision nor the recorded reasons make any reference to that part of the claim which related to clothing for the claimant himself.

7. Regulation 27 of the Supplementary Benefit (Single Payments) Regulations 1980 provides, so far as relevant, as follows:

> "A payment for any item of clothing or footwear specified in column 1 of Schedule 2 shall be made where any member of the assessment unit needs new or replacement clothing and that need has arisen otherwise than by normal wear and tear, for example where the need has arisen because of ... heavy wear and tear on clothing or footwear resulting from any mental or physical illness, handicap or disability ..... ."

8. Of the sum of £17.20 awarded by the tribunal £3.60 related to two pairs of pants. In respect of this part of the award the benefit officer now concerned makes no challenge. The papers contain no record of any claim's having been made in respect of pants for the claimant's wife (cf paragraph 3 above). Regulation 3(1) of the Supplementary Benefit (Claims and Payments) Regulations [S.I. 1980 No 1579] provides as follows:

> "Every claim for benefit shall be made in writing to the Secretary of State either -
>
> (a) on a form approved for the purpose by him and supplied without charge by such persons as he may appoint or authorise for the purpose; or

(b) in such manner as he may accept as sufficient in the circumstances of any particular case or class of cases."

It is difficult to understand why paragraph (a) was drafted in such pedantically stringent terms. The phrase "on a form" has been preferred to "in a form"; and, to make certain that no one construes "on a form" as including "in a form", the noun "form" is qualified by the adjectival phrase "supplied without charge ... etc.". It will not do, accordingly, for a claimant to type out, on a sheet of his own paper, a replica of the approved form. (Contrast the Social Security (Claims and Payments) Regulations 1979 [S.I. 1979 No 628] where regulation 4 deals with "form", and the obligation to supply forms free of charge is expressed quite separately in regulation 5.)

9. The purpose behind the stringency of regulation 3(1)(a) becomes even more elusive when it is appreciated that, at any rate so far as single payment claims are concerned, no form has as yet been approved. In practice, most claimants (in common with the claimant in the present case) are using form A9, which is primarily designed for reporting changes of circumstances. The visiting officer, who may also be the benefit officer under a different hat, is a Secretary of State's representative for the purpose of exercising at least some of the discretions conferred by regulation 3. These include -

(a) the discretion conferred by regulation 3(1)(b) (see paragraph 8 above);

(b) a discretion to accept, with retrospective effect, the subsequent amendment of a claim made in writing which was defective on the day on which it was received (regulation 3(4)(a)); and

(c) a discretion to accept a claim for a single payment made other than in writing (regulation 3(5)(a)).

I understand, moreover, that -

(i) a claim for a single payment will normally result in a visit by the visiting officer; and

(ii) it is the duty of the visiting officer, upon such a visit, to consider whether the claimant has any "exceptional needs" further to those the subject of the claim as made.

In practice, accordingly, regulation 3 is operating with a (wholly desirable) flexibility which belies the rigidity of its opening provision (subregulation 1(a)). The exception is the rule - and one can only speculate as to why it was not drafted as such.

10. When in the instant case the benefit officer completed form LT205 (his written presentation of the case to the tribunal) he wrote:

> "On 29 December 1980 [the claimant] claimed a single payment to meet the cost of underwear and slippers for himself and underwear, slippers and two jumpers for his wife."

"Underwear" would obviously suffice as a claim for two pairs of pants. In the circumstances of this case I am prepared to assume that somewhere along the line the claimant amended his claim and the Secretary of State, through the visiting officer, exercised the discretion (under regulation 3(4)(a)) to treat the amended claim "as if it had been duly made in the first instance". That said, however, I feel bound to observe that in cases where -

(a) the primary requirements of regulation 3 have not been complied with, but

(b) such deficiency has been cured by the exercise of one or more of the discretions conferred upon the Secretary of State,

it would considerably assist the appellate determining authorities if the case papers were to contain a recital of such exercise.

11. What the benefit officer does challenge is the tribunal's award of £13.60 in respect of two brassieres and a jumper for the claimant's wife. Appeal to the Commissioner lies only, of course, on the ground that the decision of the tribunal is erroneous in point of law. (Rule 8(1) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1980 No 1605], to which I shall refer as "the Appeals Rules".) The benefit officer sets out his grounds of appeal thus:

(1) The tribunal failed to establish as a fact that the claimant's wife had a need for the garments.

(2) If a need could have been established that the claimant's wife had a need [sic] for two brassieres and a jumper the tribunal failed to establish any evidence that the need had arisen by any means other than by normal wear and tear.

(3) No reasonable tribunal could have reached the decision to award a single payment under the provisions of regulation 27 on the facts as found.

I do not consider that there is any substance in ground (1). Grounds (2) and (3) are, however, a different matter.

12. There is an almost endless list of reported cases upon what is or is not an error of law. The matter has been put this way and that; and judicial pronouncements, even at high level, have not always been wholly consistent. For my part, I know of no more concise or accurate summary

than that set out by the Commissioner in Decision R(A) 1/72. I quote from paragraph 4 of the decision:

> "An appeal lies to the Commissioner only on the ground of error of law .... Consequently I could hold that the [Attendance Allowance] Board in the review decision had wrongly determined a question of law if I were satisfied (i) that it contained a false proposition of law ex facie, or (ii) that it was supported by no evidence, or (iii) that the facts found were such that no person acting judicially and properly instructed as to the relevant law could have come to the determination in question ....". (The Roman numerals have been inserted by me).

13. This is not a case which can be brought under head (i). I consider, however, that it falls plainly under heads (ii) and/or (iii). The papers contain no separate note of the evidence given to the tribunal. I am, accordingly, thrown back upon what is set out under box 3 on the relevant form LT 235 (see paragraph 4 above). The only excessive washing of clothing referred to therein is "excessive washing of underwear". The reasons for the tribunal's decision, however, expand this to "heavy wear on her underwear and clothing" (see paragraph 5 above). It is not, I suppose, impossible that the claimant's wife's disability results in the excessive washing of her jumpers; but there is no recorded evidence in respect of this; nor is it so inherently probable that I should treat the word "underwear" in box 3 as a slip of the pen for "clothing". Brassieres are, of course, "underwear". Had the tribunal's award been confined to pants and brassieres I should not have given the benefit officer leave to appeal - although I might have raised an eyebrow at the finding. As appears from what I say below, however, the effect of this decision will be to leave at large, for determination by a different tribunal, the claim in respect of all the garments itemised (for both the claimant and his wife) in the application signed by the claimant on 29 December 1980.

14. Rule 7(2) of the Appeal Rules provides as follows:

> "The tribunal shall -
>
> (a) record every determination in writing; and
>
> (b) include in every such record a statement of the reasons for their determination and of their findings on material questions of fact; and
>
> (c) if a determination is not unanimous, record a statement that one of the members dissented and the reasons given by him for dissenting."

As appears from paragraph 6 above, the tribunal made no attempt to comply with (a) or (b) of this rule in so far as the appeal related to clothing for the claimant himself. (The relevant form LT 235 does not even indicate whether the decision was a unanimous one, but this is a venial oversight.) In Decision R(A) 1/72 the Commissioner held that a

failure adequately to comply with a somewhat similar provision in the then current Attendance Allowance Regulations would support an appeal based on error of law:

> "The obligation to give reasons for the decision in such a case imports a requirement to do more than only to state the conclusion, and for the determining authority to state that on the evidence the authority is not satisfied that the statutory conditions are met, does no more than this. It affords no guide to the selective process by which the evidence has been accepted, rejected, weighed or considered, or the reasons for any of these things. It is not, of course, obligatory thus to deal with every piece of evidence or to over elaborate, but in an administrative quasi-judicial decision the minimum requirement must at least be that the claimant, looking at the decision should be able to discern on the face of it the reasons why the evidence has failed to satisfy the authority. For the purpose of the regulation which requires the reasons for the review decision to be set out, a decision based, and only based, on a conlusion that the total effect of the evidence fails to satisfy, without reasons given for reaching that conclusion, will in many cases be no adequate decision at all."

In the present case not even a bare conclusion was recorded in respect of that part of the appeal which related to clothing for the claimant himself.

15. The claimant has made no express complaint in respect of the matters with which I have dealt in paragraph 14 above. It is clear, however, from form LT 306 that he is aggrieved at the decision of the tribunal. The benefit officer has put part of that decision in the melting-pot. In such circumstances it would be wrong for me to turn aside from a manifest error of law in respect of another part - and I do not intend to do so.

16. The Commissioner's powers in respect of appeals from supplementary benefit appeal tribunals are closely circumscribed and laconically expressed. Rule 10(8) of the Appeals Rules provides -

> "On an appeal from a decision of a tribunal the Commissioner may -
>
> (a) refer the case to another tribunal with directions for its determination; or
>
> (b) hold that the decision is not erroneous in point of law."

That is all. There is not even an express power to set aside the erroneous decision - although such power can be unhesitatingly inferred. What is less immediately clear is whether the Commissioner has power to set aside part only of a decision, leaving the balance of such decision intact. In my view he has no such power. The wording of paragraph (a) seems to be against it ("the case .... its determination"). Moreoever, there is no power to remit the case to the tribunal which

made the decision appealed against. Accordingly, if part only of a tribunal's decision could be set aside the result would be that the ultimate "decision" of a single appeal in respect of a single claim might have to be sought in the separate decisions of two different tribunals. I cannot think that the legislature intended anything so inconvenient.

17. Does this mean, then, that in every case in which the Commissioner finds that there has been an error of law he must refer that case for a complete rehearing by the fresh tribunal? I think not. No express fetter is put upon the Commissioner's power to give directions to the fresh tribunal. From this it must follow that, in appropriate cases, the Commissioner is empoowered to direct, inter alia, that -

(a) the fresh tribunal determine the case upon the basis of the facts as found by the original tribunal; or

(b) the fresh tribunal rehear and determine only part of the case and determine the remainder in accordance with the relevant part of the decision of the original tribunal.

18. In the instant case no one is concerned to reopen the award of £3.60 in respect of pants for the claimant's wife. There is no point, accordingly, in the fresh tribunal's hearing evidence or argument upon that issue. In my view, however, all the other issues raised by the claimant's appeal from the decision of the benefit officer should be reheard and determined de novo (cf the final sentence of paragraph 13 above). It will be clear from what I have said in this decision that the fresh tribunal should, inter alia, enquire carefully into, and record the evidence and findings of fact in respect of, the degree to which the disability of the claimant's wife contributes to heavy wear and tear upon her clothing.

19. My decision, accordingly, is as follows:

(1) The appeal of the benefit officer is allowed.

(2) The tribunal's decision of 12 February 1981 is set aside.

(3) The case is referred to a differently constituted tribunal with directions that such tribunal shall -

(a) award to the claimant the sum of £3.60 in respect of two pairs of pants for the claimant's wife; and

(b) rehear and determine de novo so much of the claimant's appeal to the tribunal as is not the subject of direction (a) above.

(Signed) J Mitchell
Commissioner

Date: 30 July 1981

Commissioner's File: CSB/112/1981
CSBO File: SBO 136/81