

DGR/SH/14

Commissioner's File: CSB/1288/1989

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 1 September 1989 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the decision of the social security appeal tribunal of 1 September 1989.

3. The question for determination by the tribunal was whether the claimant could, by virtue of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981, for any period, escape the obligation, imposed on him by section 5 of the Supplementary Benefits Act 1976, of being available for employment as a condition of receiving supplementary benefit. If he could, then he was in a position to qualify for the long-term scale rate of benefit for the relevant period.

4. On 6 March 1989 the tribunal decided that the claimant in principle satisfied the conditions for exemption, but left it to be determined between the adjudication officer and the claimant the exact date from which the waiver should operate. They went on to state that in the event of disagreement the matter should be referred back to them. In the event, there was no agreement, and the matter was referred to the tribunal of 1 September 1989 which was a differently constituted tribunal from that of 6 March 1989. Accordingly, the whole matter was again at large. However, the tribunal of 1 September 1989, against whose decision this appeal lies, were satisfied by a majority that the claimant, who had sought the waiver on 20 October 1987 had made out his

case as from 22 October 1985, and accordingly was entitled to the long-term scale rate of benefit from 22 October 1986. The tribunal based their conclusion on the fact that the claimant was able to satisfy paragraph (u) of regulation 6. He had "no realistic prospects of employment on the ground of age." The claimant contends that the tribunal erred in point of law in not backdating the entitlement to the long-term scale rate of benefit to 28 March 1985.

5. The tribunal erred in point of law in various respects. First, they failed to explain why the claimant's age was a significant cause in his having no prospect of employment. Did his age prevent him from performing work? For this was the only relevance of age. There is a crucial distinction between age affecting a claimant's ability to perform work and age being a bar to employment opportunities. An employer might be prejudiced against taking on persons over a certain age, but it does not necessarily mean that such persons were unable, simply by virtue of their age, to undertake the relevant work. The matter was clearly expressed in paragraph 23(d) of Decision R(SB) 5/87:-

"In particular it cannot be asserted as a matter of principle that age can never under any circumstances be analogous to 'physical or mental disablement' for the purposes of regulation 6(e), as age may affect the claimant's ability to perform work, as opposed to employment opportunities not being available to him by reason of his age [my emphasis]."

There would seem to me nothing in the evidence to suggest that the claimant was prevented by his health from working. Indeed the tribunal of 6 March 1989 went out of its way expressly to state that "the appellant is in good health, with no serious health problems". Accordingly, on this ground I must set aside the tribunal's decision. I have hesitated as to whether I ought to substitute my own decision and dispose of the matter, but as the claimant may wish to give evidence as to his inability to undertake work by reason of his age, I think he should have the opportunity of doing so at a rehearing.

6. The tribunal also failed to explain why, if the claimant did bring himself within regulation 6 as from 22 October 1985, he did not also bring himself within that regulation from an earlier date. Of course, had they decided that the claimant was not required to be available for employment from a date more than 2 years prior to the application for review, they would have had to go on to consider regulation 69 and 72 of the Adjudication Regulations.

7. It follows from what has been said above that I must set aside the tribunal's decision and direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned above. The new tribunal will, of course, not need to consider the question of backdating, unless they are satisfied that the claimant could bring himself within regulation 6 at least from 22 October 1985.

8. I allow this appeal.

(Signed) D.G. Rice
Commissioner

(Date) 3 March 1992