

*Diet addition -
travel costs
allowed.*

GD/1/LS

Commissioner's File: CSB/1300/1985

C A O File: AO 2972/85

Region: London North

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Mary Allen (Mrs)

Social Security Appeal Tribunal: Aylesbury

Case No: 11/002/14

[ORAL HEARING]

1. My decision is that the decision of the Aylesbury social security appeal tribunal dated 16 July 1985 is erroneous in point of law. Accordingly I set it aside and remit the case for hearing to a differently constituted appeal tribunal.

Background facts

2. The claimant is a single parent aged 32 years. She has two dependant children Stuart and Louise aged 7 and 5 respectively. She is receiving supplementary allowance at the long term rate. Louise suffers from allergic eczema and follows a special diet on the advice of St Mary's Hospital Paddington. A dietary addition at the lower rate had been allowed from the outset of the claim on 22 November 1983 and Mrs. A had requested an increase of this amount. This case was referred to the Department's medical officer for advice regarding the cost of the diet. He consulted the senior dietician at St Mary's Hospital who stated that Louise was particularly allergic to dairy products and should substitute these products with sheeps milk and cheese. The senior dietician said in her letter dated 1 February 1985 (inter alia)

"It is...necessary for (Louise) to follow a strict dairy product free diet. To ensure that this diet is nutritionally sound a milk substitute is essential to provide the necessary protein, energy, calcium and vitamin that she would otherwise obtain from dairy products. Normally we would use a soya milk which would be available on prescription. However Louise is also allergic to soya. She is able to take sheep's milk and by doing so her diet becomes nutritionally complete. She should have 1 pint per day and approximately 1 oz Cheese....

The present cost is as follows:-

MILK - 7 pints per week	= 7 x 0.45p
	= £3.15
+ CHEESE (7 oz Hard and 2 oz soft)	= 71p + 33p
TOTAL COST	= £4.19

If the cost of ordinary milk and cheese were deducted from this it results in an extra weekly expenditure of £2."

By the adjudication officer's decision issued on 18 April 1985 the claimant was allowed an additional requirement of £2 per week in respect of the the extra dietary needs of Louise. The claimant appealed to the tribunal on the ground that this allowance did not include all expenses for obtaining the milk.

The law

3. Before I deal with the decision of the tribunal it is necessary to set out some of the provisions of the relevant regulations i.e. Supplementary Benefit (Requirements) Regulations 1983.

"Normal requirements"

- 4.-(1) the category of normal requirements shall relate to all items of normal expenditure on day to day living other than...items within Part IV of these regulations, including in particular food,...normal travel costs..."

Part III contains regulation 11, under the heading "additional requirements":-

"11.-(1) the items to which the category of additional requirements relates are those for which provision is made in Schedule 4.

(2) ...the weekly amount of the additional requirements of a claimant, including the requirements of any...dependant of his, shall be determined -

...

(b) in relation to items other than heating, in accordance with regulation 13 and Part II of Schedule 4.

...

13.-(1) ...the weekly amount specified in column (2) of any paragraph in Part II of Schedule 4 shall be applicable to the claimant -

(a) in relation to any of those paragraphs...in respect of a member of the assessment unit to whom column (1) of the corresponding paragraph applies;

(2) No more than one amount, and, if there is a choice, the higher or highest amount shall be applicable under paragraph 14 of Schedule 4 in respect of any one person.

SCHEDULE 4
ADDITIONAL REQUIREMENTS

...

PART II

ITEMS OTHER THAN HEATING

Items and cases applicable	Weekly amount
(1)	(2)
Diet	
14. Person who needs a special diet because he -	
...	
(e) suffers from a condition other than one specified in sub-paragraph (a), for which he has to follow a diet which involves extra costs substantially in excess of the amounts specified in sub-paragraph (a) in column (2).	(e) the weekly cost of the diet except in so far as it consists of proprietary foods or substances available under the National Health Service Act 1977 or,...

Finally it should be mentioned that paragraph 17 of Schedule 4 deals with hospital fares and deals with costs of travel in respect of regular visits of a patient in any hospital or similar institution.

The Tribunal's findings of fact

4. The tribunal made the following findings of fact:-

"A diet allowance of £2 per week is in payment under Schedule 4 Paragraph 14a which is the cost of the Special food requirements, less normal food costs. Special food cost £4.19, less normal £2.19 = £2.

Foods are sheeps milk and sheeps cheese not obtainable locally.

Nearest supply is Basingstoke, a round trip of 100 miles.

All dairy products including goats milk are not allowed.

Only certain cuts of lamb are allowed.

Attending allergy clinic for allergic excema in London.

Cannot have free school meals (school cannot provide special diet).

The special foods required are not available from the NHS Act 1977a."

The decision of the tribunal

5. The unanimous decision of the tribunal was "That the diet allowance awarded under Schedule 4, paragraph 14, should be the full cost of the special foods £4.19 weekly, under Regulations (14e Para)."

6. The reasons for decision were:-

"The Tribunal members considered that the special foods sheeps milk and sheeps

cheese were not available under the NHS Act 1977a, nor available locally, only from Specialist Outlets.

Under Schedule 4, paragraph 14e, the full amount of £4.19 weekly diet allowance should be granted.

7. Mrs. Allen gave evidence to the tribunal and the chairman's note of evidence includes the following

"Paragraph 14(a) diet allowance £3.60.

Local shops will not stock the goods and the foods are obtained from Basingstoke some 100 miles round trip.

Cost of sheeps milk and cheese is £4.19.

Louise cannot have foods with artificial colourings.

Louise can have only specified lean meat cuts (e.g. lamb).

Louise can have only fresh vegetables.

Louise can have only fresh fish.

...

Claimant qualifies for diet addition under Paragraph 14."

8. The claimant appealed to the Commissioner with leave and her application for an oral hearing was granted and took place on 12 October 1986. The claimant was represented by Mrs. Ruth Cohen of the Child Poverty Action Group and the adjudication officer by Mr. P. Darby of counsel for the Solicitor's Office D.H.S.S. Their submissions were brief and clear and I am grateful to both of them for their assistance.

9. It is agreed by both parties that the decision of the appeal tribunal was erroneous in point of law in that it failed to include in the record a sufficient statement of the reasons for the decision and of their findings on questions of fact material thereto. It is inevitable that the case must be remitted for hearing to a differently constituted appeal tribunal but it is only fair to observe that the law applicable is difficult that it is no criticism of the tribunal that the claim need be investigated further.

10. The claimant's submissions were that the tribunal should have made findings as to all the elements of Louise's diet that differed from normal diet. This is correct. As I have already indicated Louise cannot have foods with artificial colourings and can only eat specified lean meat cuts, fresh vegetables and fresh fish - but the tribunal has made no relevant findings. These items must be costed and it is necessary to ascertain what the extra cost is over and above the normal diet. Furthermore the tribunal must find as a fact whether the extra cost is substantially in excess of £3.60 i.e. the relevant amount in sub-paragraph (a) of paragraph 14 of Part II of the Fourth Schedule.

11. But the real issue between the parties in respect of the weekly amount payable in respect of Louise's special diet is in the construction of the words "the weekly cost of the diet" in the second column of para 14(e). The question is whether "the weekly cost" means the total amount spent or the extra cost over and above the amount which would have been spent had the claimant or her dependant not been on a special diet. I have considered with care the decision of the Commissioner in CSB/517/1982 and the more recent decision CSB/560/1985 in which the Commissioner expresses his agreement with the view that "the cost of the diet" must in a case of substitution be the entire cost of the special item. In my judgment the difficulties of construing the two differing expressions in two columns of paragraph 14 of Schedule 4 part 2 are less than at first appears. In my view what the tribunal must find as a fact is "the weekly cost of the diet" which would be the amount payable to the claimant; this involves a finding as to what the special diet consists of, whether it involves "extra cost" and what the extra cost is. Where the extra cost is for a substitute for a normal diet the whole cost must be allowed. For example in the present case Louise must follow a strict dairy product free diet which means that milk cannot be

included in her normal diet the whole cost must be allowed. This is especially so where a specified quantity of the special food is prescribed such as the number of pints of sheep's milk and the quantity and kind of cheese which is required. But where the special diet merely involves a limitation on particular foods e.g. fresh vegetables and not frozen or other vegetables the extra cost involved must involve the comparison between the two and the weekly cost cannot involve the entire cost of the item. I have come to this conclusion both on strict literal construction of regulation 4 and paragraph 14 of Schedule 4 but also on the ground that any other construction would lead to absurd results. I thus reject, but only in part, Mr. Darby's submission that only extra cost can be allowed.

12. The other main issue is whether the claimant is entitled to travel costs or whether these should be excluded. Mrs. Cohen submits that the words "weekly costs" comprise travel costs, while Mr. Darby contends (relying on regulation 4) the travel cost must be expressly provided for in the regulations. He refers to regulation 4 and paragraph 17 of Schedule 4 by way of comparison. Reference was also made to CSB/1148/82 paragraph 10. In that case the learned Commissioner said "I do not consider that the cost of travelling to the town centre to purchase the whole wheat bread was properly treated as a cost of the diet at all. Such journeys are undertaken for multiple purposes and the journeys for the sole purpose of buying bread would seem unnecessarily frequent. In any event the extra cost would entail some deduction for normal travel". This decision leaves it open whether the extra cost of travelling meaning thereby the cost to the claimant can or cannot be included. But Mr. Darby's submission that paragraph 14 is designed solely to deal with cost of food is somewhat qualified by the observation that the provisions of the regulations are somewhat ambiguous; Mr. Darby would accept that cost of postage would be included in the "weekly cost", but nevertheless contends that there is no indication that travelling costs can be allowed. And in respect of most items other than heating a defined amount is prescribed as the weekly amount and there is no indication that this includes the cost of travel (e.g. if a person needs a special diet because he suffers from diabetes he would have received at the material time £3.60 per week wherever the items of diet will have been purchased.)

13. In my view Miss Cohen's submission that the word cost should be construed as "cost to the claimant" is correct and this must include cost of travel. But the burden of proof is on the claimant and she must satisfy the tribunal that a round trip by car of 100 miles from High Wycombe to Basingstoke is justified as a matter of fact. She must also satisfy the tribunal that Basingstoke is the nearest place where the two controversial items i.e. sheep's milk and cheese can be obtained. Clearly, if one deals with such items as lean meat or fresh vegetables, these can be obtained locally. But I note that in the claimant's notice of appeal to the tribunal she quantifies her estimate at 80p per week and this requires careful reconsideration by the tribunal in the light of the observations of the Commissioner in the decision CSB/1148/1981 paragraph 10, cited above.

14. In accordance with my jurisdiction set out in regulation 27 of the Social Security (Adjudication) Regulations 1984 my decision is as set out in paragraph 1 of this decision. I direct that the tribunal in rehearing the matter shall pay particular attention to all the aspects to which I have referred in this decision and record the findings on all the facts and give adequate reasons for their decision.

15. The claimant's appeal is allowed.

(Signed) G Dobry
Commissioner

Date: 11 November 1986