

ATH/SH/6

Commissioner's File: CSB/005/1991

SUPPLEMENTARY BENEFITS ACT 1976
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow this appeal by the claimant. The decision of the social security appeal tribunal dated 7 February 1990 was erroneous in law and I set it aside. The case must be reheard and redetermined by a differently constituted tribunal.
2. At the date of the claim the claimant was aged 56 years and had one dependent son; and she received supplementary allowance at the long-term rate. On 22 February 1988 the claimant made a request for an increase in her benefit in respect of a special diet followed by her. By a decision issued on 8 March 1988 the adjudication officer decided that the claimant was not entitled to an additional requirement under paragraph 14 of Schedule 4 to the Requirements Regulations as the diet was not related to an illness. The claimant appealed. On 7 February 1990 the social security appeal tribunal decided that the claimant was entitled to the lower rate dietary addition. The claimant appeals with leave of the tribunal chairman.
3. The claimant has requested an oral hearing but I am satisfied that I can properly deal with this appeal without a hearing.
4. On 18 February 1988 the claimant's GP issued a medical certificate saying that the claimant should follow a low calorie diet to lose weight. On 17 March 1988 the GP issued a further medical certificate stating that the claimant was suffering from "obesity and hypertension and needs to follow a low calorie diet". On 29 September 1988 the claimant's GP stated:-

"[The claimant] suffers from hypertension. This would be helped by a reduction in weight. She has been ordered to lose weight as part of her treatment for this condition."

5. The law

Regulations 11 and 13 of the Supplementary Benefit (Requirements) Regulations provided that the cost of a special diet would constitute an additional requirement for the purposes of supplementary benefit if the claimant came within the provisions of paragraph 14 of Part 2 of Schedule 4 to the Requirements Regulations. Paragraph 14, so far as is relevant, provided in column (1):-

" 14. Person who needs a special diet because he -

- (a) suffers from diabetes; a peptic, including stomach and duodenal, ulcer; a condition of the throat which causes serious difficulty in swallowing; ulcerative colitis; a form of tuberculosis for which she is being treated with drugs; or from some illness for which she requires a diet analogous to that required for the other illnesses specified in this sub-paragraph;
- (b) is ... suffering from an illness not specified in sub-paragraph (a), and the diet involves extra cost;
- (c) [not relevant];
- (d) [not relevant]; or
- (e) suffers from a condition other than one specified in sub-paragraph (a), for which she has to follow a diet which involves extra cost, substantially in excess of the amount specified in sub-paragraph (a) in column (2)."

Column (2) of paragraph 14 set out the weekly amount allowed. The amount allowed under sub-paragraph (a) was at a higher rate than that allowed under sub-paragraph (b). The amount allowed under sub-paragraph (e) (so far as is relevant) was "the weekly cost of the diet", that is to say, "the whole cost of the foodstuffs" provided for in the diet: R(SB) 16/89 at paragraph 17.

6. The claimant would therefore, be entitled to an additional requirement if she needed a special diet and if - under sub-paragraph (a), she suffered from some illness for which she required a diet "analogous to that required for the other illnesses specified in this sub-paragraph"; or under sub-paragraph (b), she suffered from an illness not specified in sub-paragraph (a), and the diet involved extra cost; or under sub-paragraph (e), she suffered from "a condition" other than one specified in sub-paragraph (a) for which she had to follow a diet which involved extra cost "substantially in excess of the amount

specified in sub-paragraph (a) in column (2)" i.e. substantially in excess of the higher rate.

7. As I have said, the decision of the adjudication officer was that the claimant was not entitled to an additional requirement "as the diet is not related to an illness". In Form AT2 paragraph 5, the adjudication officer submitted that the claimant was following a diet "solely for the purpose of weight reduction, not as a treatment for an illness". In her undated letter of appeal (at page T12 of the case papers), the claimant stated that she wished to appeal against the decision not to award her claim for "a lower dietary addition". After two adjournments of the appeal by social security appeal tribunals (on 13 March 1989 and 27 September 1989), the adjudication officer made a further submission to the appeal tribunal. In that submission (page T31 of the case papers) he did not dispute that the claimant needed to follow "a 'special diet' for weight reducing purposes" but submitted that the diet followed by the claimant was not "analogous to that required for the other illnesses specified" in sub-paragraph (a) and that that sub-paragraph, therefore, did not apply; that sub-paragraph (b) did not apply because the diet did not involve "extra cost"; and that, likewise, sub-paragraph (e) did not apply as the diet did not involve "extra cost".

8. The appeal tribunal in Form AT3 box 2 have stated:

"This is an appeal against a decision of the adjudication officer to award a higher rate dietary allowance to [the claimant]."

That must clearly be a slip. The sentence presumably should read "not to award ..." Form AT3 box 2 continues:

"It is accepted by the adjudication officer that there is a need for a dietary addition but the adjudication officer concedes that this should be only at the lower rate".

In other words, as I understand it, the adjudication officer was contending that the claimant was entitled to an award under sub-paragraph (b) i.e. at the lower rate. On the other hand, the claimant contended before the appeal tribunal that she satisfied the conditions of sub-paragraph (e): see the adjudicating officer's submission dated 7 February 1991 at paragraph 3 (page 68 of the case papers). The issue before the appeal tribunal was, therefore: was the claimant entitled to an award under sub-paragraph (b) or under sub-paragraph (e)? She would be entitled to an award under sub-paragraph (b) if the special diet involved "extra cost". She would be entitled to an award under sub-paragraph (e) if the special diet involved "extra cost substantially in excess of the amount specified in sub-paragraph (a) in column (2)." What is a "substantial excess is ... a matter for the tribunal to decide in accordance with the ordinary use of English language and the exercise of their judgment"; CSB/1356/1985 at paragraph 19(3) (page T16 of the case papers).

9. As the adjudication officer had conceded (on the assumption that the appeal tribunal were correct in Form AT3 box 2) that the claimant was entitled to a dietary addition "at the lower rate" i.e. under sub-paragraph (b), he must have conceded that the diet involved some extra cost (i.e. an extra cost sufficient to satisfy the conditions of sub-paragraph (b)). In the final analysis, therefore, the issue before the appeal tribunal was whether the extra cost of the special diet was substantially in excess of the amount specified in sub-paragraph (a) in column (2)" i.e. substantially in excess of the higher rate. To determine that question, the appeal tribunal had to decide first what was the extra cost of the special diet (which would involve making a finding of fact as to the cost of the claimant's normal diet) and, secondly, whether that extra cost of the special diet was substantially in excess of the higher rate. If the extra cost was substantially in excess of the higher rate, the claimant was entitled to the whole cost of the foodstuffs provided for in the diet.

10. In their findings of fact in Form AT3, box 2 the appeal tribunal, having recorded, as I have said, that it was accepted by the adjudication officer that there was a need for a dietary addition but that this should be only at the lower rate, they continued:

"On the 22.2.88 she requested an increase in her benefit in respect of special diet followed by her stating that she needed to go on a weight reducing low calorie diet because she was overweight. She said that that diet was costing her an extra £3 per week and submitted a note from her doctor stating that she was on a low calorie diet to lose weight. Her diet provides that certain foods and drink should be excluded and fresh vegetables eaten instead."

Of the three statements that I have there quoted, the first two were merely recording statements made by the claimant. The third sentence merely summarises the nature of the diet. There were, however, no findings of fact as to the cost of the claimant's normal diet or as to the cost of the claimant's special diet. In their reasons for their decision in Form AT3, box 4 the appeal tribunal stated that "they accepted that the claimant "was suffering from an illness not specified in paragraph 14(a) of Schedule 4; and further we are satisfied that the diet involved extra cost the amount to be awarded is the lower dietary addition." They continued:-

"We were unable to agree with the submissions made on behalf of [the claimant] that the diet that she has to follow involves extra cost substantially in excess of the lower [my emphasis] dietary addition amount when we looked at the total cost item by item and used our own experience of the cost of shopping in the Birmingham area."

They expressed their appreciation for the way in which both representatives prepared and presented the case before them.

11. As I have explained above, they had to decide whether the extra cost of the special diet was substantially in excess of the higher addition (i.e. the amount allowed under sub-paragraph (a)) not in excess of the lower addition (i.e. the amount allowed under sub-paragraph (b)). It is clear that the appeal tribunal did not make the necessary findings of fact in order to determine whether or not the claimant's case came within sub-paragraph (e), and their decision, therefore, failed to comply with the requirements of regulation 25(2)(b) of the Adjudication Regulations and was erroneous in law. I must, therefore, set aside the decision.

12. The new tribunal to whom this case is submitted must determine whether or not the claimant satisfied the conditions of sub-paragraph (e). This necessarily involves, as it seems to me, making findings of facts as to (i) the cost of the claimant's normal diet, (ii) the cost of the special diet. They can then determine what was the extra cost of the special diet. To find what was the extra cost of the special diet may not be easy: see the observations of the Tribunal of Commissioners in R(SB) 16/89 at paragraph 17. But having determined the extra cost of the special diet, they can then determine whether or not the extra cost was substantially in excess of the higher rate. They will then be in a position to decide whether or not the claimant is entitled to an award under sub-paragraph (e), i.e. an award of the whole cost of the foodstuffs provided for in the diet.

13. For those reasons I allow this appeal.

(Signed) A.T. Hoolahan
Commissioner

(Date) 29 JAN 1992