

C.D.A.C.

DGR/SH/13

Commissioner's File: CSB/016/1990

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 26 January 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 26 January 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. Regulation 6 provided as follows:-

" 6. A claimant shall not be required to be available for employment under section 5 in any week in which one or more of the following paragraphs apply ...

(a)-(b)

(c) he is a person -

(i)

- (ii) who, by reason of some disease or bodily or mental disablement, is incapable of work,
- (iii)
- (d)
- (e) by reason of physical or mental disablement he has no further prospect of employment and in the 12 months immediately preceding he has -
 - (i) on average worked for less than 4 hours a week,
 - (ii) been available for employment under section 5 for not less than 39 weeks,
 - (iii) made reasonable efforts to find employment and not refused any suitable employment;
- (f)-(t)
- (u) the preceding paragraphs do not apply to him, but the circumstances are analogous to any circumstances mentioned in one or more of those paragraphs and in the opinion of the benefit officer it would be unreasonable to require him to be available for employment."

5. In the event, the tribunal allowed the appeal to the extent of accepting that the claimant was not required to be available for employment from October 1986. The claimant now complains that the waiver should have applied from an earlier date, albeit in his contentions before the tribunal he had only sought to have backdating to October 1986.

6. I accept the contention put forward by the adjudication officer now concerned that the tribunal failed to explain why the exemption should operate from October 1986, but not from any date prior thereto. Accordingly, on that ground alone I have to set aside the tribunal's decision. However, the tribunal are subject to the more serious criticism that they have not explained why the claimant should be exempted from availability for employment from any date. It is not enough merely to give as the reasons for their decision:-

"6(e) and 6(u) Conditions of Entitlement Regs.

Backdated (R(SB) 6/87 para 10) 52 weeks

R(SB) 5/87 and R(SB) 6/87 considered."

Nor did the tribunal's actual findings go any way to explain the reasoning behind their decision. There was a clear breach of regulation 25(2)(b) of the Adjudication Regulations. Accordingly, I must set aside the tribunal's decision as being erroneous in law, and direct that the appeal be reheard by a differently constituted tribunal.

7. Although the claimant appears only to have relied on paragraphs (e) and (u) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981, I consider that paragraph (c) should also be considered in the light of the evidence that the claimant's health was not of the best. Accordingly the new tribunal will consider paragraphs (c), (e) and (u) and make specific findings as to whether, and if so from what date, the claimant can establish that he was entitled to a waiver. As regards paragraph (e), the tribunal will bear in mind that, if the claimant is to derive any advantage therefrom, he has first to establish that he was from the relevant date without any realistic prospects of employment. Unless he can do this, paragraph (e) will have no application. If the new tribunal are satisfied that the claimant was at any time without such prospects of employment, they must go on to determine whether the claimant can satisfy head (i), (ii) and (iii), and, if he can, whether his being without prospects of employment was caused by physical or mental disablement. If the tribunal consider that the claimant was not at any time subject to physical or mental disablement, they must investigate whether or not he was suffering from any analogous condition pursuant to paragraph (u), and whether such condition was the cause of his being without prospects of employment. Throughout, the tribunal must make appropriate findings, and give adequate reasons for their decision. Moreover, if they rely on paragraph (u), they must make a specific finding as to whether "it would be unreasonable to require the claimant to be available for employment". If at the end of the day the tribunal are satisfied that the claimant can bring himself within regulation 6 from a date earlier than 104 weeks before the date of request for review, it will be incumbent upon them to decide whether the provisions of regulation 72 of the Adjudication Regulations were satisfied, so that the limitations on payability of arrears prescribed by regulation 69 might be circumvented. However, it must be stressed that before any question of backdating arises, the tribunal must be persuaded that the claimant satisfies the conditions for exemption from any date.

8. In this connection, it is helpful to remember that age, for the purposes of paragraph (u), is relevant only to a restricted extent. It will only be material if it prevents the claimant from performing work. 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]."

9. It follows from what has been said above that the appeal must be reheard by a differently constituted tribunal who will have regard to the matters mentioned above.

10. I allow this appeal.

(Signed) D.G. Rice
Commissioner

(Date) 2 March 1992