



RAS/SH/2/LS **COMMISSIONERS DECISION**
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Commissioner's File: CSB/0027/1986

C A O File: AO 2166/SB/86

Region: North Western

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 dated 10 October 1985 is erroneous in point of law. I set it aside and direct that the case be reheard by a differently constituted tribunal.

2. The claimant suffered from arthritis and Parkinson's disease. She was in receipt of an attendance allowance. She went into a nursing home in January 1985. She was then 75. She was not eligible for supplementary benefit because her resources exceeded £3,000. The local office of the Department of Health and Social Security had advised that when the claimant's resources fell below £3,000 she would be entitled to supplementary benefit. This would mean that she would get assistance to pay the fees for the nursing home. One month's fees were paid on 27 April 1985. That reduced the claimant's resources below £3,000. A claim for supplementary benefit was received on 3 May 1985. An adjudication officer decided that the claimant was entitled to benefit from 9 May 1985. The particular significance of this date is that the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985 came into operation on 29 April 1985. They included two matters of great importance for the claimant. Unless she had been in receipt of supplementary benefit as a boarder in the nursing home immediately before 29 April 1985 she was subject to the new lower maximum amounts for people in nursing homes imposed by the new Regulations and her attendance allowance would immediately have to be taken into account as a resource. The claimant, no doubt with the help of her daughter, quickly perceived the significance of the dates. She asked that her entitlement should be backdated to 27 April. There was some correspondence about this which led to a decision by an adjudication officer not to revise the original decision that entitlement commenced on 9 May 1985. The claimant appealed (or at least was treated as having appealed) against that decision.

3. The tribunal allowed the claimant's appeal. The text of their decision was -

"Appeal allowed. Assessment of benefit to be adjusted by:-

- (1) substituting local residential home rate of £150 per week as from 27.4.85 onwards for £138.50 presently awarded, and
- (2) attendance allowance not to be taken into account as a resource until 29.7.85."

The reasons they gave were:-

"The tribunal first considered whether there was good cause for backdating claim made on 3.5.85 to 27.4.85 under Claims and Payments Regulation 5(2)(a). Taking into account the advice received from the local office and the physical conditions of the appellant it was felt that her daughter acted with reasonable promptitude in making the claim and that this claim should be backdated to 27 April. Under Determination of Questions Regulations 7(2) the next benefit would normally have begun on Thursday 2 May when other benefits payable, but it was felt that large expenditure on nursing home fees incurred from 27 April to 2 May constituted "special circumstances" which made 27 April more appropriate as the day upon which payment should commence. Hence on 29 April the appellant was in benefit."

This appeal by the adjudication officer against that decision is brought with leave of another Commissioner.

4. The tribunal decided that the claimant's entitlement to benefit commenced on 27 April 1985. They treated the claim which was received on 3 May 1985 as having been made on 27 April 1985. They did this by reference to regulation 5(2)(a) of the Supplementary Benefit (Claims and Payments) Regulations 1981 which provides:-

- "(2) Where a claim for a pension or allowance is made in respect of a period earlier than the day on which it is made, it shall be treated as if it had been made -
- (a) where in any case the claimant proves that throughout the period between the first day of that earlier period and the date on which the claim was made there was continuous good cause for failure to make the claim before the day on which it was made, on the first day of that earlier period;"

They had found as a fact that the claimant's resources did not fall below £3,000 until the payment to the nursing home was made on 27 April. So entitlement to benefit could not have arisen before then. They also found as a fact that the claim was received on 3 May. It was therefore made on that day by virtue of regulation 3(3)(b) of the Claims and Payments Regulations. Regulation 5(2)(a) applies where a claim is made in respect of a period earlier than the day on which it is made. It is not entirely clear to me whether this is such a case. When the claim was made it was not made in respect of an earlier period. That arose later. However all those concerned with the case so far have dealt with it on the basis that the claim was or became a claim for an earlier period and I do not propose to pursue that aspect. What the tribunal did was to consider whether there was continuous good cause for failure to make the claim earlier. They decided there was. The adjudication officer now concerned with the case submits that the tribunal were wrong for several reasons. In my view they were wrong on this aspect for one reason in particular - they dealt with the point on the basis of what the claimant's daughter did rather than on what the claimant herself did. There may have been good reason for coming to the conclusion that the claimant herself had continuous good cause for failing to make the claim before she did. She may have been quite unable to do anything for herself at all. It might have been necessary for her to instruct her daughter, if she were able, to deal with the matter on her behalf. I do not know. These will be matters for the new tribunal.

5. The adjudication officer now concerned with the case makes another point about good cause. He submits that even if good cause were shown that could not get the claimant back to 27 April 1985. That was a Saturday and the adjudication officer says there are "no arrangements made by the Secretary of State for the receipt of claims during periods of normal office closure." It is true that regulation 3(3)(b) of the Claims and Payments Regulations refers to "the date on which it is received at an office of the Department" so as to fix that date as the date of a claim. However I do not need to consider what received means because regulation 5(2)(a) does not take the claim back to that date. It takes it back to "the first day of the earlier period". It follows that, if the necessary good cause had been

shown, there is nothing in regulation 3 or 5 of the Claims and Payments Regulations to prevent the claim in this case from being treated as if it had been made on 27 April.

6. Having applied regulation 5(2)(a) of the Claims and Payments Regulations in the claimant's favour the tribunal went on to deal with the problem of the date of commencement of benefit (the benefit day) under regulation 7 of the Supplementary Benefit (Determination of Questions) Regulations 1980. That regulation, in relation to the facts of this case, is to the effect that the claimant's benefit day would ordinarily be the day on which one of her other social security benefits was payable. That would have been the Thursday following Saturday 27 April. But the regulation goes on to provide that the benefit day may be a different day where there are "special circumstances". The tribunal were fully aware of this. They said that "large expenditure on nursing home fees incurred from 27 April to 2 May constituted "special conditions" which made 27 April more appropriate as the day on which payment should commence". The adjudication officer now concerned with the case submits that that was an error of law; that the purpose of the tribunal's award of benefit from 27 April was to avoid the consequences of the new legislation which commenced on 29 April but which, in some measure, protected the position of those who were in receipt of benefit immediately before that date. I have no doubt that that was the tribunal's purpose. I do not take the view however that it was an error of law to treat the circumstances in question as special circumstances. In his earlier submission the adjudication officer said that special circumstances "in the context of regulation 7(2) of the Determination of Questions Regulations cannot be held to exist for the purpose of frustrating the intentions of the Secretary of State as clearly expressed in regulations and approved by Parliament". That is in my view far too dramatic and well removed from what the tribunal decided in this case. In my view "special circumstances" in regulation 7(2) would include circumstances in which fixing the benefit day as the day of receipt of another benefit produced a situation adverse to the claimant. I assume that the reason for the rule that the supplementary benefit day is primarily to be the day of payment of some other benefit already in payment is both administrative convenience and possibly also convenience of the claimant. And a reason for the "special circumstances" exception is that administrative convenience may work injustice. So I do not think that it needs all that much to justify a departure from the administrative convenience of payment of two or more benefits on the same day. In my view the tribunal were not wrong to find special circumstances in this case and I say that notwithstanding that provision is made by regulation 12 of the Supplementary Benefit (Urgent Cases) Regulations 1981 to deal with this very kind of situation.

7. In his further submissions in response to my direction the adjudication officer submits that in any event the tribunal were wrong in law with regard to the application of regulation 9(17)(a) of the Requirements Regulations because it is limited to cases "where the claimant was in receipt [my underlining] of supplementary benefit as a boarder immediately before 29 April 1985". And backdating to 27 April 1985, even if it was right to backdate, does not put the claimant in the position of having been in receipt of benefit immediately before the relevant date. It would establish entitlement immediately before that date but that is a different matter. Now that seems to me to be unduly technical. There may be many reasons why a claimant though entitled to benefit has not actually been paid. Benefit may have been awarded but payment may have been suspended (under regulation 8 of the Supplementary Benefit (Determination of Questions) Regulations 1980) pending an appeal. The claim may have been accepted before the crucial date but the giro did not come through until afterwards. Or it never came through at all because it was lost in the post. Or benefit had been in payment for some time but the giro for the week immediately before 29 April went astray. Or payment may have been withheld under regulation 15 of the Supplementary Benefit (Claims and Payments) Regulations 1981 or made direct to a third party under regulation 15A, 15B, 16 or 17 of those Regulations. It would seem to me to be very strange if the protection ostensibly afforded to pre 29 April 1985 boarders had to depend on chances of this sort. I do not see any reason why it would have been intended to distinguish between receipt of benefit in the sense of actual payment and entitlement to receipt of it. In my

judgment the words in question in regulation 9(17) must be read as including cases where entitlement has been established whether before or after 29 April 1985 in relation to a period immediately before that date whether or not a payment in pursuance of the entitlement has been received. To interpret the words in the narrow sense contended for by the adjudication officer would turn the operation of the provision into a lottery.

8. The new tribunal must find facts and come to a decision on good cause taking account of the matters mentioned in paragraph 4. With regard to the matters mentioned in paragraphs 5, 6 and 7 the tribunal are directed to make their decision in accordance with the principles set out in those paragraphs.

(Signed) R A Sanders
Commissioner

Date: 21 November 1986