CPAG

VGHH/1/LM **Commissioner's File:** CSB/051/91

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This claimant's appeal fails. My decision is that the decision of the social security appeal tribunal dated 21 September 1989 is not erroneous in law.

2. The question at issue in this case was whether the claimant should be awarded arrears of the long-term scale rate of supplementary benefit for a period earlier than 12 months prior to review. The claimant requested review of his claim on 15 January 1988 and was awarded arrears from 14 January 1987. In order to go back further, it was necessary to satisfy paragraph (a) or (b) of regulation 72(2) of the Social Security (Adjudication) Regulations 1986 which permit the award of benefit arrears more than 12 months prior to the date of the request for review where:

> "(a) that the decision under review was erroneous by reason only of a mistake made or of something done or omitted to be done by an officer of the Department of Health and Social Security or of the Department of Employment acting as such, or by an adjudicating authority or the clerk or other officer of such authority, and that the claimant and anyone acting for him neither caused nor materially contributed to that mistake, act or omission; or
>
> (b) that where the grounds for review are that the decision was given in ignorance of or was based on a mistake as to a material fact, those grounds are established by evidence which was not before the adjudicating authority which gave the decision; that the claimant and anyone acting for him could not reasonably have produced that evidence to that authority at or before the time the decision was given, and that it has been provided as soon as reasonably practicable."

3. On 16 January 1989 an adjudication officer issued the following decision:

> "Mr Baker cannot be treated as a person not subject to the

conditions of registration and availability prior to 14/1/87."

The claimant appealed against this decision contending that the Department was aware of his condition (total deafness in one ear and tinnitus and occasional arthritis) in 1982 and the award of arrears should be backdated to then, the requirement to register as available for employment being waived from 1982 on the ground of his physical disabilities. In his written submission on the appeal the adjudication officer gave the reason for his decision of 16 January 1989 as being that prior to the claimant's application on 15 January 1988 there was no evidence to suggest that the claimant satisfied any of the conditions of regulation 6 of the Conditions of Entitlement Regulations (Persons not subject to the condition of registration and availability for employment).

4. The appeal tribunal heard the appeal on 21 September 1989. The claimant was represented by Mrs Georgina Hall, the welfare rights officer of Colchester Borough Council. He himself appeared and gave evidence, of which there is a detailed chairman's note.

5. The appeal tribunal's unanimous decision was:

"Unanimous decision dismiss the Appeal"

Their recorded findings of fact were:

"1. The Appellant is a single man who has been in receipt of Supplementary Benefit and more recently Income Support since March 1983. He had been made redundant in 1981.
2. The Appellant was seen by a Visiting Officer on the 9th April 1984 and her report is annexed to these papers and is accepted as an accurate record of what took place.
3. On 1.7.87. the Appellant completed the claim Form B1 to continue his claim for Supplementary Benefit. He answered "NO" to the question as to whether the had any form of mental or physical disability. He completed a further form in July 1987 and did not answer the same question.
4. On 16.1.89. the Adjudication Officer decided that the requirement to register for Mr Baker could be waived from the 14th January 1987."

Their recorded findings of fact were:

"The Tribunal were grateful to Mrs Hall for the careful way in which she had prepared and presented Mr Baker's case. In her conclusion she accepted that the D.S.S. have agreed that Mr Baker was unemployable from 14th January 1987 and that the circumstances that made him unemployable then existed in their entirety in March 1983. The request was that the long term scale rate should be backdated further to March 1984 on the basis that the decision was given in

ignorance of or based on mistake as to material fact and the submission was that Mr Baker nor anyone acting on his behalf could reasonably have produced the information sooner. She emphasised that Mr Baker had difficulty in completing forms which the Tribunal understand, that the provision in question was a complicated one and that Mr Baker could not reasonably have produced the evidence because he could not reasonably have been expected to know that it would make any difference to his claim. Dealing with these points the Tribunal accept that Mr Baker may well have had difficulties with forms, but nevertheless he has completed forms and in April 1987 he answered "No" to two specific questions on the subject of mental or physical disability. In a subsequent form he did not answer the question. The Tribunal reject the suggestion that it is necessary for someone to know the full import of the consequences of his or her answering a question for him or her to answer the question properly. Part of the reasoning behind these forms is to seek information about claimants so that the appropriate benefits if applicable can be paid. Mr Baker did not need to know that his deafness might bring forth more money, all he needed to do was inform the relevant department that he was suffering from deafness. The Tribunal also reject the suggestion that merely because the matter in question is a complicated provision it need affect Mr Baker's actions. He probably knew nothing of the provision in question, but that was not his concern. His concern was to answer the questions fully so that his case could be dealt with fully. Going back in time, however, in April 1984 it is clear that Mr Baker was seen by a visiting officer. The report of the interview completed soon after the interview, is with the papers and is accepted as an accurate record of what took place by the Tribunal. Even the Appellant concedes that a question about health came up because he felt that he may well have answered "fine". The visiting officer uses the word "excellent" and there is no reference to any disability. Mr Baker conceded that his memory is not too good and here again emphasis is laid on this fact in the submission. The report of the visiting officer was completed very soon after the visit some 5 years ago and the Tribunal feel that Mr Baker's memory may well be at fault in this respect. Whichever way one looks at this case it is clear that Mr Baker made no mention of his disability when he could quite easily have done so on at least three occasions between 1984 and 1988. There was an interview and he completed two forms and he did not give that information on any of these occasions. It may well be a matter of regret, but it is clearly a fact that he did not do so. In the Tribunal's view the Adjudication Officer has quite correctly dealt with Mr Baker's circumstances and the Appeal fails for the above reasons."

6. The claimant appeals, with the chairman's leave, saying that under regulation 72(b) [sic] the long-term rate should "be backdated to March 1984 on the basis that the decision was given in ignorance of or based on mistake as to material fact and on

the factual evidence in this case the claimant and anyone acting for him, could not reasonably have produced the information sooner". It is said that

(1) the appeal tribunal had failed to apply the two specific tests of regulation 72(b) namely that the evidence could not reasonably have been produced at, or before, the time of the decision and it has been produced as soon as reasonably practicable.

(2) the appeal tribunal were in breach of the rules of natural justice and failed to take account of the evidence. The evidence of the visiting officer was hearsay. The claimant said that if he had been asked about his health he would have outlined his health/disability problems.

(3) no person acting judicially and properly instructed as to the relevant law could have come to the determination in question.

7. I do not agree with any of these three points.

(1) the appeal tribunal applied the two tests correctly. Mrs Hall submitted that the claimant could not reasonably have given his evidence sooner, the presenting officer submitting that it was not unreasonable to expect him to give details of his health problems or anything which might affect his prospects of employment. The appeal tribunal agreed with the presenting officer finding that the claimant could quite easily have mentioned his disability on at least three occasions between 1984 and 1988. They were clearly applying the tests.

(2) The rules of natural justice before a social security appeal tribunal can be reduced to three: an absence of bias or mala fides on the part of the tribunal (which is not alleged here) an obligation to listen, in the case of an oral hearing to the contentions of all persons entitled to be represented (again, not in issue here - the claimant's case is the subject of a very full note) and an obligation to base their decision on evidence: see R v Deputy Industrial Injuries Commissioner ex parte Moore [1965] 1 Q.B. 456 at page 486; R(S) 4/82 (the decision of a Tribunal of Commissioners). These principles apply in supplementary benefit cases: see R(SB) 11/83. It is alleged, in the present case, that the appeal tribunal failed to take account of the evidence. I entirely disagree. The visiting officer made a report, reproduced in the case papers. He found the claimant's health to be excellent. This is not hearsay. He saw the claimant and his record of his view as to his health is first hand evidence. (Indeed, it would only go to weight if it were hearsay. Hearsay evidence is admissible in this jurisdiction: see ex parte Moore.) The appeal tribunal saw and heard the claimant. The claimant said, and his representative emphasised, that his memory was not too good. The appeal tribunal were fully entitled to hold that Mr Baker's memory of what had happened 5 years earlier might well be at fault. The

argument based on a breach of the rules of natural justice fails.

(3) Lord Radcliffe in Edwards v Bairstow [1954] A.C. 14 at pages 33-36 discusses the nature of an error of law because the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination in question. He describes the test as one in which the true and only reasonable conclusion contradicts the determination. It is quite impossible to say, in the present case, that the only true and reasonable conclusion was that the claimant's deafness in one ear, his tinnitus and his arthritis could not reasonably have been brought to the Department's attention earlier than it was. The question before the tribunal was whether the claimant had acted reasonably. The onus was on him. The tribunal found, and they had evidence on which so to find, that he had not. That was not an error of law.

8. For the above reasons, and also for the reasons given by the adjudication officer now concerned in his written submission dated 5 June 1991, the decision of the appeal tribunal is not erroneous in law.

9. My decision is set out in paragraph 1.

(Signed) V G H Hallett
Commissioner

Date: 9 March 1992