CSB 53/1981

T/JCB

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF THE SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS - CORRECTION

Paragraph 12, line 14 - delete "overpay" insert "repay".

P M HALL
Secretary

Date: 13 August 1982

Commissioner's File: CSB 53/1981
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T/JCB

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APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

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1. Our decision is:

(a) that the decision of the supplementary benefit appeal tribunal (the appeal tribunal) dated 26 November 1980 was erroneous in point of law inasmuch as no consideration was given to the effect of paragraph 26 of Schedule 2 to the Supplementary Benefit Act 1966 or paragraph 27 of Schedule 1 to the Supplementary Benefits Act 1976 as originally enacted;

(b) that in exercise of the power conferred on us by rule 10(8)(a) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1980 No 605] as amended by rule 6(2) of the Supplementary Benefit and Family Income Supplements (Appeals) Amendment Rules 1982 [S.I. 1982 No 40] we require repayment of the sum of £641.35 out of the estate of the appellant's father (the deceased) under section 20(1) of the Supplementary Benefits Act 1976.

2. This appeal is one of two appeals which were heard together by us, each of which raised among other questions the proper interpretation of the word "resources" as used in the phrase "capital resources" in successive enactments relating to supplementary benefit. In the other case we were concerned with the meaning of the word as used in the Supplementary Benefits Act 1976, as amended with effect from 24 November 1980 by the Social Security Act 1980, and in the regulations made thereunder. In the present appeal we are concerned with the word as used in that Act as originally enacted and in the Supplementary Benefit Act 1966 which it replaced.

3. Both before and after 1980 there were provisions for limiting the title of a person to supplementary benefit by reference to his capital resources. But, whereas since 1980 it has been provided that the possession by a claimant of relevant capital resources in excess of a statutory limit is an absolute bar to the receipt of a supplementary allowance or pension (see regulation 7 of the Supplementary Benefit (Resources) Regulations 1980 [S.I. 1980 No 1300] and of the similarly named regulations of 1981 [S.I. 1981 No 1527]), the provisions previously in force fixed an amount excess over which led to a claimant having attributed to him a commensurate income resource (sometimes referred to as a tariff income) with the result that his supplementary allowance or pension would be correspondingly reduced. Immediately before the 1980 changes, the figure so fixed (by paragraph 19 of Schedule 1 to the Supplementary Benefits Act 1976) was £1,200, but was not always as high. A comparable system still prevails in relation to the capital resources of members of the claimant's assessment unit other than the claimant.

4. In the present case the deceased (who died it seems in the year 1979) was awarded supplementary benefit over the period from 17 March 1969 to 5 November 1979. In connection with his claim he signed a number of statements about his circumstances in which he declared his capital at various figures (always less than £1,000), but made no mention of the fact that he had £1,000 worth of premium bonds. It is not suggested that he wilfully or fraudulently withheld information about them; he simply overlooked them or did not appreciate their relevance. The inclusion of the premium bonds among his capital resources at their face value would have raised those resources above the critical figure and reduced (or at times eliminated) the claimant's title to benefit. The aggregate amount paid to him, in excess of the amount that would have been payable if the premium bonds had been so included, has been calculated by the benefit officer to amount to £1,272.94. On 15 October 1980 the question whether any amount was recoverable by the Secretary of State for Social Services under section 20(1) of the Supplementary Benefits Act 1976 was referred to the appeal tribunal pursuant to section 20(2) as originally enacted. By the time that it came before the tribunal the latter subsection had been amended; but the validity of the reference was unaffected (see regulation 8(2) of the Supplementary Benefit (Transitional Regulations 1980 [S.I. 1980 No 984]).

5. Section 20(1) provides as follows:-

> "If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material fact, and in consequence of the misrepresentation or failure -
>
> (a) the Secretary of State incurs any expenditure under this Act; or
>
> (b) any sum recoverable under this Act by or on behalf of the Secretary of State is not recovered;
>
> the Secretary of State shall be entitled to recover the amount thereof from that person."

It will be noticed that the section refers only to expenditure under "this Act" i.e. the Supplementary Benefits Act 1976. The reference to the appeal tribunal however makes it clear that the question referred extended to expenditure incurred before 1976. In fact section 26(1) of the Supplementary Benefit Act 1966 contained an almost identically worded provision which has been kept alive by section 20(3) of the Social Security Act 1980 (see also paragraph 19(d) of Part I of Schedule 2 to that Act), so that it was permissible to refer to the tribunal questions about expenditure incurred under the 1966 Act; and we consider that the reference actually made in this case is to be interpreted as effectively doing so.

6. It was submitted by the benefit officer to the appeal tribunal that the deceased had failed to disclose his holding of £1,000 worth of premium bonds and that in each week he had in consequence been paid more supplementary benefit that he would have been paid if he had disclosed their existence. The aggregate amount of the excess was calculated to be £1,272.94. It was submitted that this amount was expenditure incurred by the Secretary of State in consequence of the failure to disclose and that it was recoverable from the appellant as administratrix of the estate of the deceased. The appeal tribunal accepted this submission and gave their decision accordingly. The appellant, having obtained leave to appeal, lodged an appeal to the Commissioner on the ground that the decision was erroneous in point of law. But in view of the importance and complexity of the issues involved the Chief Commissioner directed that the appeal be heard orally before a Tribunal of Commissioners. At that hearing the claimant was represented by her husband and the benefit officer by Mr R Birch of the Solicitor's Office of the Department of Health and Social Security.

7. Complaint was made on behalf of the appellant that the claim form and/or the literature that had been supplied to the deceased did not make it clear to him that it was necessary for his holding of premium bonds to be disclosed. But this was not in fact a relevant matter and the appellant's husband did not place reliance on the point. It is not suggested that there was any lack of good faith on the part of the deceased. But section 26 of the 1966 Act and section 20 of the 1976 Act alike apply where, whether fraudulently or otherwise, a person fails to disclose any material fact. In Regina v Medical Appeal Tribunal (North Midland Region), Ex parte Hubble 1958 2 Q.B. 228 (on appeal 1959 2 Q.B. 408) Diplock J as he then was said (at page 242):

> ""Non-disclosure" in the context of the subsection, where it is coupled with misrepresentation, means a failure to disclose a fact known to the person who does not disclose it. The term "non-disclosure" is a familiar term in insurance law. It is innocent if the person failing to disclose the fact does not appreciate its materiality, fraudulent if he does."

The passage was related to section 40(1) of the National Insurance Act 1946. We have no doubt that the words used are relevant to the consideration of the meaning of the words "fails to disclose" in the sections before us. It follows that the deceased who must be taken to have known about his premium bonds failed to disclose them when he

disclosed his other resources. As he did not appreciate their materiality the non-disclosure was innocent.

8. The main point put on behalf of the appellant was that the figure of £1,272.94 expended by the Secretary of State was in reality greater than the amount that would have been expended had disclosure been made. It was not suggested that there had been any miscalculation. It was said, however, that if the deceased had received the lesser amounts, which it is contended he would have received, had disclosure been made, he would have been forced to make up the deficiency in his allowance by disposing of a corresponding amount out of his capital resources. These would thus have been gradually reduced until the time arrived when no deduction fell to be made by reason of capital resources. A calculation (the figures are not challenged by the benefit officer) has been produced showing that on the above hypothesis the amount overpaid was £641.35; and this sum has been offered in full settlement. We have a great deal of sympathy with this approach to the question. Indeed it is possible to visualise a case under the new law where a person with resources of £2,001 partly undisclosed could receive supplementary benefit over a period of years, when, had it been refused, the claimant would necessarily have reduced his resources below £2,000 in the first week and thereafter have become entitled to benefit. And yet his obligation to repay might far exceed his resources. We do not however think that it is permissible to adopt this approach in the present case. The deceased's weekly payments were only slightly larger as the result of the non-disclosure than they would otherwise have been, and it is impossible to make the assumption that he would have made up the difference by disposal of part of his capital resources.

9. The same result as that contended for by the claimant could be reached in a slightly different way, if the word "resources" in the phrase "capital resources" could be interpreted as meaning "net resources" rather than "gross resources". If a person's resources are to be interpreted as including money owed to him it would seem to be equitable at least that they should be treated as excluding money owed by him. This question arose acutely for decision in the other appeal heard by us together with this appeal. That case turned on the meaning of the word "resources" in the post-1980 regulations (in particular in regulations made under paragraph 1(2)(b) of Schedule 1 to the Supplementary Benefits Act 1976 in its post-1980 form) we considered that ordinarily, though not, necessarily always, a person's resources had to be ascertained without reference to his liabilities.

10. But there was nothing corresponding to paragraph 1(2)(b) in either the 1966 or the 1976 Act in its original form. It is thus possible to contend that "resources" in those Acts fell to be construed differently. For reasons that will appear we do not find it necessary to decide that question. Part II of Schedule 2 to the 1966 Act and of Schedule 1 to the 1976 Act in its original form contained specific provisions relating to certain classes of resources (not including premium bonds). Paragraph 26 of the 1966 Schedule and paragraph 27 of the 1976 (both of which were in Part II) read as follows:-

> "Any resources not specified in the foregoing provisions of this schedule may be treated as reduced by such amount (if any) as may be reasonable in the circumstances of the case."

There is no indication that the terms of this provision (not reproduced in the post-1980 enactments) was considered by the appeal tribunal. It seems to us to be impossible to postulate in the light of this provision that, if the deceased had disclosed his premium bonds at a time when he already was liable to make a substantial repayment, further disallowance would have been made. It might well have been thought reasonable to treat the deceased's resources as reduced by the amount that had been overpaid even before he repaid it. The decision of the appeal tribunal, which took no account of this matter, must therefore be erroneous in point of law.

11. What should the tribunal have done if the point had been before them? It might have been argued that it was impossible in the face of such a wide discretion as that contained in paragraph 26 (and 27) to be satisfied that there was any overpayment at all. However, we do not think that this argument ought to succeed. We think that it would have been the duty of the tribunal to estimate on the balance of probabilities what (if anything) would have been deducted from the claimant's resources under the paragraph and to determine the overpayment accordingly.

12. The point on paragraph 26 (and 27) was not canvassed at the hearing, and we have considered whether it would be right to give the benefit officer an opportunity of making a submission on it. Had the paragraph or one like it been still in force, we should have regarded it as necessary to do this. But we are dealing with provisions that are now obsolete, we think it best to deal with the matter ourselves without more delay. We consider further that this is a case in which it is appropriate for us, who have all the relevant facts before us, to determine the matter ourselves. So determining it we think that it would have been right had the existence of the premium bonds been before the determining authority at a time when it was known that the claimant had been overpaid, but had not yet repaid the amount found to be overpaid, for them to treat his resources as reduced by the amount that he was bound to overpay. On that footing the true overpayment is that ascertained by the claimant and we decide accordingly that the amount to be repaid under section 20 is £641.35. The appeal is allowed.

Signed: I O Griffiths
Chief Commissioner

Signed: J G Monroe
Commissioner

Signed: D G Rice
Commissioner

Date: 2 August 1982

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