JM/SH/3

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Commissioner's File: CSB/056/1992

SUPPLEMENTARY BENEFITS ACT 1976

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal, brought by leave of the Commissioner, against a decision of the social security appeal tribunal dated 14 November 1991 which confirmed a decision issued by the adjudication officer on 25 September 1989. My own decision is that the aforesaid decision of the appeal tribunal is not erroneous in point of law - although, as I seek to demonstrate below, it could have been determined on a simpler and more decisive basis.

2. The claimant was born on 9 March 1930. He appears to have spent his working life as a labourer. He last worked on 29 August 1981 - losing his employment because the contract upon which his employers were engaged had come to an end. In September 1982 - when his entitlement to unemployment benefit had exhausted - he claimed and was awarded supplementary benefit. He has been in receipt of supplementary benefit/income support ever since. Whilst supplementary benefit was in existence he completed a number of forms. On none of those forms did he suggest that there was anything defective about his physical or mental health. On 6 January 1986 he was visited at his home so that his case might be reviewed. On that occasion he told the visiting officer of the Department of Health and Social Security that he was in good health and that he had not registered with a general practitioner in Chesterfield since he had left Staveley more than three years previously. On 6 January 1989 he completed a Form A2. Upon that form he indicated no health problems.

3. On 18 August 1989, however, the claimant requested a review of his erstwhile entitlement to supplementary benefit. (By then, supplementary benefit had been off the scene for more than 16

months.) He made that request upon a form furnished by his representatives, the Derbyshire Welfare Rights Service. (By reason of a number of appeals which have been before me recently, I am getting to know that form by heart!) The form contains a line which runs as follows:

"My health. I have the following health problems ....."

"Angina" was inserted. The form also contains the printed line: "Please backdate my entitlement appropriately." It is common ground that that form furnished the first intimation to the Department that there was anything amiss about the claimant's health. Unsurprisingly, the local adjudication officer decided that there were no grounds for retrospectively releasing the claimant from the requirement to be available for employment as a condition of entitlement to supplementary benefit (cf section 5(1) of the erstwhile Supplementary Benefits Act 1976).

4. As I now know to be customary in cases presented by these representatives, it was not until after the local adjudication officer had issued his decision that any attempt was made to particularise the grounds upon which this claimant relied; and that attempt was, in this case, delayed until 28 February 1991, ie almost $1^1/_2$ years after the local adjudication officer had issued his decision. The grounds of appeal of that date contained the following sub-paragraphs:

" (2) DSS leaflets SB1, SB21 etc effectively mislead claimants.

(3) No reference is made on <u>any</u> official DSS publication to the possibility of age being analogous to disablement."

I deal with that point straightaway. Sub-paragraph (4) of the grounds of appeal proceeds thus:

" (4) This is a most complex issue involving an expert knowledge of Social Security past and present regulations."

That is certainly true. The possible analogy of age to disablement was dealt with at length by the Tribunal of Commissioners which gave the decisions in R(SB) 5/87 and R(SB) 6/87. Those decisions made clear that there is nothing approaching an "automatic" analogy. Any simple statement in a DSS leaflet to the effect that age could be analogous to disability would - without detailed amplification - have merely encouraged even more claimants to make these hopeless claims, leading to ultimate disappointment. Adequate amplification would have had to reflect the final sentence of paragraph 19 of R(SB) 5/87, where the Tribunal of Commissioners was at pains to point out that if a claimant's lack of prospects of employment was attributable solely to the state of the labour market, then such lack would avail him nothing. That final sentence - in fact - would seem to me to have been, by itself, fatal to this

claimant's case. As I have pointed out in paragraph 2 above, as late as 6 January 1989 he was indicating that he had no health problems. I can find nothing in the papers to suggest that in a normally active labour market a man of this claimant's age and health would have had, prior to April 1988, any real difficulty in obtaining employment as a labourer.

5. But this case founders upon a more formidable rock than that. Regulation 69(1) and (the now revoked) regulation 72 of the Social Security (Adjudication) Regulations 1986 are fully set out in the submission of the local adjudication officer. I need not repeat them here. Since in this case the application for review was not made until 18 August 1989, no practical benefit could accrue to the claimant unless he could bring his case within regulation 72. In CSSB/1/88 the Commissioner said this:

> "As I read them section 5 of the Supplementary Benefits Act 1976 and regulation 6 of the Conditions of Entitlement Regulations are designed to provide a standard condition of being available for employment to recipients of supplementary benefit, unless or until a recipient seeks its removal, and that on sufficient grounds. The onus is thus clearly on the recipient - that is to say the claimant. To suppose otherwise would, I consider, make the scheme of section 5 of the Act and regulation 6 virtually unworkable."

The Commissioner who decided CSB/1331/1989 (to be reported as R(SB) 10/91) expressly agreed with that passage. And in paragraph 11 he proceeded thus:

> " 11. In my judgment, where regulation 72(1)(a) of the above cited Social Security (Adjudication) Regulations 1986 refers to a decision under review being "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 ...." etc., that refers only to clear mistakes of fact or law in relation to an actual issue in a given case at a time when the officer of the relevant Department etc. was actively required by his duties under the social security legislation to arrive at a decision or take some administrative act. It certainly does not impose a general duty on the officers etc of the Department of their own accord constantly to keep all cases under review in order to see whether or not any particular exempting regulation might apply. The wording of regulation 72(1)(a) does not in my judgment bear that construction and to hold otherwise would be to place an impossible burden upon officers of the Department etc."

6. I respectfully agree with both of the passages which I have set out in the preceding paragraph; and since CSB/1331/1989 is to be reported, it manifestly commands the support of a majority of Commissioners. As I have previously pointed out to this claimant's representative, until such time as the Court of Appeal disapproves of the foregoing passages - and it has not yet, so far as I am aware, even been asked so to do - the overwhelming

majority of these appeals to the Commissioner based upon long-delayed applications for review are doomed to failure.

7. In this case the Regional Chairman, on 10 May 1991, generously admitted the claimant's extremely late appeal. In due course, the appeal tribunal disallowed that appeal. It went with some care into the issues. It found that neither paragraph (e) nor paragraph (f) of regulation 6 of the Conditions of Entitlement Regulations was satisfied and that the claimant's situation had not been analogous to either of the situations envisaged by those paragraphs. In those circumstances, it felt it unnecessary to proceed to any consideration of regulation 72 of the Adjudication Regulations. In a submission dated 4 June 1992 the adjudication officer now concerned supports the claimant's appeal, submits that I should set aside the appeal tribunal's decision of 14 November 1991 and invites me to refer the case for rehearing by a fresh appeal tribunal. The fact that I have declined so to do will come as no surprise to the claimant's representative. On 5 October 1992, in case on Commissioner's file CSB/073/92, I held a long oral hearing in which the claimant was represented by the present claimant's representative and in which were fully canvassed various issues which arise in this present appeal. On 22 October 1992 I signed an eight page decision in that case. As I said in paragraph 2 thereof, the hearing was conducted with the greatest good humour on both sides. There was full and uninhibited discussion of the general issues presented by greatly delayed applications for waiver of the requirement to be available for employment; and it was quite clear that the representative takes a much more radical view of the effect of the legislation and of relevant Commissioner's decisions than do I (or, indeed, than do other Commissioners). The representative is fully aware that if I were to refer this case for rehearing by a fresh tribunal, it would be with directions which would render the decision of that tribunal a foregone conclusion.

8. But I wish here to say something about the aforesaid submission of the adjudication officer now concerned. He is technically correct in setting out the following passage from CSSB/470/89:

> "Should the tribunal decide that the claimant qualifies for waiver of the condition of availability they should indicate from what date they hold this to be the case without regard to financial consequences. It is only thereafter that issues related to regulation 69 and possibly 72 of the Adjudication Regulations will arise."

At the date when I first read that, I respectfully agreed with it. But it is my own firm view that it has now been overtaken by the passage of time. It is still being regularly relied upon by adjudication officers who submit to the Commissioner that there was error of law in the relevant appeal tribunal's decision. Now that it is more than $4^1/_2$ years since supplementary benefit disappeared from the scene, such submissions are needlessly technical. There have been before me

in recent weeks a number of appeals in which the relevant application for review was delayed until well into 1991. The systematic investigation of such cases - as commended in CSB/470/89 - wastes public time and wastes public money which could be better expended upon appeals of real substance. (At the aforesaid oral hearing, the then claimant's representative - who is the representative in the present appeal - told me that in Derbyshire there are still 300 to 400 cases of this nature in the adjudicational pipeline.) It is my confident view that the above-quoted passage from CSB/470/89 ought now to be regarded as obsolete. If the adjudicational system is not to become hopelessly clogged, appeal tribunals should go straight to regulations 69 and 72 of the Adjudication Regulations. If consideration of those regulations leads to the plain conclusion that a claimant has no prospect of any practical advantage from his application for review, the appeal tribunal need go no further. I invite adjudication officers to take the same approach when preparing their submissions to the Commissioner.

9. The claimant's appeal is disallowed.

(Signed) J. Mitchell
Commissioner

(Date) 6 November 1992