

CP A-9

DGR/SH/14

Commissioner's File: CSB/067/1990

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 24 May 1989 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide that the claimant was not, during the subsistence of the supplementary benefit legislation, entitled to the long-term scale rate of supplementary benefit.

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 24 May 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)-(d)

(e) by reason of physical or mental disablement he has no further prospect of employment and

in the 12 months immediately preceding 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 upholding the decision of the adjudication officer, disallowed the appeal. They made the following findings of fact:-

"Found facts as stated in facts 1-9. Accepted Appellant had trapped sciatic nerves for which he had successful treatment about 8 years ago. Had some pain in back but not seriously affected. Had bronchitis but not serious element in eligibility for work in that 6(e) not fulfilled. Not accepted in appellant's case 6(u) satisfied. Had over a long period made little effort to find work and at age 55 his prospects of work were not so affected by age and prospects in locality that he fell within 6(u)."

6. It is contended that the tribunal gave inadequate reasons for their decision. It is arguable that the tribunal found that the claimant was unable to satisfy head (iii) of paragraph (e), which, if such was the case, would be fatal to his claim under either paragraph (e) or paragraph (u). However, I do not think that the tribunal have made a sufficiently clear finding on this point. The tribunal also appear to have decided that the claimant's age was not something which by analogy could bring him within paragraph (u). However, in my judgment, they have not explained with sufficient particularity why this was the case.

7. Accordingly, I must set aside the tribunal's decision as being erroneous in point of law for breach of regulation 25(2)(b) of the Adjudication Regulations. However, it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently substitute by own decision.

8. For the purposes of this appeal, I will assume in favour of

the claimant that at the date of the request for review, if not earlier, the claimant had no realistic prospects of employment and that he satisfied sub-paragraphs (i), (ii) and (iii) of paragraph (e) of regulation 6. But did the absence of realistic prospects of employment arise by reason of "physical or mental disablement" within paragraph (e) or by any analogous condition within paragraph (u)? Clearly there was no evidence to suggest that the claimant's medical condition was such that it was the cause of his having no realistic prospects of employment. The tribunal have made a finding that his bronchitis was not a serious element in his eligibility for work nor was his back pain of serious concern in this connection, and I endorse their findings. But was the claimant's age analogous to "physical or mental disablement"? He was, at the date of the hearing before the tribunal, aged 55. It was only of relevance if it prevented him from performing work.

9. 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 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]."

10. In the present case there was no medical or other evidence to suggest that the claimant was precluded by his age from undertaking work. He may not have been able to obtain work by reason of the local employment conditions, but that was wholly irrelevant. Moreover, employers may have been prejudiced against him having regard to his age, but again that was irrelevant. Accordingly, I am satisfied that the claimant's age was not analogous to "physical or mental disablement" and therefore he could not bring himself within paragraph (u). No other paragraph of regulation 6 would appear to be relevant.

11. Accordingly my decision is as set out in paragraph 1.

(Signed) D.G. Rice
Commissioner

(Date) 3 March 1992