

"Good cause" and "exceptional circumstances" in pre-1980 regulations provide different tests for backdating claim for SS. "Exceptional" means "extraordinary". Circumstances means all circumstances of claimant to be taken into a/c - not just his mental state, so if in his surrounding area there is someone interested in his welfare, even tho' not an "appointee" that is relevant.

Commissioner's File: CSB/0073/1986

C A O File: AO 2204/86

Region: London South

SUPPLEMENTARY BENEFITS ACT 1976

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

Name: Paul Myers (appointee) B. Myers (Mrs) (Mother)

Social Security Appeal Tribunal: Croydon

Case No: 7/22/04

[ORAL HEARING]

1. My decision is that the decision of the Croydon social security appeal tribunal dated 19 September 1985 is erroneous in point of law. Accordingly I set it aside and remit the case for hearing to a differently constituted appeal tribunal.
2. This is an appeal by the claimant with the leave of the Commissioner to the Commissioner from the unanimous decision of the appeal tribunal confirming the decision of the adjudication officer issued on 3 June 1985 providing as follows:-

"The claim for supplementary benefit shall not be backdated for a period prior to 24 November 1980."

On 17 November 1986 I directed an oral hearing. Accordingly on 18 March 1987 I held an oral hearing. The appointee was not present. The appointee was represented by Miss J Winter of the Greater London Citizens Advice Bureau Service. The adjudication officer was represented by Mrs A Saxon of the Solicitor's Office DHSS. To both of them I am indebted.

3. The claimant now aged 24 is a single person living in his mother's household. He is severely mentally handicapped and his mother is his validly appointed appointee. He is in receipt of attendance allowance and severe disablement allowance. On 14 March 1985 the appointee claimed supplementary benefit on the claimant's behalf and she requested that the claim be backdated to the claimant's 16th birthday. A visiting officer called at the claimant's address on 1 April 1985. The appointee stated that the Royal Society for the Mentally Handicapped had advised her to claim benefit. She had been unaware of the claimant's entitlement and had not made enquiries at the local social security office. The claimant had been at boarding school on his 16th birthday. It was a special school and it appears he was placed there by the Education Department of the London Borough of Croydon. He left school in 1980. A payment of arrears for the period from 24 November 1980 to 1 May 1985 was made to the appointee.

4. The relevant statutory provisions are as follows:-

"Regulation 19 of the Social Security (Adjudication) Regulations 1984 [S.I. 1984 No. 1451] as amended by S.I. 1984 No. 1999.

Section 14 of the Supplementary Benefits Act 1976 is amended by the Social Security Act 1980 and the Social Security and Housing Benefits Act 1982.

Regulation 19 of the Supplementary Benefit (Claims and Payments) Regulations 1977 [S.I. 1977 No. 1142]."

The "backdating" issue for determination by the tribunal and which is the issue now before me involves the construction of regulation 5 of the Supplementary Benefit (Claims and Payments) Regulations 1977 [S.I. 1977 No. 1142] regulation 5(1) and (2) which provides as follows:-

- "5. - (1) Subject to paragraph (2), a claim to a pension or allowance shall be made not later than the beginning of the first period for which it is payable.
- (2) Where they are satisfied that there are exceptional circumstances justifying it in any particular case or class of cases, the determining authority may treat a claim as having been made on such earlier date as they may determine."

5. Miss Winter in her able address to me summarised the background and the lack of legal issues and defects of the tribunal's decision. She informed me that prior to 10 April 1985 when the appointee was appointed there was no appointee. The issue Miss Winter submitted before me was whether the claimant's circumstances which satisfied the good cause provisions of regulation 5(2)(a) of the Supplementary Benefit (Claims and Payments) Regulations 1981 also satisfied the "exceptional circumstances" provisions of regulation 5(2) of the Supplementary Benefit (Claims and Payments) Regulations 1977. She submitted they are not identical and referred me to paragraph 16 of the decision of a Tribunal of Commissioners in R(SB)9/84. Although it is not the same test it is possible to satisfy a lesser test of good cause and also to satisfy the test of "exceptional circumstances", although the tests are different they are not incompatible. Miss Winter referred me to decision R(SB)56/83 in particular paragraphs 9 and 18 and submitted that that case was similar to the present. Miss Winter also referred me to the unreported decision on Commissioner's file CSB/1111/1985 at paragraph 6 thereof. She submitted that the facts satisfied both tests and invited me to do the same. Miss Winter then dealt with the distinction between the two tests; she submitted that the adjudication officer at page 34 of the case papers relied on the distinction between the two tests. The Tribunal of Commissioners in R(SB)9/84 did not have expressly before them the question whether the claimant's circumstances could be such he might satisfy both tests - they left that matter for rehearing having drawn the attention of the new tribunal to the higher hurdle. The distinction in R(SB)9/84 cannot be applied, in the present circumstances paragraph 16 of R(SB)9/84 is the nub of the distinction between the two tests but in the present case since no claim was made on his behalf prior to 14 March 1985 and since no appointee was appointed prior to 10 April 1985 the power to make exceptional needs payments could not have been of any practical assistance to him. For someone who had no appointee and had not entered the scheme those powers to make exceptional needs payments were irrelevant to his case. Decisions R(SB)56/83 and R(SB)9/84 do not conflict and although the two tests are separate tests it is possible for the claimant to satisfy both tests on the facts. Miss Winter then turned to a further issue of law that is the lack of an appointee until 10 April 1985. She stated that the adjudication officer had relied on the A code which provided guidance and laid emphasis on the claimant being in the care of other adults during the period in contention here. The A code is only guidance and never had the force of law. Miss Winter referred me to the older cases on good cause including decision R(G)2/74 at paragraph 7 and commended that approach in the case of "exceptional circumstances". She

submitted that regulation 5 of the Supplementary Benefit (Claims and Payments) Regulations 1977 gave a wholly unfettered discretion. The A Code seemed to fetter that discretion and the adjudication officer was wrong in law to rely on the A Code when a Commissioner has given a decision on a mentally handicapped person without an appointee. The adjudication officer is preferring a path laid down by guidance rather than case law. Miss Winter then dealt with the decision of the appeal tribunal and submitted they erred on three counts, first they failed to take any sufficient account of the material facts before them secondly they misinterpreted the meaning of regulation 5 of the 1977 Regulations and thirdly they failed to distinguish between the statutory provisions and the non-binding guidance. Miss Winter informed me that she had also considered a further error of law in that the record of the tribunal's decision showed that it was not written by the chairman of the tribunal although signed by him. However in the light of the decision on unreported Commissioner's file CSB/868/1985 he decided not to press that submission. In concluding her able opening address to me Miss Winter invited me to follow decisions R(SB)56/83 and CSB/1111/1985. In reply Miss Winter submitted that the actions of third parties were relevant to both tests for good cause and "exceptional circumstances", referred to decision on unreported file CSB/1009/1986 (of which I was the author) and submitted that the facts of that unreported case where the claimant was only temporarily ill were different to the case now being dealt with. Miss Winter also submitted that the authors of decisions R(SB)56/83 and CSB/1111/85 were not wrong in following R(SB)17/83. Further Miss Winter submitted that the application of regulation 5(2) must vary and includes a measure of discretion. Finally in reply Miss Winter submitted that the test of "exceptional circumstances" put forward by Mrs Saxon made it difficult for anyone to meet the test and that where a claimant had satisfied the good cause test the onus of proof should shift to the adjudication officer to show why the claimant has not passed the test of exceptional circumstances.

6. In the light of the view I take of the case I do not propose to set out the submissions before me made by Mrs Saxon.

In my judgment the decision of the appeal tribunal is erroneous in point of law in that they failed to make adequate findings of fact on which to found their reasons for decision. Further the appeal tribunal erred in law in that they considered the A Code as an aid to construing the statutory provisions of regulation 5(2) of the Supplementary Benefit (Claims and Payments) Regulations 1977. Explanatory notes regarding the workings of statutory provisions issued by a Government Department for the assistance of their officials are inadmissible for the purposes of construing the statutory provisions. Such notes inevitably derive persuasive force from the fact that they represent the views of the persons charged with the administration of the statutory provisions and therefore possessing special knowledge of those provisions, and however much an advocate may disclaim reliance on them otherwise than as part of his argument, their use might well result in the Court being influenced by official opinion. In this regard I draw attention to the judgment of Jenkins L.J. (as he then was) in the Court of Appeal decision of L.C.C. v. Central Land Board [1958] 1 W.L.R. 1296 and decision R(SB) 28/84 at paragraph 7. Though of course the A Code is of considerable assistance, it cannot be used as an aid to construction.

In regard to the interpretation of regulation 5(2) a Tribunal of Commissioners in decision R(SB)9/84 at paragraph 16 held that "exceptional circumstances" were not the same as good cause. What they did not do was say what "exceptional circumstances" were. They dealt with good cause. R(SB)56/83 again dealt mainly with good cause but at the end of the decision referred to "exceptional circumstances" which were there undefined. This was followed by the decision on unreported Commissioner's file CSB/1111/85, again a decision on good cause. That decision and the Tribunal of Commissioner's decision referred to above which were both in relation to good cause, accepted the view at paragraph 3 of decision R(SB)17/83 in saying that the claimant only had such cause. In my judgment it is a matter of fact and not of law whether there are "exceptional circumstances". Though the above referred to decisions are authority for the proposition that there is a difference between

good cause and "exceptional circumstances" there is no authority as to what "exceptional circumstances" are. One of the differences is that in relation to good cause, only the claimant's good cause or lack of it counts and no consideration is given to third party involvement except as an appointee duly appointed. In regard to regulation 5(2) the activities or otherwise of third parties are something that can be considered, and I derive support from paragraph 6 of the unreported Commissioner's decision CSB/1009/86 (of which I was the author). The availability of someone else who could have been aware of the circumstances to make a claim is a material fact. A handicap may be sufficient to constitute "exceptional circumstances" on the facts of a particular case, but consideration must be given to all the surrounding circumstances. The test of good cause is very specific to the claimant but the words "exceptional circumstances" in regulation 5(2) make the test at once a wider and a narrower one than the good cause test. It is wider in that the word "circumstances" is used. It is well established that words are to have their normal meaning. "Circumstances" in normal usage includes some general situation in the world or society defined in the Shorter Oxford Dictionary as a state of affairs surrounding something or surroundings. By using "circumstances" the intention of the legislature was to take note of all the circumstances surrounding the claimant and therefore of the possibility of more than one person being interested in the claimant's welfare enough to make a claim on his behalf (and where necessary to carry out the "appointee" procedure). In my view in so far as R(SB)56/83 was intended to say that "exceptional circumstances" covered those of the claimant alone it went beyond the requirements of that decision. This decision was based on the view of the Commissioner in decision R(SB)17/83 in respect of the involvement of others. However given the dates of the claim in decision R(SB)17/83 there was no need to consider "exceptional circumstances" as the dates are for 1981 and regulation 5(2) ceased to have effect in 1980. Only the claimant's abilities were in issue in that case. Again in decision R(SB)17/83 the issue as appears from the decision was never argued as to "exceptional circumstances". In my view the involvement of another person or persons interested in the welfare of the claimant is relevant to considering his "circumstances" for the purposes of regulation 5(2). A test of "exceptional circumstances" is again narrower than good cause because of the word "exceptional". I refer in this regard to paragraph 16 of decision R(SB)9/84. In the field of the pre 1980 largely discretionary legislation payments under a later claim were made only in very exceptional circumstances. The fact that the claimant was not in a position to avail himself of that discretion (as no appointment had been made) is an irrelevant consideration to the interpretation of the regulations. "Exceptional" means extraordinary or circumstances outside the normal run. The claimant's circumstances taken as a whole (and that of course is an issue of fact for the tribunal) are not exceptional or at least arguably not so. The claimant was mentally handicapped but was not without other help and not unlike other handicapped persons or persons unable to speak the English language. They may have others such as interpreters available to help. "Exceptional circumstances" differ from good cause. It is necessary in the case of "exceptional circumstances" to view the whole circumstances surrounding the claimant and those circumstances must be extremely unusual. The appeal tribunal reached the correct conclusion that there were no exceptional circumstances, having weighed up the whole circumstances of the claimant not only his mental state. However on the face of their record there is no indication as to what process of weighing up was effected by the tribunal or what evidence taken in respect of the whole circumstances of the claimant was considered as opposed to his disability. These are matters of fact on which further evidence is needed.

7. In accordance with my jurisdiction set out in regulation 27 of the Social Security (Adjudication) Regulations 1984 my decision is as set out in paragraph 1 of this decision. I direct that the tribunal to whom I remit this case in rehearing the case shall pay particular attention to all the aspects to which I have referred above. Further they shall consider carefully the exact wording of the relevant regulations and make and record their findings on all the material facts and give reasons for their decision.

8. Accordingly the claimant's appeal is allowed.

(Signed) J.B. Morcom
Commissioner

Date: