

CDAG

JM/SH/2

Commissioner's File: CSB/124/1991

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 is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 12 November 1990 which confirmed a decision issued by the adjudication officer on 20 September 1988. My decision is as follows:

- (1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.
- (2) Without making fresh or further findings of fact, I am able to give the decision which I consider that the appeal tribunal should have given.
- (3) The decisions of the adjudication officer pursuant to which the claimant was paid supplementary allowance fall to be reviewed.
- (4) The aforesaid decisions are revised so as to make supplementary allowance payable at the long-term scale rate from and including 11 June 1987.
- (5) There are no grounds by virtue of which the claimant can, by invoking the erstwhile regulation 72 of the Social Security (Adjudication) Regulations 1986, escape the restriction of payment of arrears imposed by regulation 69 of those Regulations.

2. Four years after supplementary benefit wholly disappeared from the statute book, there are still coming before the Commissioner appeals turning upon regulation 6 of the erstwhile Supplementary Benefit (Conditions of Entitlement) Regulations 1981. This case is one of them. I hesitated long

before deciding that I would find the appeal tribunal's decision erroneous in point of law. In my view its most conspicuous error lay in endorsing the local adjudication officer's conclusion that the claimant could avail himself, at all, of regulation 6(u) of the Conditions of Entitlement Regulations. In a submission dated 2 September 1991 the adjudication officer now concerned supports the claimant's appeal; but upon the ground only that the appeal tribunal did not adequately explain why it considered that regulation 72 of the Adjudication Regulations could not be invoked by the claimant. The adjudication officer now concerned submitted that, having set aside the tribunal's decision of 12 November 1990, I should remit the matter for rehearing before a fresh tribunal. Such an exercise would - in my view - have been in this case a waste of time and of no little public money. I should certainly have required such fresh tribunal to re-examine the whole regulation 6(u) aspect of the case; and should have expected it, in the light of a proper application of the relevant case law, to have found that this claimant did not come near to showing that in 1987 - or at any relevant time - his circumstances were "analogous" to the circumstances prescribed in regulation 6(e). But the claimant has already been paid the arrears of benefit (about £700) to which the local adjudication officer's decision entitled him; and there would, of course, be no question of the Secretary of State's being entitled to recover that sum. So, as I have indicated, a rehearing by a fresh appeal tribunal would be totally pointless. If and in so far as the appeal tribunal's decision failed adequately to explain why this claimant could not bring his case within regulation 72 of the Adjudication Regulations, I seek below to make good that deficit.

3. Although no date of birth appears in the papers before me, the claimant seems to have been born in May 1934. At the material time he had been in receipt of supplementary allowance since at least July 1976. He had been signing quarterly since May 1984. He had worked as a labourer. His own representative makes the point (in the grounds submitted in support of the application for leave to appeal to the Commissioner) that the claimant's prospects of employment had been restricted by the state of the local job market. He also stressed the claimant's age, diabetes, length of time unemployed and lack of training. I deal shortly with each of those in turn:

- (a) When, on 11 January 1988, the claimant applied for a review so that he might be awarded the long-term scale rate, he was only aged 53. In view of the specific provisions relating to age which were set out in regulation 6 of the Conditions of Entitlement Regulations, that was a conspicuously low age at which to seek to invoke analogies.
- (b) The papers contain no medical evidence whatsoever. It appears quite clear, however, that the claimant's diabetes was mild. It could be controlled by diet. He did not even require to use insulin.
- (c) In view of the claimant's low age and relatively good

health, the overwhelming inference must be that the length of time for which he had been unemployed was solely attributable to the depressed state in which the labour market had been in Liverpool for many years. In the final sentence of paragraph 19 of R(SB) 5/87, 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.

- (d) That last comment is equally applicable to the claimant's lack of training. To put it another way: the overwhelming inference must be that, in a normally healthy labour market, this claimant would in 1987 have found no difficulty in finding employment as a labourer.

4. I have already referred to the total absence from the papers of any expert medical evidence. There is also a conspicuous lack of evidence in relation to each of the following:

- (a) any efforts made by the claimant to obtain employment;
- (b) any job's having been refused to the claimant on account of his age; and
- (c) any job's having been refused to the claimant by reason of his diabetes.

In common with many claimants and representatives, the representative in this case relied upon decision on Commissioner's file CSSB/147/1987. That case was decided upon what the Commissioner expressly referred to as its "special circumstances". The claimant in that case was lucky - and the text of the decision suggests that that may have been the view of the Commissioner who gave the decision.

5. I turn to the erstwhile regulation 72 of the Adjudication Regulations. I can see no grounds whatever upon which this claimant can bring himself within that regulation. So far from there having been any mistake or omission on the part of any officer of the Department of Health and Social Security, it would - in my view - have been erroneous if the claimant had been awarded the long-term scale rate in respect of any period before 11 June 1987. Indeed, I have been at some pains to demonstrate that I have the gravest doubts as to the propriety of the award from that date. Certainly, the fact that the Department's local office became aware of the claimant's dietary needs in respect of his mild diabetes, cannot conceivably be elevated into a matter putting that office upon enquiry as to whether the claimant ought or ought not to continue to be required to be available for employment. As for the quarterly signing, such signing has never been a consideration with any bearing upon the application of regulation 72. That was always my own view - and it was the view of many, if not all, of the other Commissioners. It is to be regretted that the decision now reported as

R(SB) 10/91 arrived upon the scene too late in the day to spare innumerable claimants the dashing of hopes which had been induced by the over-optimistic advice tendered to them by their representatives.

6. The claimant's representative appears to have relied, before the appeal tribunal, upon R(S) 11/51. On the relevant form AT3 no mention whatever is made of that case. That omission must, I have decided, amount to error of law. I should be very sorry, however, if the relevant appeal tribunal were to think that I consider such error to be in any way reprehensible. R(S) 11/51 was, of course, concerned with incapacity for work in the context of sickness benefit. It might have been material if the claimant had been seeking to bring himself within regulation 6(c)(ii) of the Conditions of Entitlement Regulations. But he did not seek to do so - either directly or by way of analogy. For my part, I can understand why the appeal tribunal made no explicit reference to R(S) 11/51.

7. In form, the claimant's appeal is allowed. In effect, that avails him nothing.

(Signed) J. Mitchell
Commissioner

(Date) 10 April 1992