JM/SH/3

Commissioner's File: CSB/144/92

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

Name: M M

Social Security Appeal Tribunal: Stockport

Case No: 616:05818

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 8 July 1992 which confirmed the effect of an adjudication officer's decision issued on 24 September 1991. My own decision is as follows:

(1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.

(2) It is expedient that I should make fresh and/or further findings of fact and, in the light thereof, give the appropriate decision.

(3) None of the decisions of the benefit officer or of the adjudication officer awarding supplementary benefit to the claimant falls to be reviewed because the claimant has failed to establish any ground which would in law justify such review.

2. This is one of four appeals to the Commissioner. All four have these factors in common:

(a) They arise out of highly belated applications for the review of erstwhile entitlement to supplementary benefit. (In each instance supplementary benefit had been off the statute book for more than three years at the date of the relevant application.)

(b) The retrospective revision sought is centred upon one or more of the additional requirements for which

Mahon – don't think we want to write this up, pretty provocative tho' ^ sense of the remarks are. If you agree, could you please put on transcript file ^ handle attached,

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RECEIVED 11 OCT

# With Compliments

Entertainingly vitriolic decision enclosed.

Action by phone 12/10


CHIEF EXECUTIVE'S DIVISION

**Metropolitan Borough of Stockport**

A.L. Wilson IPFA DPA(Lond)
Chief Executive

provision was made in the Supplementary Benefit (Requirements) Regulations 1983 and/or in equivalent provisions in earlier legislation.

(c) The claimants are represented by Mr J Lyons of the Stockport Welfare Rights Unit.

(d) The appeal tribunal heard the cases on the same day and - properly enough - made on the respective forms AT3 cross-references to entries on other of those forms.

(e) The appeal tribunal confirmed the adjudication officer's refusal of the request for a review.

(f) The chairman granted leave to appeal to the Commissioner.

(g) The adjudication officer now concerned -

(i) submits that the appeal tribunal's decision is erroneous in law in that insufficient findings of fact and insufficient reasons are recorded;

(ii) submits that, nevertheless, no grounds justifying a review have been made out by the respective claimant; and

(iii) invites me to substitute my own decision for the decision given by the tribunal.

(h) As appears from paragraph 1 above, I have accepted both of those submissions of the adjudication officer now concerned and I have acceded to her invitation.

3. The following general observations apply to all four appeals:

(1) Supplementary benefit was a non-contributory benefit of last resort. It was designed to maintain at a reasonable standard of subsistence those who would otherwise have been unable to achieve that standard. Almost by definition, then, it imported a measure of urgency. "How are things now?" was the crucial question, not "How were things one (or two or five or ten) years ago?" Of course, that latter type of question properly fell to be answered in certain cases; hence the legislative provisions in respect of late claims and review. But those provisions were relatively stringent.

(2) I have been a Commissioner since supplementary benefit passed into the jurisdiction of the Commissioner. From the outset of the "new" system, which came into effect on 24 November 1980, the forms, both for original claims and for the routine reconsideration of existing

awards, have been "user friendly". They have been worded so as to encourage claimants to indicate circumstances which might give rise to - among other things - payments in respect of additional requirements. Contemporaneity was of substantial importance. In the case of items such as extra heating and extra laundry costs, it was highly desirable that it should be possible to investigate the situation as it obtained at the time. Investigating a situation which obtained more than three years previously presents difficulties upon which I need not elaborate.

(3) Despite the unceasing erosion of the sense of personal responsibility, the stage has not yet been reached where a mentally capable claimant can, with impunity, absolve himself from making any exertions in furtherance of his own welfare interests. Neither adjudication officers nor visiting officers are endowed with extra-sensory perception. Over my years of experience in this jurisdiction, I have been impressed by the assistance which visiting officers have accorded to claimants of means-tested benefits. (The papers in the four cases now before me amply illustrate such assistance; and it has resulted in awards of single payments, as well as awards in respect of additional requirements.) I am aware that in recent years full-time representatives - mainly working in the more northerly areas of England - have sought to lay upon local adjudication officers and visiting officers responsibilities which would, if duly discharged, either bring the whole system to a standstill or call for the employment of further officers, whose salaries would impose an unacceptable strain upon already straitened public resources. As in so many fields of English (and Scots) law, reasonableness must be the guide. And it is reasonable to expect claimants (other than the mentally disabled who have no appointee) to pay heed to their own best interests.

(4) The upshot of what I have said in sub-paragraphs (1), (2) and (3) above is that - certainly in the case of supplementary benefit - grossly delayed applications for review fall to be looked at with informed scepticism. That is especially true when - as in the cases now before me - a claimant has been presented with a pro-forma, prepared by a representative, which calls for nothing more from the claimant than the putting of a tick against one or more of a list of benefit increments. No one can blame a claimant for thinking: "Might as well have a go".

(5) The local adjudication officer had no conceivable alternative to deciding as he did decide. He heard nothing from the claimants or from the representative by way of even the most inept indication of the grounds upon which it was contended that the application could

be brought within section 104 of the Social Security Act 1975. All attempt at that exercise was postponed until there had been an appeal against his decision. I have frequently encountered such tactics where full-time representatives in the north of England have been involved; and I have frequently commented that that deplorable practice is little short of an abuse of the adjudicational processes. From the standpoint of the relevant representative it has the advantage of relieving him (or her) of the tedium of making any sort of enquiry into the material facts until that essential chore has been largely performed for him (or her) by the local adjudication officer. That is fine for the representative. It is not so fine for other claimants whose cases have some foundation in reality; and who have to wait in the queue whilst the time of overworked local adjudication officers is wasted upon what are overt fishing expeditions. That the exercise in the cases now before me was a fishing expedition appears plainly from Mr Lyons' submissions dated 9 December 1992. In the non-metaphorical sense, fishing expeditions are harmless enough - even when, as here, the hook comes in empty. But I myself do not regard as harmless expeditions which result in the needless waste of public time and, in consequence, public money.

(6) That said, I am satisfied that, as a matter of law, the appeal tribunal ought to have considered and pronounced upon the fresh material and fresh arguments which were laid before it. However much one can sympathise with the position in which the tribunal was put, it should have looked beyond the very sparse material which had been before the local adjudication officer at the time when he gave his decision. The burden of showing that a review application can be brought within section 104 of the 1975 Act undoubtedly falls upon the party seeking the review. (That is not in dispute.) But however late in the day the relevant material and arguments were produced, the appeal tribunal should have investigated that material and pronounced upon those arguments. Whether that is regarded as a matter of ordinary fairness or, more technically, as a matter which fell within the scope of section 36 of the Social Security Administration Act 1992 ("Questions first arising on appeal"; formerly section 102 of the 1975 Act) is an issue which I need not here decide.

(7) One of the two grounds upon which the local adjudication officer refused the requests for review was that the respective claimants had "not identified the decision(s) to be reviewed". I am on Mr Lyons' side on that aspect of the case. I know that in recent years Commissioners (mainly in Edinburgh) have directed much learned dissertation to the issue. I myself, however, have often made plain that I favour a

pragmatic approach. Commonsense must be allowed to prevail. There are many review cases which, as a matter of practicality, can be allowed to proceed without the identification of the precise decision of the adjudication officer which falls for review. It will normally, of course, be his latest relevant decision. But where a particular benefit has been in payment for many years, even that may be troublesome to identify.

(8) I say a few words about the erstwhile regulation 72 of the Social Security (Adjudication) Regulations 1986; although, of course, that regulation never fell for consideration until grounds for a review had been established and the matter had proceeded to revision. Until 6 April 1987 there was an absolute 52 weeks limit upon the retrospective payment of any increase in benefit consequent upon a review. That gave rise to serious injustice in (the relatively rare) cases where underassessment of benefit was clearly attributable to error on the part of officers of the Department of Health and Social Security. The 1986 Adjudication Regulations came into operation on 6 April 1987 - and regulation 72 thereof reflected an unprecedented relaxation which was heartily welcomed by (amongst many others) the Commissioners. But, alas, the representatives of claimants lost no time in seeking to invoke it in cases of a type which had never been in the contemplation of the legislators - with the consequence that it was revoked with effect from 1 September 1991. (Its place was taken by the more stringently worded regulation 64A.) On many occasions the Commissioners had to emphasise that the (undoubtedly beneficent) ambit of regulation 72 was nothing like as wide as was suggested by claimants' representatives. I tend to agree with Mr Lyons that the oft-quoted paragraph 11 of decision on Commissioner's file CSB/1331/1989 (to be reported as R(SB) 10/91) is not directly in point so far as the circumstances of these present appeals are concerned. But directly in point here is what was said in paragraph 6 of decision on Commissioner's file CSB/260/1990:

> "In my judgment regulation 72(1)(a) does not impose a duty on officers of the Department to interrogate claimants as to every conceivable circumstance which might affect their award of supplementary benefit. The mistake envisaged by the regulation is a clear and obvious mistake made by the officer of the Department on the facts disclosed to him or which he had reason to believe were relevant. Clearly the tribunal were correct in holding that the claimant had not shown that there had been a mistake by the officer

> of the Department. They, also, bore in mind that if the claimant were to show such a mistake it had also to be shown that he had not caused or materially contributed to it; they found on the evidence that his failure to disclose his illness and his reference to hoping to obtain work would have contributed to a mistake."

It virtually goes without saying that, where an antique omission is being relied upon, firm and clear evidence must be adduced by way of support. Speculative inferences are not firm and clear evidence.

4. The claimant is a widow who was born on 30 January 1914. For some years her sight has been failing. In 1987 she was registered as partially sighted. She was awarded supplementary benefit in 1983 and continued to receive that benefit until it passed into income support. Her application for a review of her entitlement was signed on 13 May 1991. She (or someone on her behalf) put a tick in the boxes designated heating, help in the home, attendance needs, age and blindness. So far as I can make out from the papers, no attempt was made to pursue help in the home, attendance needs or age. Accordingly, those aspects of the case do not fall for any comment by me.

5. The Requirements Regulations provided for an additional requirement in respect of blindness; "person aged not less than 16 who is blind." In regulation 2(1) "blind" was defined as meaning "so blind as to be unable to perform any work for which eyesight is essential ....". It is possible that at some time during the existence of supplementary benefit the claimant satisfied that definition. But this case graphically illustrates the difficulties posed by these inordinately belated claims for review. In such cases it is not only the claimant who faces difficulties. The adjudicating authorities are embarrassed by the paucity of contemporaneous evidence. The only medical evidence in the papers which relates to the claimant's eye troubles is a one page questionnaire prepared by the claimant's representative and completed on 16 January 1992 by her general practitioner. The general practitioner makes plain that he had not known the claimant before April 1988. It is obvious, accordingly, that what he wrote in respect of the state of her eyesight before that date must have been based upon records which had come into his hands. It seems equally obvious that the medical expert who compiled those records was never asked to give - and never gave - his mind to the aforesaid definition of "blind". The general practitioner in 1992 was asked to give his mind to that definition. He wrote: "Probably incapable of work for normal eyesight from about '83 onwards." Manifestly the general practitioner was there doing his best for his patient. But his speculation (somewhat tentatively expressed) could be nothing more than an inference from the records which he had read. But the real vice in accepting such belated speculation is reflected in the prejudice suffered by the Department. How is the Department, at this late stage, to refute the speculation?

If the "blind" issue had been raised 5 or 6 years ago, a contemporaneous medical examination could have been made to determine whether the claimant at that time complied with the legislative definition. The burden of proof lies upon the claimant. She has not discharged that burden. I do not share the general practitioner's view as to how the balance of probability falls. I am also of the view that by May 1991 it was too late effectually to canvass the issue of whether and what enquiries should have been prompted by the registration, on 29 October 1987, of the claimant's partial blindness.

6. The claimant's eyesight has been tied into the claim that a heating addition at the higher rate should have been awarded. (It was awarded at the lower rate in January 1984.) The contention is that the claimant's troubles with her eyes amounted to "a serious physical illness". That is - by any criteria - a pretty long shot. In his answers of January 1992 the general practitioner did not commit himself. He was asked whether he described any of the claimant's problems as "a serious physical illness". He wrote: "Eye problems as above". That is - no doubt intentionally - inconclusive. This is another instance where contemporaneity is important. The case for a review has not been made out.

7. The claimant's appeal is disallowed.

(Signed) J Mitchell
**Commissioner**

**(Date) 20 September 1993**