

Central heating addition - separated wife, ~~the~~ who first
claimed after 5 Aug 85 - if householder before 5 Aug 85
& continuous by "applicable" - she was entitled to CHTA.

VGHH/5/LS

Commissioner's File: CSB/0159/1986

C A O File: AO 2297/SB/86

Region: Midlands

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER'S DECISION
PERMANENT RECORD
DO NOT TO BE REMOVED

[ORAL HEARING]

Decision

1. This adjudication officer's appeal succeeds. My decision is that the decision of the social security appeal tribunal dated 19 November 1985 is erroneous in point of law. I set it aside and refer the case to another social security appeal tribunal for determination in accordance with my directions.

Representation

2. I held two oral hearings of this appeal. The adjudication officer was represented by Mr D. Ross of counsel at the first oral hearing and by Mr J. Latter of counsel at the second oral hearing, instructed in each case by the Solicitor's Office, Department of Health and Social Security. The claimant, who was present at both hearings, was represented on each occasion by Mr R. D. Prew, Welfare Rights Worker, C.A.B. Tribunal Representation Unit, Wolverhampton.

Nature of the appeal

3. The question in this case is whether the claimant is disentitled by virtue of the provisions of regulation 12(2)(j) of the Supplementary Benefit (Requirements) Regulations 1983, from receiving additional allowance for central heating (at the higher rate) under paragraph 3(b) of Schedule 4 to those regulations.

4. Regulation 12(2)(j) is in these terms:

"[[j) no amount shall be applicable to a householder under paragraph 3 unless that paragraph was applicable to him before 5th August 1985 and has been continuously applicable to him since that date or would have been so applicable to him but for the effect in this case of regulation 12(2)(f).]]"

The adjudication officer's decision

5. (1) On 6 September 1985, an adjudication officer determined that the claimant was

entitled to a supplementary allowance of £35.65 a week, payable from 2 September 1985, which included an additional requirement of £2.10 for heating in accordance with the provisions of paragraph 8 of Schedule 4.

(2) The claim for supplementary benefit was made on 27 August 1985 (a Tuesday). Benefit was awarded from 2 September 1985 (a Monday). A formal claim was completed on form A1 on 4 September 1985, the Wednesday after Tuesday 3 September 1985. The Secretary of State had, it seems clear, accepted the claim of 27 August 1985 (notwithstanding that it was not made on form A1 until 4 September 1985) as having been duly made in the first instance (i.e. on 27 August 1985) under the provisions of regulation 3(4) of the Supplementary Benefit (Claims and Payments) Regulations 1981 and awarded benefit from the following Monday on the basis that that was the first day of the benefit week applicable to the claimant: see regulation 7(1)(a) of the Supplementary Benefit (Determination of Questions) Regulations 1980.

6. The claimant appealed to a social security appeal tribunal against the adjudication officer's decision saying that she had a 5 roomed house and believed that she was entitled to a larger allowance based on the number of rooms. In other words, she was relying on paragraph 3(b) of Schedule 4 of the Regulations.

7. In his written submission on the appeal, the adjudication officer stated that the claimant was a 25 year old lady separated from her husband. Her dependent children were aged 3 and 1. She was in receipt of supplementary allowance and child benefit. The family had savings of less than £500 and there were no reported health problems. The claimant had stated that she had separated from her husband on 28 August 1985. The husband had previously been in receipt of supplementary benefit for the whole family. She had also stated that her home had central heating in the five rooms and that her living room had an external door fitted and that one wall was glass panes. A home visit was made to the appellant, on a previous claim, on 19 October 1984. The house was reported to be in good condition and was not reported as being damp or difficult to heat. The rooms were not reported to be large. The Secretary of State had not recognised the claimant's home as being part of an estate built with a heating system of which the running costs were disproportionately high. The adjudication officer had decided that the claimant was not the householder before 5 August 1985. Regulation 12(2)(j) of the Requirements Regulations as amended by SI No. 1985 No. 1247 which came into operation on 5 August 1985 applied and she was accordingly not entitled to an additional requirement for central heating under paragraph 3 of Schedule 4 to the Requirements Regulations in respect of her claim to supplementary allowance from 29 August 1985. Having regard to the provisions of paragraph 8 of that Schedule she was however entitled to an additional requirement in respect of extra heating for the children.

The social security appeal tribunal's decision

8. The social security appeal tribunal heard the appeal on 19 November 1985 and unanimously decided that the claimant was entitled to an additional requirement at £4.20 weekly for heating. Their recorded findings of fact were:

"[The claimant] claimed supplementary allowance on 27.8.85 and at that time her children were aged 3 & 1 year old. There was a matrimonial separation on 28.8.85 when her husband left the household to live elsewhere. The home had night storage heaters in the living room, kitchen/dining room & in the hall. Prior to the marital separation [the claimant's husband] as required by legislation made the supplementary allowance claim on behalf of and for the household comprising, as well as himself, [the claimant] and 2 children. In that situation, paragraph 3(b) of Part I of Schedule 4 of the Requirements Regulations applied to the household."

The tribunal's recorded reasons for this decision were:

"The Tribunal consider that the word "household" or "householder" should have their normal everyday meaning relying on common sense and common experience. Paragraph 3 was applicable to the household before 5.8.85 and would have been continuously applicable since then, but for the marital separation. The Tribunal find that regulation 12(2)(j) of the Requirements Regulations does not, therefore, have the effect of reducing the entitlement for this particular household merely as a result of the marital separation."

The relevant law

9. (1) Regulation 2(1) of the Supplementary Benefit (Requirements) Regulations 1983, as amended, provides that unless the context otherwise requires

" 'partner' means one of a married or unmarried couple"

- (2) Paragraph (6) of regulation 5 provides:

(6) For the purposes of the table a householder is a single claimant who -

(a) [in respect of a home or, as the case may be, a household in Great Britain] is responsible for housing expenditure or, if the household incurs no such expenditure, is the member of the household with major control over household expenditure;

(b) does not share such responsibility or control with another member of the same household; and

(c) is either not absent from the home or if absent is absent only -

(i) otherwise than as a student on normal vacation, and

(ii) for a period which has not yet continued for more than 13 weeks.

- (3) Paragraph 12(2)(j) is set out in paragraph 4 above

- (4) Paragraph (5) of regulation 12 provides:

(5) For the purposes of Part I of Schedule 4 "householder" means a person (including a partner) who satisfies the conditions of sub-paragraphs (a) and (b) of paragraph 6 of regulation 5 (meaning of householder) but where a person satisfies the condition of sub-paragraph (a) but, contrary to sub-paragraph (b), shares responsibility for, or control of, the expenditure there referred to with another member of the same household -

(a) paragraphs 2 to 6 of Schedule 4 shall apply to him as if the amounts specified in column (2) of those paragraphs were divided by the number of the persons in the household who share responsibility or control;

(b) paragraph 8 of Schedule 4 shall apply as if he was

a householder.

(5) Paragraph 3 of Schedule 4 to the regulations provides:

3. Person who is a householder where the home, excluding any bathroom, lavatory or hall, consists of -
 - (a) not more than four rooms; (a) [£2.20]
 - (b) five or more rooms; (b) [£4.40]and is centrally heated by a single system, including night storage heaters, which (notwithstanding that individual parts of the system may be operated independently of each other) is operated from a central point and is the normal means of heating the living or dining areas.

Grounds of appeal to the Commissioner

10. The adjudication officer appealed against the tribunal's decision, with my leave. His original submission, dated 22 May 1986, was that the fundamental issue in the case was whether the undisputed title of the claimant's husband to an additional requirement for central heating which had been awarded in his claim under paragraph 3(b) of Schedule 4 to the Requirements Regulations up to and including 28 August 1985 was capable of being continued in the separate claim for supplementary benefit of his wife which was allowed from only 2 September 1985. In his submission, a central heating addition was only applicable under paragraph 3 of Schedule 4 in respect of a person who was a householder as defined in regulation 12(5). It was not disputed that the husband in his claim for benefit was such a person and the claimant in her claim might also now be such a person. It was further submitted that as regards the period when the husband and the claimant were together, regulation 12(5) contemplated the possibility that a partner, as defined in regulation 12(5), might be a householder and therefore a person to whom an additional requirement for central heating was applicable. Nevertheless, it was submitted that regulation 12(2)(j) was fatal to her claim to such an additional requirement because the supplementary benefit awarded her did not span 5 August 1985 and because she was not continuously in receipt of that benefit since. The word "applicable" in the context of regulation 12(2)(j) meant that a person not merely satisfied the conditions specified in the relevant provision of the Requirements Regulations but that the requirement had been included in the assessment of their benefit and that they had been awarded a pension or allowance based on that assessment of their benefit. There must have been a continuous award of benefit from prior to 5 August 1985 and continuously thereafter the person must have been in receipt of supplementary benefit. The claimant had not.

11. In a subsequent submission, made as a result of directions given at the first oral hearing, the adjudication officer, in the light of the comments of the Commissioner at paragraph 6 of the recent decision CSB/0027/1986, withdrew the point that paragraph 3 of Part I of Schedule 4 was not continuously applicable because the husband's claim was made up to and including 28 August 1985 and the claimant's claim was payable from 2 September 1985. For the claimant had claimed supplementary benefit on 27 August 1985. The essence of the subsequent submission was that the status of householder was conferred on a claimant because regulation 5(6) "refers to 'a single claimant'", those words being set full-out and therefore applying to sub-paragraphs (a) and (b) of paragraph 6 of regulation 5. In the alternative if the status of householder was not conferred on a claimant it was submitted that until after the husband left her, which was at a date after 5 August 1985, the claimant could not have satisfied the conditions of sub-paragraphs (a) and (b) of paragraph 6 of regulation 5. As regards the definition of "applicable" it was submitted that an award, as opposed to entitlement, under the conditions mentioned in regulation 12(2)(j) was essential

because it could not have been intended that this legislation should enable new claims to be made in the indefinite future. It was submitted that decision CSB/0297/86 supported this interpretation.

12. This further submission also considered the point, raised by myself at the first oral hearing, that a decision to the effect that the claimant was not entitled to an additional requirement for central heating as her husband would have been, was discriminating between men and women: see EEC Directive of 19 December 1978 (79/7/EEC). It was submitted that the discrimination was between claimant and non-claimant, not between men and women and that social security benefits were not, in view of the decisions in Hoeck and Scrivner relating to the Belgian benefit "minimex" within the ambit of the Regulation.

Was the tribunal's decision erroneous in law?

13. (1) Before me, it was not in dispute that the tribunal's decision was erroneous in point of law, for the reasons set out in paragraph 14 below.

(2) Mr Latter, representing the adjudication officer, did not seek to support the written submission that it was necessary to be the claimant for supplementary benefit, in order to qualify as a householder, in terms of regulation 12(5) of the Requirements Regulations. He drew my attention to the wording of regulation 12(1) which, as he pointed out, is entirely inconsistent with the view that the householder in terms of paragraph 3 of Schedule 4 must be a claimant. I agree. Column 1 of Part I of that Schedule is directed to persons who are members of the assessment unit. It is possible to qualify under Part I without the person concerned being a claimant at all. Regulation 12(5) defines the meaning of "householder" for the purposes of Part I of Schedule 4. There is nothing in that definition to incorporate the opening words of regulation 5(6), namely "For the purposes of the table a householder is a single claimant who". Regulation 12(5) refers to "a person (including a partner) who satisfies the conditions of sub-paragraphs (a) and (b) of paragraph 6 of regulation 5..." Any person, including one of a married or unmarried couple (the definition of "partner"), can qualify under paragraph 3 of Schedule 4, as a householder if he satisfies these conditions. The assessment unit will, however, not benefit unless the householder is a member of that unit. It is irrelevant whether or not he or she is the claimant.

14. (1) It was not disputed before me that the tribunal's decision cannot stand. It is crucial in the consideration of whether the claimant in this case was a "householder" in terms of regulation 12(2)(j) to consider the meaning given to that word by regulation 12(5). "Householder" does not bear its ordinary meaning in regulation 12(2)(j). It bears the meaning attributed to it by regulation 12(5) which the tribunal did not consider at all. Their decision is erroneous in point of law on this ground and I set it aside.

(2) The necessary facts must be found in order to decide whether or not the claimant was a householder in terms of regulation 12(5), before her husband left her and while he was in receipt of supplementary benefit. It is not expedient for me to conduct an investigation for this purpose and to give the decision which the tribunal should have given. There should be a new tribunal should be entirely differently constituted and should determine the case in accordance with my directions.

Directions to the new tribunal

15. The new tribunal should, in the first instance, determine the date from which supplementary benefit should have been awarded by the adjudication officer. His decision (see paragraph 5 above) awarded benefit from Monday 2 September 1985, Tuesday 17 August 1985 having been accepted as the date of claim (see regulation 3(4) of the 1981 Claims and Payments Regulations for the authority for this course). The award

for the following Monday was, clearly, on the ground that it was the first day of the benefit week: see regulation 7(2) of the Supplementary Benefit (Determination of Questions) Regulations 1980 for the relevant provisions. Such day is normally determined, under those provisions, on grounds of administrative convenience. Such considerations are, however, outweighed by the injustice that treating Monday as the first day of the benefit week involves in the present case. Where justice requires that some other day should be chosen that constitutes "special circumstances" in terms of regulation 7(2) of the Determination of Questions Regulations: see paragraph 6 of Commissioner's decision CSB/0027/1986. In the present case, the day of the week that should be chosen is that immediately following the last day for which the claimant's husband received benefit and I direct the tribunal, in the absence of some compelling reason to the contrary, so to decide.

16. The tribunal should then determine whether the claimant was "the householder" in terms of regulation 12(2)(j) of the Requirements Regulations (a) before 5 August 1985 and (b) remained the householder continuously from that date. In order to do this they should disregard the fact that she was not the claimant until her husband had left her. That, as already stated, is irrelevant. Their concern is to see whether she satisfied the conditions of paragraphs (a) and (b) of regulation 5(6) of the Requirements Regulations. It is argued on behalf of the claimant that in fact she did satisfy them throughout, because she was the tenant of the property throughout. The tribunal should satisfy themselves that this was so, and that she did satisfy these conditions.

17. If the tribunal finds that the claimant did satisfy these conditions from before 5 August 1985, they should decide that the adjudication officer's award of benefit, which will commence from the day following the last day for which the claimant's husband received benefit (see paragraph 15 above), is to include a central heating allowance at the higher rate specified in paragraph 3(b) of Schedule 4 to the Requirements Regulations. Her title, if (as she will then have done) she avoids the penal provisions of regulation 12(2)(j), is not in dispute.

Concluding remarks

18. Before parting with this case it is appropriate to comment on the arguments addressed to me on the meaning of the expression "applicable to him" in regulation 12(2)(j) of the Requirements Regulations. Since the householder in terms of paragraph 3(b) of Schedule 4 to those Regulations does not have to be the claimant, for the reasons given in paragraph 13(2) above, I see no reason why paragraph 3(b) should not be applicable to him where there is title, but no award has been made. A Commissioner in decision CSB/0297/1986 decided that a continuous award was essential. But he gave no reason for this conclusion other than that he considered this "appropriate" and his attention was not drawn to the decision of the House of Lords in Insurance Officer v. McCaffrey [1984] 1 WLR 1353 which draws a clear distinction between title and award. In the present case, there will, on my direction in paragraph 15 above, be a continuous award so that this question does not in fact arise. If, however, I am wrong, I would hold that "applicable to" refers to entitlement. I reject the adjudication officer's suggestion that this might lead to claims in the indefinite future. The provisions relating to late claims, and the bar on a favourable review more than 52 weeks before request, render this argument without real substance.

19. I reject the suggestion that the present case can not involve discrimination between men and women and that the distinction drawn in regulation 12(2)(j) is between claimant and non-claimant. As already pointed out, that regulation, and regulation 12(5), draw no such distinction. But nothing now turns on this additional point and I make no further comment on it. Whether EEC Directive 79/7/EEC applies to a central heating allowance under paragraph 3 of Schedule 4 is a difficult question on which I should have required further argument, if it had been necessary to decide it. The question might well have entailed a reference to the European Court.

20. The tribunal to whom the case is now referred, for the reasons already given, does not need to consider the points discussed in paragraph 18 and 19.

21. My decision is set out in paragraph 1.

(Signed) V G H Hallett
Commissioner

Date: 15 April 1987