

C of E Keys - reg 6(C) (G) & (U)
- claimant had epilepsy
& became incapable of
work as a result. C4

CSB 199/85

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RFMH/SH/3/MD

Commissioner's File: CSB/199/1985

C A O File: AO 2151/85

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

1. My decision is that the decision of the social security appeal tribunal dated 7 September 1984 is erroneous in point of law and I set it aside. I direct that the matter be reheard by a differently constituted tribunal in accordance with the directions in this decision.
2. At the material time the claimant, then aged 45, lived with his wife and 2 dependent children. He was in receipt of supplementary benefit during the inclusive period from 2 December 1976 to 11 April 1984 because he was unemployed and from 12 April 1984 because he was submitting doctors statements to the effect that he was unfit for work.
3. On 14 May 1984 the adjudication officer decided that although the claimant was entitled to supplementary benefit at the ordinary rate for normal requirements, he did not qualify for the long term rates. Thereupon the claimant appealed to the tribunal against that decision. In his grounds of appeal he stated that he was an epileptic and he submitted a letter from his own doctor dated 3 September 1984 to the effect that "Had he applied for a sick note at any time in the previous year, he would have been given one as his condition has not changed in that time. His drugs and his condition have deteriorated slowly over the years, but he has certainly been unemployable through his health over at least the last 52 weeks".
4. In his written observations on the claimant's appeal the adjudication officer submitted that the claimant was not eligible for long term scale rates because he failed to satisfy regulation 7(2)(b) of the Supplementary Benefit (Requirements) Regulations 1983 in that he had not been in receipt of a prescribed allowance for a continuous period of not less than 52 weeks. As a result the adjudication officer considered that the claimant would not be entitled to the long term scale rates until the prescribed pay day in week commencing 15 April 1985.

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5. On 7 September 1984 the tribunal upheld the adjudication officer's decision. The findings of fact read as follows:-

"[The claimant] is a married man with two dependent children. He states that he suffers from epilepsy which his doctor has verified and that his wife is an agrophobic."

The reasons for decision read as follows:-

"As the appellant has not been continuously in receipt of supplementary benefit for 52 weeks he is therefore not entitled to the long term scale rate."

The claimant now appeals against that decision on a point of law to the Commissioner, leave having been granted by a chairman of social security appeal tribunals. It is contended on behalf of the claimant that the tribunal erred in law because they failed to consider the claimant's argument on the application of regulation 7(1)(c) of the Requirements Regulations.

6. The claimant asked for an oral hearing of the appeal, a request to which I acceded. At the oral hearing held before me on 6 January 1986 the adjudication officer was represented by Mr C A M E d'Eca of the Solicitor's Office of the Department of Health and Social Security. The claimant did not attend.

7. Section 5 of the Supplementary Benefits Act 1976 ("the Act"), as amended, provides:-

- "5. - (1) The right of any person to a supplementary allowance is subject -
 - (a) except in prescribed cases, to the condition that he is available for employment; and
 - (b) in prescribed cases only, to the further condition that he is registered in the prescribed manner for employment.
- (2) Regulations may make provision as to -
 - (a) what is and is not to be treated as employment for the purposes of this section; and
 - (b) the circumstances in which a person is or is not to be treated for those purposes as available for employment."

8. Pursuant to section 5(2) of the Act the circumstances in which a person's right to an allowance is not subject to conditions of registration and availability for employment under section 5(1) of the Act are prescribed in regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981, as amended. Regulation 6 provides, so far as is relevant to the present appeal:-

"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 and regulation 8 [not applicable in the present case] does not apply to him:-

- (a) ...
- (b) ...

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- (c) ...he is a person -
 - (i) ...
 - (ii) who, by reason of some disease or bodily or mental disablement, is incapable of work, or
 - (iii) ...
- (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 adjudication officer it would be unreasonable to require him to be available for employment."

7. Regulation 7 of the Requirements Regulations sets out the circumstances in which a person shall be entitled to long term rates for normal requirements. Regulation 7(1) and (2) provides:-

- "7. - (1) In this regulation -
 - (a) where entitlement to an allowance is not subject to the condition of availability for employment under section 5(1)(a), that allowance is referred to as 'the prescribed allowance';
 - (b) the expression 'subject to the condition of availability' in relation to an allowance means subject to the condition of availability for employment under section 5(1)(a);
 - (c) the expressions 'period in receipt of the prescribed allowance' and 'period in receipt of a qualifying benefit' include any period in respect of which it was subsequently held, on appeal or review, that the person concerned was so entitled to such allowance or pension and excludes any period in respect of which it was subsequently held that he was not so entitled;

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- (d) the expression 'unemployment benefit office' means any office or place appointed by the Secretary of State for the purposes of claiming unemployment benefit.
- (2) The conditions for the purposes of paragraphs 1(b) and 3(b) of the table (conditions for long term rate for couples and householders not of pensionable age) are that -
 - (a) the person is eligible for the prescribed allowance or is eligible for an allowance while the partner of a person aged not less than 60;
 - (b) unless he is a person aged not less than 60 or is the partner of such a person, he has, subject to paragraphs (3) to (5), been in receipt of the prescribed allowance for a continuous period of not less than 52 weeks."

Regulation 2(1) defines "qualifying benefit" to mean "any of the following, namely invalidity benefit or non-contributory invalidity pension under Part II of the Social Security Act, unemployability supplement (increase of industrial injuries disablement pension) under section 58 of that Act or an allowance in respect of unemployability under article 18 of the Naval, Military and Air Forces etc (Disablement and Death) Service Pension Order 1983;"

10. Regulation 19(2) of the Social Security (Adjudication) Regulations 1984 provides that every tribunal shall record a statement of the reasons for their determination and of their findings on material questions of fact. In my judgment for the reasons set out below the tribunal in the present case failed to comply with the statutory requirements. Further they failed to have regard to the relevant legislation in that they failed to explain the basis upon which they concluded that the claimant had not been "in receipt of the prescribed allowance for a continuous period of not less than 52 weeks" for the purposes of regulation 7(2)(b) of the Requirements Regulations. I should put on record that Mr d'Eca supported the appeal. Manifestly the tribunal's decision was erroneous in law and I have no alternative but to set it aside and direct that the matter be reheard by a differently constituted tribunal.

11. Now although the tribunal rightly referred to regulation 7(2)(b) of the Requirements Regulations in order to determine whether or not the claimant qualified for long term rates for normal requirements they failed to consider and record any findings of fact on the crucial question as to whether the claimant had been in receipt of "the prescribed allowance" in terms of regulation 7(1)(a) and if not would have been assisted by regulation 7(1)(c). It is impossible to make any decision on the application of regulation 7(2)(b) prior to determining these matters. Accordingly the new tribunal should first consider whether the claimant is assisted by regulation 6 of the Conditions of Entitlement Regulations so that he is not required to be available for employment under section 5(1)(a) of the Act and entitled to "the prescribed allowance" in consequence. They should refer specifically to paragraphs (c) (ii), (e) and (u) of regulation 6. With regard to paragraph (c)(ii) this is almost identical to the conditions of entitlement to sickness and invalidity benefit contained in section 17(1)(a) of the Social Security Act 1975 and in my view the meaning of the words "incapable of work" carry the same interpretation. In this context "work" is defined as meaning work which the person concerned can reasonably be expected to do and this is a question of fact (R(S)1/53). The burden of proving that he is incapable of work rests on the claimant (R(S)13/52). A person is incapable of work, if having regard to his age, education, experience, state of health and other personal factors, there is no work or type of work which he can reasonably be expected to do. Work in this connection means remunerative work (R(S)11/51). In the present case the claimant claimed and was awarded sickness benefit from 12 April 1984. Prior to that date he registered for employment so that he must have considered that he was capable of work. However in a letter dated 3 September 1984 the claimant's own doctor indicated that the claimant had

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been "unemployable through his health over at least the last 52 weeks" i.e. 4 September 1983. The new tribunal should find as fact based on the evidence before them whether the claimant was incapable of work by reason of some specific disease or bodily or mental disablement and if so as from what date. If the tribunal conclude that the claimant satisfies the condition set out in paragraph (c)(ii) for a continuous period of not less than 52 weeks prior to 18 April 1984 that is the end of the matter because the claimant then satisfies the conditions of entitlement to long term rates for normal requirements under regulation 7(2)(b) of the Requirements Regulations. However if the tribunal conclude that the claimant does not satisfy either of these conditions they should then proceed to have regard to paragraph (e). It should be noted that it does not apply to a person who is incapable of work "by reason of some disease" but is limited to a person who "by reason of physical or mental disablement" has no further prospect of employment. The terms "disease" and "disablement" are not legally defined and might be given as a result their ordinary meaning. In my view a "disease" signifies any departure from general health which is amenable to treatment whereas a "disablement" condition which need not affect general health e.g. blindness or loss of limbs. The paragraph (e) envisages a permanent situation which is not always present in a person suffering from some disease. The tribunal should record as fact whether in their opinion, having regard to any medical evidence before them the claimant's epilepsy falls within the term "physical or mental disablement" and then have regard to whether the claimant can satisfy either sub-paragraphs (i), (ii) or (iii) in the 12 months immediately preceding 18 April 1984. If the new tribunal conclude that the claimant is not assisted by paragraph (e), they should then consider paragraph (u), which in my view is a "last resort" category giving the adjudication officer and tribunal some discretion alleviating the effects of section 5 of the Act from the claimant, if they consider it to be reasonable in the circumstances and the facts are analogous or similar to those referred to in the preceding paragraphs of regulation 6. Accordingly if the new tribunal consider the claimant's illness long term so that it is analogous to a physical or mental disablement the tribunal have a discretion to conclude that the claimant is assisted by paragraph (u) provided any of the conditions referred to in sub-paragraphs (i), (ii) or (iii) of paragraph (e) are satisfied in the 12 months immediately preceding 18 April 1984. In the light of those findings the new tribunal should determine the period in which the claimant was in receipt of the prescribed allowance prior to 18 April 1984 under the terms of regulation 7(1)(c) of the Requirements Regulations and then proceed to determine whether the claimant is entitled to long term rates for normal requirements by virtue of regulation 7(2)(b).

12. The new tribunal will of course be conducting a complete rehearing and the claimant is at liberty to submit any further medical evidence in support of his case. The claimant's appeal is allowed and I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs
Commissioner

Date: 13th February 1986