

Commissioner's File: CSB/216/1990

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 given on 25 January 1990 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.
2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the decision of the social security appeal tribunal of 25 January 1990.
3. On 7 June 1988 the claimant requested that the long-term scale rate of supplementary benefit be awarded for a period prior to 11 April 1988 on the ground that from that time he no longer had any realistic prospects of future employment. On 1 September 1988 the adjudication officer awarded the claimant the long-term scale rate of benefit as from 8 June 1987, the qualifying period commencing on 9 June 1986. The claimant considered that the award should have been backdated further, and appealed to the tribunal.
4. In the event, the tribunal upheld the decision of the adjudication officer. They considered that, although the claimant had made out his case as from 9 June 1986, he was unable to establish that he satisfied paragraph (u) of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 for any earlier period. Unfortunately, the tribunal failed to explain why, if they were satisfied that the claimant brought himself within paragraph (u) from 9 June 1986, he did not also bring himself within that paragraph from an earlier date. It follows that I must set aside the tribunal's decision, and direct that the appeal be reheard by a differently constituted tribunal.

5. However, the decision of the tribunal of 25 January 1990 is also erroneous on the more serious ground that the tribunal failed to explain why the claimant was entitled to the long-term scale rate of benefit from any date. Accordingly, on that ground also the decision has to be set aside.

6. The new tribunal will consider paragraphs (e) and (u) of regulation 6 and make specific findings as to whether, and if so, from what date, the claimant can establish that he was entitled to be exempted from the requirement to be available for employment. As regards paragraph (e), the tribunal will bear in mind that, if the claimant is to derive any advantage therefrom, he has first to establish that he was from the relevant date without any realistic prospects of employment. Unless he can do this, paragraph (e) will have no application. If the new tribunal are satisfied that the tribunal was at any time without such prospects of employment, they must go on to determine whether the claimant can satisfy heads (i), (ii) and (iii) and, if he can, whether his being without prospects of employment was caused by physical or mental disablement. If the tribunal consider that the claimant was not at any time subject to physical or mental disablement, they must consider whether or not he was suffering from any analogous condition pursuant to paragraph (u), and whether such condition was the cause of his being without prospects of employment. Throughout, the tribunal must make appropriate findings and give adequate reasons for their decision. If they are persuaded that the claimant can bring himself within regulation 6 from a date earlier than 104 weeks before the date of request for review, it will be incumbent upon them to decide whether the provisions of regulation 72 of the Adjudication Regulations are satisfied, so that the limitations on the payability of arrears prescribed by regulation 69 may be circumvented.

7. It may also be helpful to bear in mind that if the claimant is going to rely on age, so as to bring himself within paragraph (u), he must demonstrate that from the relevant date age prevented him from performing work. There is a crucial distinction between age affecting a claimant's ability to perform work and age being a bar to employment opportunities. An employer might be prejudiced against taking on persons over a certain age, but it does not necessarily mean that such persons were unable, simply by virtue of their age, to undertake the relevant work. The matter was clearly expressed in paragraph 23(d) of Decision R(SB) 5/87:-

"In particular it cannot be asserted as a matter of principle that age can never under any circumstances be analogous to 'physical or mental disablement' for purposes of regulation 6(e), as age may affect the claimant's ability to perform work, as opposed to employment opportunities not being available to him by reason of his age. [my emphasis.]"

8. Finally, if the tribunal are otherwise satisfied that the claimant can by reason of paragraph (u) bring himself within

paragraph (e) from the relevant date, they will also have to make a value judgment on the question whether "it would be unreasonable to require him to available for employment".

9. Accordingly I allow this appeal.

(Signed) D.G. Rice  
Commissioner

(Date) 2 March 1992