C.P.A.G.

AWEW/SH/1

Commissioner's File: CSB/223/1990

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 ("the appeal tribunal") dated 4 June 1990 is erroneous in law and falls to be set aside.

2. This is a claimant's appeal, brought with the leave of the appeal tribunal's chairman, confirming the decision of the adjudication officer dated 5 October 1989, that the claimant was not entitled to the long-term scale of supplementary allowance because he was required to be available for employment under section 5(1) of the Supplementary Benefits Act 1976.

3. The claimant is a married man who at the time of the hearing before the appeal tribunal was aged 57. That tribunal found that he had not worked since losing his employment as a club steward in 1983. Since then he has been in receipt of the short-term scale rate of supplementary allowance, being subject to the requirement to be available for employment. By a letter received in the Department on 1 August 1988 he sought a review of his entitlement prior to April 1988 and waiver of the requirement to be available for employment. In the event the local adjudication officer refused to interfere on the ground that prior to April 1988 there was no evidence on which to ground a decision that the claimant was exempt from the requirement to be available for employment under any of the exempting provisions of regulation 6 of the Supplementary Benefits (Conditions of Entitlement) Regulations 1981. The claimant appealed to the appeal tribunal and appeals now to the Commissioner.

4. The provisions of regulation 6 of the 1981 Regulations which appear to be relevant to this appeal are the following:-

" 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(1)(a) (which is not relevant in this case) does not apply to him:-

(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.

(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 benefit officer it would be unreasonable to require him to be available for employment."

5. The appeal tribunal's findings and reasons were sufficiently succint to be set out here in full -

"The claimant has long-standing back trouble, arising from working as a fettler up to 1982. He constantly wears a body support for his spine and is and has been for many years in receipt of medication prescribed by his doctor for pain-relief. He has arthritis in the neck and knees which give him pain and is unable to turn his head independently. He can read with glasses and his hearing does not seem to day to be much impaired. He is 57 and has made regular efforts to look for work since losing employment as a club-steward in 1983, by applying for newspaper-advertised vacancies and following up Job Centre vacancies. He has no other skill or trainable aptitude other than heavy-industry, fettling and club-stewardship. It is accepted that he could not return to fettling but the duties of a club-steward would not be beyond him still, since that would probably be in line with the type of jobs he has been applying for. The Department was not aware of any health problem until 1 8 89 when he requested a review of his entitlement to Income Support. In particular, until 1 8 89 there was no evidence as to health available to the Department upon which it failed or omitted to act. For whatever reason, the claimant told the Visiting Officer in 1985 that he was fit for work.

It is not health grounds alone that prevent the claimant from working. (That is not argued on behalf of the claimant) Regulation 6(e) has no direct application .

Under the analogy provision available by virtue of Regulation 6(u) it is accepted on the evidence that the claimant satisfies Regulation 6(e)(i), (ii) and (iii).

The claimant's age is analogous to disablement not because his age alone affects his ability to perform but because his age coupled with his back trouble and arthritis affects his employment opportunities.

Does that analogous circumstance in fact leave him with no further prospect of employment? If he cannot find work which we think he can do, viz, club stewardship, the non-availability of such work is not necessarily influenced by either his age or his medical condition (or a combination of those factors) but simply because such jobs are few and far between.

Whilst the state of the labour market is a factor to be taken into account in assessing the claimant's prospects of gaining employment at his age, the paucity of work the claimant can do is not by reason of physical or mental disablement or of the analogous circumstances. What the claimant has not got is immediate prospects of employment, which is not to say he is without any further prospect, in a realistic or foreseeable sense, by reason of the analogous circumstances. For this reason we find that it is reasonable to expect him to remain available for employment."

6. The thrust of the claimant's grounds of appeal and submissions is that the appeal tribunal failed to give clear and adequate reasons for their decision. In the first place, the claimant's representative contends that the appeal tribunal's findings were contradictory in terms. She submits, in effect, that the appeal tribunal's finding that "under the analogy provision available by virtue of regulation 6(u) it is accepted on the evidence that the claimant satisfies regulation 6(e)(i), (ii) and (iii) "cannot be reconciled with their finding that no exemption from the requirement to be available for work was established. I do not accept this submission. I agree that the matter should have been put much more clearly, but I consider that the only sensible interpretation of the words in question in the context of the appeal tribunal's findings as a whole is that they were intending to say merely that sub-paragraphs (1)(ii) and (iii) of paragraph (e) were satisfied but not all of paragraph (e) itself. As the adjudication officer now concerned with the case submits in his submissions dated 18 September 1990 "by accepting that sub-paragraphs (i), (ii) and (iii) of regulation 6(e) are satisfied, it does not necessarily follow that the overriding condition concerning further prospects of employment applies.

7. I find, however, that the complaint that the appeal tribunal did not give adequate reasons for the decision is soundly based. I feel no doubt that having found, as they did, that by reason of his age coupled with his back trouble and arthritis and the paucity of suitable work, the claimant had no immediate prospects

of employment, it was incumbent upon the appeal tribunal to go further and to spell out for the benefit of the claimant how they had reached the conclusion that he had in fact realistic prospects of further employment by explaining what those prospects were. On this ground, I hold that the decision of the appeal tribunal was wrong in law and I set it aside. The matter is remitted to a differently constituted tribunal for rehearing.

8. I cannot leave this case without a reference to the final submission of the local adjudication officer in his lucid and detailed submissions to the appeal tribunal in Form AT2 in the papers where he said this:-

> "If the tribunal decide in the claimant's favour that he was exempted from the requirement to be available for employment and consequently was entitled to the long-term scale of supplementary benefit, I submit that the payment of arrears is limited by regulation 69 of the Adjudication Regulations 1986 to 12 months from the date on which the review was requested and at that time supplementary benefit had been abolished and there was no provision within the income support provisions for payment of long-term scale rate.".

9. In my view that submission is not correct. Nothing in regulation 69 inhibits the fresh tribunal from reviewing back beyond 12 months the requirements that the claimant should be available for employment as a condition to entitlement to supplementary allowance. Unless the claimant satisfies regulation 72, such a review cannot be translated into benefit in respect of any day 12 months before the date of review. Nevertheless, the entitlement to the long-term scale rate which flows from the waiver of the requirement to be available for employment emanates in the transitional addition to his income support under Part II of the Income Support (Transitional) Regulations 1987. If any part of that transitional addition subsisted in August 1988 and thereafter, it would seem that the provisions of regulation 69 cannot bar the payment of arrears arising since. However, if the claimant can bring his case within regulation 72, there will be no retrospective restriction on arrears of benefit thrown up by the waiver of the requirement. On the evidence and the material before me, this would seem a long shot. But, of course, it will be open to the claimant at the fresh hearing to call any further evidence and make any further submissions on the point which he thinks fit.

(Signed) A.W.E. Wheeler
Commissioner

(Date) 19 March 1992