

a) Reg 72 Adjudication Regs is retrospective as long as request for review put in after 6 April 1987 (date it came into force). b) There have been a series of reviews - ie it is still possible to review original award of benefit - ie review does not obliterate all that went before it.

Commissioner's File: CSE/241/1988

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Norwich

Case No:

1. My decision is that the decision of the social security appeal tribunal dated 14 September 1987 is erroneous in law. I set it aside and direct that the case be reheard by a differently constituted tribunal.
2. The claimant has been in receipt of a supplementary allowance for some years. It appears that when benefit was first awarded the claimant was allowed an additional requirement for heating payable at the lower rate pursuant to paragraph 3 of Schedule 4 to the Supplementary Benefit (Requirements) Regulations 1983. Then, following a letter said by the claimant to have been written on 26 March 1983 and an inspection made by an official on behalf of the Department of Health and Social Security, the award was reviewed and the heating addition under paragraph 3 was revised to make the higher rate payable. Now the higher rate payable pursuant to paragraph 3 (dealing with the so-called central heating addition) is less than the higher rate payable pursuant to paragraph 2(b) which deals with heating additions on accommodation grounds i.e. where the home in question is exceptionally difficult to heat adequately) and on 4 March 1987 the claimant wrote to the Department in effect asking for the higher rate under paragraph 2(b). There was another inspection and the award of benefit was again reviewed so as to make the paragraph 2(b) rate payable. But the decision to that effect did not include any arrears and the claimant appealed. He wanted the paragraph 2(b) addition backdated. The appeal however did not proceed. Instead, an adjudication officer carried out a further review and, by a decision issued on 16 June 1987, awarded arrears to be paid under paragraph 2(b) for 52 weeks from before 4 March 1987, the date of the claimant's letter to which I have referred. That period of 52 weeks is the backdating limit imposed by regulation 69 of the Social Security (Adjudication) Regulations 1987 and predecessor provisions. However, from 6 April 1987, when the 1987 Regulations came into operation, regulation 72 provided an exemption from limitations on payments of arrears of benefit. That regulation (as then in force) is in these terms -

"72. Nothing in this section shall operate so as to limit the amount of benefit or additional benefit that may be awarded on a review of a decision if the adjudicating authority making the review is satisfied either -

- (a) that the decision under review was erroneous by reason only of a mistake made, or something done or omitted to be done by an officer of the Department of Health and Social Security or of the Department of Employment acting as such, or by an adjudicating authority or the clerk or other officer of such an authority, and that the claimant and anyone acting for him neither caused nor materially contributed to that mistake, act or omission; or
- (b) that where the grounds for review are that the decision was given in ignorance of or was based on a mistake as to a material fact, those grounds are established by evidence which was not before the adjudicating authority which gave the decision; that the claimant and anyone acting for him could not reasonably have produced that evidence to the authority at or before the time the decision was given, and that it has been produced as soon as reasonably practicable."

And the claimant, believing he could benefit from that provision, appealed to the tribunal against the decision of 16 June 1987. He took the view that he had in effect been deprived of the paragraph 2(b) higher rate heating addition because the inspection carried out by the departmental official in 1983 was inadequate; in particular the official had failed to concern himself with matters which were relevant to an award under paragraph 2(b) and, furthermore, the official had advised the claimant that he did not qualify for an award under that provision. The tribunal did not agree with the claimant. They disallowed his appeal and he now appeals to the Commissioner. The claimant attended the oral hearing of his appeal and was represented by Mr N. Bateman, a welfare rights officer. The adjudication officer was represented by Mrs H. Wheatly of the Solicitor's Office, Departments of Health and Social Security.

3. The tribunal had apparently not questioned that regulation 72 applied to the case. But that was questioned before me by Mrs Wheatly. She said it did not apply because the paragraph 2(b) heating addition had been awarded by a review decision in May 1987 and that was before the commencement date of regulation 72. But, as Mr Bateman contended, the review decision now in issue in this case is the decision issued on 16 June 1987 which allowed 52 weeks backdating and which was given in response to the claimant's appeal against the decision of 11 May 1987, the appeal apparently being treated as a request for a review. So both the request for a review and the review decision happened after regulation 72 had come into operation and that regulation in my view in principle applies to this case:

see paragraph 11 of R(SB) 48/53.

4. Mrs Wheatly agreed that if regulation 72 was capable of applying the tribunal's decision was erroneous in law because they had not made findings of fact relating to the matters which fall to be considered if a conclusion is to be reached as to whether a claimant can derive advantage from that provision. Was a mistake made or was there something done or omitted to be done by a relevant official? Did the claimant or anyone on his behalf cause or materially contribute to the mistake, act or omission? Does regulation 72(b) apply? And there is a further point. It is of course 'the decision under review' which has to have been erroneous by reason of the mistake, act or omission. And in a case like this where there is an original award of benefit and a series of reviews, which is 'the decision under review'? An award of supplementary benefit is ordinarily an award of benefit for an indefinite period: regulation 6(1) of the Supplementary Benefit (Determination of Questions) Regulations 1980, and it may well be that every subsequent review is in principle a review of the original decision. But I do not need to resolve that problem in this case, if it is a problem, because it seems to me that the review decision of 16 June 1987 which backdated the paragraph 2(b) hearing addition as from 4 March 1987 must have been a review of the original decision awarding benefit; the decision in May 1987 which awarded the paragraph 2(b) addition would have been by way of review of the original decision and it seems to me that the claimant cannot be in any worse position because the adjudication officer who made the May 1987 decision did not deal with backdating. Now it is suggested by the summary of facts in the adjudication officer's submissions to the tribunal that there may have been breaks in benefit entitlement after the original award which would mean of course that after each break there would have been a new decision awarding benefit. The history needs to be established with greater clarity.


5. As I have indicated the tribunal's decision is erroneous in law because the tribunal did not deal with the matters to which I have referred above and I accordingly allow the claimant's appeal; the new tribunal will have to make findings of fact and give reasons which take account of those matters. The copy of the 1988 letter which was produced to me may be relevant; it is to be returned to the claimant with his copy of this decision.

6. There were other grounds for this appeal which related to matters at the hearing by the tribunal and to the note of the evidence made by the chairman. Having allowed the appeal on the ground dealt with above I do not of course need to deal with the other grounds.

(Signed) R A Sanders
Commissioner

Date: 10 April 1990

15 GLENBARR ST
GLASGOW G21

A nuclear-free zone authority 
An equal opportunities authority
Tel 041 552-8801
Our ref
Your ref
If phoning or
calling ask for **CHRIS ORR**
Date 30.5.90

Cy to Vicki

REG 72 AND REVIEW

PLEASE FIND ENCLOSED A RECENT COMMISSIONERS DECISION WHICH IN PART ADDRESS ITSELF TO THE CONTINUING DEBATE AS TO WHICH DECISIONS ARE ACTUALLY UNDER REVIEW.

THE COMMISSIONER COMES DOWN ON THE SIDE OF THE UNSUPPORTED COMMISSIONERS DECISIONS I HAVE ALREADY CIRCULATED. REVIEW IS POSSIBLE AGAINST ALL DECISIONS. THE LAST REVIEW DOES NOT OBLITERATE ALL THAT HAS GONE ON BEFORE.

THE ORAL HEARING WAS ORIGINALLY TO DEAL WITH THE QUESTION OF WHETHER OR NOT REG 72 HAD RETROSPECTIVE EFFECT IN THE EVENT THE COMMISSIONERS SAYS NOTHING ON THIS BUT THE EFFECT OF HIS DECISION MUST BE THAT REG 72 AS BEING A RETROSPECTIVE SUBJECT ONLY TO THE LIMITATION OF THE REVIEW REQUEST UNDER 72 GOING IN AFTER APRIL 87. OTHERWISE NO LIMIT.

CHRIS ORR

WELFARE RIGHTS OFFICER