CP AG.

WMW/JOB Commissioner's File: CSB/243/90

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I hold the decision of the Liverpool Social Security Appeal Tribunal dated 14 December 1989 to be erroneous in point of law. For that reason I set it aside. However I think it appropriate to exercise the power conferred by section 101(5)(a)(i) to give the decision which I consider the tribunal should have given. That decision is to refuse the appeal from a decision by an adjudication officer issued on 16 April 1989 refusing to review Mr McNally's former right to supplementary benefit in respect of the date from which fell to be included therein the long term scale rate.

2. This case came before me by way of an oral hearing at Liverpool. Mr McNally was represented by Mr David Taylor, Solicitor, of the Vauxhall Community Law Centre, Liverpool and the adjudication officer by Mr Stephen Cooper, Solicitor, of the Office of the Regional Solicitor, Department of Social Security. I am grateful to both for their assistance and careful submissions.

3. It will at once be seen from the form of the decision set out in paragraph 1 above that I have in effect endorsed that reached by the tribunal. The error of law which has required me to set aside their decision is related only to the adequacy of their reasons.

4. Mr McNally is unfortunately now deceased but his son has been appointed to act on his behalf in this appeal. Nonetheless for simplicity I shall continue to refer to Mr McNally, Senior, as "the claimant".

5. Before dealing with the main issues in the case I should note that there was raised at both the tribunal hearing, and again at the hearing before me a question as to the claimant's possible entitlement to have had included in his award of supplementary benefit an additional requirement in respect of heating under paragraph 1(2)(a) of Part I of Schedule 4 to the Supplementary Benefit (Requirements) Regulations 1983. For the reasons which follow I do not in any way criticise the tribunal for not having dealt with that matter. For my part I have quite insufficient information finally to determine it. But although I later make reference again to the matter in paragraph 12 below, nothing in this decision is to inhibit the claimant, if so advised, from seeking now a review of his former award to supplementary benefit in that regard. I should also add that since it would be necessary to regard any such request for review as having been made only at the tribunal hearing he could have difficulty in achieving any practical result. Regulation 69 of the Social Security (Adjudication) Regulations 1986 prohibited an award of that

benefit more than a year prior to the date of the request for a review. That prior date, December 1988, was after supplementary benefit had been abolished. It follows that Mr McNally could only achieve a positive award if the limited grounds for relief from the restriction under regulation 69 contained in adjudication regulation 72 can be made out. In that regard I draw particular attention to that part of the relevant heads of that regulation which require a claimant to show an absence of what I might call "co-culpability". Having regard to the lateness with which this matter was raised and what appears from the file as it at present is, there may be considerable difficulty in doing so.

6. Mr McNally was in receipt of supplementary benefit, so far as concerns this decision, continuously since 11 May 1984. In August 1988 by a pro-forma application he sought a review of what had been his award of benefit to the effect of having included in it the long term scale rate. It appears that he was founding upon regulation 6(e) and (u), and especially the latter, of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 in order to have removed from his entitlement to the award the statutory condition imposed by section 5 of the Supplementary Benefits Act 1976. He was no doubt hoping that that condition would be sufficiently removed to allow him to found upon the provisions of regulation 7 of the Supplementary Benefit (Requirements) Regulations 1983 so that a year after the removal of the condition he would qualify for the long term scale rate.

7. It appears that in response the Department, by a letter dated 6 September 1988, informed the claimant that he had been in receipt of the long term scale rate since 2 March 1987. The section 5 condition had been removed with effect from the claimant's 60th birthday on 25 February 1987 in terms of Conditions of Entitlement regulation 6(b). The claimant responded on 5 October 1988 by sending a repeat pro-forma raising the same issue. Then in January 1989 he wrote again raising the same question and, as I would understand his letter, claiming that he should have been relieved from the section 5 condition at age 55. The Department, in March or April, sent the claimant an adjudication officer's decision which effectively stated that no grounds for review had been found to re-open the supplementary benefit award. That, I must assume, was repeated in the decision quoted on the form AT2 containing the adjudication officer's submission to the tribunal. The ground raised in the appeal, at best for the claimant, was a suggestion that age should have been taken into account in about 1982 so that he could have been held by reason of the consequences of his age then to have had a situation analogous to that mentioned in Conditions of Entitlement regulation 6(e), namely some disablement such that he had no further prospects of employment.

8. I have no doubt that the adjudication officer in 1989 was, on the information before him, well warranted in making a decision to refuse to review. There was before him no information which could have justified that step. In order to do so some one or more of the grounds set out in section 104 of the Social Security Act 1975 required to be made out.

9. The first contention for the claimant, both before the tribunal and before me, was to the effect that there was an error, in the sense of section 104(1)(a) of the Act, in the award of supplementary benefit in respect that there should have been included a higher rate heating allowance because Mr McNally's wife was "housebound with bronchitis". That appeared from a visiting officer's report in August 1985. Founding upon that it was argued that the whole award was then opened up for reconsideration. In support of

that R(SB)9/81 was founded upon. At paragraph 9 the Commissioner said this -

> "In my opinion on an appeal under section 15 an appeal tribunal can competently entertain submissions and evidence upon matters within the purview of the original claim even if these have not previously been considered, and may in its discretion either deal with these matters as presented or adjourned to allow further investigation of them."

The section 15 to which he referred was of the Supplementary Benefits Act 1976. It provided, at paragraph (3)(c) this, in short -

> "On an appeal under this section the appeal tribunal may -
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> (c) substitute for any determination appealed against any determination which the Commission could have made."

The "Commission" was of course the old Supplementary Benefits Commission. But that Commission, and section 15 of the 1976 Act disappeared long before this case got under way. When it was before the adjudication officer and before the tribunal the grounds for opening up an existing or former award were much more limited by section 104 of the 1975 Act. It had been applied to supplementary benefit by the Social Security Act 1986. Mr Taylor sought to persuade me that R(SB)9/81 still applied. I had to point out the views which I have expressed about review and revisal in the common appendix to CSSB/297/89 and others and, indeed, further decisions given by the same Commissioner as decided R(S)9/81 following upon CSSB/297/89 largely endorsing what was therein set out so far as relevant to this case. A short adjournment took place for consideration. Mr Taylor nonetheless still sought manfully to persuade me that there were still grounds for backdating the award of long term scale rate in this case.

10. I accept Mr Taylor's reference to paragraph 10 of the decision on file CSSB/238/89 where, under reference to the common appendix and section 104 of the 1975 Act, the Commissioner pointed out that in cases like that, and like this, where supplementary benefit has ceased, it is open to review decisions which are no longer operative. But in such cases, of course, grounds for review have still first to be established such as to warrant opening up the last operative decision in respect of that benefit. Here there was a complication because in 1987 the section 5 condition had already been removed by reason of satisfaction of Condition of Entitlement regulation 6(b). And at paragraph 11 of CSSB/238/89 the Commissioner said -

> "But where the aspect of benefit sought to be brought under review has previously been under review and the subsequent application seeks review for any period prior to the date of the earlier review decision the grounds of review will require not only to be relevant to allow review of the current version but must be applicable also to the original decision. The adjudication officer conducting the review could not alter the current version of the award in relation to such a prior period without finding that the original decision also had failed to take appropriate account of the material fact or that it had become inappropriate by reason of some supervening change of circumstances or

was erroneous in law."

I endorse that. Mr Taylor referred then to CSB/241/88 where a view appears to be expressed at paragraph 4 that every review is in principle a review of the original decision. That could mean that as long as a different ground is raised since it is always the original awarding decision that is under review there is at least a potential ground under section 104 for having the review - whether or not there follows a revisal. That view, I confess, appears to me to be against the principles set out in the common appendix and in CSSB/238/89 and associated decisions. In CSB/241/88 the Commissioner noted that he did not have to decide the matter and so his observation is at best *obiter*. In my view in this case what the claimant would have had to do was to establish a ground under section 104 of the 1975 Act warranting a review of the 1987 decision which then formed part of the running award starting from 1984. But since, prior to 1987, the section 5 condition had been automatically imposed from 1984 it would have been necessary for that same ground of review to have applied to that decision. What was here suggested was that an age analogy with Conditions of Entitlement regulation 6(e) gave ground for review that presumably being something of which the adjudication officer in 1987 had been ignorant, and similarly of which the adjudication officer in 1984 would have been ignorant. Alternatively a full investigation could have revealed that the Conditions of Entitlement provisions were only satisfied at an interim date in which case the ground of review for the 1987 decision would have been the same but that in regard to the 1984 decision would have been a subsequent change of circumstances. Of course the claimant's case was that he had been disabled from further prospects of work from 1982 - prior to the original award in 1984 - and so it really was "ignorance" which was being advanced as a ground of review. That involved section 104(1)(a) of the 1975 Act.

11. Now the question for the tribunal was whether the adjudication officer had been correct in his decision that there were no grounds of review of at least the 1987 decision. He put facts before the tribunal indicating that the claimant had appeared to be in good health and was not considered to be incapable of work due to physical or mental disability before his 60th birthday in 1987. He also put the affect of reports of visits by officers of the Department in 1982, 1983, 1984 and 1985 and 1986 from which there was no hint that a case for the long term scale rate might then have existed other than, in due course, age. Before the tribunal and before myself nothing else was advanced to warrant such a review. The most that was suggested, and that was before the tribunal, was that the adjudication officer at some unspecified time had, according to the chairman's note of evidence, -

> ".. facts before him and [so] should have investigated the matter further. Error was one of omission. Failure by AO to address relevance of 6(u). Failure to consider reg. 6 at all."

The adjudication officer then in attendance said that regulation 6 had indeed been considered. And of course at that stage the whole argument was predicated upon gaining access to a revisal of the whole award by reason of a review upon the grounds of an error about the heating addition. From all that is in the file and that was said before me I see nothing to warrant a review of either the 1984 or the 1987 decisions so far as concerned any question of relief from the statutory section 5 condition. Accordingly I consider that the adjudication officer came to the correct decision, and so did the tribunal although they proceeded by erroneous reasoning.

12. The tribunal reasoning proceeded upon the basis that whatever they did they would not have been able to make any award more than 12 months prior to the 1988 request. Regulation 72 could not apply, they felt, because its paragraph (2) provided that relief under it could not apply to -

> ".. a review of a decision by an adjudication officer or, on a reference by an adjudication officer, by an appeal tribunal, where the ground for review is that the decision was erroneous in point of law by virtue of a decision by a Commissioner .. given subsequent to the decision."

The tribunal's concern was that the concept of age as possibly analogous to regulation 6(e) was only laid down subsequent to the 1984 decision namely in August 1986 by R(SB)5/87 although there had been a hint of it in decision CSSB/177/85 dated 12 February 1986. I think lines have got crossed. There is in section 104 of the 1975 Act a provision, at sub-section (1A), that a decision of an adjudication officer may be reviewed on the ground that it was erroneous in point of law. That would have applied here if there had been at some appropriate stage a decision declining to remove the section 5 condition under Conditions of Entitlement regulation 6(e) and (u) on the ground that age could never be analogous to the conditions set out in the former paragraph. But here the condition had simply been imposed automatically by the statute. Adjudication Regulation 72(2) was not involved at all. The only question was whether grounds had been made out for reviewing the earlier decisions not because there was any legal error in them - the automatic operation of a statute could never be regarded as an error of law - but because there had been a mistake or a change of circumstances as earlier discussed. It matters not whether people thought age could or could not have been analogous to 6(e) in 1984 and 1987. Mr Taylor sought to place some emphasis on that as a problem. But all that mattered was whether, as at 1988 or before the tribunal in 1989, the ignorance/change of circumstances could be made out. Nothing was put before me to show that that was possible and, as already indicated, the whole proceedings before the tribunal on this issue proceeded upon a wrong basis in law, namely that access could be got to revisal by the heating addition question. Perhaps the root cause of the problem is summed up in one of the written submissions for the claimant to me to the effect that the adjudication officer in May 1984 decided that the claimant should be required to be available for work. There is no reason to suppose that any such decision was ever positively made. The statutory condition would normally just apply automatically.

13. Finally I should return again to the question of the heating addition in respect of the claimant's wife. The note of evidence by the tribunal makes it clear that from February 1987 the higher rate heating addition had been awarded. The grounds for that are not clear to me. There is mention of the wife suffering severe bronchitis and being allergic to house dust. That must, I have to assume, been enough to warrant an adjudication officer holding that Mrs McNally needed extra warmth to be provided because she suffered from a serious physical illness in terms of paragraph 1(2)(b) of Part I to Schedule 4 to the Requirements Regulations. Clearly 1(2)(a) had not been made out because it required a physical illness such that the individual was "confined to the home". The note of evidence in that regard records the wife as being "not housebound." The note of evidence also records that earlier, in August 1985, Mrs McNally had been housebound with bronchitis and a central heating allowance had then been made. No higher award, could, of course, be made unless it could have been shown that she satisfied paragraph 1(2) of Part I

of Schedule 4 to the Regulations. Mr Taylor sought to make much of the fact that the wife was housebound in 1985 and so the higher award should have been made. But it is not enough that the individual be "housebound" because of some illness. It is necessary that the individual on that account requires extra warmth to be provided because of suffering from the illness which makes the individual housebound. It is impossible at this stage to know whether or not it may have been a failure to establish that part of the regulatory provisions that led to a refusal of the higher rate in 1985 and acceptance that they were made out that led to the grant in 1988. There is not necessarily, between the two decisions, such a dichotomy as to show that there must have been at least a mistake by an adjudication officer. It will therefore be necessary now to establish that, which may be difficult, if the issue is now to be raised - see paragraph 5 above.

14. Finally I should explain that I do not fault the tribunal for what they did about the higher heating rate question because that was not really an issue before them. What was before them was, as already noted, a request for a review of the award of benefit as it had been prior to April 1988. Only an adjudication officer may review such an award in terms of section 104 of the 1975 Act. It was that issue which was alone before the tribunal. There was therefore no requirement for them, and indeed at their own hand they would not have had power, to consider the question of the higher rate heating addition. See paragraph 6 of CIS/11/91. They could only have considered the heating issue if an adjudication officer had remitted it to them, again in terms of said section 104. Of course it was suggested in this case that under section 102 of the 1975 Act the tribunal could have proceeded to determine the matter because that section provides -

> "(1) Where a question under this Act first arises in the course of an appeal ... the tribunal ... may, if they think fit, proceed to determine the question notwithstanding that it has not been considered by an adjudication officer."

No doubt that provision requires a broad interpretation. But I am certainly not clear that a question arising under section 102(1) is necessarily the same as a question arising under section 104(2) which provides that -

> "A question may be raised with a view to a review under this section ..."

In any case the later section conventionally would control and limit the earlier section. I therefore incline to the view that the higher heating question was not one that the tribunal could properly have taken on board. In any event since it had not been raised before the hearing it would have been necessary, as a matter of natural justice, to have continued the case to allow the adjudication officer to deal with it and so the practical result would probably have been the same.

14. The appeal succeeds, but upon a technicality only.

(signed) W M Walker
Commissioner
Date: 24 March 1992