

Diet addition under ~~14~~ <sup>14</sup>(E) — meaning  
— "a condition" — not necessarily pathological (CSB)  
— could be physically or mentally abnormal.  
② "whole cost" does not mean whole cost of food  
each week but only cost above that of normal diet  
DGR/SH/24/MD (but see R(SB) 3/88 (CSB/688-1986)).  
Commissioner's File: CSB/427/1987

C A O File: AO Not Known

Region: North Eastern

## SUPPLEMENTARY BENEFITS ACT 1976

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

#### DECISION OF THE SOCIAL SECURITY COMMISSIONER

#### [ORAL HEARING]

1. For the reasons hereinafter appearing, the decision of the social security appeal tribunal given on 5 June 1986 is erroneous in point of law, and accordingly I set it aside. However, as it is expedient that I give the decision the tribunal should have given, I further decide that the claimant is entitled to an additional requirement in respect of a special diet at the rate of £6 per week.
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 5 June 1986. In view of the unsatisfactory nature of the submissions of the adjudication officer now concerned, I directed an oral hearing. At that hearing the claimant appeared in person, whilst the adjudication officer was represented by Mr E O F Stocker.
3. On 12 March 1985 the adjudication officer, acting on the advice of a senior medical officer of the Department of Health and Social Security, refused to award to the claimant an additional requirement in respect of a special diet. On 5 December 1985 a medical report on behalf of the claimant was received at the local office, but the adjudication officer, having considered that report, decided on 12 March 1985 that there were no grounds to review his earlier decision. In due course the claimant appealed against the decision of 12 March 1985.
4. In the event, the tribunal allowed the appeal in part. They decided that the claimant was entitled to "an additional requirement in respect of a special diet at the lower rate as specified under Requirement Regulations, Schedule 4, paragraph 14(a)". Manifestly, the paragraph in question was 14(b), as is apparent from the reasons given by them for their decision. The tribunal made the following findings of fact:-

"At the date of the claim appellant was in receipt of supplementary benefit. The appellant is allergic to certain foods, including dairy products, sugar, wheat and corn products and foods with certain additives.

There had been an improvement in the appellant's health due to the diet which she followed."

The tribunal gave as the reasons for their decision the following:-

"Dr. Downing had studied the appellant's case and carried out tests which were likely to be correct and certainly had not been disproved. Dr. Maberly had continuing knowledge of the appellant and his continuing tests showed she was allergic to certain foods. Prior to this the consultant at North Tees General Hospital had formed a similar opinion. The DHSS Medical Officer disagreed and cast doubts on accuracy of tests, but he had not seen the appellant, had no first hand knowledge of her condition. His evidence did not satisfy the tribunal he knew better than the other doctors involved. The tribunal were satisfied on the balance of probability the appellant needed to follow a diet and because of the type of food she had to buy it would involve some extra expense justifying an additional requirement under Requirement Regulations, Schedule 4, paragraph 14(a)."

Again, the tribunal inadvertently referred to paragraph 14(a) when clearly, from the use of the words "a diet" which would "involve some extra expense", they clearly had sub-paragraph (b) in mind. Accordingly, their award was £1.55 per week.

5. In this appeal the claimant contends that she comes within paragraph 14(e) of Part II of Schedule 4 to the Supplementary Benefit (Requirements) Regulations 1983 [S.I.1983 No.1399], and that in consequence she is entitled to "the weekly cost of the diet".

6. Paragraph 14, in so far as it is relevant to this appeal, reads as follows:-

"14. Person who needs a special diet because he -

- (a) suffers from diabetes; a peptic, including stomach and duodenal, ulcer; a condition of the throat which causes serious difficulty in swallowing; ulcerative colitis; a form of tuberculosis for which he is being treated with drugs; or from some illness for which he requires a diet analogous to that required for the other illnesses specified in this sub-paragraph;
- (b) is convalescing from a major illness or operation or suffering from an illness not specified in sub-paragraph (a), and the diet involves extra cost;
- (c) ...
- (d) ...
- (e) suffers from a condition, other than one specified in sub-paragraph (a), for which he has to follow a diet which involves extra cost, substantially in excess of the amount specified in sub-paragraph (a) in column (2) [which was at the relevant time £3.60].

7. Manifestly, the claimant does not suffer from any condition or illness set out in sub-paragraph (a). However, the tribunal were prepared to accept that she could bring herself within sub-paragraph (b). The claimant wishes to go further and establish that she falls within within sub-paragraph (e). The paragraph is not happily drafted. There are references to sometimes an "illness" and sometimes to a "condition", and it is far from clear whether any distinction is being drawn between these two words. Several attempts have been made in Commissioners' decisions to grapple with this problem, and in one such

decision it was pointed out that pregnancy is a condition but not an illness, suggesting that the word "condition" is wider than "illness". However, as regards the meaning of "condition" in sub-paragraph(e) guidance is now available in a decision of the Court of Appeal - Robert Adamson v. Chief Adjudication Officer where, in the course of his judgment, with which his two brethren agreed, O'Connor L.J. observed as follows:-

"So then, what is 'suffers from a condition' in sub-paragraph (e)? In my judgment, suffering from a condition in this sub-paragraph in its context must mean the condition which is either physically or mentally abnormal. For my part, I would not limit it to a pathological condition; that might be too narrow. I prefer to put it as a condition which is physically or mentally abnormal and is one for which a treatment is that the sufferer 'has to follow a special diet'."

8. In the present case, I have no doubt on the evidence before them that the tribunal, if they had applied their mind to this issue, could have reached no other conclusion than that the claimant was suffering from a condition physically abnormal, and could bring herself within sub-paragraph (e). In so far as the tribunal failed to consider this aspect of the case, they clearly erred in point of law, and I must set aside their decision.

9. However, the claimant asked me not to remit the case for reconsideration by another tribunal but to dispose of the matter myself. Moreover, Mr Stocker supported her in this approach. There was evidence before the tribunal that the extra cost of the diet amounted to £5 to £6 per week, and I was invited by the claimant, and Mr Stocker did not demur, to substitute my own decision for that of the tribunal, and to award an additional requirement at the rate of £6 per week.

10. However, Mr Stocker very properly drew my attention to a difficulty, which he nevertheless hoped would not prevent me from dealing with the matter in the way suggested. He pointed out that, if a claimant suffers from a condition, other than one specified in sub-paragraph (a), for which he or she has to follow a diet involving extra cost, substantially in excess of £3.60 - and I accept that £6 per week is substantially in excess of that amount - the award pursuant to column (2) is "the weekly cost of the diet except in so far as it consists of proprietary foods or substances which are available under the National Health Service Act 1977" (in the present case there are no such proprietary foods). So long as I treated "the weekly cost" as representing the extra cost occasioned by the diet, he had no criticism. However, he felt obliged to point out that a Tribunal of Commissioners in a decision on Commissioner's file CSB/0688/1986 had made observations which perhaps suggested that the award should take the form, not of the extra cost, but of the cost of the entire expenditure on food. If that was the view of the Tribunal of Commissioners, then he contended that it was erroneous.

11. At paragraph 12 of that decision the Tribunal observed as follows:-

"The difficulty in the present case arises from the fact that, since the claimant's son began his special diet in infancy, it is not possible to compare the cost of the special diet with the cost of what he had normally been eating prior to undertaking the special diet. In those circumstances, the claimant must seek to adduce some evidence of the probable cost of a normal diet for a person of the claimant's sons' age and other circumstances against which the 'extra cost' of the claimant's sons' diet can be measured - for example, evidence of the cost of feeding the son's of friends or relatives at a comparable age. It must be noted that the extra cost under (e) has to be 'substantially' in excess of £3.60 per week. What is 'substantially in excess' is a matter for the new tribunal to decide. If the new tribunal find that the claimant's son is in need of a special diet under (e), they must award 'the weekly cost of the diet except in so far as consists of proprietary foods or substances available under the National Health Service Act 1977'. The senior medical officer has certified that none of the substances or foods mentioned can be prescribed on the NHS and, accordingly, the

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new tribunal must determine 'the weekly cost of the diet'. In other words, the weekly cost allowed is not the 'extra cost' but the whole weekly cost of the diet".

The difficulty lies in the last sentence.

12. The position is made worse by the fact that in a sense in the case of a person on a diet the whole of his intake of food during the course of a week could be said to be his diet. That intake represents a balance of different foodstuffs in different proportions. For if he is required to consume particular items, the normal effect of this is to cause him to reduce the intake of other items. He could, of course, end up by simply increasing his total intake, but it is more likely that he would keep roughly the same quantity but change the composition. Accordingly, in this sense it could be said that his whole intake constitutes his diet.

13. However, on balance I do not think that that was what was intended by paragraph 14(e). Nor do I think that the decision of the Tribunal of Commissioners should be so construed. What a claimant is being protected against is the extra cost of the items which he consumes as a result of suffering from the relevant condition over and above the cost of the items which he would have consumed, had he not been suffering from that condition. He gets the entirety of that cost, and not merely the excess over and above the £3.60. In my judgment, a careful reading of paragraph 12 of the decision of the Tribunal of Commissioners shows that this is what they intended to say. For, in the course of paragraph 12, there is a reference to "extra cost" as being something substantially in excess of £3.60 per week, and later the words "extra costs" are taken up in the final sentence. Accordingly it would seem that when the Tribunal speak of the weekly cost allowed not being the "extra cost", they meant that the weekly cost was not to be restricted to the excess over and above the £3.60. The addition to be awarded was to cover the total cost of the diet, but such cost was calculable not by reference to the cost of the total intake of food, but by reference to the additional cost, occasioned by the diet, over and above the cost of the normal intake appropriate to a person not suffering from the relevant condition. Moreover, I find some support for this view in the fact that the social security tribunal, whose decision was the subject of appeal leading to the Court of Appeal's decision in Robert Adamson v. Chief Adjudication Officer, proceeded on the basis that the "appellant's weekly dietary cost" was to be computed "as the excess of the required expenditure on food (£37.50 - based on £5.50 per week) after deducting £25 being the Tribunal's estimate of the food content of the basic weekly allowance of £43.00". No criticism of this approach was voiced by the Court of Appeal.

14. Accordingly, I am satisfied that the claimant in the present case is only entitled to the extra cost of the diet, and the only evidence available is that such extra cost amounts to £6.00 per week.

15. It follows from what has been said above that I can conveniently substitute my own decision for that of the tribunal. Accordingly my decision is as set out in paragraph 1.

(Signed) D.G. Rice  
Commissioner

Date: 4 March 1988