JGM/SH

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

C.S.B. 432/1981

NTBR

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 24 March 1981 was erroneous in point of law and is set aside. The matter must be referred to another tribunal.

2. The claimant is a woman now over 80 years of age who at the relevant time was in receipt of a supplementary pension. The present matter has been handled on her behalf by her daughter and son-in-law.

3. In January 1981 the claimant moved to a new rented home, the keys of which were handed to her on 9 January, and she moved in on 19 January. At a date or dates to be ascertained by the new tribunal claims were made on her behalf for sundry items of furniture or household equipment. The items included carpeting. The claimant's daughter and son-in-law say (and there is documentary evidence to support it) that they were assured that single payments would be made for all the items. In fact they received a notice dated 2 February 1981 in Form BO 40A, which was not I think before the appeal tribunal, which on its face indicated that payment for all the items was enclosed but from which on the reverse side the carpeting had been deleted and the payment enclosed was reduced by the amount allowed for the carpeting. Substantially the ground for the rejection of the claim for carpeting was that the claimant's flat had thermoplastic tiles and that she therefore did not qualify for further floor covering. The benefit officer added that there was no serious damage or serious risk to health or safety. He might have added secondly that the carpeting was purchased on 17 January and that he had treated the claim as made on 26 January at which date (i) the claimant did not need the item in terms of regulation 3(2)(a) of the Supplementary Benefit (Single Payments) Regulations 1980 (SI 1980 No. 985) and she already possessed the item in terms of regulation 3(2)(b) of those Regulations (to which I shall refer as "the Single Payment Regulations").

4. The rejection was confirmed on appeal by the appeal tribunal, who mentioned the second ground of rejection, and the claimant now appeals to the Commissioner. In granting leave to appeal I called attention to regulation 26(1)(b) of the Single Payments Regulations (now regulation 28(1)(b) of the 1981 Regulations of that name) which, it seemed, might afford the claimant some relief from the consequences of postponing the claim (if it was so postponed) until after the item was acquired. I held an oral hearing of the appeal at which the claimant was represented by her son-in-law and the benefit officer was represented by Mrs L Conlon of the Solicitor's Office of the Department of Health and Social Security.

5. The claimant's son-in-law and her daughter, who was also present, indicated clearly to me that they considered that they had been promised the payment, and that the promise had been broken. They were in the habit of treating a man's word as his bond, and they appeared to think that for that reason their appeal should succeed. If they had an enforceable contract for the payment of the money they could sue on it in the Courts, but I can adjudicate only on entitlement under the Regulations I add, however, that I think that they put the matter too high. I can understand their feeling that they were let down. But it is not possible to treat assurances of the kind given by officers of the Department of Health and Social Security as promises. In fact at the time supplementary benefit had recently been converted from a largely discretionary system to a system based on entitlement. It is regrettable if an officer of the Department familiar with the practice of the determining authorities under the old system indicated a too confident opinion about what would happen under the new. But unless the claimant's son and daughter-in-law prejudiced themselves by acting on the basis of what was said to them in a way in which they would not otherwise have acted, they have in my judgment no real complaint. Ex gratia payments (which are outside my competence) are sometimes made to persons who so act to their prejudices but I am not persuaded that the claimant, or her daughter or son-in-law, have done anything on the basis of the assurance given them that they would not have done in any case.

6. On matters more directly connected with what I have to decide the claimant's son-in-law told me that he began enquiring about payment for carpeting well before it was purchased. It must in fact have been arguable before the appeal tribunal that there was in fact a claim before the purchase. However the benefit officer's statement in the form LT 205 to the effect that the claim was made on 26 January seems to have been acquiesced in. In these circumstances I could not regard the decision as erroneous in law just because the possibility of an earlier date was not considered.

7. The matter is however for other reasons being referred back and the new tribunal should make a finding on the date of the claim - or (if they find that the benefit officer waived the need for a claim) the date of the waiver, which, in a case of waiver, takes the place of the date of the claim. It will be in view that under regulations 2 and 3 of the Supplementary Benefit (Claims and Payments) Regulations 1980 /SI 1980 No. 1579/ and the corresponding provisions of the present Regulations the Secretary of State was and is authorised to allow informal and even oral claims, and that it was held in Decision R(SB)14/82 that a benefit officer can waive the requirement of a claim.

8. I must first consider the principal ground on which the claim was rejected, viz. that the flat had thermoplastic tiles which rendered carpeting unnecessary. The statement of the grounds of the tribunal's decision contains the following:-

> "..... the conditions of regulation 9 of /the Single Payments Regulations/ are not satisfied in that the accommodation taken over by /the claimant/ already had thermoplastic tiles and she therefore does not qualify for further covering."

There was however nothing in regulation 9 which precluded the claimant from being awarded a payment for carpeting just because there were thermoplastic tiles. The claimant has at all material times been over pensionable age and thus satisfied the condition in regulation 9(2)(b) and so far as regulation 9 was concerned was entitled under regulation 9(3) to a payment for carpeting if it was in the list of essential furniture and household equipment in regulation 9(4), to which I shall come. If the claim was to be rejected because of the thermoplastic tiles it had to be rejected under regulation 3(2) on the ground that, though the claimant did not possess carpeting, she did not need it or on the ground that in terms of regulation 3(2)(b) she had available to her a suitable alternative. It was thus not possible for the claimant to deduce from the decision the reasons why her claim failed by reference to the thermoplastic tiles. On that ground alone the decision is erroneous.

9. But the tribunal also found that the carpeting had been purchased before the claim was made. If this was the case, it would be an additional ground for rejecting a direct claim for the carpeting. But the claimant's son-in-law told me also that he had used some of the claimant's money set aside for meeting her winter fuel bills to pay for the carpeting - (for which a single payment had been refused) and was subsequently unable to meet her fuel bills; and that in the result he had later to assist her in meeting them. Nowhere near so full a statement was before the appeal tribunal. If it had been, the question of the application of regulation 26(1)(b) of the Single Payments Regulations might have been considered. This regulation is dealt with more fully in paragraphs 15 to 19 below.

10. The decision of the tribunal could not be regarded as erroneous in law simply because no account was taken of the matters outlined at the beginning of the previous paragraph, since that was not (in such relative detail) before the tribunal. But Mrs Conlon, adopting in this respect the written submission of the benefit officer now concerned, submitted that, nevertheless, the facts before the tribunal were sufficient to raise the possible relevance of regulation 26(1)(b) and that it should have been considered. As it was not considered and findings relevant to it were not made the decision was erroneous in law, and on this ground also I set it aside.

11. The new tribunal must start by making and recording a finding as to the date when the claim was made or (if the need for a claim was waived) the date when it was waived. If the date so found preceded the date of the purchase of the carpeting they must then go on to consider (and record findings on) the matters mentioned in paragraphs 12 to 14 below and if it is after the date of the purchase they must go on to consider the matters mentioned in paragraph 19 below.

12. Assuming that a claim was made (or was waived) before the carpeting was bought it would presumably be found (this seems to be admitted) that as at the date of the claim (which is the material time; (see Decisions R(SB)26/83)) the claimant had not got and did not possess the item. It is at this stage that they should consider whether (by reason of the thermoplastic tiles or otherwise) she had a need for the item (the carpeting) or had available a suitable alternative item. If satisfied as to need and as to the claimant's not having available a suitable alternative item, they must go on to consider under what regulations a payment could be made for the carpeting. Two regulations suggest themselves as possible - viz. regulation 9 relating to essential furniture and equipment and regulation 30, the ultimate fall back regulation.

13. The items of essential furniture and equipment listed in regulation 9(4) included at sub-paragraph (h) "polyvinyl chloride (or equivalent) floor coverings". It has been held that carpeting may be (but not necessarily is) equivalent to polyvinyl chloride (see Decision R(SB)19/82). It will be for the tribunal to consider whether the carpeting asked for was equivalent. If so, payment fell to be awarded for it under regulation 9(3) as regulation 9(2)(b) was satisfied.

14. The alternative regulation under which a payment might be made is regulation 30 which applies where a single payment represents the only means by which serious damage or serious risk to the claimant's health or safety can be avoided. This in relation to carpeting seems to me to be a very long shot. But the tribunal must deal with it as it has been raised.

15. I turn now to the possibility that the date of claim (or waiver) is found to be later than the purchase of the carpeting. In that event the claim for a single payment (whether founded on regulation 9 or regulation 30 must fail (see Decisions R(SB)26/83 and the Decision on file CSB/748/82 to be reported as R(SB)47/83)). A claim to a single payment can in that case succeed if at all only by reference to regulation 26 of the Single Payments Regulations, which, so far as material provides as follows:-

> "26. - (1) A single payment shall be made where a claimant -
>
> (a) .....
>
> (b) has spent, on any item for which had he claimed it a single payment would have been made under these regulations, money set aside to provide for any item to which the category of normal, additional or housing requirements relates,
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> and as a consequence is unable and cannot reasonably be expected to meet the cost of any item to which one of those categories relates which it is essential that he should meet.
>
> (2) The amount payable in a case to which paragraph (1) applies shall be the amount of the cost, or where more than one item is concerned the aggregate amount of the costs, which he is unable to meet, subject to a maximum of -
>
> (a) .....
>
> (b) in case to which paragraph 1(b) applies, the amount of the single payment which would otherwise have been made."

16. There are a number of conditions to be satisfied before a payment can be made under this regulation, and the first is that one should be able to postulate that there was expenditure on an item for which, had the claimant claimed it a single payment would have been made. This gives rise to an immediate question in a case where a claim (albeit not yet finally determined) has in fact been made for a single payment and the claim has been rejected. Mrs Conlon referred me to the Commissioner's decision on file CSB/488/83 where the simple view was taken that a claim (under the corresponding regulation of the present regulations) could only succeed in respect of an item for which no claim had been made because only then can the above condition apply. On the other hand she referred me to a decision of my own on file CSB/1103/82 where I took the view that that regulation could not be so easily side-stepped. In neither decision was

any reference made to section 15(4) of the Supplementary Benefits Act 1976 (as amended).

17. It must be clear that if the simple view is right it is not possible for a person who is unsure about the law (as everyone was in January 1981) or about the date of the claim (or waiver) (and the provisions of the regulations referred to in paragraph 6 are likely to cause uncertainty) cannot claim a single payment for an item and in the alternative a single payment under regulation 26. In which case the point that the tribunal ought to consider regulation 26 when a claim has been made for an item under one of the other regulations must always be a bad one, since on this view, once it is established that a claim has been made and rejected it will follow automatically that there is no claim under regulation 26. This would very largely frustrate the purpose of the regulation.

18. In my decision on file CSB/1103/82 I referred to the decision of the House of Lords in George Wimpey & Co Ltd v British Overseas Airways Corporation [1955] AC 169 where three of their Lordships were of opinion that there was what Lord Reid called a "temporal connotation" in the words "would if sued have been liable" in the Act of Parliament in question viz. that the words meant "would if sued at a particular time (there was disagreement on what the particular time was) have been liable", while the other two Law Lords adopted the simple view that a person who had been sued but found not to be liable could not be a person who was or would if sued have been liable. I do not base my rejection of that simple view on this however, because in my judgment there is a shorter answer. A finding of fact or other determination embodied in or necessary to a decision, or on which it is based is not conclusive for the purpose of any further decision (see section 15(4) of the Supplementary Benefits Act 1975 (as amended)). It follows that a decision refusing a single payment under one of the Single Payments Regulations is not conclusive on the question whether, had the claimant claimed it a single payment, would have been made. There is in my judgment a "temporal connotation" about it; and the question whether a single payment would have been made has to be determined on the hypothesis that a claim had been made at the time that the need arose.

19. Consequently the new tribunal, if they find that the claim in this case was made after the carpeting had been purchased will, in dealing with regulation 26, start with the question whether had the claimant claimed when the need first arose, a single payment would have been awarded, which is very much the same question as they will have to decide if they find that

the claim preceded the acquisition of the carpeting. But that will not be enough since, as was pointed out in Decision R(SB) 36/83, there are a number of other conditions that must be satisfied before an award can be made under the regulation. Thus it has to be shown that money set aside (as to which see paragraph 7 of Decision R(SB) 36/83) to provide for an item of normal housing or additional requirements (in this it would seem fuel costs) had been spent on the carpeting, and that in consequence of spending the money so set aside she could not reasonably be expected to meet the cost of paying for any of such requirements which it was essential that she should meet. If these matters are established then in my judgment the requirement of need under regulation 3 will also be established (I rely for this in particular on the words "essential that she should meet").

20. There will, if all the foregoing questions have been decided in favour of the claimant, be a question of the amount of the payment to be made. This will under regulation 26(2) not necessarily be the same as would have been payable if the claim had been made at the right time for the carpeting direct. That amount is merely, by virtue of regulation 26(2)(b), the maximum that can be awarded. The payment will however also be limited to the amount of the cost of the items of normal or other requirements which the claimant is unable to meet.

21. The appeal succeeds.

(Signed) J G Monroe
Commissioner

Date: 6 January 1984

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