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4/2.

Anaemia / Breastfeeding

Jim McG.'s case

IEJ/SH/4/MD

Commissioner's File: CSB/432/1985

C A O File: AO 2558/SB/85

Region: North Western

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Maurice Fredrick Attwood

Social Security Appeal Tribunal: Manchester

Case No: 60/12

1. (1) This is a claimant's appeal from the decision dated 7 January 1985 of a social security appeal tribunal ("the tribunal") brought by my leave and upon the contention that the tribunal's decision was given in error of law. By their decision the tribunal upheld the decision of a benefit officer issued on 14 March 1984 to the effect that the claimant's claim for an additional requirement in respect of a diet for his wife was not appropriate. The adjudication officer now concerned concedes that the tribunal's decision was given in error of law in respects I will later below identify, and I agree.
- (2) The appeal is allowed. I set aside the tribunal's decision as given in error of law in respects later below identified and direct that the claimant's appeal be reheard by a differently constituted tribunal. I do not consider it expedient to seek to give myself the decision which the tribunal should have given, as in my judgment a proper determination requires the ascertainment and finding of additional facts.
2. The basic circumstances of the case have not been in significant dispute and are as follows:-
 - (1) The claimant is a married man who was at all material times in receipt of supplementary allowance in respect of an assessment unit comprising himself, his wife, 3 children under the age of 7 and a fourth, D, a son born on 15 January 1984. The requirements of the assessment unit at all material times already included an additional requirement in respect of a special diet for the claimant himself, referable to his suffering from an ulcer condition, but I mention that only to discard it as of relevance to the present appeal.
 - (2) On 8 February 1984 the claimant requested an increase in his benefit in respect of a special diet for his wife, indicating that the ground of such application was that she required extra nourishment in order to breast feed D. The application was supported by a letter dated 6 March 1984 from the family's GP, addressed to whom it might concern and written in reference to the claimant's wife, and

indicating:-

"Please note the above lady needs a nourishing diet of cheese, meat, fruit and wholemeal in order to breast feed her baby. As her husband is on a low income she cannot afford to do this and needs an extra allowance to cover same. Thanking you... ."

- (3) The benefit officer's decision then ensued, it being his view that the claimant's wife did not satisfy the relevant qualifying requirements for an additional requirement in respect of special diet, namely those under regulation 13 of and - in particular - paragraph 14 of Schedule 4 to, the Supplementary Benefit (Requirements) Regulations 1983 ("paragraph 14"). The claimant appealed from that refusal to the tribunal. The claimant and his wife did not attend the tribunal's substantive hearing of the appeal (due, it seems, to ill-health). They were, however, represented before the tribunal by a Welfare Rights Officer. By the time the tribunal came to deal substantively with the matter (there had been 2 initial adjournments to which I need not further refer) the evidence before the tribunal had been amplified by a circumstantial letter subscribed by the claimant and his wife; by a further letter from the GP dated 17 July 1984 which materially included the intimation:-

"I would advise that [the claimant's wife] is not suffering from any serious illness but needed extra diet during pregnancy and during breast feeding the baby (which she is still doing). She will need extra nourishment until she has finished breast feeding the baby. As she is always c/o" [seemingly "complaining of"] "tiredness - weakness. I hope the above will be of assistance to you";

and by a further letter from another doctor dated 13 December 1984, again referring to the claimant's wife, and materially indicating:-

"This lady was previously being treated for Anaemia (ie. iron deficiency and vitamin deficiency). It seems her anaemia was of dietary nature though at present investigations for iron and vitamin stores in body are at normal levels. I have no doubt that this is because she was recently given extra vitamins and iron. Her diet is still the same and there is every likelihood that if it is not corrected or supplemented, this might require treatment in future."

3. The tribunal had before them also a detailed written submission prepared by the claimant's representative dealing with iron deficiency and diet in relation thereto, and that made reference to a recent survey as to the cost of a balanced diet for a pregnant woman made by the Maternity Allowance Survey, and to the means of the assessment unit in relation to the cost so indicated.
4. In correct analysis, the claim so instituted by the claimant was (in the absence of any withdrawal of it), to be regarded as a continuing claim. However, at the substantive hearing of the appeal the claimant's representative indicated that the claimant's wife had ceased breast feeding on 1 January 1985 and that the claim fell to be regarded as one down to but not beyond that date. So regarded, the period spanned by the claim as in issue before the tribunal was that commencing from the inception of the claim and ending at 1 January 1985. And it did not, of course, at all necessarily follow that all material facts stood in the same light throughout the duration of that period - there might or might not have been material changes within such period.
5. (1) The tribunal's stated findings of fact were:-

"The appellant's wife [named] was not suffering from an illness which required a diet involving extra cost. She was suffering from Anaemia but medication available on prescription under the National Health Service was sufficient for the same."

(2) Their stated reasons for decision were:-

"Under regulation 13 and para 14 of Sched 4 to Supp Ben (Requirements) Regulations the tribunal was not satisfied that the appellant's wife was suffering from an illness requiring a special diet involving extra cost."

6. (1) Regulation 13 above mentioned leads paragraph 14, and materially provides to the effect that an additional requirement in respect of diet is to be applicable to a claimant where a member of the assessment unit fulfils the qualifying requirements under paragraph 14, but that not more than one amount (and if there is qualification under more than one head, then whichever is the higher or highest amount,) is to be so applicable in respect of any one person. Paragraph 14 is for convenience of reference set out as an appendix to the present decision. It is of importance to note that paragraph 14 commences with the lead words "person who needs a special diet because he -", which then govern the succeeding lettered sub-paragraphs, each of which includes the words "suffers from", clearly used in the context of suffering from a particular illness or medical condition, so that when sub-paragraph (e) refers to "suffers from a condition other than one specified in sub-paragraph (a),..." "condition" falls to be read in the same light. The determining authorities are, of course, entitled to take judicial notice of ordinary facts of human life, and to number amongst those that commonly problems in connection with the breast feeding of a human baby may arise either as to production of an adequate supply of suitable milk by the mother or in relation to acceptance by the baby of the diet so offered, or from a combination of both, - though there may, of course, be other relevant considerations of medical character. When applying paragraph 14 one may in context predicate either that the "person who needs a special diet" is the baby, or that it is the mother in order to produce that which will meet the requirements of the baby and/or to avoid undesirable personal health conditions which may otherwise attend this function of maternal provision.

(2) I do not regard it as incumbent upon the determining authorities to apply paragraph 14 in such contexts in any narrow or unrealistic way - but it is nevertheless incumbent upon them to make an award under paragraph 14 only where the qualifying requirements are squarely met.

7. In broad summary, the case put forward by the claimant's representative on his behalf, in reliance upon the medical evidence and the written submissions before the tribunal, was as to the claimant's wife having incurred an iron deficiency during pregnancy which, in combination with the implementation of medical advice as to the desirability of breast feeding D, gave rise to a continuing need during the duration of her breast feeding for her to enjoy the benefit of a special diet with a high iron content, necessitating expenditure which the resources of the assessment unit did not, consistently with meeting other commitments, extend to financing. And, at the forefront of such evidence, was of course the support afforded by the 2 doctors' letters. But, it is to be noted, the second of those was some 9 months later than the first, and given at a time shortly before the breast feeding came to an end.

8. As is correctly identified by the adjudication officer now concerned, the tribunal have in my judgment fallen into error of law in failing to "ask themselves the right questions"

of reasons demonstrated any recognition of any potential difference between the position at differing times in the claim period. Moreover there is a "missing middle" in what appears to have been their reasoning, in that they have made no findings - but needed to make findings - as to what had been the diet upon which the claimant's wife had been subsisting. For whilst they were entitled to accept the second doctor's letter as confirmatory of there being no existing requirement for special diet to redress iron deficiency by 13 December 1984, and as to his view as to how this had come about, they needed in the light of the first doctor's letter both to explore what had been the claimant's wife's diet during the earlier part of the claim period and to include in the statement of their reasons for decision something which indicated, if it was the case, why they preferred the "hindsight" conclusion which they were drawing from the second doctor's letter to that which the first doctor had contemporarily indicated as to the claimant's wife needing extra diet during the period of breast feeding already in course at the time of his letter.

9. So also they needed, even if (as I suspect was the case) no affirmative case was being advanced on the claimant's behalf under paragraph 14 with regard to any sub-paragraph other than (e), to indicate in the record of their decision upon what grounds they had concluded that it did not apply. What they have in fact included under the heading of reasons for decision is no more than a conclusion.

10. Should the tribunal who will be concerned with the rehearing arrive at the conclusion that the claimant's wife was at the material time suffering from the condition of anaemia they may, in my judgment, properly regard that as a prospective foundation for her need for a special diet, for that is clearly a "condition". More difficult questions may arise for their determination. But since the words used in paragraph 14 which are critical are, in my judgment, ordinary English words used in an ordinary English sense I do not consider it proper for me to prejudice by personal comment any conclusions at which they might arrive as to whether or not considerations distinct from those of the health of the claimant herself, and identifiable as relevant only to the needs of D, could be brought within the scope of paragraph 14.

11. In strict formulation the error of law on account of which I set aside the tribunal's decision is conveniently described as a failure to satisfy their obligations as to stating findings of fact and reasons for decision sufficient to discharge their obligations in that behalf under regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984 as amended. But behind that formulation has lain also, in my judgment, an omission on the part of the tribunal to ask themselves - all - the right questions. And whilst I find it unnecessary to give detailed directions to the tribunal who will be concerned with the rehearing in this behalf, they should be particularly concerned to make all appropriate findings of fact "to be reached in awareness that all issues of fact will again be wholly at large before them" and state reasons for decision with sufficient particularity to enable the respective parties to determine therefrom how it is, as the case may be, that their respective contentions upon the appeal have prevailed or have not prevailed. I have not overlooked the submissions advanced by the claimant upon the present appeal as to the additional financial constraints under which he has been put by reason of the delay in obtaining a final adjudication upon his appeal - or that an unavoidable consequence of my present decision will be to further protract the time, whatever be the eventual result. But I have no jurisdiction to rehear the appeal myself "on its merits" and make findings of fact, and can do no more in this context than to urge that the rehearing should take place so soon ever as arrangements can be made for it following my present decision.

(Signed) I. Edwards-Jones
Commissioner

Date: 6th December 1985

TABLE 1
Schedule 4 paragraph 14 of the Requirements Regulations 1983

Items & cases applicable	Weekly Amount (2)
14. Person who needs a special diet because he -	£ 3.60
(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 an operation or suffering from an illness not specified in sub-paragraph (a) and the diet involves extra cost;	£ 1.55
(c) is a dependant and is living in the same accommodation as a person suffering a form of respiratory tuberculosis for which he is being treated with drugs.	£ 1.55
(d) suffers from renal renal failure for which he is treated by dialysis; or	£10.35
(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.	(e) 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 or, in Scotland, the National Health Service (Scotland) Act 1978.

NOTE

The figures in Column 2 are those in force as from 26.11.84. Those in force prior to that date (as from November 1983) were (a) £3.35 (b) £1.45

(c) £1.45 (d) £9.60.