

From David Wayman  
Whole cost diet: <sup>necessity of</sup> comparison of normal...  
Special diets Tribunal's inquisitorial function. Share  
under para 14(e) Sch 4.

MHJ/14/LM

Commissioner's File: CSB/432/1988

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: S. C.

Social Security Appeal Tribunal: Rochdale

Case No: Not Known

1. My decision is that the unanimous decision of the Rochdale social security appeal tribunal given on 1 September 1987 is erroneous in point of law. Accordingly I set it aside and remit the matter for rehearing by an entirely differently constituted tribunal.

2. The claimant appeals with leave of the chairman against the decision dismissing his appeal against the decision of the adjudication officer, issued on 13 March 1987, that he was "not entitled to a whole cost diet of £13.16 weekly".

3. At the material time the claimant was aged 26, married with three dependent children. He was suffering from chronic renal failure and since 8 February 1987 has been undergoing dialysis. On 29 January 1987 he claimed a special, whole cost, diet addition because he had been put on a strict high protein/low potassium diet by his doctor. The adjudication officer made certain enquiries, sought the advice of the Department's senior medical officer, considered the matter in the light of the information he had and gave the decision of 13 March 1987 set out in the preceding paragraph.

4. The claimant appealed and, on 1 September 1987, the tribunal found as facts that the claimant was a married man with three dependent children, in receipt of benefit, who had been diagnosed as "suffering from kidney failure and advised to use low protein diet". They then continued -

"Accepted this was essential to his well-being. No evidence as to what the cost of his diet on S.B. without kidney failure would be except that [claimant's wife] had to eat less to allow her husband to follow his diet. Diet sheet as used at cost of £13.16 by hospital and accepted as accurate by [the claimant's wife]."

The tribunal's reasons for their decision were -

"Paragraph 14(e) SB (Requirements) Regs. considered. Accepted that appellant falls within this need but extra cost of diet doesn't exceed £3.80 in sum specified in sub para (a) Column 2."

5. The paragraph referred to is in fact paragraph 14(e) of Schedule 4 to the Supplementary Benefit (Requirements) Regulations 1983, which deals with additional requirements in respect of items other than heating under regulations 11 and 13, although how the claimant - or, for that matter, anyone not familiar with the relevant regulations - could be expected to have divined that from the tribunal's stated reasons it is hard to imagine.

6. Paragraph 14 of Schedule 4 is concerned with a -

"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) is a dependant and is living in the same accommodation as a person suffering from a form of respiratory tuberculosis for which he is being treated with drugs;
- (d) suffers from renal failure for which he is treated by dialysis; or
- (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)."

The weekly amount specified in sub-paragraph (a) in column (2) was as at the date of the hearing £3.80, and the amount specified in sub-paragraph (e) of column (2) was -

"the weekly cost of the diet except in so far as it consists of proprietary foods or substances available under the National Health Service Act 1977 ... "

7. It is common ground that the claimant suffered from none of the conditions in sub-paragraph (a). However, on the face of it, he was "suffering from an illness not specified in sub-paragraph (a)" and accordingly came within sub-paragraph (b) which, as at the date of the hearing, attracted a weekly addition of £1.65. Sub-paragraph (c) is not relevant, and sub-paragraph (d) was not satisfied until 8 February 1987, when he began renal dialysis. The tribunal found, correctly, that the claimant fell within sub-paragraph (e) at the date of the claim and they therefore had to consider whether the extra cost of his diet was "substantially in excess" of £3.80. The tribunal found that the extra cost did not exceed £3.80, but as they had previously held that they had "no evidence of what the cost of his diet ... without kidney failure would be" (my emphasis), except that the claimant's wife had to eat less herself in order to pay for his food, that was not a finding they could properly make.

8. In the clear and helpful submission dated 8 September 1988 by the adjudication officer now concerned with the case it is submitted that "the point at issue therefore is whether subparagraph (e) is also satisfied, thereby entitling the claimant to an additional requirement at a higher rate than that appropriate under subparagraph (b)". I agree, as I also agree with the further submission that the tribunal made no findings of fact as to what the cost of a "normal diet" for the claimant would be, and that without such a finding no determination under sub-paragraph (e) can be made. In brief, the tribunal has to find both the cost of the special and of the normal diet in order to make a comparison and thus determine whether the extra cost exceeds £3.80. The tribunal failed to do so; their decision is in breach of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 and consequently erroneous in law.

9. I also agree with the adjudication officer's submission that the tribunal failed to exercise their inquisitorial function. The question of cost was plainly crucial to the issue they had to decide and if, as was obviously the case here, the tribunal was not satisfied that they had sufficient information it was their right, and indeed their duty, to obtain that further information - if necessary by adjourning the hearing although, in the instant case,

as it would appear from the chairman's note of evidence that the claimant's wife was present (although she is not recorded as being so among the "Names of others present"), particulars of cost could have been obtained without delay.

10. For the above reasons the tribunal's decision is erroneous and is set aside. The matter will be remitted for rehearing and I have no doubt that the new tribunal will be assisted by Commissioners' decisions CSB/688/86 and CSB/427/87.

11. The claimant's appeal is allowed.

(Signed) M H Johnson  
Commissioner

Date: 20 October 1989