

CSB 449/1981

Coal - payment in lieu

JNBP/JCB

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Mabel Burley (Mrs)

Supplementary Benefit Appeal Tribunal: Barnsley

Case No: 01/32

1. My decision is:-

(a) The decision of the Barnsley Supplementary Benefit Appeal Tribunal dated 11 June 1981 is set aside.

(b) I substitute for the said decision my own decision as follows:-

(i) the payment of £4.90 per week received by the claimant from the National Coal Board in lieu of concessionary coal has to be taken into account in full as an occupational pension under regulation 11(2)(d) of the Supplementary Benefit (Resources) Regulations 1980 in assessing the claimant's resources for the purposes of supplementary allowance;

(ii) the said payment cannot be disregarded under regulation 11(4)(f) of the said regulations because that regulation applies only where a benefit is received in kind by the claimant;

(iii) regulation 11(5) of the said regulations does not operate to limit the extent to which the said payment has to be taken into account;

(iv) the determination by the Supplementary Benefit Officer issued on 18 February 1981 is confirmed.

2. This is an appeal, brought with my leave, by the claimant against the above mentioned decision of the Barnsley Supplementary Benefit Appeal Tribunal which confirmed the above-mentioned determination by the Supplementary Benefit Officer.

3. The claimant is a widow whose late husband was employed by the National Coal Board. Because of his employment she would at the relevant time have received an allowance of fuel in kind had her state of health been such as to make it possible for her to handle such fuel. However, because of the state of her health she received a cash allowance of £4.90 per week in lieu of the fuel.

4. The benefit officer awarded supplementary pension at the rate of £5.71 per week from the prescribed pay day in the week commencing 23 February 1981. He decided that the cash payment of £4.90 per week was an "occupational pension" for the purposes of regulation 11(2) of the Supplementary Benefit (Resources) Regulations 1980 and therefore had to be treated as income and taken into account in full as an income resource. In making his assessment he also made an adjustment of £4.50 per week by way of recovery of previous overpayments but that adjustment is not the subject of the present appeal.

5. The claimant appealed to the tribunal on the ground that the whole of the income of £4.90 per week had been taken into account whereas £4.00 of that amount should have been disregarded in accordance with regulation 11(5)(d) of the above-mentioned regulations. In his statement to the tribunal the benefit officer gave the reason mentioned in paragraph 4 above for his decision to take account of the sum of £4.90 per week and also referred to regulation 11(4) of the regulations as relevant to the case although he did not rely upon it as a reason for his decision.

6. Before I proceed to consider the tribunal's decision it will be convenient to set out the relevant parts of regulation 11 mentioned above. It provides as follows:-

- "11.--(1)
-
- (2) There shall be treated as income and taken into account in full -
- (a)
-
- (d) any occupational pension;
-
- (3)
- (4) The following income resources shall be disregarded:-
- (a)
-
-
- (f) the value of any benefit in kind in the form of a concession;
-
-

- (5) There shall be taken into account -
 - (a)
 - (b)
 - (c)
 - (d) any other income not mentioned in the preceding paragraphs,

only to the extent that the aggregate of any income to which the preceding sub-paragraphs apply exceeds the sum of £4.

- (6)
 "

Regulation 2(1) of the said regulations provides that:-

"Occupational pension scheme" means an occupational pension scheme within the meaning of the Social Security Pensions Act 1975; and "occupational pension" shall be construed accordingly, except that any reference to an occupational pension shall not include a reference to any element of that pension payable by way of compensation for injury, disease, disablement or death suffered by a person by reason of the service or employment on which he was engaged;"

Section 66(1) of the Social Security Pensions Act 1975 provides as follows:-

"66.-(1) In this Act -

.....

"Occupational pension scheme" means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of earners with qualifying service in an employment of any such description or category;"

7. The tribunal recorded their findings on questions of fact material to their decision as follows:-

"The Appellant receives a cash payment from the National Coal Board of £4.90 per week in lieu of concessionary coal. It was stated to the Tribunal that the value of any benefit in kind in the form of a concession shall be disregarded (Regulation 11(1)(4)(f) [obviously meaning Regulation 11(4)(f)] of the Resources Regulations and that Regulation 11(2)(d) of the S.B. (Resources) Regulations provided that any occupational pension shall be treated as income".

Then, after giving their decision upholding the benefit officer's decision they recorded their reasons as follows:-

"It appeared to the tribunal that the cash payment of £4.90 per week made to the Appellant by the National Coal Board has to be treated as income in accordance with Regulation 11(1)(d) [obviously meaning Regulation 11(2)(d)] of the (Resources) Regulations of the S.B. Act 1980".

8. The claimant appeals on the grounds that the facts found were such that no tribunal acting judicially and properly instructed as to the relevant law would have come to the determination in question and that inadequate reasons were given for the decision. In support of the first ground it is submitted that regulation 11(4)(f) should be literally construed and that £4.90 is the value of a benefit in kind in the form of a concession and should be disregarded as an income resource and in effect that it cannot be right that the claimant, who received a payment instead of the benefit in kind because of her ill-health, should have the payment taken into account although the benefit in kind would have been ignored if she had been in better health and had received it. It is also submitted that the payment made to the claimant should not have been regarded as an occupational pension and that the tribunal erred in failing to deal with the claimant's contention that regulation 11(5)(d) should have been applied. In support of the second ground it is submitted that it is not clear from the decision why the tribunal discounted all the evidence put forward by the claimant's representative and that the claimant had, therefore, no way of knowing why her appeal failed. It is also submitted that the meaning of the words "in kind" should be interpreted so as to include a payment such as that received by the claimant which varies with the value of a bag of Sunbrite fuel.

9. The benefit officer supports the appeal. He submits that the tribunal failed to record its reasons for finding that:-

- (i) the National Coal Board payment is an occupational pension which is to be taken fully into account under regulation 11(2)(d);
- (ii) the payment is not a benefit in kind which should be disregarded under regulation 11(4)(f);

and that the tribunal failed to deal with regulation 11(5)(d) at all, even though it was the point of the appeal by the claimant. He goes on to submit that on the basis of the facts found, no tribunal acting judicially and properly instructed as to the relevant law could have reached a determination on the claimant's appeal.

10. I agree that the tribunal's decision was erroneous in law. However I do not agree with all of the arguments to that effect advanced by the claimant and the benefit officer.

11. I do not consider that the tribunal failed to give adequate reasons for its conclusion that the payment received by the claimant should be regarded as an occupational pension for the purposes of regulation 11(2)(d) or that that conclusion was wrong in law. There was no dispute as to the nature of the scheme under which the payment came to be made to the claimant and the relevant parts of the documents in which the scheme was comprised were in evidence. It seems to me to be clear from the record of the tribunal hearing, including the Chairman's note of evidence, that the tribunal applied the definition of "occupational pension" to the facts as presented to them and concluded that the facts fitted despite the arguments put forward on behalf of the claimant. There was no need for them to give detailed findings on all the elements of the definition or expressly to refute each and every argument addressed to them. Moreover, I consider that the tribunal's view that the payment to the claimant constituted an occupational pension as defined for the purposes of regulation 11(2)(d) was correct. I would agree that the payment would not be likely to be described as a pension in ordinary speech but the definition of "occupational pension scheme" quoted in paragraph 6 above, from which the meaning of "occupational pension" is to be derived, is in very wide terms and refers to "benefits in the form of pensions or otherwise". Also, the definition refers to "any scheme or arrangement which has, or is capable of having effect so as to provide benefits" (my underlining) and thus covers cases of benefits which may be withdrawn. I must, therefore, reject the argument that the payment to the claimant could not be a pension because it was a concession which could be withdrawn whereas a pension could not be withdrawn.

12. As regards regulation 11(4)(f), the tribunal recorded a finding that the claimant received a payment of £4.90 per week in lieu of concessionary coal. The benefit officer submits that the tribunal failed to record its reasons for finding that the payment should be disregarded but my criticism is that the tribunal failed to express a clear decision at all as to whether the payment should be disregarded. I think it might well be reasonable to assume that the tribunal accepted the statement made to it that the payment should be disregarded but the failure to state that conclusion was an error.

13. The tribunal decision was clearly erroneous in point of law in that it did not refer at all to the question of the applicability of regulation 11(5)(d) which was raised expressly by the claimant.

14. It follows that I must set the tribunal's decision aside. Rule 10(8)(a)(i) of the Supplementary Benefit and Family Supplements

(Appeals) Rules 1980, as amended with effect from 15 February 1982, provides:-

"On an appeal from a decision of a tribunal the Commissioner may -

- (a) hold that the decision is erroneous in point of law and -
 - (i) if he is satisfied that it is expedient in the circumstances, give the decision the tribunal should have given; or
 - (ii) refer the case to another tribunal with directions for its determination.

or

- (b)

In the present case the tribunal made all the findings of fact necessary for the determination of the case. I am, therefore, in a position to give the decision that the tribunal should have given and I am satisfied that it is expedient in the circumstances to do so.

15. I have already indicated that the circumstances in which the payment came to be made to the claimant were such that the payment was an "occupational pension" for the purposes of regulation 11(2)(d) and therefore had to be taken into account. I have taken note of the letter dated 6 May 1981 from the National Union of Mineworkers expressing the opinion that the payment was not in any sense of the word an occupational pension but I am not persuaded by the reason advanced in support of that opinion.

16. On the basis of tribunal's finding that the cash payment received by the claimant was in lieu of concessionary coal, my conclusion is that the payment cannot be disregarded under regulation 11(4)(f). In my view that regulation applies only where a benefit is actually received in kind by a claimant. The fact that the regulation refers to the "value" of the benefit in kind does not justify extending the application of the regulation to benefits which are in the particular case received in the form of "cash in lieu" although usually received in kind. I would agree that the reference to value adds nothing to the meaning of the regulation because there is no need to evaluate a benefit which is to be disregarded but I consider that the unnecessary reference arose naturally from the fact that if the benefit in kind were to be taken into account as an income resource it would first have to be evaluated. I note that "value" is used in the same way in regulation 10(2)(a) where "the value of one daily meal" is to be disregarded.

17. The effect of regulation 11(5) is that income of certain kinds is to be taken into account only to a limited extent. It has no effect in relation to income of any kind to which paragraph(2) to (4) of the regulation applies. As I have decided that the payment received by the claimant was of the kind referred to in paragraph (2)(d) it follows that regulation 11(5) does not apply and the payment must be taken into account in full.

18. It follows that the assessment made by the benefit officer rightly took account of the payment of £4.90 per week received by the claimant.

19. For the foregoing reasons my decision is as set forth in paragraph 1 above. Although the appeal is allowed my decision is to the claimant's disadvantage.

(Signed) J N B Penny
Commissioner

Date: 15 July 1982

Commissioner's File: C.S.B. 449/1981
C SBO File: SBO 536/81