CSB 451/1983

APPENDIX 7

JBM/BC

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the Birkenhead Supplementary Benefit Appeal Tribunal dated 2 February 1983 is erroneous in point of law. Accordingly I set it aside and remit the case for hearing by a differently constituted appeal tribunal; rule 10(8) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 as amended by rule 6(2) of S.I. 1982 No. 40.

2. This is an appeal by the claimant with the leave of the Commissioner against the unanimous decision of the appeal tribunal confirming the decision of the benefit officer issued on or about 10 August 1982 "the appellant deemed to be fit to register for employment up to and including 8.6.82."

3. The facts and history of the matter are dealt with in paragraphs 1 and 2 of the submission dated 14 July 1983 of the benefit officer now concerned. I do not propose to set these matters out afresh here. The claimant requested an oral hearing. Accordingly on 7 February 1984 I held an oral hearing. The claimant was represented by Mr Nicholas Warren, Solicitor, of Birkenhead Resource Unit. The benefit officer was represented by Mrs G M V Leslie. To both of them I am indebted. The claimant was not present.

4. The relevant statutory provisions are referred to in paragraph 3 of the submission dated 14 July 1983 referred to above. Nothing is to be gained by my setting out those references afresh here.

5. I set out in this paragraph of my decision the submissions made at the hearing by Mr Warren. Mr Warren submitted that this was a question of registration for work. As to the background, the claimant had been unemployed for some years and in receipt of supplementary benefit as an unemployed person. He had been a person who was not well. Since these events the claimant had been in receipt of long term sickness notes and was now in receipt of invalidity benefit. He had originally taken no steps to get into "the sickness channel" of benefit. He had stayed on supplementary benefit on the basis of unemployment. After receiving advice he requested the benefit officer to review his benefit and in

particular that his allowance should be subject to the condition of registration for work. Section 5 of the Supplementary Benefit Act 1976 introduces into the scheme the condition of registration for work. This provision has subsequently been amended but not in respect of the present claim. Section 5 is the crucial section of the 1976 Act. Unless the claimant is a prescribed case then receipt of supplementary benefit is subject to the condition that he is available for employment. Mr Warren referred me to regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 and in particular (c)(ii) of that regulation. When the claimant asked for a review, the benefit officer's response was to lift the condition of registration of employment but "lifted it only more or less on the date of the request." It was the claimant's contention that the condition should not have applied to him for some years. The benefit officer in lifting the condition from the date of request treated the grounds of review as a change of circumstances whereas the true grounds of review were that the previous decision had been based on a mistake as to a material fact. Mr Warren referred to the "52 week bar" contained in regulation 4(2) of the Supplementary Benefit (Determination of Questions) Regulations 1980. There is no immediate financial effect attached to the lifting of the condition of registration - the financial effect came 12 months after the claimant has had the condition lifted - then he becomes eligible for long-term rates. The effect of regulation 4(2) is to allow the claimant to go back 2 years in terms of the question of condition to work - that would still only lead to an increase of benefit for 52 weeks - the bar is against increase. The tribunal's duty, in Mr Warren's submission at the hearing, was to look at whether the past decision had been based on mistake as to some material fact or had been given in ignorance of a material fact and if so satisfied to weigh the relevant evidence and to decide on the balance of probabilities whether to revise. The tribunal had before them a simple question of fact - whether the claimant was incapable of work for the past 2 years. Mr Warren referred to the record of the tribunal's decision, in particular the note of evidence, and said that it was now common ground that the tribunal had a note from the claimant's general practitioner which note is at page 21 of the casepapers and is dated 26 January 1983. However there is no record in the evidence of that note. Mr Warren referred to the tribunal's findings of fact in particular the fourth and fifth findings and said there was no mention of the certificate in the note of evidence - it is an incomplete note. Mr Warren referred to the sixth finding of fact. In reference to box 3 of the record of the appeal tribunal, Mr Warren referred to paragraph 18 of the claimant's grounds for leave to appeal to the Commissioner dated 16 March 1983. He criticised the appeal tribunal for its use of the words "is deemed" in their decision. (I pause to observe that the use "is deemed" in the tribunal's decision is mirrored by the use of their wording "should be regarded" in their Reasons for Decision). As to paragraph 18(b) of the grounds for application for leave to appeal Mr Warren stated that the claimant's medical practitioner's report now contained as document 21 in the casepapers nowhere appears or is referred to on the face of the tribunal's record. As to paragraph 18(c) the claimant is left guessing.

6. I turn in this paragraph of my decision to the submission made at the hearing by Mrs Leslie. Mrs Leslie did not support the appeal. She submitted that it was a question of fact for the tribunal to determine whether in fact the claimant's physical condition was such that he was incapable of work and that his condition was such that he was not required to register and be available for work. Mrs Leslie referred to section 5 of the Supplementary Benefits Act 1976 and to regulation 6(c) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. Mrs Leslie said that the requirement to register has now been dropped but applied at the relevant time. She conceded that the doctor's note dated 26 January 1983 had been produced at the tribunal hearing. She submitted that the evidence in the doctor's note was vague and that it does not say just when the claimant was sick and when he worked on occasions against medical advice. She stated that it was unspecific. Many people worked who could be described as unwell but not incapable of work while working. The claimant went on registering for work and declaring himself capable of work. Mrs Leslie referred to paragraph 5 of the further submission dated 1 September 1983 of the benefit officer now concerned and in particular to paragraph 5 of the decision of the Commissioner R(S)4/60. It was clear evidence on which the tribunal could have come to the decision they did. Mrs Leslie referred to the finding of fact of the tribunal that, the claimant went on registering until 9 June 1982. As to the tribunal's reasons, the findings of fact justified the tribunal's decision that the claimant should no longer be required to register for work as a condition for receiving supplementary allowance. As to the question of review the benefit officer did not accept on the evidence that there had been a mistake or ignorance of material fact - what the tribunal thought was that there should be no review - on the facts they were entitled to reach the decision they did. As to the time limit the bar is on the revision which increases the amount of supplementary benefit - the 2 years is immaterial except that is what the claimant is claiming. The effect of the review would be to increase benefit in due course. Mrs Leslie submitted that the decision was one to which a reasonable tribunal could have come. The question of review would not arise.

7. In this paragraph I set out the submissions of Mr Warren in reply. Mr Warren conceded that the decision of the tribunal is one to which a reasonable tribunal could have come. That he submitted is irrelevant - the issue is did they properly come to their decision. Mr Warren submitted that he did not have to establish that the claimant's case before the tribunal was in such apple-pie order that a decision against him would have been perverse, "I cannot say he had to win that appeal - he was entitled to a fair trial as to the issue of fact and he did not get it. The tribunal blinkered themselves by their "deeming" provision and took not a blind bit of notice of the doctor's note - in my view the doctor's note was a relevant matter for them to take into account - it is vague - it is unspecific - but still relevant for them to take into account in deciding the question of fact. I only have to establish the tribunal went about it the wrong way and there should be a reference back to enable the tribunal to consider the matter properly".

8. I refer in this paragraph to Mrs Leslie's final submissions. Mrs Leslie submitted that the tribunal did make findings of fact - they did not specify the medical certificate but she did not think that was fatal to their finding of fact - they were justified in making findings of fact which was a question for them. Unless it is conclusively shown that the tribunal had an utter disregard for the evidence before them and there is no reason the tribunal could have come to that decision the claimant has not established his case.

9. I accept the submissions of Mr Warren made at the hearing. Though it was conceded in the benefit officer's further submission dated 1 September 1983 at paragraph 4 that the doctor's note dated 26 January 1983 had been produced at the tribunal hearing, there is no reference whatsoever to it in the tribunal's record. That was evidence before the tribunal which they either did not take into account or if they did so have failed to make findings of fact or give reasons relating thereto. Their decision was accordingly erroneous. I do not consider it expedient for me to give the decision the tribunal should have given - that involves my considering the doctor's note of 26 January 1983, which being a matter of fact is for an appeal tribunal, not for the Commissioner.

10. In accordance with my jurisdiction under rule 10(8) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 as amended by rule 6(2) of S.I. 1982 No 40 my decision is as set out in paragraph 1 of this decision and I direct that the tribunal in rehearing the matter shall pay particular attention to the matters referred to in paragraphs 5 and 7 of this decision. In particular the chairman should expressly in his note of evidence refer to the medical certificate and the tribunal should make findings of fact in regard thereto on which to base their reasoned decision. I would add that the issue of fact is entirely at large before the appeal tribunal to whom I remit this case. I would further add that it is essential in all cases that a copy of all documents which were before the tribunal should be expressly referred to in the record and copies of all such documents should be in the casepapers with the record and not as here included only as the result of later submissions made by the claimant.

11. Accordingly the claimant's appeal is allowed.

Signed J B Morcom
Commissioner

Date: 20 March 1984

Commissioner's file: CSB/451/1983
C SBO File: 460/83
Region: North Western