

*Whole cost diet /
need for fridge.*



JBM/LS

Commissioner's File: CSB/507/1985

C A O File: AO 2498/85

Region: North Eastern

SUPPLEMENTARY BENEFITS ACT 1976

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

Name: Edward Devine

Social Security Appeal Tribunal: Sheffield

Case No: 10/27-01

[ORAL HEARING]

1. My decision is that the decision of the Sheffield social security appeal tribunal dated 15 February 1985 is erroneous in point of law. Accordingly I set it aside and remit the case for hearing to a differently constituted appeal tribunal.
2. This is an appeal to the Commissioner with the leave of the Commissioner from the decision of the appeal tribunal confirming the decision of the adjudication officer issued on 30 November 1984 "The claimant is not entitled to a single payment for a refrigerator because it is not considered to be essential within the meaning of Regulation 9 of the Supplementary Benefit (Single Payments) Regulations". The claimant requested an oral hearing to which request the Commissioner acceded. Accordingly on 8 January 1986 I held an oral hearing. The claimant was not present. The claimant was represented by Dr. P Martinez Senior Welfare Rights Officer, Sheffield. The adjudication officer was represented by Mrs A Stockton of the Solicitor's Office, Department of Health and Social Security. I am indebted to both of them.
3. The findings of fact of the appeal tribunal on the face of their record dated 15 February are as follows:-

"Appellant in receipt of Supplementary Benefit continuously since 1981. In the Summer 1983 the Consultant advised appellant that his daughter Marie (D of B 2481) required a High Protein Diet of Fish, Eggs, Yoghurt, Cheese and Meat. Marie has not seen the Consultant since 1983 but has been under the care of her own Dr/No evidence of Weight of Marie/No medical evidence available. Appellant's refrigerator broke down in August 1984. Claimed single payment on 13.11.84".

The tribunal gave their reasons for decision as follows:-

"The appellant fails to satisfy Reg 9(k) (Single Payments) Reg 1981 because a refrigerator is not an essential item by virtue of the fact that the dietary food stuffs for his Daughter Marie do not need to be

kept at refrigerated temperatures.

A single payment under Reg 39 (Single Payments) Regs 1981 is not appropriate as there is no evidence that there exists a likelihood of serious [sic] risk or serious damage to the Health and Safety of any member of the Assessment Unit which may be prevented by making a single payment for the item requested".

I would add that in the typed note of evidence at page 9A of the case papers regulation 9(k) is erroneously referred as "Reg 9(R)" nothing turns on this.

4. The following statutory provisions are relevant:-

Regulation 9 of the Supplementary Benefit (Single Payments) Regulations 1981 (SI. 1981 No. 1528) as amended by SI. 1982 No. 907, SI. 1982 No. 914, SI. 1983 No. 1000, SI. 1983 No. 1240, SI. 1983 No. 1245, SI. 1983 No. 1630, SI. 1984 No. 593 and SI. 1984 No. 938.

Regulation 19 of the Social Security (Adjudication Regulations 1984, (SI. 1984 No. 451 as amended SI. 1984 No. 613). Regulation 9(k), of the Supplementary Benefit (Single Payments) Regulations 1981 provides as follows:-

"In this Part of these regulations "essential furniture and household equipment" means the following items:-

"..

(k) a refrigerator, but only where a member of the assessment unit requires, for medical reasons a special diet for which it is necessary to keep foodstuffs at refrigerated temperatures;"

5. Dr. Martinez relied on his written submissions received at the Office of the Commissioner on 3 January 1986 and contained in the case papers. The main burden of his submission was that I should not follow the Decision of the Commissioner R(SB)16/83 in the light of the wording of regulation 9(k)). Mrs Stockton supported the adjudication officer's written submissions dated 28 June 1985 and relied on the decision of the Commissioner R(SB)16/83 and submitted that one must not look at regulation 9(k) of the Single Payments Regulations in isolation but in the general context of those regulations and of the Supplementary Benefits Act 1976 as amended. At the hearing the argument ranged widely as to the construction of regulation 9(k).

6. In my judgment the appeal tribunal erred in law in that they failed to construe regulation 9(k) properly and to make adequate findings of fact. The question is one of construction of regulation 9(k) of the Supplementary Benefit (Single Payments) Regulations 1981 in of course the general context of those regulations and of the 1976 Act. It is clear from regulation 9(k) that the availability of refrigerators is to be more restricted than that for example of such items as 3-piece suites. Once there has been a medically prescribed diet (and that is a question of fact for the tribunal to make findings on evidence before them) the question is what is a special diet. In my judgment a special diet must be a positive diet and not an excluding diet. In a positive

diet the medical advice is directed to the consumption of particularised foodstuffs and to the amounts thereof. An excluding diet which is in my judgment not a special diet is one where the medical advice is not to consume certain particularised foodstuffs. Examples of special diets are high protein or high fibre diets. I turn therefore to the concluding words of regulation 9(k). The special diet must consist of foodstuffs requiring to be kept at refrigerated temperatures. In view of the paramount prerequisite of establishing need under regulation 3(2)(a), the assessment unit will not qualify for a refrigerator under regulation 9(k) if it has a suitable alternative mode of keeping foodstuffs at refrigerated temperatures. However if there is no such suitable alternative then the assessment unit in my judgment will need a refrigerator where foodstuffs in the medically prescribed special diet require to be kept at refrigerated temperatures. There is nothing in regulation 9(k) which requires me to consider whether the assessment unit should shop on a daily basis and in my view questions of shopping on a daily or other basis are not relevant considerations here. If the special diet consists, say, of inter alia fresh fish and butter the tribunal could take judicial notice of the fact that such items if not kept at refrigerated temperatures for a period of a few days or so will not be fit for consumption. Judicial notice of such matters would not of course preclude the consideration of evidence before the tribunal in respect of particular foodstuffs. However, on a commonsense basis where shopping is done for the assessment unit on a weekly basis such items as fresh fish and butter could not be expected to be fit for consumption 6 days thereafter unless kept at refrigerated temperatures.

I turn now to the decision of the Commissioner in R(SB)16/83 in particular at paragraph 19 thereof. With respect to the learned Commissioner I do not accept his apparent suggestion that the regulation requires that there must be evidence "of there being any item in the claimant's diet which would not have been there had she been in perfect health", since the diet might have prescribed in different quantities or proportions items which would have been present in any event. Neither Dr. Martinez nor Mrs Stockton were able in argument before me to suggest a foodstuff relevant in the present case which came within the above wording and which would require refrigeration. Stated shortly, in my judgment, if a member of an assessment unit has a medically prescribed special diet (within the meaning referred to above in paragraph 6) where foodstuffs need to be kept at refrigerated temperatures (and there is no other suitable alternative mode of keeping the items at refrigerated temperatures) then the assessment unit is within the provisions of regulation 9(k).

7. In accordance with my jurisdiction set out in regulation 27 of the Social Security (Adjudication) Regulations 1984 my decision is as set out in paragraph 1 of this decision. I direct that the tribunal to whom I remit this case in rehearing the case shall pay particular attention to all the aspects to which I have referred above. Further they shall consider carefully the exact wording of the relevant regulations and make and record their findings on all the material facts and give reasons for their decision.

8. Accordingly the claimant's appeal is allowed.

(Signed): J B Morcom
Commissioner

Date: 31 January 1986