

CS B 517/1982

IEJ/FB

Diet - 'Build-up'

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Peter Alfred David Eames

Supplementary Benefit Appeal Tribunal: King's Lynn

Case No: 6/34 and 35

1. (1) This is a claimant's appeal against the unanimous decision dated 16 March 1982 of a supplementary benefit appeal tribunal ("the tribunal") brought by my leave. I should for clarity mention at this point that the decision of the tribunal was given in respect of two distinct claims by the claimant, one for a single payment in respect of certain household items and the other in respect of the amount of supplementary allowance which had been awarded to him, and that leave to appeal to the Commissioner has been granted only in respect of the tribunal's decision upon the latter of those two claims, as no tenable contention as to error of law on the part of the tribunal was raised by the claimant in regard to the former. The tribunal's decision now in issue upholds a benefit officer's decision dated 9 November 1981 that:-

"Supplementary allowance of £19.24 determined and paid weekly from the prescribed pay day (Thursday) in week commencing 26 October 1981 increasing to £23.24 from the prescribed pay day in week commencing 23 November 1981 and then changing to £20.48 from the prescribed pay day in week commencing 7 December 1981."

- (2) The changes of amount so indicated are not, with a single exception, matters in issue upon the present appeal - they reflect changes in amounts involved in the computation of resources and requirements as to which there is no dispute. The single exception is as to the element in the award of benefit attributable as an "additional requirement" in respect of special diet, which was throughout taken into computation in the amount (initially £1.20 and later £1.30) from time to time applicable under head (b) of paragraph 13 of Schedule 3 to the Supplementary Benefits (Requirements) Regulations 1980 as amended and in force at the material times ("Paragraph 13").

2. The substantial contention raised by the claimant upon his appeal is that in the circumstances of the case the several assessments should have taken into computation as an "additional requirement" in respect of special diet the current amounts prescribed under a different sub-paragraph of paragraph 13, namely sub-paragraph (e) - which, if the contention prevails, would properly be reflected by a significantly higher award of supplementary allowance throughout.

3. (1) The claimant has requested an oral hearing of his appeal but I am refusing that request as I am satisfied that the appeal can properly be determined without one.
- (2) The appeal formally succeeds. I set aside the tribunal's decision as given in error of law in the respect later below indicated and I direct that the claimant's appeal from the benefit officer's decision be re-heard by a differently constituted tribunal. As I consider that a proper determination of such appeal will involve the exploration of factual matters not at present in evidence I do not consider it expedient to give myself the decision which the tribunal should have given. It follows that whether or not the appeal leads to any practical advantage to the claimant remains to be seen.

4. The material circumstances of the case are not in dispute and are as follows:-

- (1) At all material times the assessment unit comprised the claimant, then aged 53 and in receipt of industrial injuries disablement benefit and special hardship allowance, his wife age 29, and their daughter age 2; but the claimant's wife was again pregnant.
- (2) The claimant in support of his claim for supplementary allowance in general, and the inclusion of an additional requirement in respect of special diet in particular, had sent to the local DHSS office prior to the benefit officer's decision a letter from the consultant obstetrician under whose care the claimant's wife was in connection with her pregnancy and the confinement which that indicates to have been expected in February 1982. That letter, expressed in reference to the claimant's wife, materially indicated as follows:-

"She is underweight and has been medically advised to supplement her diet with "BUILD UP". As the amount required is in excess of £2.20 per week (the cost would be £3.46 per week), I would be grateful if you would kindly arrange a subsidy as this family is already managing on a very low income. Thank you for your help.

Yours faithfully

M. B. K. M.R.C.O.G."

5. Paragraph 13 is one of a number of heads operative in conjunction with regulation 13 of the Requirements Regulations to provide for the award of amounts in respect of "additional requirements" in the assessment by which the amount (if any) of supplementary allowance payable is determined. It appears in Part II of Schedule 3, headed "Items other than Heating" and is itself headed "Diet". As in force at the inception of the claim periods in issue paragraph 13 provided as follows:-

Items and cases applicable (1)	Weekly amount (2)
<p>"Diet"</p> <p>13. Person who needs a special diet because he -</p> <p style="padding-left: 40px;">(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 analagous to that required for the other illnesses specified in this sub-paragraph;</p> <p style="padding-left: 40px;">(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;</p> <p style="padding-left: 40px;">(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;</p>	<p>13. (a) £2.80;</p> <p style="padding-left: 100px;">(b) £1.20;</p> <p style="padding-left: 100px;">(c) £1.20;</p>

Items and cases applicable (1)	Weekly amount (2)
<p>(d) suffers from renal failure for which he is treated by dialysis; or</p> <p>(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).</p>	<p>(d) £8.00;</p> <p>(e) 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 or, in Scotland, the National Health Service (Scotland) Act 1978."</p>

I should here interpose that the amounts under heads (a) to (d) in column 2 were with effect from 23 November 1981 altered respectively to £3.05; £1.30 and £8.70.

6. (1) The primary contention of the claimant before the tribunal was that the award of supplementary allowance should be such as to reflect the full cost of the "BUILD UP" as to which his wife had received medical recommendation (and which he put at £3.46½ rather than the £3.46 referred to in the doctor's letter above cited). But his written submissions also embraced a claim under sub-paragraph (b) if his claim in relation to sub-paragraph (e) did not succeed.
- (2) The tribunal have indicated in the record of their decision that they considered all the sub-paragraphs (a) to (e) and that "an additional requirement under sub-paragraph (b) was correct at the rate of £1.20 per week increasing to £1.30 per week from 23 November 1981". They have, however, wholly failed to embody in the record of their decision any material from which the claimant can ascertain upon what grounds his contention as to the applicability of sub-paragraph (e) has been rejected, and that omission in my judgment constitutes an error of law such that their decision must be set aside, that error being failure to comply sufficiently with the requirements of Rule 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 ("the Appeals Rules") as to expressing their findings of fact and reasons for decision.

7. I will shortly turn to matters material to the re-hearing; but before so doing I would record my disquiet at the manner in which the case was put by the benefit officer then concerned before the tribunal. The claimant had, as I have indicated, submitted a supporting medical recommendation by a consultant obstetrician as to the claimant's wife requiring an intake of "BUILD UP". All that the tribunal had before them to support the benefit officer's decision on its merits (as distinct from matters of law or fact otherwise bearing upon the propriety or otherwise of an award in reference to the provision of it for her) was the intimation in the "reasons for the Supplementary Benefit Officer's decision":-

"The Supplementary Benefit Officer decided that as" /the claimant's wife/ "was not suffering from diabetes or an analogous illness, nor from renal failure, the higher rate dietary additions were inappropriate. Although the weekly cost of the diet is considerably more than the prescribed amount for diabetes and similar illness, an addition based on the weekly cost was also considered inappropriate because" /her/ "diet involves the purchase of a proprietary food, 'BUILD UP'. The Supplementary Benefit Officer therefore decided that an extra £1.20 weekly should be allowed as" /she/ "needs extra nourishment during her pregnancy." (Emphasis here supplied by me)
"The Supplementary Benefit Officer having sought medical advice has been advised that a diet is not needed but rather a supplement and this is covered by the lower standard dietary addition of £1.20".

8. It is of course for a benefit officer to give his decision upon a claim in the light of such (if any) medical evidence as he thinks fit to obtain; and it is no less open to a tribunal than to a Commissioner hearing an appeal to evaluate conflicting evidence. But here the claimant had adduced expert medical opinion - and it is a cardinal principle of natural justice, in my view, that a claimant so doing shall have "chapter and verse" as to any expert evidence relied upon as displacing such, in order that he may if so advised bring forward additional expert evidence himself. To a trained legal mind the passage that I have cited and emphasised presents a plethora of unresolved aspects - was the DHSS medical source consulted shown the obstetric consultant's letter? Did he or she really opine on any clinical needs of the claimant without having examined her or, so far as the evidence goes, seen any records or case notes? Was he or she opining on the questions of law arising under paragraph 13 as well as or instead of upon medical matters? - It is in my view unsatisfactory to confront a supplementary benefit appeal tribunal with what appears to be an authoritative pronouncement in such tenor emanating from the DHSS instead of giving "chapter and verse" as to who was asked what, and upon what information, and with what replies in terms.

9. I am required by the Appeals Rules to give appropriate directions to the tribunal which will be concerned with the re-hearing of the appeal. I find this no easy task in the present case. It will, of course, be for them to consider successively (and for the purposes of construction, collectively) the several sub-paragraphs of paragraph 13. As a starting point I will indicate that should they decide that sub-paragraph (b) is in the circumstances satisfied they should not on that account refrain from taking into consideration sub-paragraph (e)

also, unless by the time they give their decision what I am next about to indicate has been displaced by authority.

10. In my judgment such tribunal should proceed on the footing that a claimant may be eligible for the higher rate applicable under sub-paragraph (e) notwithstanding that the postulated requirements of sub-paragraph (b) are also satisfied - though any additional requirement established under sub-paragraph (e) would be substitutional for one under sub-paragraph (b), not cumulative.

11. A proper decision by the tribunal must necessarily embrace a correct appraisal of the effect of the wording of paragraph 13 sub-paragraph (e), and I consider it incumbent upon me to endeavour to give them some guidance in this respect also. It is at this point that I find particular difficulty - for, in truth, I am by no means confident that I have reached correct conclusions as to this myself, and have formed the view that it is a provision eminently warranting reappraisal with a view to legislative amendment.

12. (1) Little difficulty appears to me to arise upon the text in column (1) of paragraph 13. It is apparent from the introductory wording of paragraph 13 that the reference in sub-paragraph (e) to "a diet which involves extra cost" contemplates the excess of cost of a "special" diet over that of a "normal" diet; and I would add in that context only that whilst in many usages the basic concept of "diet" is an intake of food and or drink which is restricted (in character and/or quantity) by reference to the norm, the term "diet" is in my view in context as well applicable where the difference consists in some addition to such intake in excess of what is the normal (as eg, in "a high protein diet").

(2) Further, what may entail a cost "substantially" in excess of the cost of a normal diet is in my judgment clearly a matter for the tribunal to decide in accordance with the ordinary use of English language and the exercise of their judgment.

13. (1) I will next assume for the purpose of exposition only that an assessment unit includes a member who undoubtedly suffers from a condition, other than one specified in sub-paragraph (a), for which he has to follow a diet which involves extra cost, and that it is accepted that the extra cost is substantially in excess of the amount specified in sub-paragraph (a) in column (2). The text of column (2) under sub-paragraph (e) has then to be considered - and it is here that the problems to my mind arise.

(2) The applicable weekly amount of the additional requirement is prescribed as "the weekly cost of the diet" subject to exceptions. As originally enacted the word "extra" appeared after the word "weekly" and before the word "cost"; but this was by amendment omitted before the Schedule in which paragraph 13 appears came into force.

- (3) If in a particular case the material person's diet is required to include goat's milk but exclude cow's milk, but the goat's milk is (as I believe is generally so) the more expensive, does the formulation as it now stands take the weekly cost of the goat's milk or the weekly excess of cost of the goat's milk over that of cow's milk? Since we are dealing with "additional requirements" one would at first sight expect only the excess of cost to be taken. So also one might expect as regards the "high protein diet" that what would be taken would be the incremental cost only of the additional protein over the cost of a "normal" diet. But even without consideration of the amendment to which I have referred it appears to me that "the cost of the diet" must in a case of substitution such as I have postulated, no less than in the case where the extra cost is incurred upon some item additional to a normal diet, be the entire cost of the special item. I come next to the "exceptions".
- (4) What are "proprietary foods"? It seems to me that in context the distinction here sought to be made must be the same as that between "proprietary" and "non-proprietary" medicines.
- (5) As to this, and as a starting point, I accept and adopt with respect the formulation by Adams J in Woolworths (New Zealand) Limited v Wynne [1951] N.Z.L.R. 923 at 943:
- " ' proprietary medicine' is a medicine in respect of which the proprietor has a right to prevent others from making or selling it at all, or to prevent them from making or selling it under the name he uses, or in the particular form in which he makes or sells it."
- (6) So one may distinguish between "aspirin B.P." and "branded aspirin". But whilst there are some foods still currently obtainable in the UK in "non-proprietary" form (e.g. many fresh meats, fish and fresh vegetables) the vast majority of foodstuffs procurable in Great Britain nowadays are, as a matter of common knowledge, marketed in "proprietary" form. Thus far, at least, the logic and purpose of the distinction which I find clearly made in the text of paragraph 13(e) is not apparent to me.

- (7) Next the problem arises as to whether, in the proper construction of the exceptions, the dichotomy is between "proprietary foods" as one category and "substances available under the National Health Service Act ..." as a second category, or whether the categorisation is of both proprietary foods and substances so far as respectively available under the National Health Service Act in point.
- (8) The puzzle is made no easier to resolve by awareness that food is itself a "substance".
- (9) "BUILD-UP" is, it is not in dispute, a "proprietary" substance (I believe, though I do not decide, that it is aptly described also as a "proprietary food"). In response to an enquiry I initiated in the present context I have been officially informed that "BUILD-UP" is not available under the National Health Service Act.
- (10) Section 1(3) of the Supplementary Benefit Act 1976 provides "the requirements of any person to be taken into account for the purposes of this Act do not include any medical, surgical, optical, aural or dental requirements; and regulations may provide that the requirements which by virtue of this sub-section are not included in a person's requirements include or exclude prescribed requirements".
- (11) Whilst section 1(3) is not in terms so directed or confined, I am inclined to infer that it is primarily directed to precluding, as a general rule, any payment by way of supplementary benefit in respect of needs which can be met under the National Health Service. But, be that as it may, it is so framed as to enable exceptions to be prescribed - and in fact regulation 11(3) of the Requirements Regulations is such a prescription, and takes out of the ban under section 1(3) - amongst other items - the items to which paragraph 13 relates, so leaving section 1(3) inapplicable to those.

14. The best elucidation I have been able to make in the circumstances is that under column 2 in respect of sub-paragraph (e) the cost of items of special diet is, where the requirements of column 1 are satisfied, to be attributed as an additional requirement except in such cases as the items giving rise to such cost are themselves available under the National Health Service Act, whether such items be "proprietary foods" or other substances. And I direct the tribunal rehearing the appeal to proceed upon that construction of sub-paragraph (e) of paragraph 13 unless it is by the time that their decision is given displaced by authority.

But there must surely be a better form of wording which can be devised to effect the legislative intention - be my own diagnosis of that right or wrong.

15. I should for completeness add that:

- (1) it will be for the tribunal rehearing the claimant's appeal to determine afresh upon the evidence before them as to whether the "BUILD-UP" the cost of which has been claimed is a substance available under the relevant National Health Service Act or a proprietary food so available, should it become material for them to apply column 2 of sub-paragraph (e) of paragraph 13; and
- (2) should they then conclude that the provisions of column 1 of sub-paragraph (e) are satisfied and that "BUILD-UP" is not available under the National Health Service Act in point I further direct that they proceed on the basis of construction of column 2 whereby the full weekly cost of the necessary quantity of "Build-Up" is to be taken, and not merely the excess of that cost over some other cost.

16. For convenience of reference I would add that the directions I am giving for the rehearing are those to be found in paragraphs 9, 10, 12, 14 and 15 above. My own decision is as indicated in paragraph 3(2) above.

Signed: I Edwards-Jones
Commissioner

Date: 8 June 1983

Commissioner's File: C.S.B. 517/1982
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