CSB 533/1981

JGM/SG

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

1. This is an appeal against the decision of the supplementary benefit appeal tribunal dated 2 June 1981 confirming a review decision of the benefit officer which fixed the amount of the claimant's supplementary allowance from 9 March 1981. My decision is that the decision appealed from was erroneous in point of law in so far as it provided for a deduction of 50 pence per week from the allowance made to the claimant for special wear and tear on clothing under paragraph 18 of Part II of Schedule 3 to the Supplementary Benefit (Requirements) Regulations 1980 [S.I. 1980 No. 1299] (the Requirements Regulations). In exercise of the power conferred by regulation 10(8) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980, as amended, I direct that the above deduction be not made.

2. The claimant is a person not capable of managing her affairs who lives as a boarder (within the meaning of the Requirement Regulations) in the house of a person to whom I shall refer as T; and T has been appointed by the Secretary of State for Social Services pursuant to the power now contained in regulation 26 of the Supplementary Benefit (Claims and Payments) Regulations 1981 [S.I. 1981 No. 1525] or some previous similar regulation to exercise on her behalf any rights to which she may be entitled under the Supplementary Benefit Act 1976.

3. The claimant, as a boarder, is entitled to have included in her normal requirements under regulation 9(1)(a) of the Requirements Regulations a weekly amount for board and lodging which is the full weekly amount charged subject to a maximum related to what is a reasonable weekly charge in the relevant area (see regulation 9(2) and 9(4)). It appears that it was T's intention to charge an amount which would be accepted without question as being within this maximum; but she in fact allowed the level of her charge to fall behind rising levels of charges in the area so that in early 1981 she was charging the claimant £21 per week when £39 per week would have been accepted without question as being within the maximum. She increased the charge to £39 per week from 9 March 1981 and asked on behalf of the claimant for a review of her award of a supplementary allowance on this among

other grounds. The award was reviewed and revised to take account of the increased charge with effect from 9 March 1981 as being a relevant change of circumstances; but T appealed on behalf of the claimant asking that it be dated back for up to 52 weeks as appeared perhaps to be allowed by regulation 4(2) of the Supplementary Benefit (Determination of Questions) Regulations 1980 /S.I. 1980 No. 1643/ (the Determination of Questions Regulations). The supplementary benefit appeal tribunal dismissed her appeal so far as it was based on this point and as I read their decision expressly left it to the benefit officer to investigate certain other points raised in the appeal. The claimant appealed to the Commissioner and was at the oral hearing before me represented by Mr R Smith a solicitor with the Child Poverty Action Group and the benefit officer was represented by Miss L Shuker of the solicitor's office of the Department of Health and Social Security.

4. Mr Smith very properly indicated that he was not pursuing the claim to have the award dated back by reference to the claimant's requirements under regulation 9(1)(a). Although regulation 4 of the Determination of Questions Regulations contains no provision analogous to that of regulation 31(4) of the Social Security (Determination of Claims and Questions) Regulations 1975 /S.I. 1975 No. 558/ to the effect that review based on a material (sic) change of circumstances shall not have effect before the date on which the change took place, it is in my judgment clear that it must be the case that without any such provision (there is no such provision in regulation 32 of the last mentioned regulations, which relates to industrial injuries) revision on review based on a relevant change of circumstances must (unless perhaps there is something in the change that has a retrospective effect) be confined to the position subsequent to the change. As in this case the requirements that fell to be assessed were those of the claimant and not of T, the relevant change was the raising of T's charge and not the rise in reasonable local charges that prompted the increase in T's charge, the decision could not be revised on this account for any period before the charge was increased.

5. Mr Smith however contended that the revised award was erroneous in another respect. He argued that the point was made, albeit somewhat obscurely, in the claimant's letter of appeal. I am not sure that it matters whether it was specifically mentioned in that letter because the letter, by clear implication, asks for the review of the existing award, so that there was an obligation to make a correct revised award, and so long as the point was made to the appeal tribunal it was one that they had to decide. The point made by Mr Smith was that the claimant had been treated in the revised assessment as entitled to have an additional requirement of £2.45 in respect of special wear and tear on clothing under paragraph 18 of Part II of Schedule 3 to the Requirements Regulations, but subject to a deduction of 50 pence per week therefrom under regulation 13(5) of those regulations. Mr Smith contended that the deduction was not properly made. Although the record of the proceedings is not entirely clear about the points made I consider that it emerges from it that this point was made and left to the benefit officer to decide. Miss Shuker conceded that the tribunal ought to have dealt with it and not left it

to the benefit officer (although I suppose it might have been done by way of further review) and the decision was therefore erroneous in point of law. I could therefore remit the matter to an appeal tribunal to decide the question. But it is a straight matter of construction of the regulations and I think it best to give the decision myself as I am empowered to do.

6. Regulation 13(5) and (6) read as follows:-

> "(5) Subject to paragraph (6), where a long-term rate for normal requirements is applicable to the claimant whether as a person to whom paragraph 1(a) or 3(a) of the table /in paragraph 2 of Schedule 1 to the Supplementary Benefits Act 1976/ applies or under regulation 7, amounts shall only be applicable to him /or her/ under Part III of Schedule 3, other than paragraphs 8 and 11, to the extent that in aggregate they would, but for this paragraph, exceed 50p.
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> (6) Paragraph (5) shall not apply where an amount is applicable in respect of a dependant under any of paragraphs 9, 10, 13, 16 and 18 of Schedule 3."

(The underlining is mine).

7. Mr Smith contended that the 50 pence deduction from the claimant's requirements under paragraph 18 ought not to have been made. With some rather ill-directed encouragement from me he contended that paragraph (5) was excluded in the claimant's case by paragraph (6). He withdrew the contention promptly when Miss Shuker correctly pointed out that paragraph (6) applies only to dependants and that a claimant can never be a dependant.

8. Mr Smith's main argument was presented to me by reference to the text of regulation 13 in its original form and not by reference to that text as amended (from the inception of the regulation) by paragraph 8 of the Schedule to the Supplementary Benefit (Aggregation, Requirements and Resources) Amendment Regulations 1980 /S.I. 1980 No. 1774/. The effect of the amendment was to interpolate the words underlined in the text above cited. Mr Smith argued that the claimant (who was certainly entitled to the relevant long-term rate) was not so entitled under regulation 7, and he ought to have included in his argument a submission that she was also not so entitled as a person to whom paragraph 1(a) or 3(a) of the table applied. I must deal with the last matter as if this submission had been made and I will take it first.

9. The table referred to is that in paragraph 2 of Schedule 1 to the Supplementary Benefit Act 1976 as amended by the Social Security Act 1980. It specifies in general terms what are the normal requirements of the persons indicated in column 1 of the table, the amounts so specified being set out in column 2. The only classes of persons specified in the table in the Act itself are "relevant person" (ie one member of a married or unmarried couple) and "householders". Whether or not it is possible for a person to be simultaneously a boarder and either a householder or a relevant person there is no

evidence that the claimant was either of these things. But there is power to modify the table by regulations; and regulation 9(1) of the Requirements Regulations provides in relation to boarders for the substitution of different amounts for those in the table. Although it is clear that the effect of this provision is to lay down what are to be the normal requirements of boarders, it is not clear precisely how the table is to be regarded as re-written. I do not think that it can have the effect of making boarders a sub-group of either relevant persons or householders in the table; and I do not consider that a boarder ever becomes a person entitled under paragraph 1(a) (relating to relevant persons over pensionable age) or 3(a) (relating to householders over pensionable age). A fortiori those paragraphs do not apply to the claimant who is not over pensionable age.

10. Mr Smith's submission was that the claimant was not a person to whom the long-term rate was applicable under regulation 7. Regulation 7(1) applies the long-term rate only to persons within paragraph 1(b) of the table (relating to relevant persons not over pensionable age) and 3(b) of the table (relating to householders not over pensionable age) who satisfy the two conditions (a) and (b) there set out. There is no doubt that persons to whom either of paragraph 1(b) and 3(b) applies and who for that reason qualify for the long term rate have the long-term rate applied to them under regulation 7. But for the same reason as regulation 9(1) does not carry boarders who are over pensionable age into paragraphs 1(a) or 3(a) of the table it does not in my judgment carry boarders who are not over pensionable age into paragraphs 1(b) or 3(b). But regulation 7(5) extends the appropriate long-term rate to anyone who satisfies the conditions (a) and (b) above mentioned even if they are not within paragraph 1(b) and or 3(b) of the table so that, apart at any rate from the provisions of regulation 9(8) mentioned below, a boarder who satisfied the conditions (a) and (b) would under regulation 7 have the long-term rate applied to him. The question is whether regulation 9(8) affects this.

11. Regulation 9(1)(b) in effect includes in a boarder's normal requirements an allowance determined under regulation 9(8), and regulation 9(8)(b) fixes a long-term and ordinary rate for a boarder who is not a relevant person. The regulation ends as follows:-

> "..... and in sub-paragraphs (a) and (b) the long-term rate shall be applicable where, but for this regulation, a long-term rate would have been applicable pursuant to paragraph 1(a) or 3(a) of the table or to regulation 7 and otherwise the ordinary rate."

It is clear that but for regulation 9 the long-term rate would have been applicable to the claimant by virtue of regulation 7(5). The effect of regulation 9(8) is that it is applicable not under regulation 7(5) but under regulation 9(8) in circumstances in which it would otherwise have been applicable under regulation 7(5). This means in my judgment that the long-term rate is not applicable under regulation 7 (or for that matter under paragraph 1(a) or 3(a) of the table) and accordingly 50 pence does not fall to be deducted

from the requirement for wear and tear of clothing by virtue of regulation 13(5) and I have given my decision accordingly.

12. Mr Smith made a submission to me about the record of the hearing and the document headed "Chairman's Note of Evidence" which had clearly been prepared by the clerk to the tribunal and signed by the chairman. He made suggestions about justice not having been seen to be done and invited me to give some ruling on the practice, which in my judgment is fairly commonly followed, of allowing at least the record of the decision to be completed by the tribunal clerk. I have allowed the claimant's appeal on the only live point and it is not appropriate that I should use this occasion as one in which to pronounce formally on points that do not really arise for decision, and I shall confine my observations to the following.

13. Miss Shuker drew my attention to the decision on Commissioner's file C.S.S.B. 1/82 which contains the following at paragraph 9:-

> "It was a matter of complaint on behalf of the claimant that the record of the tribunal's decision showed that it was not written by the chairman of the tribunal although signed by him. In my opinion a chairman of a supplementary benefit appeal tribunal makes himself responsible for the contents of the record of the tribunal decision by signing that record. The record of the tribunal's decision, findings and reasons should however be made by the chairman himself or at least under his specific direction, it being his responsibility also to ensure that the record represents the corporate views of the members."

14. I agree with the foregoing statement and would specially emphasise the final sentence. It does not in terms cover the note of evidence. This differs from the record of the decision findings and reasons in that there is a specific obligation (under regulation 7(2) of the Supplementary Benefits and Family Income Supplements (Appeals) Rules 1980 /S.I. 1980 No. 1605/ to furnish such a record, whereas there is no specific obligation on the chairman to take a written note of the evidence though it is plainly desirable that he should. This does not however mean that the clerk should not take a note of the evidence. It is indeed often very helpful that he should do so. But it is undesirable that what is in fact the clerk's note of the evidence should be put forward as if it was the chairman's notes, though it is perfectly proper that the chairman should endorse the note as being in accordance with his recollection. If the clerk does take a note and it is made use of by the tribunal it should be available to any appellant or respondent.

15. It is no part of the function of the clerk to participate in the decision making process, and he and the tribunal should be careful to avoid doing anything that would suggest to the claimant

that he is doing so. His position is in this respect somewhat analogous to that of a clerk to magistrates (as to whom see Halsbury's Laws of England (4th Edition) Vol 29 paragraph 381). His position however differs from that of **magistrates'** clerks in that, not having any legal qualification, he should not tender any advice on the law. As the passage cited from Halsbury's Laws shows, it will in general only be in the case of serious departure from these principles (and there was no such departure in the present case) that a decision will on this account be regarded as erroneous in point of law.

(Signed) J G Monroe
Commissioner

Date: 19 November 1982

Commissioner's File: C.S.B. 523/1981
C SBO File: 633/81