

Supplementary Benefit - grounds for review of a
decision.

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JGMI/HJD

Commissioner's File: CSSB/81/90

*49/92

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Edward QUINN

Social Security Appeal Tribunal: Glasgow Central

Case No: 552 04287

1. My decision is that the decision of the social security appeal tribunal dated 5 March 1990 is erroneous in law and is set aside. The decision which I give in its place is that no grounds under section 104 of the Social Security Act 1975 are shown for the review of the decisions of the social security appeal tribunals dated 20 February 1987 and 15 September 1987.
2. This is an appeal by the claimant with leave on a question of law against the above-mentioned tribunal decision of 5 March 1990. Disposal of the claimant's appeal has been subject to exceptional delay due to the intervention of a number of other decisions of the Commissioners upon review issues.
3. On 22 May 1986 the claimant, a married man living with his wife and in receipt of supplementary benefit, requested a review of his benefit as regards various additional requirements. He was dissatisfied with the adjudication officer's decision and appealed to a social security appeal tribunal. Two tribunals, the first on 20 February 1987 and, after an adjournment, a second on 15 September 1987, gave decisions on review of the claimant's additional requirements and awarded additional requirements in respect of heating (higher rate), laundry and wear and tear of clothing. The adjudication officer's decision as regards additional requirements for baths (awarded) and diet (refused) was accepted. On 21 August 1989 the claimant made a request for further review of the additional requirements in his supplementary benefit assessment in reliance upon regulation 72 of the Social Security (Adjudication) Regulations 1986 (S.I. 1986 No. 2218.). That request was refused and the claimant again appealed to a social security appeal tribunal.
4. In connection with that appeal the Department of Social Security was asked to provide information on the earlier years of the claimant's benefit claims. That information was duly supplied. The tribunal unanimously refused the claimant's appeal. They made the following findings of fact:-

"The facts are as set out in paragraphs 1, 2, 3, 4, 5, 6, and 7 of the AO's submission.

In addition it was accepted:-

- (1). The appellant was deaf and dumb.
- (2). His wife suffers from a nervous condition but was able to communicate.
- (3). The appellant was employed until 1969.

(4). The history of DHSS visits was detailed in the additional papers per submission dated 13.10.89."

The tribunal's reasons were stated in the following terms:-

"It was clear from the history of visits and previous Tribunal decisions that, despite the appellant's communication problems, very full information was given to the DHSS representative on their numerous visits, as was clear in the subsequent assistance given per previous Tribunal decisions.

It was clear from this information that the DHSS had full information available when the decision to backdate to 1985 was made. There is no evidence to support a further claim in terms of Regulation 72(b) for a further review."

5. It is apparent from the terms of the tribunal's decision that they approached the claimant's case by directly considering whether there was evidence to indicate ignorance or error within the scope of regulation 72(b) of the above-mentioned Adjudication Regulations affecting earlier decisions of the Department on the claimant's benefit. The tribunal's decision was made before the issue of the series of Commissioners' decisions referred to in paragraph 2 above in which it was established that applications for review in supplementary benefit cases fell to be directed, at least in the first place, against the current or last operative decision upon the subject under review. This point and some of these decisions were referred to in paragraph 6 of my decision on Commissioner's File CSSB/91/89 which accompanied a direction to the claimant's representative given by me on 3 March 1992. It would follow that the tribunal in the present case ought to have addressed the question whether grounds under section 104 of the Social Security Act 1975 for review of the previous social security appeal tribunal decisions were established.

6. There is however a suggestion contained in the submission by the claimant's representative, made in response to the direction referred to above, to the effect that the tribunal were entitled directly to examine the earlier decisions on the claimant's benefit assessment. Reference is made to reported decision R(P) 1/82 as supporting this approach. I am unable to accept that submission. Decision R(P) 1/82 was a case in which a review was carried out by an adjudication officer at a stage when a tribunal decision on the subject was already under appeal to a Commissioner. The Commissioner dealt as a preliminary point with the question whether the claimant's right of appeal was affected by this subsequent decision which had effect only from a date later than the decision under appeal. As the Commissioner noted it was arguably not a review decision at all. But treating it as a review decision he held that the appeal could continue against the tribunal decision so far as unaffected by the subsequent review decision. The case was not directed at all to the question against what decision any further review must be directed when there was already a relevant review decision in existence. Since the prior decisions in the present case were, in terms of section 117(1) of the Social Security Act 1975, final upon the claimant's additional requirements subject only to appeal or to review under section 104 of the same Act I remain satisfied that it was necessary in the present case to demonstrate statutory grounds for review of the previous social security appeal tribunal decisions.

7. For the foregoing reasons the decision of the tribunal is erroneous in law

and must be set aside. In the direction referred to above I asked the claimant's representative for a submission regarding the existence or otherwise of statutory grounds of review under section 104 of the previous tribunal decisions. It is submitted in reply on behalf of the claimant that the introduction of regulation 72 of the Social Security (Adjudication) Regulations 1986 was a "relevant change of circumstances since the decision was given" for the purposes of section 104(1)(b) of the 1975 Act. This possibility was referred to by me in paragraph 7 of the decision on Commissioner's file CSSB/91/89 which accompanied my direction.

8. Now it is in my opinion clear that a change of legislation could in certain circumstances represent a relevant change of circumstances justifying review of a decision under section 104(1)(b). Such a change might well justify a review of a decision of continuing effect but it would only do so from the date when the change in question came into force. There is an example of this in decision R(P) 2/84. See paragraphs 8(3) and 11 of that decision. Alternatively it is possible that a change in the law having retrospective effect could represent a relevant change of circumstances affecting a past decision as at the date when that decision was made. That was the possibility examined in reported decision R(G) 3/58, the decision of a Tribunal of Commissioners. In that case a provision of regulations extinguishing the right to payment on a benefit draft not cashed within 6 months was by later amendment made inapplicable to death grant. The question arose whether that was a relevant change of circumstances affecting a previous decision holding that the claimant's right to payment of death grant on an uncashed draft had been lost. The Tribunal of Commissioners held that the amending provision excepting death grants was not retrospective and did not entitle the claimant to have the previous decision reviewed. The amending provision was not merely procedural but affected substantive rights and therefore the normal presumption against retrospective legislation arose and was not overcome.

9. It is accordingly necessary to consider the effect of regulation 72 of the Adjudication Regulations introduced by amendment with effect from 6 April 1987. That amendment modified the position previously obtaining under regulation 87(1)(b) of the Social Security (Adjudication) Regulations 1984 (S.I. 1984 No. 451) (and regulation 69(1)(a) of the Adjudication Regulations 1986 as these were originally framed) under which the right to obtain, by review and revisal of a past decision, sums of supplementary benefit which might have been but were not awarded in the past was in all cases lost if these sums related to a period more than one year before the application for review was made. Regulation 72 in effect created an exception preserving such rights in the limited circumstances specified in that regulation.

10. In my judgment the effect of regulation 72 (now repealed) was not merely procedural. It affected substantive rights and its effect was somewhat analogous to that of the amendment considered in R(G) 3/58 in creating an exception to the loss of old benefit entitlements. The normal presumption against the retrospective effect of legislation therefore applies. But although regulation 72 could be invoked in relation to past decisions coming within its terms there is nothing in the wording of the regulation to suggest that it was intended to be retrospective in the proper sense of altering for the past the limitations upon revisals of supplementary benefit decisions contained in regulation 87(1)(b) of the 1984 Regulations. Indeed the critical opening words of the regulation: "... nothing in this section shall operate so as to limit ..." point unequivocally to the future. I have accordingly no

doubt that regulation 72 was not, properly speaking, retrospective in operation and that its introduction in April 1987 in no way affected the correctness of decisions made on reviews applied for under the unamended provisions. I therefore reject the submission that the introduction of regulation 72 represents a possible statutory ground of review for the purposes of section 104 of the Social Security Act 1975.

11. An alternative submission is made on behalf of the claimant that the tribunal decision could be reviewed on the ground of mistake as to a material fact "in that they did not give consideration of the [claimant's] flat as being exceptionally difficult to heat adequately, nor having unsuitable washing/drying facilities." It is in my judgment impossible to sustain this alternative submission. Such alleged failures of consideration are not equivalent to the mistakes of fact. In any event as regards the first point the tribunal of 20 February 1987 in fact awarded an additional requirement for heating at the higher rate appropriate to that circumstance from the date which, as a matter of fact, they found appropriate. On the second point the tribunal of 15 September 1987 awarded an additional requirement for laundry as claimed by the claimant and backdated it for the then maximum period of one year.

12. In exercise of the power in section 101(5) of the Social Security Act 1975 I therefore give the decision which the tribunal should have given, which is that no grounds for review under section 104 of the Social Security Act 1975 are shown for review of the prior decisions of the tribunals of 20 February 1987 and 15 September 1987. My substituted decision is as set forth in paragraph 1 above.

13. Although the decision of the tribunal has been set aside as erroneous in law, for practical purposes the claimant's appeal fails.

(signed) J G Mitchell
Commissioner
Date: 29 June 1992