

*Claimant's appeal successful
Question 1 of review not claim*

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SUPPLEMENTARY BENEFITS ACT 1976
SOCIAL SECURITY ACT 1986



APPLICATION FOR LEAVE TO APPEAL AND APPEAL TO COMMISSIONER
FROM DECISION OF SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: MARGARET MCGLONE (Mrs)

Social Security Appeal Tribunal: Glasgow North

Case No: 555 08293

[ORAL HEARING]

1. I grant the claimant leave to appeal on a question of law against the decision of the social security appeal tribunal dated 11 January 1990. Of consent I treat the application as the claimant's appeal. My decision upon the appeal is that the decision of the social security appeal tribunal dated 11 January 1990 is not erroneous in law.

2. I granted an oral hearing upon the application by the claimant for leave to appeal in this case. Submissions were lodged on behalf of the claimant and the adjudication officer in response to a Direction given by me. At the hearing the claimant, who did not attend, was represented by Mr W Ross Cameron, Welfare Rights Officer, Strathclyde Social Work Department and the adjudication officer was represented by Mr D Cassidy acting as the Solicitor in Scotland to the Department of Social Security. I am grateful to both representatives for their helpful submissions. It was apparent from the outset of the hearing that there was a question of law warranting the grant of leave to appeal. I accordingly granted leave to appeal and of consent treated the hearing as a hearing upon the claimant's appeal.

3. On 16 June 1989 a written request was made by Mr and Mrs McGlone to the Department of Social Security to "...swap the claimant role...", with backdating to 1983. The husband was the former claimant, and his entitlement was subject to the condition of availability for employment. Evidence was submitted on behalf of the wife that she was qualified to be accepted as a substitute claimant under the provisions of the Supplementary Benefit (Aggregation) Regulations 1981, (S.I. 1981 No. 1524) as amended, regulation 1A. The change of claimant was accepted and backdated to 21 November 1983. The substituted claimant was found not required to be available for employment as a condition of entitlement to supplementary benefit and an adjudication officer awarded arrears of the long term scale rate of benefit from 19 November 1984. At the same time however the adjudication officer refused to review the award of supplementary benefit retrospectively as regards additional requirements. An appeal to a social security appeal tribunal was taken against the latter decision on behalf of the substituted claimant.

4. The Law

The material provisions of regulation 1A of the Aggregation Regulations are

reproduced in the Appendix hereto. So far as not quoted in the text of this decision the other material provisions of statute and regulation referred to herein are also reproduced in the Appendix.

5. At the tribunal hearing it was contended by Mr Cameron on behalf of the substituted claimant that the backdated election to change claimant was a "claim for benefit" and that accordingly, as an adjudication officer had backdated that change on good cause under regulation 1A(6) of the Aggregation Regulations, he was entitled to establish before the tribunal that there were grounds for further additional requirements to be awarded from the backdated date of claim. The chairman's notes show that the tribunal very wisely considered this as a preliminary issue and they decided that the transfer of claimant from husband to wife was not a matter of a new claim but was an administrative matter.

6. The tribunal then proceeded to consider the claimant's appeal upon the ~~basis that the issue of possible entitlement to further additional requirements was a matter for review.~~ The adjudication officer conceded at the hearing that the higher heating addition, which had previously been awarded from 10 August 1987 following a request for review on that matter made on 17 March 1987, should be backdated to 17 March 1986, that is, one year before the date of request. Upon the basis on which the tribunal had intimated that they were proceeding, Mr Cameron agreed to this and the tribunal gave a decision of consent upon that matter.

7. The tribunal refused the claimant's appeal ~~as regards other possible additional requirements.~~ Existing additional requirements for diet and clothing awarded from 17 March 1986 were not challenged. The other additional requirements referred to were in respect of laundry and baths. It was accepted by Mr Cameron that these needs had not previously been brought to the Department's attention and that if they fell to be looked at in the context of a review regulation 72 of the Social Security (Adjudication) Regulations 1986 (S.I. 1986 No. 2218) would have to be satisfied to enable these to be dealt with and backdated as it would be a review requested more than one year after the ending of supplementary benefit. The tribunal refused the appeal on these items, explaining that the requirements of regulation 72 were not met and in particular, under reference to regulation 72(1)(b), that the claimant could reasonably have brought the material facts to the attention of the Department earlier.

8. Before me it was accepted by both representatives that the application of the repealed provisions of the Supplementary Benefits Act 1976 and relative regulations had been saved by regulation 49 of the Social Security (Claims and Payments) Regulations 1987 (S.I. 1987 No. 1968). Mr Cameron submitted that the tribunal had erred in treating the subject of entitlement to additional requirements as one of review and renewed his argument that the change of claimant involved a fresh claim for benefit. The adjudication officer and the tribunal were, he submitted, wrong to deal with the additional requirements as a review issue. He was entitled to have these adjudicated upon as part of the accepted backdated claim. The wording of the "good cause" provision in regulation 1A(6) of the Aggregation Regulations and the general emphasis on the entitlement of a claimant to supplementary benefit in the legislation and past decisions supported his view that change of a claimant involved a fresh claim. He also referred to the provisions of regulation 5(2)(aa) of the Supplementary Benefit (Claims and Payments) Regulations 1981 (S.I. 1981 No. 1525) as supporting the concept of a claim. He conceded however that if a

change of claimant was effected by way of a new claim then there was no specific provision in the supplementary benefit legislation for avoiding the duplication of benefit that would result from backdating the new claimant's claim. It was somewhat faintly suggested by Mr Cameron that section 12 of the Supplementary Benefits Act 1976 might provide the necessary machinery but he submitted that it was *per incuriam* that there was no clear provision in this regard.

9. Mr Cassidy for his part submitted that a change of supplementary benefit claimant within the same assessment unit did not involve a new claim. There was, he said, one award of benefit for the assessment unit. Once the question of election was determined in this case with backdating it led to a review of the award due to the new claimant's entitlement to waiver of the requirement of availability for employment and, after one year, to her entitlement to the long term scale rate of benefit. The present appeal arose from a separate decision of the adjudication officer to refuse to review the additional requirements contained in the assessment. There was no need in this appeal to consider the merits of the decision on change of claimant.

10. I have come to the conclusion that Mr Cassidy's approach is, in principle, to be preferred to that of Mr Cameron. I can readily accept that after an unsuccessful supplementary benefit claim by one spouse or partner any subsequent attempt by the other spouse or partner to secure benefit had to be made by way of a fresh claim as envisaged in regulation 5(2)(aa) of the Claims and Payments Regulations 1981. The situation is in my judgment radically different where there is an existing and continuing entitlement to supplementary benefit on the basis of the aggregate resources and requirements of the one assessment unit and the entitlement in the name of one qualifying claimant in the unit is altered to entitlement in the name of the other.

11. When regulation 1A of the Aggregation Regulations was introduced by the Supplementary Benefit (Equal Treatment) Regulations 1983 (S.I. 1983 No. 1004) with effect from 21 November 1983, regulation 4 of the Supplementary Benefit (Claims and Payments) Regulations was also amended, as underlined below, so as to read:-

"4. Every person who makes a claim for benefit shall furnish such certificates, documents, information and evidence for the purpose of determining the claim or of determining the question which partner of a married or unmarried couple satisfies the conditions of regulation 1A of the Aggregation Regulations as may be required by the Secretary of State and, if reasonably so required, shall for that purpose attend at any office or place as the Secretary of State may direct."

That amendment suggests, although not conclusively, a distinction between the determination of the question referred to and the determination of a claim. Furthermore if it had been intended that the making of an election under regulation 1A of the Aggregation Regulations was to be treated as a claim it would have been a simple matter to make that clear so that the good cause provisions of regulation 5(2) of the Claims and Payments Regulations would have applied automatically. That was not done and instead regulation 1A(6) contains its own "good cause" provisions. I therefore think that although "good cause" is admittedly a concept normally applied to claims for benefit, its presence as a separate provision here is in fact an argument against the procedure for change of claimant being classed as a claim for supplementary benefit purposes. It is also significant that the process of claimant change

is referred to in regulation 1A as "an election for a change of claimant" and not a claim for benefit.

12. A striking contrast may be observed in the provisions of the Social Security (Claims and Payments) Regulations 1987 dealing with claims for income support. Regulation 4(4) provides as follows:-

(4) Where one of a married or unmarried couple is entitled to income support under an award and, with his agreement, his partner claims income support that entitlement shall terminate on the day before that claim is made or treated as made."

It is clear that under those provisions an alteration of claimant for income support purposes is dealt with as a matter of claim for benefit. However ~~there is no possibility of duplicated entitlement to, or awards of, income support since the entitlement of the former claimant is to terminate on the day before the appropriate date of the new claim.~~

13. There is no corresponding provision in the supplementary benefit legislation terminating entitlement upon a change of claimant. In my judgment the review provisions of section 104 of the Social Security Act 1975 apply to enable the consequences of a change of supplementary benefit claimant to be dealt with, including the consequences in respect of a past period. Those statutory grounds enable effect to be given to any permissible increase in the entitlement to benefit consequent upon a change of claimant without creating the problem of duplication of entitlement or of payment for which, as Mr Cameron recognised, there is no clear mechanism in the supplementary benefit legislation. While it might be possible to deal with a duplication of supplementary benefit under section 12(1A) of the Supplementary Benefits Act 1976, that sub-section certainly does not appear to have been framed with this possibility in mind. In the same way questions of increases in entitlement to benefit arising at the time of, but not consequent upon, an election to change claimant also fall to be dealt with by way of review subject to the review powers of section 104 of the 1975 Act and, of course, the limitations of regulations 69 and 72 of the Adjudication Regulations.

14. In my judgment therefore the tribunal were essentially correct in deciding that the election to change the supplementary benefit claimant in this case did not constitute a new claim for benefit and that accordingly questions of entitlement to further additional requirements fell to be considered as review questions. I have of course given much fuller reasons for reaching this conclusion than the tribunal in response to the more detailed arguments presented to me.

15. It follows that the tribunal were entitled to deal with the question of additional requirements as a review issue and to proceed upon the agreed backdating of the higher heating addition. There remains only the question of the tribunal's treatment of the claimant's possible entitlement on review to additional requirements for laundry and baths. Mr Cameron accepted that if these additional requirements fell to be approached in that way it was necessary for him to establish statutory grounds for review under section 104 of the Social Security Act 1975 and, more importantly having regard to the date of the request, circumstances enabling him to satisfy the provisions of regulation 72 of the Adjudication Regulations.

16. As the justification which was urged by Mr Cameron on the tribunal for review in respect of these requirements rested upon facts which had not previously been brought to the Department's attention, the claimant's case was essentially based on the adjudication officer having been in ignorance of material fact in connection with these requirements when awarding past benefit. But while the information produced could well demonstrate such previous ignorance of material fact and afford a *prima facie* ground for review under section 104(1) (a) of the Social Security Act 1975 I consider that the tribunal were well entitled to hold, as they did, that the information could reasonably have been brought to the Department's attention long before it was and that accordingly the claimant could not satisfy an essential condition of the applicable provision of regulation 72, namely regulation 72(1)(b). In my judgment in reaching and explaining that conclusion the tribunal did sufficient to justify their decision to refuse the claimant's appeal as regards these additional requirements.

~~17. Since the tribunal's conclusion on regulation 72 was fatal to the claimant's case I do not regard the tribunal's omission to deal with grounds of review under section 104 as an error of law requiring me to set aside the decision of the tribunal. Upon the whole matter my conclusion is that the decision of the tribunal is not erroneous in law.~~

18. The appeal of the claimant is refused.

(signed) J G Mitchell
Commissioner
Date: 25 October 1991

APPENDIX/