

Availability requirement - Reg 6(e) COE Regs.

T/2/LS

Commissioner's File: CSSB/232/1985

C A O File: AO

Region:

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name:

Social Security Appeal Tribunal: Lanarkshire

Case No: 015/13

1. Our decision is that the decision of the social security appeal tribunal dated 2 July 1985 is erroneous in point of law, and accordingly we set it aside. We direct that the matter be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is the claimant's appeal on a point of law, the necessary leave having been granted, against the unanimous decision of the social security appeal tribunal dated 2 July 1985 confirming the adjudication officer's decision issued on 23 March 1985 to the effect that the claimant was required to be available for employment as a condition of receiving a supplementary allowance. The present appeal like that in the case on file CSSB/189/1985 raises questions as to the application of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 [S.I. 1981 No. 1526], as amended, ("the Conditions of Entitlement Regulations"), with particular reference to the interpretation of regulation 6(u). The appeals of the present claimant and the other claimant were heard together at an oral hearing held before us, at which the claimants were represented by Mr C Orr, a Welfare Rights Officer from the Strathclyde Regional Council. The adjudication officer was represented by Miss R Kearns of the Solicitors' Office of the Department of Health and Social Security. We are indebted to them both for their able submissions. As the facts and circumstances relating to each appeal contain certain differences, we propose to give separate decisions.

3. At the time of his appeal the claimant was aged 59 and a married man with one dependant child. He was in receipt of a supplementary allowance, and signing every 13 weeks at the unemployment benefit office. On 6 February 1985 he submitted an application for the long term rate of benefit stating that, due to his age, the long term unemployment situation and the fact that he had been out of work for 4 years, the requirement to register should be waived. He stated that he had diverticulitis, a hiatus hernia and a recent heart problem. The letter was treated as an application for review of earlier awards of the allowance which had been credited at the "short-term" rate, a matter which (as will appear depended not on his not being required to register but on his not being required to be available for employment). He sought back-dating even though he was available for employment, because if successful he would have been entitled to be credited with the long-term rate (see regulation 7(2) of the Supplementary Benefit (Requirements) Regulations 1983 [S.I. 1983 No. 1399] for up to 52 weeks prior to the application for review (see regulation 87 of the Social Security (Adjudication) Regulations 1984 [S.I. 1984 No. 451] ("the Adjudication Regulations").

4. At the tribunal hearing on 2 July 1985 the claimant attended and was represented by Miss L King. The claimant's appeal was dismissed. The tribunal found the facts about the

claimant's age family position and claim as stated above, and in addition they found facts as follows:

- "....."
3. He worked as a pay clerk until 13.12.80 and was then made redundant. The rate of unemployment in the area is 20%.
 4. The claimant's doctor confirmed that he suffers from diverticulitis, nervous palpitations, hiatus hernia and cervical spondylosis but although not fit for heavy work would certainly be fit for light work.
 5. The claimant has little prospect of employment. He has not turned down any offer of work.
 6. He is not registered at the Job Centre nor with the Disablement Resettlement Officer."

The tribunal's reasons for upholding the decision of the adjudication officer were expressed as follows:

"The claimant's arguments revolve round Regulation 6 sub-paragraphs, (e), (f) and (u) of the [Conditions of Entitlement Regulations]. The argument put forward by the representative that age of the claimant was analogous to physical or mental disablement is rejected by the Tribunal. The Tribunal can see nothing analogous in this, particularly as the question of age is in fact separately dealt with in Regulation 6(p). Under that paragraph the claimant does not qualify as he is aged under 60. The claimant fails to meet the over-riding condition of paragraph (e) that he has no prospect of work because of physical or mental disablement. He is fit for light work. With regard to paragraph (f) he does meet the overriding condition of little or no prospect of employment but he fails to meet the other requirements (ii) and (iii) in that he has been in employment in the previous 10 years and the requirement to be available has applied. The tribunal considered that all the various conditions of the separate paragraphs (e) or (f) must be satisfied if the claim is to succeed. In this case they have not been satisfied. Had the tribunal found for the claimant they would not have back-dated the waiving of the conditions beyond 52 weeks. They can see nothing in regulation 87 [of the Social Security (Adjudication) Regulations 1984 [S.I. 1984 No. 451] ("the Adjudication Regulations")] to justify back-dating beyond 52 weeks."

5. Section 5(1) of the Supplementary Benefits Act 1976 provides as follows:-

- "5.-(1) The right of any person to a supplementary allowance is subject
- (a) except in prescribed cases, to the condition that he is available for employment; and
 - (b) in prescribed cases only, to the further condition that he is registered in the prescribed manner for employment

We need say no more about the condition of registration in section 5(1)(b) because there has been no regulation imposing such a requirement on any person of the claimant's age. And in any case this appeal is concerned with the possibility of exception from the requirement of availability for employment.

6. Regulation 6 of the Conditions of Entitlement Regulations made pursuant to section 5(1)(a) of the Act lists the cases in which a person is not required to be available for

employment as a condition of title to a supplementary allowance. Paragraphs (a) to (u) (including interpolations by amendment) contain well over twenty exceptions from the requirement of availability. Some of these provide for essentially short-term exceptions; but the exceptions with which this appeal is concerned are not short-term. We do not think it necessary to set out every paragraph, but only those to which we refer in this decision. It will be noted that several of the paragraphs contain sub-paragraphs, and that sometimes (as with paragraph (c)) the sub-paragraphs contain alternative conditions and that more times (as with paragraphs (e) and (f)) the sub-paragraphs contain cumulative conditions. Regulation 6 (as amended) so far as material provides as follows:

"6. A claimant shall not be required to be available for employment under section 5 in any week in which one or more of the following paragraphs apply and regulation 8 does not apply to him:-

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- (c) he is a person -
- (i) to whom regulation 9(2)(b) applies, or
 - (ii) who, by reason of some disease or mental disablement, is incapable of work, or
 - (iii) who is engaged in work for the number of hours a week (being, in the case of a person to whom regulation 9(1)(a)(i) applies, less than 35 hours or, in any other case, less than 30 hours) which, having regard to some such disease or disablement suffered by him, he is usually capable of working;
-
- (e) by reason of physical or mental disablement he has no further prospect of employment and in the 12 months immediately preceding has -
- (i) on average worked for less than 4 hours a week,
 - (ii) been available for employment under section 5 for not less than 39 weeks,
 - (iii) made reasonable efforts to find employment and not refused any suitable employment;
- (f) he has no prospect of future employment and lacks the training or experience to be able to enter or re-enter employment and -
- (i) he is within 10 years of attaining pensionable age,
 - (ii) he has not been in employment in the previous 10 years,
 - (iii) during that period the requirement to be available for employment pursuant to section 5 has not applied and would not have applied to him had a claim been made for an allowance by or in respect

of him;

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- (u) the preceding paragraphs do not apply to him, but the circumstances are analogous to any circumstances mentioned in one or more of those paragraphs and in the opinion of the benefit officer it would be unreasonable to require him to be available for employment."

7. The appeal tribunal concluded, rightly in our view, that paragraph (f) did not apply to the claimant in that, not having been unemployed for 10 years he could not satisfy sub-paragraph (ii) of the paragraph. But we note also that they concluded in relation to that paragraph the claimant did "meet the over-riding condition of little or no prospect of employment". This is not in fact an accurate paraphrase of the condition in question, but the condition is similar to one found in paragraph (e), to which we are about to turn, in relation to which they made no specific finding.

8. We consider that the tribunal misdirected themselves in relation to paragraph (e). In order to bring himself within paragraph (e) a claimant has to show that he has no further prospects of employment and that this is by reason of physical or mental disablement, and also that he has in the preceding 12 months satisfied the three conditions in sub-paragraphs (i), (ii) and (iii), which this claimant quite possibly could satisfy. The tribunal in their findings on paragraph (f) came close to a finding that the claimant had no further prospects of employment, but they rejected the claim on the irrelevant ground that the claimant was capable of light work. Had they been considering paragraph (c) (ii), relating to incapacity for work, it would have been relevant to consider whether the claimant was capable of light work. But what the tribunal was concerned with was the claimant's prospects of employment and not his capacity for work. In the decision on file CSSB/94/1985, a case concerning a man aged 56 suffering from chronic bronchitis the Commissioner said (at paragraph 6):

"It does not necessarily follow that because he is physically capable of light work an elderly man with chronic bronchitis has further prospects of employment."

This is indeed true; and in the present case the tribunal came close to finding that this claimant, who although not suffering from chronic bronchitis had various ailments, did not have prospects of further employment. And the tribunal clearly erred in law in excluding the claimant under paragraph (e) on the bare ground that he was capable of light work. We set the decision aside. It will be for the new tribunal to consider once again whether the claimant has no prospects of further employment and whether this is by reason of the claimant's physical or mental disablement. They will no doubt have before them evidence of the medical conditions from which the claimant suffers, and it will be for them to consider whether this amounts to physical disablement. On these issues we would point to our conclusion in the appeal on file CSSB/189/1985 to the effect that man has no prospects of employment if he has no realistic prospects of such employment but not if he merely has poor prospects; and that the disablement need not be the sole cause but must be a significant cause of the lack of prospects (see the summary in paragraph 23(e) of the decision and the details in the other paragraphs there referred to).

9. If the tribunal find that the claimant does not succeed by reference to paragraph (e) they should go on to consider paragraph (u) relating to circumstances analogous to any of the circumstances mentioned in one or more of the preceding paragraphs. It seems to us to be unlikely that, if the claimant cannot succeed under (e), he will be able to succeed under (u). But the possibility cannot be ignored by the tribunal. In connection with paragraph (u) we call attention to the guidance that we have given on the matter summarised in

paragraph 23(a), (b), (c) and (f) of our decision in the appeal on file CSSB/189/1985 and more fully explained in the other paragraphs there referred to. As we have set aside the decision on other grounds we do not need to say much more about the tribunal's conclusions relevant to paragraph (u). We do however think that the reasons of the tribunal like those of the tribunal in the case on file CSSB/189/1985 for not treating age as analogous to disablement were inadequately expressed as they do not enable the claimant (or us) to be sure that the tribunal treated the question as one of fact in all the circumstances and not as a pure question of law to be answered adversely to the claimant.

10. There remains the further point of back-dating, to which the tribunal adverted but which, on their conclusions on the main point, they were not obliged to express a final conclusion. Regulation 87 of the Adjudication Regulations provides for review (where the conditions for review are satisfied) for an indefinite retrospective period, subject only to the restrictions in regulation 87(1) on revision that will have the effect of making benefit payable or increasing the amount payable. In the present case the effective restriction is 52 weeks before the application for review imposed by regulation 87(1)(b). If, however, it is necessary and justifiable to go back for 104 weeks on the condition of availability in order to make the higher long-term rate repayable for 52 weeks back, there is nothing in regulation 87 to prevent it. In point of fact we think that, in the light of section 15(4) of the Supplementary Benefits Act 1976, the tribunal if they are satisfied that the condition of availability ought not to have applied for 104 weeks before the date of the application can review and revise the awards for the second 52 weeks of those 104 without actually reviewing the decisions for the previous 52 weeks (and see Decision R(1) 5/66).

11. The claimant's appeal is allowed.

(Signed) J G Monroe
Commissioner

(Signed) J G Mitchell
Commissioner

(Signed) R F M Heggs
Commissioner

Date: 18th August 1986