lost for parliamentary claimant but good otherwise see exp closing words at para 12 Go

WMW/JOB **Commissioner's File:** CSSB/512/89

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: HUGH WATT Jnr

Social Security Appeal Tribunal: Glasgow Central

Case No: 552 04093

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1. I find no error of law in the decision of the Glasgow Central Social Security Appeal Tribunal dated 4 September 1989 such as to warrant my interference therewith. This appeal is accordingly dismissed.

2. The appeal to the tribunal was against a decision by an adjudication officer issued in May 1989 refusing to review the claimant's then running award of supplementary benefit. That award allowed for certain additional requirements. Of course since 11 April 1998 the claimant had been in receipt of income support. Accordingly the review request received on 5 May 1989 related to a benefit which had ceased to exist. No doubt the object, questions of arrears and the competency of payment thereof aside, was, through the Income Support (Transitional) Regulations 1987, to obtain an award of an enhanced amount of that support.

3. The request in question, so the tribunal were informed, had sought a review of all additional requirements in payment prior to April 1988 under regulation 72 of the Social Security (Adjudication) Regulations 1986. I must first note that that regulation does not warrant any review at all. All that it does is to provide relief, if its conditions are satisfied, from the restriction imposed by adjudication regulation 69 on the amount of arrears of entitlement for which payment actually be made. The authority for reviewing a running award such as this was and is to be found in section 104 of the Social Security Act 1975. The tribunal were informed that the additional requirements covered by the request were, first, a disabled person's heating allowance which had been payable. That, which must have been by way of a review, I take to have been by an adjudication officer but, as I understand from the papers, there was and is no suggestion of any basis upon which that part of the running award could have been further reviewed. Accordingly I leave that matter aside.

4. The other additions were in respect of extra baths, wear and tear and laundry. Those additions were the result of a tribunal decision dated 5 November 1986. That decision had backdated the award to one year before the date of the decision. It had been unanimous and is on the file. I take it to have been before the present tribunal. There is nothing therein disclosed to indicate upon what basis that review had taken place: that is to say which of the heads of section 104(1) of the 1975 Act, as it was then in force, had

been taken to be satisfied. But given the history in the adjudication officer's submission to the present tribunal about reports of visiting officers and in particular one in September 1986, the probable ground of review was that there had been a relevant change of circumstances since the awarding decision had been given - that is that the need had arisen for the additions in question sometime after the adjudication officer's decision awarding supplementary benefit had been made. It clearly had not been earlier reviewed on the question of additions far less these particulars additions, according to the history of the case. Whilst when that change had occurred was neither recorded in terms nor the change itself specified, it had effectively been determined as having occurred one year before the date tribunal hearing. The award was thus not to the maximum in arrears. I think I derive some confirmation of my reconstruction when it appears from paragraphs 5 and 6 of the adjudication officer's submission that the need for these particular additions had arisen some time between June 1983 and September 1986.

5. Following upon the 1986 tribunal decision further claims for additional requirements were made in April 1987 and April 1988 but nothing more was sought than was already in payment. Accordingly the May 1989 request was held the raise nothing new and so to give no grounds for reviewing the relevant part of the awarding decision. It is clear from the papers that there was no suggestion of a relevant change of circumstances since the 1986 tribunal decision nor, in terms of section 104(1)(a) and the closing part of that subsection that that tribunal decision had been given in ignorance of or had been based on a mistake as to some material fact, far less ignorance or mistake then vouched by fresh evidence.

6. I have considered the chairman's note of evidence as recorded in the tribunal's record of proceedings and I can find nothing therein which could begin to fit, far less satisfy, section 104(1)(a) or (b) of the Act. The tribunal recorded the history of the case - put briefly as being that the claimant became entitled to supplementary benefit at age 16 in November 1966; he became epileptic at age 21; that the home had been visited on several occasions over the years but without any evidence being discovered of need for additional requirements, confirmed by the claimant's father; and that in 1986 a tribunal had awarded the additions earlier referred to. The unanimous decision was to uphold the decision of the adjudication officer. These reasons for decision were given -

> "From the facts detailed in box 2 above [the findings of fact], the tribunal do not consider that there is any evidence that there are grounds for review under S.104."

I think that to be the only decision which the tribunal could have reached and I see nothing wrong in their putting the matter so tersely.

7. The grounds of appeal are "inadequate reasons". It is first contended that no findings of fact have been made as to whether the needs existed at earlier dates. Finding of fact No. 3 is in these terms -

> "The home was visited on several occasions over the years but there is no evidence that the need for any additional requirements or "exceptional circumstances" payments had been discussed. This is confirmed by the appellant's father."

It is contended to be only relevant to questions arising under regulation 72. The final sentence of the contention is -

> "If the need existed and the DSS had'nt been told then section 104 would be satisfied but not 72(a). The question would then be could 72(b) be satisfied."

The first part of the contention ignores the preliminary question as to whether review is warranted: that is whether any grounds under section 104 have been made out. Section 104(1)(b) could not be used again in the circumstances. Only 104(1)(a) was in play. It was not for the tribunal to determine whether the needs had existed from any particular date. It was for the claimant to satisfy the tribunal that the needs had existed for a date earlier than 52 weeks before the date of the decision by the 1986 tribunal and then either that that had been put before the tribunal but they had misunderstood it - i.e. made a mistake about it - or that they had been in ignorance of it. In the latter case it would have been because the claimant had not disclosed it. Only he could have known the relevant date. But the claimant does not appear to have kept the tribunal in ignorance and it is not now suggested that he did so. Finding of fact 3 may well be relevant to regulation 72 but it seems to me to be clearly also relevant to the question as to whether the 1986 decision was given in ignorance or by way of mistake. If nothing is said over the years about a need there arises an inference that it did not exist. The onus was on the claimant, by fresh evidence, to establish the position. He did not do so.

8. The adjudication officer originally supported the appeal upon the ground that the tribunal had not considered all the possible grounds for review under section 104 and had not given reasons for deciding why they did not exist. There is a reference to consideration of a question whether review could have been made because the adjudication officer had erred in law. But there was no relevant decision by an adjudication officer before the tribunal. The decision put before them for review was that of a tribunal and neither the adjudication officer, nor the later tribunal exercising the powers of an adjudication officer, had power to review the 1986 decision upon the ground of error of law.

9. Consequent upon an adjudication officer's direction requesting submissions in light of the common appendix to CSSB/297/89 and others the adjudication officer has made further submissions and the claimant's representative has responded.

10. The first matter now raised by the adjudication officer concerns what is said in the common appendix at paragraph 25 about the burden of proof and a consequent possible duty upon an adjudication officer to make investigation. The relevance of that to this particular case escapes me since, again, it concerns the question of review of a decision by a tribunal. But I should perhaps point out that in paragraph 11 of decision on file CSSB/544/89 another Commissioner has not only endorsed what I said in the common appendix but has emphasised it by a most apt reference to paragraph 03013 of the adjudication officer's guide.

11. The adjudication officer further submits that the tribunal erred in law in not fully considering all the grounds for review under section 104, under reference to paragraph 51 of the common appendix. Essentially I have already dealt with that matter but I should point out that paragraph 51 contains no

suggestion that a tribunal has to look exhaustively at all possible grounds for review. What is said is that the tribunal must satisfy itself that there were, or are, grounds and should record what those are, even if obvious. In this case, for the reasons already given, ground of review in section 104(1A) was not open. Ground of review in subsection (1)(b) was not open since the whole object of the exercise was to go behind the decision of 1986. None of the later paragraphs of the subsection apply. That leaves only (1)(a). The tribunal held that the facts did not reveal any ground for review. Looking to their findings of fact, as I have said, that was clearly correct. Indeed, looking as I have more broadly at the note of evidence, there is nothing there either to have warranted a review under section 104(1)(a).

12. The remainder of the adjudication officer's submission is concerned with the need for accurate recording and intimation of decision. There appears to be a confusion between the record that is kept, or which should be kept, and the terms of its intimation. I accept that the terms of intimation need not directly reflect word for word the actual decision. There are no doubt cases where the actual decision would be unintelligible to the lay person. But the point that was made in paragraph 44 of the common appendix, now pointed to by the adjudication officer, was that decisions of adjudication officers, both original and on review, must be accurately framed and their terms preserved so that if thereafter a review is being considered the reviewing authority will know exactly what it is that they have to consider. And I note that in decision on file CSSB/540/89 another Commissioner has in effect supported my views about the need for accurate records of decisions, whether original or on review, being kept - paragraphs 10 - 13 refers. And I accept what is said in the last mentioned paragraph, that deficiencies in the form of a decision may not necessarily vitiate it and may, if challenged, in general be corrected by the tribunal on appeal. It may be that the adjudication officer had more in mind paragraph 16 of the common appendix where I dealt with what I regarded as being requisite by way of intimation to claimants. And it is regulation 63 of the Social Security (Adjudication) Regulations 1986 that so requires. The Commissioner who dealt with file CSSB/540/89 has endorsed that. The point is simple. If claimants are not told enough about decisions they may have to be excused from seeking reviews in an imprecise way, thereby increasing the burden upon the Department and the adjudication officers to investigate in light of the actual decision to see whether grounds for review exist. If grounds for decision are properly recorded and sent out the onus will more fully sit upon a claimant to show grounds for review later.

13. In response the claimant's representative points out that no details of the earlier decisions or their actual form were before the tribunal. That is incorrect. As noted the relevant earlier decision, by the 1986 tribunal, was before the tribunal with whose decision I am concerned. There is a further comment that the appendix (I presume the common appendix) fails to explain how its departure from the principles in R(B)1/82 can be justified. That representative did not cite that decision at the oral hearing of the cases which resulted in the common appendix. But I see no contradiction, which may be why the case was not cited. Just as part of a running decision may be reviewed and revised but the rest of the decision runs on so, if the decision is later partly reviewed, the remainder runs on and may be appealable. That was the point in R(B)1/82 - paragraph 3 refers.

14. The appeal fails.

(signed) W M Walker
Commissioner
Date: 22 October 1991