

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. This claimant's appeal succeeds. My decision is that the decision of the social security appeal tribunal dated 25 July 1988 is erroneous in law. I set it aside and refer the case to another social security appeal tribunal for determination in accordance with my directions.

2. I held an oral hearing of this appeal. The claimant, who was unrepresented, was present. The adjudication officer was represented by Mr M. Qureshi of the Solicitor's Office Departments of Health and Social Security.

3. The claimant, a coppice worker and bodger aged 58 years and living alone in owner occupied property at the date of the appeal to the tribunal, claimed supplementary benefit in January 1986 and was in receipt continuously of this benefit. An initial payment of income support was made but on 30 April 1988 an adjudication officer issued the following decision:

"Mr Stewart is not entitled to receive Income Support as he has failed to provide information required by the Adjudication Officer, in order to determine his claim."

4. The claimant appealed against that decision and in his written submission on the appeal the adjudication officer stated that although the claimant's business consistently failed to make a profit, the claimant undertook his work "in expectation of payment" and thus clearly fell within the definition of remunerative work in regulation 5(1) of the Income Support (General) Regulations 1987. That regulation provides:

"5.(1) Subject to the following provisions of this regulation, for the purposes of section 20(3)(c) of the Act (conditions of entitlement to income support), remunerative work is work in which a person is engaged, or, where his hours of work fluctuate, he is engaged on average, for not less than 24 hours a week being work for which payment is made or which is done in expectation of payment."

The adjudication officer was therefore bound to consider whether the claimant worked for less than 24 hours a week. In his submission, the claimant had failed to provide information required by regulation 7(1) of the Social Security (Claims and Payments) Regulations 1987 which provides:

"Evidence and information

7.-(1) Every person who makes a claim for benefit shall furnish such certificates, documents, information and evidence in connection with the claim, or any question arising out of it, as may be required by the Secretary of State and shall do so within one month of being required to do so or such longer period as the Secretary of State may consider reasonable."

Since he had not provided this information within one month he was not, in the adjudication officer's submission, entitled to receive income support.

5. The appeal tribunal's decision was:

"Adjudication Officer's decision confirmed. The appellant is not entitled to income support because he has failed to provide information required by the Adjudication Officer in order to determine his claim."

In giving reasons for their decision the record states:

"he had, technically, failed to give information, and therefore to satisfy the Adjudication Officer of his entitlement to benefit, and his appeal fails."

6. Leave to appeal to the Commissioner was granted at the hearing.

7. The decision of the appeal tribunal was clearly erroneous in law (as was that of the adjudication officer). The failure to provide the information required by regulation 7(1) of the Claims and Payments Regulations is not, of itself, a ground for any of the statutory authorities (the adjudication officer, the social security appeal tribunal or the Commissioner) deciding that a claimant is not entitled to benefit. The sanction for failure to provide information is contained in regulation 37(1) of the Claims and Payments Regulations which entitle the Secretary of State (not the adjudication officer, or the tribunal or the Commissioner) to suspend the payment of benefit.

8. The tribunal were also in error in placing the onus of proof (that he continued to satisfy the conditions of entitlement for benefit) on the claimant. The claimant was already in receipt of benefit and to withdraw that benefit it was necessary for the adjudication officer to give a review decision. The onus was on the adjudication officer to show that there were grounds for review and revision of the decision awarding benefit.

9. I set aside the decision of the social security appeal tribunal as erroneous in law and refer the case to another social security appeal tribunal which should be entirely differently constituted. The case has already caused the previous tribunal difficulty - as they recorded in their decision. It is desirable that sufficient time should be allowed at the rehearing for a full investigation of the facts. The adjudication officer who appears at that hearing should be an experienced senior person.

10. The first question before the fresh tribunal will be whether there are grounds for review of the decision awarding benefit. In this connection their attention is drawn to the fact that remunerative work in terms of regulation 5(1) of the Income Support Regulations is work for not less than 24 hours a week. It was previously 30 hours a week in relation to supplementary benefit so that clearly inquiry on this matter was and is justified. Whether there are grounds for review in this connection will depend upon the results of those enquiries.

11. If there were no grounds for review, the tribunal will not be able to revise the decision awarding benefit and their decision should make it clear that the claimant is entitled to income support. If there were grounds for review, the tribunal should state what those grounds were. The tribunal then has, as pointed out in paragraph 10 of the written submission dated 23 December 1988 of the adjudication officer now concerned, an

inquisitorial function. They should, as explained in paragraph 4 of the later submission, make findings in respect of the hours worked and the nature of the work performed. They must then decide whether the claimant falls within the terms of regulation 5(1) of the Income Support (General) Regulations. In this connection, I express my agreement with paragraph 11 of the earlier submission of 23 December 1988, where a distinction is drawn between work in the hope of payment and work in the expectation of payment. In regulation 5(1) of the Income Support (General) Regulations "payment" does not mean "profit". But the exception in paragraph (c) of regulation 6 of those Regulations (relating to voluntary work) should be considered. If the claimant is a person falling within that paragraph, he would not be treated as engaged in remunerative work.

12. The tribunal should have before them copies of both the adjudication officer's written submissions referred to in this decision (with which I am in general agreement) and the decided cases referred to in those submissions. The whole of the case papers (including the record of the decision of the tribunal now set aside) should be before the fresh tribunal. That tribunal should ensure that they make findings on the points referred to in my decision and in those two submissions and on all other relevant points raised by the claimant or the adjudication officer. The record of their decision should comply with regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986.

13. The claimant, at the hearing before me, emphasised that he had been without benefit for a considerable period of time. Those concerned with arranging for the case to be reheard by a fresh tribunal are asked to arrange for the rehearing to take place as soon as possible and to be treated as urgent at all stages.

14. My decision is set out in paragraph 1.

(Signed) V G H Hallett
Commissioner

Date: 5 April 1989