CIS/268/1989

AWEW/SH/2

Commissioner's File: CIS/268/1989

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal ("the appeal tribunal") dated 21 June 1989 was erroneous in law and should be set aside.

2. This is a claimant's appeal from the appeal tribunal's decision, confirming the decision of the adjudication officer, that the earlier decision that the claimant was entitled to a lower-rate, and not a higher rate, heating addition did not fall for review.

3. There were concurrent findings of fact by the adjudication officer and the appeal tribunal in the following terms. On 16 July 1987, the claimant, a 59 year old woman living in local authority accommodation, was awarded the lower-rate heating addition on the ground that she suffered from arthritis and bronchitis. On 11 March 1988 she claimed a single payment for clothing which she subsequently supported with a report from her doctor dated 29 March 1988 that because of her arthritis and chronic bronchitis she required a constant warm temperature. By a letter dated 12 April 1989, the claimant's representative requested a review of supplementary benefit which was turned down by the adjudication officer on 19 April 1989.

4. The appeal tribunal upheld the adjudication officer's decision. They gave their reasons as follows -

> "The issue before the Tribunal was not whether Mrs McTernan was entitled to extra help for hearing because of her medical condition or not because that had already been determined and she had been awarded the lower rate based on her bronchitic condition. When the Adjudication Officer reviewed this on 19 April 1989 he had to have regard to

whether there were any other factors or considerations which were not before him when he made his original decision to award the lower rate and which would justify reviewing the decision to allow the higher rate. Mr Nelson contended that if the medical report of Dr. Strachan referred to in the notes of evidence had been before the Adjudication Officer at the time he was asked to review the decision this constituted new evidence which could only lead to one conclusion namely that Mrs McTernan should be awarded the higher rate. However, the Tribunal were far from satisfied with the contents of Dr. Strachan's note. Whilst the note says that Mrs McTernan suffers from a serious physical illness and then goes on to say what it is and also that because of this a constant temperature must be maintained, the Tribunal were convinced that in completing this form (and indeed it was a form that had been prepared by Mrs McTernan's adviser and taken by her to her doctor simply to complete the type of physical illness from which she suffered) the doctor concerned could not possibly have given that note or that report bearing in mind the provisions of Part I of Schedule 4 to the Requirement Regulations which clearly draw a distinction between claimants who suffer from chronic ill health and need extra warmth and those claimants who suffer from a serious physical illness and need a constant temperature. The Tribunal could not understand how Dr. Strachan could possibly come to the conclusion that Mrs McTernan needed a constant temperature to be maintained when he must have been aware that she is a lady who is not confined, to the home, she travels about, and she also visited the doctor's surgery herself. The Tribunal's opinion is that if the Regulations had been before the doctor and he had been asked to certify which of the paragraphs Mrs McTernan fell within then he could not possibly have said that she came within the higher heating range bearing in mind the qualifications for the lower rate. However, be that as it may the decision that the Tribunal have to reach is whether the Adjudication Officer's refusal to review should in effect be reversed and that there should be a review. To determine this the Tribunal has to have regard to what facts and other information was before the Adjudication Officer at that time. The Tribunal were convinced that there was nothing new before the Adjudication Officer at that time and even if the certificate of Dr. Strachan as submitted by Mr Nelson had been before the Adjudication Officer at that time it would not have been sufficient evidence to warrant a review.".

5. The adjudication officer now concerned with the case does not support this appeal. He submits that the appeal tribunal were correct in deciding not to review the adjudication officer's decision and that their reasons for so deciding disclose no error of law. I do not accept that submission.

6. The matter is governed by the provisions of section 104(1) of the Social Security Act 1975, which at all times material to this case, provided that -

" 104. - (1) Any decision under this Act of an adjudication officer, a social security appeal tribunal or a Commissioner may be reviewed at any time by an adjudication officer, or, on a reference by an adjudication officer, by a social security appeal tribunal, if -

(a) the officer or tribunal is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact; or

(b) there has been any relevant change of circumstances since the decision was given; or

(bb) it is anticipated that the relevant change of circumstances will so occur; or

(c) the decision was based on a decision of the question which under or by virtue of this Act falls to be determined otherwise than by an adjudication officer, and the decision of that question is revised,

but regulations may provide that a decision may not be reviewed on the ground mentioned in paragraph (a) above unless the officer or tribunal is satisfied as mentioned in that paragraph by fresh evidence.".

7. In my view, having regard to the additional evidence from the claimant's doctor which was placed before them, the appeal tribunal adopted the wrong approach in deciding the issue whether or not the adjudication officer's decision should be reviewed. Instead of focusing, as they did, on the issue whether the adjudication officer had correctly decided on the material which was before him that the decision should not be reviewed, the appeal tribunal should have considered whether the further medical evidence adduced at the appeal hearing constituted a material fact for the purpose of section 104(1)(a) of the 1975 Act, that is to say whether it was a fact which would have been material to the determination of the adjudication officer if he had been aware of it. In Saker v. Secretary of State for Social Services, reported as an appendix to R(I) 2/88, Nicholls L.J. said, in a decision based on the corresponding provisions of section 110 of the Act, that a fact would satisfy this test if it is one, which had it been known, would have called for serious consideration by the [tribunal] and might well have affected its decision. Such a test, applied by a reasonable tribunal to the facts of the present case, would, in my view, have been

satisfied.

8. For this reason I hold that the decision of the appeal tribunal that they should not embark on a review of the case at all was wrong in law. The result is that I allow the appeal and remit the case to a differently constituted tribunal with a direction that the decision of the appeal tribunal be reviewed and that they proceed to decide whether to revise it or not on a fresh consideration of all the evidence placed before them.

9. While, of course, it is entirely the responsibility of the fresh tribunal to make such findings of fact on that evidence as they think fit, it is perhaps worth mentioning that for my part I find it difficult to see how the present appeal tribunal felt able to infer from the fact that because the claimant had personally attended her doctor's surgery she could not suffer from a serious physical illness.

(Signed) A.W.E. Wheeler
Commissioner

(Date) 5 May 1992