CPM

DGR/SH/13

Commissioner's File: CIS/436/1990

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons set out below, the decision of the social security appeal tribunal given on 20 April 1990 is not erroneous in point of law, and accordingly this appeal fails.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 20 April 1990.

3. The question for determination by the tribunal was whether the claimant could, by virtue of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981, for any period, escape the obligation, imposed on him by section 5 of the Supplementary Benefits Act 1976, of being available for employment as a condition of receiving supplementary benefit. If he could, then he was in a position to qualify for the long-term scale rate of benefit for the relevant period.

4. Regulation 6 provided 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 .....

(a)-(d) .....

(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 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)-(t) ....

(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."

5. In the event, the tribunal upheld the adjudication officer, deciding that the claimant could not bring himself within regulation 6.

6. The claimant sought to rely on paragraph 6(u). He accepted that he could not bring himself within paragraph (e), but he sought to establish that his condition was analogous to "physical or mental disablement" within paragraph (e), and that it was by reason thereof that he had no realistic prospects of employment. The tribunal appear to have accepted that the claimant was in fact without realistic prospects of employment and, for that matter, that the claimant was able to satisfy heads (i), (ii) and (iii) of that paragraph. However, they did not consider that the claimant's condition was analogous to "physical or mental disablement" within paragraph (e). They said:-

> "The Social Security Appeal Tribunal .... considered the quintet of factors stated in the written submission of Citizens Advice Bureau. In law they were singly and cumulatively capable of being treated on an analogous basis to the physical disability covered by 6(e) but on the available evidence the social security appeal tribunal did not accept that those factors as a question of fact amounted to or proved that physical disability."

7. The method of expression on the part of the tribunal is not altogether satisfactory. However, they seem to be saying that they considered the "quintet of factors stated in the written submission" to see whether they could be said to be analogous to "physical or mental disablement" within paragraph (e), but that when properly evaluated they did not amount to such physical or mental disablement. I think that conclusion was right.

8. The only element in the quintet which called for serious consideration was the allegation that the claimant's age was analogous to "physical or mental disablement". Manifestly, the other matters there referred to, such as the absence of

employment opportunities, the absence of recent experience of employment in any relevant field, the claimant's lack of training and relevant qualifications could not on any footing be considered analogous to "physical or mental disablement". Moreover age itself is not automatically an analogous condition. It is important to realise that there is a distinction between age affecting a claimant's ability to perform work, and age being a bar to employment opportunities. An employer might be prejudiced against taking on persons over a certain age, but it does not necessarily mean that such persons were unable, simply by virtue of their age, to undertake the relevant work. The matter was clearly expressed in paragraph 23(d) of Decision R(SB) 5/87:-

> "In particular it cannot be asserted as a matter of principle that age can never under any circumstances be analogous to 'physical or mental disablement' for the purposes of regulation 6(e), as age may affect the claimant's ability to perform work, as opposed to employment opportunities not being available to him by reason of his age [my emphasis]."

In the present case, there was nothing to suggest that the claimant was prevented by his age from performing work. Indeed, a report of Jonathan Osborne, Consultant ENT Surgeon dated 31 October 1989, expressly states that, subject to certain safeguards, the claimant is unable to perform work:-

> "I would have thought it would have been reasonable for him to resume any occupation where he is not exposed to any loud levels of noise or required to have good hearing for safety reasons. Provided these criteria are followed I would have thought it would have been reasonable for him to be employed as a labourer."

Accordingly, the tribunal were right to conclude that the claimant could not bring himself within regulation 6(u).

9. The tribunal also went on to consider whether the claimant, if he could otherwise satisfy paragraph 6(u), could comply with the condition set out in the final words of that particular provision. On that point, the tribunal found as follows:-

> "Finally on the available evidence and as a separate issue the Social Security Appeal Tribunal hold that it is not unreasonable to require the claimant to be available for work."

The tribunal had to make a value judgment as to whether, having regard to all the facts, it was reasonable or unreasonable to require the claimant to be available for work. In the event, the tribunal decided that it was not unreasonable to require him to be available. This was a matter entirely for them. What is reasonable or unreasonable is something which is incapable of analysis. Reasons can never be given for what is reasonable - hence I reject the submission on this point by the adjudication

officer now concerned. The tribunal, using their commonsense and the experience of the world, had to make a value judgment as to whether or not the claimant satisfied the final condition. In their view he did not. That alone is fatal to the claimant's case.

10. Accordingly, I do not think that it is open to me to disturb the decision of the tribunal. I have no alternative but to dismiss this appeal.

(Signed) D.G. Rice
Commissioner

(Date) **2 March 1992**