

JGM/BC

Commissioner's File: CSB/0054/1986

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Region: Wales and South Western

SUPPLEMENTARY BENEFITS ACT 1976

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

Name: Iris Doreen Peters (Mrs)

Social Security Appeal Tribunal: Weymouth

Case No: 007/04

1. My decision is that the decision of the social security appeal tribunal dated 8 October 1985 was erroneous in point of law and it is set aside. The matter must be referred to another tribunal.
2. The claimant is a woman who lost a leg when she was aged 20 and now at the age of 68 suffers also from arthritis. She lives in a residential care home registered under Part I of the Registered Homes Act 1984 and as a person living in such a home is classified as a boarder in terms of the Supplementary Benefit (Requirements) Regulations 1983 (the Requirements Regulations). These regulations have been the subject of repeated amendments relevant to the present issue, having been amended in particular in December 1984, April and November 1985 and July 1986. Basically a boarder is entitled to have included in his or her requirements the entire cost of his or her board and lodging. But this has been made subject to some limitation by reference to some standard of what may be called "reasonableness". Originally this was covered by regulation 9(6)(b) of the Requirement Regulations. But, probably because this involved the assembly of information about charges prevailing locally and thereby created administrative problems, successive attempts have been made to lay down what may be called rule of thumb limitations. The amending regulations above referred to were all directed to achieving this. But the validity of each of the first three sets of regulations has been challenged. As things stand the 1984 amendment has been held to have been invalid but the amendments of April and November 1985 have been held to have been valid. But appeals to the Court of Appeal are pending on all these points and it is at present impossible to say with certainty which of the amendments are good and which are not, or whether if the amendments are invalid the pre-amendment provisions still stand or not.
3. The present appeal covers a period beginning 3 June 1985 after the commencement date of the amendments of April 1985, and the tribunal decision now appealed from was given before the coming into force date of the November 1985 regulations. I am conscious also that subsequent decisions of the Courts or of some Tribunal of Commissioners may show that the guidance given in this decision is ill-founded and may thus have been displaced by higher authority by the time that the new tribunal comes to consider this case.

4. The April 1985 amendment was introduced by the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985. These introduced the first version of Schedule 1A to the Requirements Regulations, which is the version referred to in this decision. And paragraph 1 of that Schedule fixed monetary maximums for the weekly amount allowable as a requirement of boarders in residential care homes, a different maximum being allowed in respect of different categories. Paragraph 5 of the Schedule purported to give to the Secretary of State power to vary those maximums. But in the light of the decision of the Court of Appeal in Secretary of State for Social Services v Cotton (11 December 1985 not reported) it is accepted that this power of variation is invalid. But in the decision on file CSB/255/1986 a Tribunal of Commissioners held that the invalidity of paragraph 5 did not vitiate paragraph 1, which can by disregarding references in paragraphs 1, 2 and 3 operate without the Secretary of State having any power of variation. This last decision is one of those subject to appeal to the Court of Appeal.

5. Paragraph 1 sets out in a list of cases (in sub-paragraphs (a) to (f) of paragraph 1(1)), where the home is a home for persons in need of personal care by virtue of one or more of the conditions listed in those sub-paragraphs. The present case concerns the conditions specified in sub-paragraphs (1)(a) and (e). That in sub-paragraph (a) is old age, where the weekly maximum was put at £110, and that in sub-paragraph (e) is physical disablement, where in the case among others of persons over pensionable age who before attaining that age had become physically disabled the weekly maximum was £170. I add that paragraph 2 of Schedule 1A makes comparable provision in relation to nursing homes, though the maximums are different.

6. The adjudication officer decided that the home in which the claimant was residing was a home for persons in need of personal care by reason of old age, and fixed the maximum at £110 per week. The claimant's appeal was allowed seemingly on the ground that she was a person who, prior to becoming a person of pensionable age, was disabled. The adjudication officer now appeals to the Commissioner. The tribunal's attention was not, it seems, drawn to the fact that under paragraph 7(2) of Schedule 1A physical disablement is to have the same meaning as in the Registered Homes Act 1984 and regulations made thereunder. In relation to residential care homes "disablement" is defined in section 20(1) of the Act as meaning in relation to persons that they are blind, deaf or dumb or substantially and permanently handicapped by (among other things) illness, injury or congenital deformity. The tribunal did not conclude that the claimant was physically disabled and had been since attaining pensionable age by reference to this definition. But I should not hold them to have erred in law in that respect as there can be no argument that the claimant, having lost a leg at the age of 20, was substantially and permanently handicapped by injury from that time. I may add that regulation 7(2) makes a similar provision in relation to the meaning of "old age" which equally was not considered by the tribunal. But I have not been able to find any definition of this phrase in the Registered Homes Act 1984 or in regulations made under it.

7. The interpretation of paragraphs 1, 2 and 3 of Schedule 1A presents major difficulties. Paragraph 1, (which is set out in the next paragraph), makes provision in relation to residential care homes, which are defined in paragraph 7(1) as including homes registered under the Registered Homes Act and certain classes of homes not so registered. Paragraph 2 makes parallel provisions in relation to nursing homes which are defined in regulation 7(1) as premises within the meaning of sections 21 and 22 of the Registered Homes Act 1984 (irrespective of whether they are registered under it) and certain

other homes. Paragraph 3 (which is set out in paragraph 14 below) provides for adjustments to be made where either a residential care home or a nursing home is a home for, or is registered under the Registered Homes Act 1984 for, persons in need of personal care by reason of two or more of the physical or mental conditions listed in paragraphs 1 and 2. It is drafted on the assumption that neither the differences in the definitions of "residential care homes" and "nursing homes" nor their different treatment in the Registered Homes Act 1984 necessitates any distinction in paragraph 3. This paragraph makes a distinction for the first time between a home for persons in need of care by virtue of a condition and homes registered for any such persons. It is not well co-ordinated with the Registered Homes Act 1984 and the regulations thereunder, viz. in particular the Residential Care Homes Regulations 1984 (the Residential Homes Regulations) and the Nursing Homes and Mental Nursing Homes Regulations 1984 (the Nursing Homes Regulations).

8. Paragraph 1 of Schedule 1A provided as follows:

- "1.-(1) Subject to paragraphs 3 and 5 [paragraph 5 is not relevant and is in any event ultra vires], where the accommodation provided for the claimant is a residential care home for persons in need of personal care by virtue of -
- (a) old age, the appropriate amount shall be £110.00 per week; or
  - (b) past or present mental disorder but excluding mental handicap, the appropriate amount shall be £120.00 per week; or
  - (c) past or present drug or alcohol dependence, the appropriate amount shall be £120.00 per week; or
  - (d) mental handicap, the appropriate amount shall be £140.00 per week; or
  - (e) physical disablement, the appropriate amount, in the case of persons to whom sub-paragraph (2) below applies shall be £170 per week or, in any other case, shall be £110 per week; or
  - (f) any other condition not falling within sub-paragraph (a) to (e) above, the appropriate amount shall be £110 per week.
- (2) For the purposes of (e) above this sub-paragraph applies to persons under pensionable age, or persons over pensionable age who before attaining pensionable age have become physically disabled."

A new Schedule 1A was substituted in November 1985 by the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions (No 2) Regulations 1985 increasing the maximum amounts. However, for convenience I will refer to the earlier version of Schedule 1A.

9. It is clear that the first enquiry is whether the accommodation provided for the claimant is a residential care home for persons in need of personal care by virtue of any one or more and if so which of the conditions listed in sub-paragraphs (a) to (f). The tribunal instead of asking this question asked what was or were the condition or conditions by virtue of which the claimant needed such personal care. This latter question can arise under paragraph 1(2) but only after the first question has been answered. The tribunal thus misdirected themselves. I may add that under paragraph 3 (set out in paragraph 14 below) a third question, viz. what is the personal care that the claimant is in fact receiving may arise.

10. How should the various questions be answered? I take first the first question which may be paraphrased as "what category or categories of persons is the home a home for?" The natural answer to this question is "the categories of persons for whom in fact it holds itself out as providing personal care". In view of the fact that the Registered Homes Act 1984 in section 5(3) authorises the imposition of conditions for registration of residential homes and in section 5(5) makes it an offence to fail to comply with any such condition, the natural answer above ought to be qualified by the adding at the end the phrase "without failure to comply with any condition of registration". The claimant is 68 and has only one leg, her need for personal care is the result of a combination of old age and physical disablement. It is doubtful whether the claimant would be in need of personal care in a residential home at all if she were affected only by old age. There can be few residential care homes that cater mainly for the elderly that are not in practice found to be catering for those who as well as being elderly are physically or mentally disabled. And the homes could quite naturally be described as homes for those in need of personal care by virtue of old age and disablement.

11. If the natural answer to the question suggested above is (as I am disposed to think it is) right, subject to the qualification about compliance with conditions of registration, then in each case that comes before a tribunal there should be evidence of what those conditions are. These are presumably contained in some document addressed to those responsible for the running of the home. They might be expected to appear also in the certificate or registration (a public document) or elsewhere; and omission from the certificate would not be conclusive that no conditions had been attached.

12. In the present case the only indication in the case papers before the tribunal of what the home was for was a sentence in the adjudication officer's submission (form AT2) to the effect that the home is registered as a residential home for the elderly. There is no indication of the source of this statement, or of its author's interpretation of the regulations in question. The question for the tribunal was what was or were the category or categories of patients for which the home was a home. In one appeal that I have seen the adjudication officer submitted that it was for the area health authority to "categorise" the home in question. In the present case there is no such submission; and the adjudication officer now concerned relies simply on the statement that the home was registered as a residential home for the elderly. I trust that I am not reading too much into this when I treat it as a submission broadly to the same effect. I can find nothing in the regulations to suggest that a tribunal, in deciding the question of fact, was bound to accept the opinion of the area health authority as to what were the categories for which the home is a home as conclusive, and if the tribunal were so to treat it, they would be committing the error of law identified by Watkins J in Sampson v Supplementary Benefits Commission [1979] SB 19 where he held that it was wrong for the Commission to

shackle themselves by the interpretation of the phrases "advanced education" and "non-advanced education" by reference solely to the opinion of the local education authority. In the same way it is wrong for a social security appeal tribunal to shackle itself by the categorization of the area health authority even if the area health authority's categorization is directed to the point. The categorization of the home in the present case as a home for the elderly taken by itself carries no conviction. The question of what it is a home for has to be determined as a question of fact by looking to see what categories of patients that it sets out to provide for, not (in the case of a registered home) being a category prohibited by the conditions of registration.

13. This is the first question that the tribunal must decide. If it emerges that there is more than one category it will almost certainly be necessary to consider paragraph 3 of the Schedule in order to determine which is the relevant category of patient. This paragraph, which applied equally to residential care homes and nursing homes, uses the phrase "registered for"; and one might expect that it would be for the registering authority to decide what a home is registered for. But in fact, as was pointed out in the Commissioner's decision on file CSB/1422/1985 at paragraph 9, the Registered Homes Act 1984 does not provide for registering homes for any particular category of patient, it merely refers to registering them. The nearest that it comes to the concept of registering for a purpose is the power to impose conditions, which makes it possible to say that a home is not registered for a purpose where there is a condition that it shall not be used for that purpose. Part I of the Act, which relates to residential care homes, and the Residential Homes Regulations, provide for categorising residents rather than homes, and seem to me clearly to contemplate that homes may cater for more than one class of resident. Part II, which relate to nursing homes, and the Nursing Homes Regulations provide for categorising homes but not into the categories mentioned in paragraph 2 of Schedule 1A. And in my judgment the purpose for which a home is registered can be ascertained only by reference to the conditions imposed. If a home is registered under the Act without any restriction as to the categories of residents then it is registered for all categories. I must add that this does not seem to have been the view of the author of the decision above mentioned on file CSB/1422/1985. Furthermore it has no relevance to the construction of paragraph 1 of Schedule 1A, which is concerned only with "homes for" a particular category or categories of resident. That in my judgment is a question of fact to be answered in the light of the considerations mentioned in paragraph 12 above.

14. If the new tribunal conclude that the home in question in this case is a home for one category of resident only (and they might do this) even if they concluded that the home was a home for persons in need of care by reason of old age who, only incidentally, were also in need of such care by virtue of some other condition) then they will have no difficulty in applying paragraph 1. but if, as seems perhaps more likely, they conclude that it is a home for more than one category of resident patient, the tribunal will have to go on to consider paragraph 3 of Schedule 1A which provides as follows:

"3.-(1) Where the accommodation provided for the claimant is -

- (a) both a residential care home and a nursing home, or
- (b) a residential care home or a nursing home

being a home for, or a home registered under the Registered Homes Act 1984 for, persons in need of personal care by virtue of any two or more of the physical or mental conditions referred to in paragraphs 1 or 2, the appropriate amount shall be set out in the following sub-paragraphs of this paragraph.

- (2) Where the home is so registered and where the personal care that the claimant is receiving in that accommodation corresponds to a category of personal care for which that accommodation is so registered, the appropriate amount shall be that amount, subject to paragraph 5, in paragraphs 1 or 2, as the case may be, as is consistent with that personal care.
- (3) Where the home is so registered but where the personal care that the claimant is receiving in that accommodation does not correspond to any of the categories of personal care for which the accommodation is so registered, the appropriate amount shall be the lesser amount, subject to paragraph 5, in paragraphs 1 or 2, as the case may be, that is consistent with those categories.
- (4) In any other case not coming within sub-paragraphs (2) or (3) above, the appropriate amount shall be that amount, subject to paragraph 5, in paragraph 1 or 2, as the case may be, having regard to the nature of the personal care that the home provides, as is consistent or reasonably consistent with the personal care that the claimant is receiving in that accommodation."

15. This provision was intended, one would think, to deal exhaustively with the case of homes for residents/patients in two or more categories and it is limited by sub-paragraph (1) to cases where the home is either a home for, or a home registered for, two or more categories. One view of the construction of the paragraph is that registered homes fall within it only if they are registered for two or more categories, the provision about homes for two or more categories applying only to unregistered homes the opposite view is that a registered home which is registered for only one category but is a home for two or more categories is within the paragraph. The first view leaves a lacuna if there can exist a home registered for one category only which is in fact a home for two or more categories, which on that view would be outside paragraph 3 altogether. But despite what I said in my decision on file CSB/70/1986 I now think that, in the light of the conclusions reached in paragraph 12 above on the meaning of a "home for ....." and in paragraph 13 above on the meaning of a "home registered for ....." a case cannot arise in which you have a home registered for only one purpose which is in fact a home for two or more categories. Accordingly I need not decide which of the above two interpretations of paragraph 3(1) of Schedule 1A is right. I shall assume that the new tribunal will either reach a conclusion that the home in this case is registered for and is a home for one category only, in which case they will apply paragraph 1 without the need for recourse to paragraph 3, or they will find that it is a home registered for more than two or more categories, in which case they will apply either paragraph 3(2) or paragraph 3(3), paragraph 3(4) being excluded by their finding of

registration for two or more categories. They will apply paragraph 3(2) if, they find that the category of personal care which the claimant is receiving in relation to her disablement corresponds to a category of care for which they find the home registered, ie if they find the home registered for the category of person in need of personal care by virtue of disablement. Otherwise they will apply paragraph 3(3).

16. I allow the appeal and remit the matter to another tribunal who should determine the matter in the light of the guidance given above or in any relevant decision especially of higher authority to which their attention is drawn.

(Signed) J G Monroe  
Commissioner

Date: 30 January 1987