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Bulletin 169

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSIS/1081/01

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Oral Hearing

Appellant: Sarah Paterson

Respondent: Secretary of State

Tribunal: Hamilton

Tribunal Case No: U/05/101/2000/03757

DECISION OF SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal, brought with leave of the chairman, is allowed. The decision of the Hamilton appeal tribunal (the tribunal) held on 28 February 2001 is in error of law and I set it aside.

2. I consider it expedient under s.14(8)(a)(ii) of the Social Security Act 1998 to make my own decision based on the evidence which is undisputed by the parties:-

The claimant, from 26 July 2000, is regularly and substantially engaged in caring for her father who is in receipt of a qualifying benefit and the claimant thus falls within paragraph 4(a) of Schedule 1B to the Income Support (General) Regulations 1987. The case is therefore remitted to the Secretary of State to decide whether or not the other conditions to entitlement to income support are satisfied at the relevant date.

The issue

3. The general conditions of entitlement to income support (IS) are set out in s.124 of the Social Security Contributions and Benefits Act 1992 (the Act). So far as material in this case, it reads:-

“124.- (1) A person in Great Britain is entitled to income support if –
.....
(e) he falls within a prescribed category of person ...”

4. Regulation 4ZA of the Income Support (General) Regulations 1987 (the IS regulations) defines the prescribed categories of person for the above purposes. Subject to exceptions which are not relevant here, a claimant falls within a prescribed category of person if:-

“... a person to whom any paragraph of Schedule 1B applies”

5. The applicable paragraph in this appeal is paragraph 4 of Schedule 1B. The relevant parts read:-

“4. A person (the carer) –
(a) who is regularly and substantially engaged in caring for another person if –
(i) the person being cared for is in receipt of attendance allowance or the care component of disability living allowance at the highest or middle rate prescribed in accordance with Section 72(3) of the Contributions and Benefits Act; ...

- (b) who is engaged in caring for another person and who is both entitled to, and in receipt of, an invalid care allowance.”

6. It has been accepted by the Secretary of State that the claimant's father receives a qualifying benefit. At issue is the meaning of “substantially engaged in caring”. The claim was refused on the ground that for invalid care allowance purposes (ICA) under regulation 4 of the Social Security (invalid Care Allowance) Regulations 1976 (the ICA regulations) “substantially engaged in caring” entails caring for at least 35 hours a week for the severely disabled person and the same must apply to paragraph 4(a) of Schedule 1B to the IS regulations (para.4(a)).

7. The conditions for entitlement to ICA are in s.70 of the Act. They include:-

“70.-(1) A person shall be entitled to an invalid care allowance for any day on which he is engaged in caring for a severely disabled person if-

- (a) he is regularly and substantially engaged in caring for that person ...

- (2) In this section, “severely disabled person” means a person in respect of whom there is payable either an attendance allowance or a disability living allowance by virtue of entitlement to the care component at the highest or middle rate”

8. The relevant part of regulation 4 of the ICA regulations is this:-

“4.-(1) a person shall be treated as engaged and as regularly and substantially engaged in caring, for a severely disabled person on every day in a week if, and shall not be treated as engaged or regularly and substantially engaged in caring for a severely disabled person on any day in a week unless, as at that week he is, or is likely to be, engaged and regularly engaged for at least 35 hours a week in caring for that severely disabled person.”

9. Is paragraph 4(a) to be interpreted in conformity with the definition of “substantially engaged in caring” for the purposes of ICA? That is the question arising in this case.

Background

10. The claimant was formerly in receipt of jobseeker's allowance (JSA). She claimed IS for the requirements of herself and her husband on 26 July 2000. She said that she now wished to claim IS as she was regularly and substantially engaged in caring for her father. In response to a query from the Department whether she would be claiming ICA, she said that she would not, as she could not commit herself to caring for 35 hours a week. Nor, however, was she available for work, which is why she no longer wished to claim JSA.

11. An adverse decision by the Secretary of State was issued on 21 September 2000. The claimant appealed to the tribunal, saying that she cared for her parents between 25-30 hours

per week. She also looked after her daughter and grandchild following a back injury (presumably, the daughter's back injury).

12. The claimant submitted a diary of the help that she provided. Basically, she went each weekday to her parent's home three times a day. She went in the morning to assist with washing, dressing, medication, housework, meal preparation, and taking her father out in his wheelchair to shop, visit a pub or club, etc. She returned in the afternoon to help prepare dinner and again later in the evening to help her father get ready for bed, have his medication and she would make the house secure.

The tribunal hearing

13. The claimant was present at the tribunal hearing, represented by a local welfare rights officer (the representative). He relied on CSIS/36/00.

14. In that case, a claim for IS was refused because the claimant's wife was in remunerative employment. It was argued that she was regularly and substantially engaged in caring for the claimant, but a tribunal refused to take that into consideration. Deputy Commissioner J G Mitchell QC held that was the wrong approach. Under regulation 6 of the IS regulations, if a person is able to establish that they are regularly and substantially engaged in caring for another in terms of paragraph 4(a), hours of work by that person, which would otherwise constitute remunerative employment, can be ignored.

15. In giving directions to a new tribunal, the Commissioner accepted a submission from the Secretary of State's representative that his directions should include the following (see paragraph 10 of CSIS/36/00):-

- (1) That the "regular" nature of the care might readily be established and the focus should be on the question of substantial caring;
- (2) That, unlike the test for invalid care allowance the provisions in the regulations made no specification of qualifying number of hours and accordingly what constituted being substantially engaged in caring was to be decided on the evidence and duration of such care;
- (3) That care which had been accepted as reasonably required for disability living allowance purposes would be relevant but not conclusive in this connection. ..."

16. The presenting officer in the current appeal, however, maintained that the only specific definition of "substantially engaged in caring" was that relevant for ICA purposes and was thus also applicable to the interpretation of paragraph 4(a). Therefore, the claimant must care for her father a minimum of 35 hours a week.

17. The tribunal accepted the presenting officer's submission and confirmed the decision under appeal.

Appeal to the Commissioner

18. The representative argues that substantial care ought to be decided on the nature and duration of such care in the particular case. There is no justification to read the ICA definition of the same phrase into the IS regulations. This is particularly so having regard to the terms of paragraph 4(b) of schedule 1B to the IS regulations (para.4(b)) which provide quite separately for ICA entitlement.

19. In the Secretary of State's written submission to the Commissioner the claimant's appeal is supported. It is said that the test for "substantially engaged in caring" encompasses a claimant's non-availability for work because of the care she provides. The applicable regulation of the Jobseeker's Allowance Regulations 1966 (the JSA regulations) is regulation 13(4), which reads:-

"(4) A person with caring responsibilities may restrict the total number of hours for which he is available for employment to less than 40 hours in any week providing

- (a) in that week he is available for employment for as many hours as his caring responsibilities allow and for the specific hours that those responsibilities allow and
- (b) he has reasonable prospects of securing employment notwithstanding that restriction and
- (c) he is available for employment for at least 16 hours in that week."

20. It is argued by the Secretary of State that the claimant's situation gives her no reasonable prospects of securing employment, nor could she make herself available for the minimum 16 hours per week. When a claimant is precluded from availability by her pattern of caring, this is an additional way to satisfy the paragraph 4(a) test and the 35 hour rule is inappropriate in such circumstances.

The oral hearing

21. This case came before me for an oral hearing on 19 March 2002. The claimant was represented by Mr Ross McFarlane and by Mr McClelland, both of Money Matters. The Secretary of State was represented by Miss Anne Cairns, Solicitor, of the Office of the Solicitor to the Advocate General. I am most grateful to them for their assistance.

The arguments

22. Miss Cairns maintained the Secretary of State's support for the appeal. It was submitted that I should substitute my own decision in the terms now set out at paragraph 2 above.

23. Miss Cairns pointed out that paragraph 4(a) contains no definition restricted to a qualifying number of hours. This contrasts with the position under the ICA regulations. Therefore, no such rigidity could be read into paragraph 4(a). Substantial caring must be decided on the evidence of the nature and duration of such care. It is a matter of extent and

degree. It is not possible to state any minimum number of hours, as this would be a similar unwarranted restriction to requiring 35 hours by analogy to the ICA definition.

24. The focus is on the care provided. That the claimant may have problems preventing a greater input of care, for example because of the claimant's own health problems or childcare or a part or full-time job, is not pertinent to how much care is given to the one with the qualifying benefit. Moreover, that the claimant's pattern of care renders her disentitled to JSA is not determinative. However, the very factors which mean that she is not available for work, the heavy and recurring commitment to her father, will also be relevant to whether she is "substantially engaged" in caring.

25. In the same way, the care requirements on the basis of which the qualifying benefit had been awarded to the person to whom care is given, would be relevant but not conclusive on whether there was substantial caring.

26. Mr McFarlane said that if it is mandatory to demonstrate 35 hours of caring a week, then there is no purpose in having both paragraph 4(a) and paragraph 4(b) because of the substantial overlap between the two.

27. It is invidious that under the present departmental practice, the local office looks at the question of substantial caring only in terms of a requirement of 35 hours a week and is not interested in anything else.

28. Commissioner Mitchell had been reluctant in CIS/36/00 to introduce a required number of hours, as this would defeat the purpose of having no such definition included in paragraph 4(a).

29. Mr McFarlane urged that what counts as care is not equated with what is required for entitlement under the disability living allowance (DLA) care component. For example, there was no reason why walking to and from her father's home in order to assist him should not qualify as caring in this context.

My conclusion and reasons

Substantially engaged

30. I accept the submissions of the parties. The tribunal erred in law in requiring care of at least 35 hours a week. The ICA regulations set out that meaning for "substantial" which underscores that the lack of any such definition in paragraph 4(a) is intentional.

31. There are claimants who will not satisfy paragraph 4(b) who nevertheless fulfil heavy caring commitments. For example, some IS claimants might choose not to claim ICA because the person they care for receives the severe disability premium which they would lose if the claimant was awarded ICA. Other carers might not be entitled to ICA because they receive an overlapping benefit, such as retirement pension under regulation 4 of the Social Security (Overlapping Benefit) Regulations 1979. Conversely, if a person falls within paragraph 4(b), entitled to and actually receiving ICA, this provides a shortcut to that person's eligibility for IS, subject to the other conditions of entitlement, without further adjudication on the merits.

32. Under paragraph 4(a) it is a question of fact for the adjudicator whether the circumstances of the claimant's case fit "substantially engaged in caring". Relevant factors will be the pattern of caring, how long it lasts, how disruptive it is to the claimant's life, predictability of need, the kind of help provided, the care accepted for DLA or attendance allowance purposes, and the proportion both of the claimant's life and that of the person for whom she cares which is taken up by the assistance in issue.

33. I agree with Miss Cairns that whether the claimant can satisfy regulation 13(4) of the JSA regulations is not conclusive. That regulation addresses a different question, viz availability for work, which is not coterminous with whether a person is substantially engaged in caring for another person. Under regulation 6 of the IS regulations, as noted above, a person who would otherwise be engaged in remunerative work is treated as not so engaged if their circumstances fall under paragraph 4(a).

34. However, I am unable to agree with her that the focus is solely on the person to whom care is given. It is true that the person being cared for must be in receipt of attendance allowance or the care component of DLA at the highest or middle rate. But the carer is the subject of paragraph 4(a) and it is he or she who has to be substantially engaged in caring. Therefore, the primary emphasis must be on the effect on *that* person's life. However, the reasons *why* the claimant is unable to give a greater commitment have no bearing on the case. The question is whether, taking into the account the needs of the person cared for, and the impact on the claimant's own life, the claimant can be regarded as substantially engaged in caring. All these are ordinary words in the English language and, provided the conclusion drawn by the adjudicator is a reasonable one, having regard to the facts found, that is sufficient.

Caring

35. Although there is a link with a person receiving disability living allowance or attendance allowance, the cases on ICA (there are none with respect to IS) have never suggested that the care required is either the attention in connection with bodily functions or supervision which is requisite for entitlement to care component. Thus, in CG/006/90, the Commissioner accepted washing, shopping for food and cooking for a severely disabled person as counting, and even when this was in preparation for a visit or was cleaning up afterwards. This differed from CG/012/91. The Commissioner there refused to accept time spent by the carer while her disabled brother was abroad on seeking nursing care for him when he returned. The Commissioner reasoned that caring presupposes the more or less continuous presence of the person cared for. However, he was prepared to accept ancillary activities for the benefit of that person carried out on the same day as personal assistance, for example, shopping.

36. As in the ICA regulations, so in the IS regulations, there is no prescription of the term "caring" by importing a definition from DLA. Therefore, the meaning is not restricted by the statutory test applicable to attendance allowance and DLA care component. An apposite analogy might, however, be the care of a child of the claimant by another which allows an increase of certain benefits. In R(S)20/54, applying CS/726/49, it was accepted that the correct test was whether the carer "to a substantial extent ... performs those duties for a child with which a child needs assistance because he or she is a child, or exercises that supervision over a child which is one of the needs of childhood". The nub of caring for a disabled person is perhaps whether the carer performs those duties with which the disabled person needs

assistance because of their disability or exercises that oversight which arises for a similar reason. Domestic tasks are therefore included but not walking to and from the disabled person's home, as this is too indirectly related to the assistance required.

Summary

37. Having regard to the undisputed evidence, it is a reasonable conclusion in this case that the claimant falls within paragraph 4(a). It is not mandatory for a claimant seeking to rely on 4(a) rather than 4(b) to demonstrate 35 hours a week of caring. An adjudicating authority evaluates the evidence and determines whether the quality and quantity of the care means that the claimant is "substantially engaged in caring" for a person receiving a qualifying benefit. Care covers assistance or supervision arising out of the disabled person's needs and therefore will include domestic tasks which the disabled person, by virtue of their disability, is unable to carry out themselves and even if provided by the carer outwith the recipient's presence. But transport to and from the recipient in order to provide the care is too remote because it is not itself assistance provided to the disabled person.

(signed)
L T PARKER
Commissioner
Date: 4 April 2002