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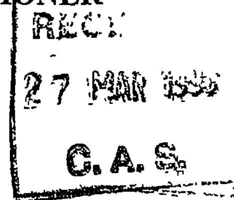
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF SOCIAL SECURITY COMMISSIONER



Name:

Social Security Appeal Tribunal:

Case No:

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1. This claimant's appeal succeeds. I hold the appeal tribunal decision dated 16 December 1994 to be erroneous in point of law and accordingly set it aside. I refer the case to the tribunal for determination afresh in light of the guidance which follows.

2. The claimant took to the tribunal an adjudication officer's decision issued in December 1991 holding her entitled to income support assessed so as to include a severe disability premium from 3 December 1990 to 18 November 1991 but holding also that she was not entitled to benefit from and after the latter date because the premium was then disallowed. The reason for that disallowance was that the claimant no longer satisfied paragraph 13 of Schedule 2 to the Income Support (General) Regulations 1987.

3. The provision just referred to prescribes the condition for an award of the premium. That condition, set out in paragraph 13(1), is that the individual concerned be "a severely disabled person". Sub-paragraph (2) permits such a person to be so treated only if, as applicable to the present case -

> "(a)(ii) subject to sub-paragraph (iii), he has no non-dependents aged 18 or over residing with him ..."

I understand from the papers that there was no suggestion that the claimant had at any material time a partner and the chairman expressly so recorded in effect -

> "5. It is expressly conceded by the presenting officer that the Department accepts that the appellant and her ex-husband were not living together as husband and wife."

in the findings of fact. That indicates the cause of the trouble. The premium was disallowed from the time that the ex-husband started to live within the same premises as the claimant. So saying, I choose language which, I hope, is for present purposes sufficiently neutral. The question then, the husband being over the age of 18, was

whether he was a "non-dependent". If he was then the adjudication officer and the tribunal's decisions were well-founded. If not, not.

4. Regulation 3 of the General Regulations, as applicable at the time of the adjudication officer's decision, provided that a "non-dependent" included any person, except someone to whom paragraphs (2), 2(A) or 2(B) applied, who normally resided with a claimant. The first question therefore, logically, was whether the ex-husband "normally resided" with the claimant. Paragraph (4) stated that -

> "For the purposes of this regulation a person resides with another only if they share any accommodation except a bathroom, a lavatory or a communal area ..."

I do not think that the rest of the provision is relevant, but that is not to stop the new tribunal considering it if it should be founded upon. There was a considerable amount of evidence that the ex-husband had a room of his own and that the only accommodation shared was the bathroom, any communal area such as passages or corridors, and possibly the lavatory, aside. There was a nice question as to whether he shared the kitchen. The evidence, however, seemed to be that he did not himself use the kitchen physically: his food was made for him and on his behalf by his daughter in the kitchen. The daughter was at the material time visiting in order to look after each of her parents but was not residing in the premises.

5. The tribunal found against the claimant. Their findings of fact, so far as relevant to the regulation 3(4) issue were these -

> "2. Between [23 August 1991] and a date that was not given in detail in September 1992, the appellant was the tenant of a local authority flat. The accommodation in that flat consisted of a bedroom, a living room, a kitchen off the living room and a bathroom.
>
> 3. The appellant's former husband used the bedroom. He also used the bathroom. The appellant herself used the living room as a bed-sitting room. The appellant and her ex-husband did not eat meals together. There was apparently a poor relationship between them. Meals for both of them were cooked in the kitchen. Clothes which belonged to the appellant were stored in the bedroom.
>
> 4. As from September 1992 onward the appellant moved house. The arrangement between her and her ex-husband continued. In the new house the accommodation was the same as described above except that there was a second bedroom. The appellant used one bedroom and the living room. Her ex-husband was not allowed use of the living room. He used the other bedroom. Meals were still cooked for him in the kitchen and he had the use of the bathroom."

The tribunal endorsed the adjudication officer's decision and held that the claimant's husband did normally reside with her. They explained that thus -

"We reach that conclusion in the light of Regulation 3(1) of the Income Support (General) Regulations having regard to the facts as we have found them above. The appellant's ex-husband resided under the roof of the house which she rented. He was given with her consent the use of a bedroom in that house. Further meals were cooked for him in the kitchen of that house. Taking a broad view of the matter and having regard also to Regulation 3(4) of the said Regulations we are satisfied that the appellant's ex-husband resided with her as the householder. He shared the accommodation of the house in a general sense with the appellant with her consent."

As the adjudication officer now points out there is no explanation as to how or why the tribunal found said regulation 3(4) to be satisfied. The question was not whether there was a sharing in a general sense. The issue depended upon a precise analysis of exactly what accommodation was shared and in so far as that was limited to a bathroom, lavatory or other communal area, as defined in paragraph (5), then there was no "residing with". In this respect I sustain the ground of appeal. I think that the claimant's representative has correctly stated the position about the kitchen. The mere use of the kitchen to prepare food for her father by the claimant's daughter does not amount to his sharing of that "accommodation" any more than if the daughter had prepared his food in her own kitchen and brought it to the mother's house he could be said to have been sharing his daughter's kitchen. There is a nice question, however, about the first period when the bedroom, then occupied by the ex-husband, contained also some clothes belonging to the claimant. The tribunal have not explained what, if anything, they made of this matter. It is because I feel unable to come to a view about it, myself, that the case must go back. The essential question will dependent upon evidence as to what it was that was stored in the bedroom, in what it was there stored and the extent to which, if any, the claimant herself went in and out of that room to deal with her property there. The result will be very much a matter of impression depending upon fact and degree, I suspect. But the tribunal will have to bear in mind that it is a "sharing of *accommodation*" that is in issue and it will be whether what use, if any, was made of the bedroom by the claimant gives them the impression that, in the normal English usage of the words, there was any such sharing. If there was none then the tribunal may well have little difficulty in allowing the whole appeal. But if there was, it will only be after the move that the appeal probably will fall to be allowed.

6. The language at the end of the last paragraph is designed to reflect my impression from the evidence as it stands at the moment, and as recorded by the old tribunal to the effect, that there was no sharing of accommodation after the move in September 1992. That is not to inhibit the new tribunal from coming to a different view in light of the precise evidence put before them. But if the evidence remains the same as before the old tribunal then they will no doubt wish to take note of how I view the law as illuminating those facts.

7. There was considered, quite properly, by the old tribunal a further question which may further arise in the present case. That is if the new tribunal hold the ex-husband to be sharing any relevant accommodation with the claimant. The concern

then will be whether he can still be expected from the definition of "non-dependent" by reason of the excepting paragraphs mentioned in 3(1). This will probably only be by paragraph (2A). That paragraph applies to those other than close relatives - and of course the ex-husband was at the material time not a close relative. But it also requires that he be liable to make payments on a commercial basis to the claimant in respect of his occupation of the dwelling - regulation 3(2A)(a). I doubt if the rest of the paragraph will be relevant but, yet again, that is in no way to inhibit the new tribunal from considering any part if there is evidence put before them requiring such consideration.

8. In this case the evidence, and I restrict, for reasons which should by now by obvious, my consideration to the period from August 1991 to September 1992, was that the claimant was paying, at least from November 1991 onwards, "a charge of £15 per week". That quotation is from the old tribunal's finding of fact number 6 which was in these terms -

> "From 19 November 1991 onwards a charge of £15 per week was paid to the appellant by her ex-husband. According to a claim form submitted in January 1993, this charge was towards the cost of electricity and telephone."

They quite properly considered this issue and determined that the payment being only in that sum and primarily directed towards telephone and electricity came nowhere near satisfying the sort of figure that a commercial lodger might be expected to pay. There are, however, two questions which may arise for the new tribunal. It does appear that the payment commenced when the ex-husband moved into the claimant's house. There was evidence before the old tribunal that the £15 per week was rather "for the use of the room and the share of the bathroom" - according to the evidence recorded by the chairman. It is not entirely clear why the tribunal rejected that evidence. Finding number 6 might be thought to amount to an explanation. But the claim form submitted in January 1993 does not appear to be part of the papers. Even if it was it seems to refer to a period outwith the important one between November 1991 and September 1992. Nonetheless, an explanation would still be required for why the direct evidence from the claimant was rejected. There is also a letter dated in January 1992, number 16 of the papers, in which she has stated in writing that the £15 per week was for the room. Moreover, in judging the whole matter, the new tribunal will no doubt wish to take into account the sense, or lack of it as they judge appropriate, in the then prevailing family circumstances of the arrangements made by it and the reasons therefor, all as set out in particular in that letter.

9. For the reasons set out above this appeal must succeed.

(signed) W M Walker
Commissioner
Date: 14 March 1996