

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CDLA/509/2009

Before Upper Tribunal Judge A Lloyd-Davies

DECISION

My decision is that the decision of the tribunal held on 21 July 2008 is erroneous in law. I set it aside. I give the decision that the tribunal should have given, namely, that the claimant's appeal was allowed and that the claimant was entitled to the payment of the higher rate of the mobility component from 27 June 2007 to 6 November 2007.

REASONS

1. The claimant was admitted to hospital on 18 August 2005 for investigations following a stroke. She remained in hospital until 25 January 2006. She was then transferred to a private nursing home, which was a neurological and specialist care unit. Initially the weekly fee at the unit of rather over £1,300 was funded in its entirety by the local NHS Primary Care Trust ("the PCT"). However, from 16 May 2007 the funding was met as to 75% by the PCT and as to the remaining 25% by the local authority, the claimant contributing £50 per week to the monies expended by the local authority. By a claim treated as made on 27 June 2007 the claimant claimed both components of disability living allowance. A decision maker decided on 30 October 2007 that the claimant was entitled to the highest rate of the care component and the higher rate of the mobility component, but that neither component was payable since the claimant was being maintained as a NHS in-patient in a hospital or similar institution. On 3 November 2007 the claimant was discharged from the care unit to her daughter's home. By a letter received on 30 November 2007, the claimant's representative appealed the decision relating to the payability of the mobility component on the grounds that the claimant's placement in the care unit was partially funded by the local authority and that she should therefore not be treated as an in-patient. The decision was re-considered but not changed. The claimant appealed to the tribunal. The tribunal dismissed her appeal on the grounds that the substantial contribution made by the NHS to her care meant that she was to be treated as receiving in-patient treatment. The claimant's representative sought permission to appeal which was granted by a district tribunal judge. The claimant's representative requested an oral hearing of the appeal before the Upper Tribunal, which request I granted.

2. At the oral hearing the claimant was represented by Mr Summers of a local welfare rights unit and the Secretary of State by Miss Chan of the Office of the Solicitor to the Secretary of State. I am grateful to them both not only for their oral submissions, but also for their subsequent written submissions which I directed.

3. There is no dispute before me as to the non-payability of the care component for the period from 27 June 2007 to 6 November 2007 (which latter date is I assume the first disability living allowance payment date following the claimant's discharge from the care unit on 3 November 2007), although I note that the Secretary of State contends that non-payability for this period arises because of the provisions of regulation 8 of the DLA Regulations 1991, whilst the claimant's representative asserts that it arises because of the provisions of regulation 9 of those Regulations.

4. The issue in this case is whether the claimant is disqualified from the receipt of the mobility component for the period from 27 June 2007 until 6 November 2007 by virtue of regulation 12A of the Disability Living Allowance Regulations 1991. That regulation, so far as is relevant, provides as follows.

"(1) Subject to regulation 12B (exemption) [not relevant], it shall be a condition for the receipt of disability living allowance which is attributable to entitlement to the mobility component for any period in respect of any person that during that period he is not maintained free of charge while undergoing medical or other treatment as an in-patient –

(a) in a hospital or similar institution under the NHS Act of 1977, the NHS Act of 1978 or the NHS Act of 1990;

(b) [not relevant]

(2) For the purposes of paragraph (1)(a) a person shall only be regarded as not being maintained free of charge in any hospital or similar institution during any period when his accommodation and services are provided under section 65 of the NHS Act of 1977, section 58 of, or paragraph 14 of Schedule 7A to, the NHS Act 1978 or paragraph 14 of Schedule 2 to the NHS Act of 1990.

(2A) [not relevant]."

Paragraph (2) of Regulation 12A has the effect that a person is always to be regarded as maintained free of charge when maintained in a hospital or similar institution under the NHS Act 1977 unless he or she is a private patient in a NHS hospital or the only element of maintenance is the provision of goods and services for which charges may be levied under paragraph 14 of Schedule 2 to the NHS and Community Care Act 1990.

5. There is no dispute before me that the care unit was a similar institution to a hospital. It was accordingly submitted by Miss Chan that since 75% of the claimant's costs in the care unit during the relevant period were met by the PCT the claimant could not fall within regulation 12A(2) since any funding by the PCT would put the claimant outside the terms of regulation 12A(2). I cannot accept the breadth of that submission. As was pointed out in paragraph 70 of R(DLA)2/06, endorsing the decision of the Commissioner in CIS/3325/2000, a person is only maintained in a hospital or similar institution by the NHS if his accommodation and non-nursing services (often referred to as "hotel costs") are being provided by the NHS under section 3 of the NHS Act 1977 (or section 3 of the consolidating 2006 Act). If the accommodation and non-nursing services are not being provided or funded by the NHS, then the claimant is not being maintained as an in-patient under the relevant legislation and, accordingly, regulation 12A(1) cannot bite. In the present case on the face of it the local authority was funding the claimant's accommodation in the care unit to the tune of rather over £350 a week (less the £50 contribution from the claimant) from 16 May 2007. The only legislative authority for this funding was if the local authority was providing accommodation under section 21 of the National Assistance Act 1948, as it stated it was (see pages 73 to 80). Therefore, if the arrangements made from 16 May 2007 are taken at face value, it follows that the claimant was not being maintained as an inpatient by the NHS and

hence was not caught by regulation 12A(1). (I add, although there was no evidence on this before the tribunal below or myself, £350 per week would appear roughly to approximate to weekly "hotel costs" in the area of the PCT/local authority where the care unit was situated.)

6. Miss Chan, however, had a secondary argument. This was to the effect that in reality the NHS had the whole responsibility for the claimant, even for the period from 16 May 2007. Miss Chan pointed out that under "The National Framework for NHS Continuing Health & NHS Funded Nursing Care" at paragraph 23 (to be found at page 140 of the case papers), where a person's primary need is a health need, the NHS was regarded as responsible for providing for all their needs, including accommodation, and that that person was then eligible for NHS Continuing Health Care: once the NHS was under this obligation, section 21(8) of the National Assistance Act 1948 prevented the local authority from providing accommodation. Miss Chan referred to the fact that the PCT (at pages 85-86) stated that the claimant was being treated under "continuing care" rather than under NHS Funded Nursing Care. Miss Chan therefore submitted that viewed overall the NHS had total responsibility for the claimant whilst she was in the care unit, including the period from 16 May 2007 when local authority funding was provided. Accordingly the claimant was caught by regulation 12A(1).

7. I am not prepared, on the evidence in this case, to accept this submission of Miss Chan. The following matters have weighed with me.

- (a) There is no suggestion in this case that the local authority and the PCT had deliberately entered into any such doubtful funding arrangement as fell to be considered in R(DLA) 2/06. I therefore consider that unless there is compelling evidence to the contrary I should not assume that the local authority was acting contrary to the terms of section 21(8) of the National Assistance Act 1948.
- (b) The claimant's stroke occurred in August 2005. She remained in a NHS hospital until January 2006, when she moved to the care unit. Her accommodation in the hospital and in the care unit was wholly funded by the NHS for the period from August 2005 until May 2007, a period of rather over 21 months. Local authority funding was only involved for the last 5½ months of the claimant's stay in the care unit.
- (c) At the end of her stay in the care unit, the claimant was discharged to her daughter's home where she was still to receive an NHS Funded Nursing Care package - see page 84.

In my judgment this history is consistent with the claimant having had a primary health care need from August 2005 until May 2007, by which time her condition had stabilised and preparations were to be made for her ultimate discharge from the care unit. It is further consistent with this that the claimant might reasonably be considered not to have a primary health care need from May 2007 but was only entitled to NHS Funded Nursing Care: indeed, unless this was the case, there was no reason whatsoever for the local authority to fund accommodation costs at the care unit for the period from 16 May 2007. I am not prepared, on the evidence available to me, to assume that the local authority for this period was acting outwith the powers conferred on it by section 21 of the National Assistance Act 1948.

8. I therefore reject both Miss Chan's arguments. Since the tribunal essentially decided that the claimant was caught by regulation 12A(1) because a "substantial" part of the funding came from NHS, rather than analysing the situation in the manner indicated above, it follows that its decision was erroneous in law and must be set aside. I substitute the decision which is given above.

(Signed)

**A Lloyd-Davies
Judge of the Upper Tribunal**

(Date)

6 April 2010