hospitals.

JM/1/SH/LM **Commissioner's File:** CP/03/1989

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Vera Fell

Appeal Tribunal: Lancaster

Case No: 605:02148

[ORAL HEARING]

1. This is an adjudication officer's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 9 August 1988 which reversed a decision issued by the adjudication officer on 12 January 1988. My decision is as follows:

(1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.

(2) It is expedient that I should myself make further findings of fact and, in the light thereof, give the decision which the appeal tribunal should have given.

(3) The decision of the adjudication officer awarding retirement pension at hospital pocket money rate from and including 3 December 1984 falls to be reviewed because there has been, since that decision was given, a relevant change of circumstances, namely that on 24 June 1987 the claimant was discharged from hospital.

(4) The decision referred to in sub-paragraph (3) above is revised so as to provide that from and including 24 June 1987, and until there is any further relevant change of circumstances justifying review and revision, retirement pension is payable at a rate unaffected by the Social Security (Hospital In-Patients) Regulations 1975 (in either the original or the amended form of those Regulations) because the claimant has not since 24 June 1987 received free in-patient treatment within the meaning of regulation 2(2) of those Regulations.

2. I make two general comments in respect of my aforesaid decision:

(a) Its effect is, in fact, identical to the effect of the appeal tribunal's decision. I in no way disagree with the conclusion reached by the appeal tribunal. I have set its decision aside because I consider it to be deficient in its recorded findings of fact and in its recorded reasoning. Such deficiency I have sought to remedy.

(b) The material before me does not permit me to give a decision in terms of precise sums of money. I leave to the adjudication officer and the claimant's representative the agreement of the relevant sums. Should such agreement not be reached, either party shall be at liberty to restore this appeal before me for final determination.

3. This was one of five appeals which I heard together in Liverpool. Almost all of the relevant facts and all of the relevant law are common to those five appeals. I have, accordingly, thought it convenient to draft a common Appendix which will accompany each of the short individual decisions. That Appendix is incorporated into and forms part of this decision.

4. I need only add that the claimant in this appeal -

(a) was born on 20 July 1921;

(b) was accepted as retired from 23 July 1981;

(c) was from 4 April 1974 until 24 June 1987 continuously an in-patient in a hospital.

5. The adjudication officer's appeal is disallowed.

(Signed) J Mitchell
Commissioner

Date: 22 August 1990

JM/1/SH/LM (Appendix)

APPENDIX

1. There are presently before me five adjudication officer's appeals, namely those on Commissioner's files numbers CP/3/1989, CP/14/1989, CP/15/1989, CP/63/1988 and CS/12/1989. In each of those appeals the relevant claimant lives - or, at the material time, lived - in a house to which I shall refer as "the Hostel". Four of those claimants were - and are - in receipt of retirement pension. At the material time the fifth claimant was in receipt of invalidity benefit. Identical issues arise in each of the appeals. Put simply, the crucial question is whether the claimants, whilst living in the Hostel, fell and fall to be treated as receiving free in-patient treatment in a hospital or similar institution, with the consequence that a substantial reduction fell and falls to be made in the rate of the relevant personal benefit payable to the claimants. I held one oral hearing in respect of all five appeals. In each case the adjudication officer was represented by Mr H Palin, of the Solicitor's Office of the Departments of Health and Social Security and the claimants were represented by Mrs S Maunders, Welfare Rights Officer of the Welfare Rights Service of the Lancashire County Council. I heard careful argument and detailed evidence. Unsurprisingly, the hearing was not brief; but thanks to the clarity and good humour with which both advocates presented their respective cases, I found the hearing very pleasant to conduct. I have decided that, in the circumstances, the most convenient way of presenting the decisions is to deal with the common issues in this Appendix and to incorporate this Appendix into each of the short decisions devoted, respectively, to the individual claimants. To avoid unnecessary suspense, I say now that my conclusion is that the claimants when living at the Hostel were not and are not receiving free in-patient treatment within the meaning of regulation 2(2) of the Social Security (Hospital In-Patients) Regulations 1975. The consequence is that no deduction fell or falls to be made, pursuant to those Regulations, from the rate of personal benefit to which the claimants were and are entitled whilst living at the Hostel.

2. Before I turn to the legal and factual details I comment briefly upon the circumstances in which I decided to proceed with the hearings despite a very belated written request from Mrs Maunders for a postponement of those hearings. The cases are, in fact, of some antiquity. Each of the relevant appeal tribunal decisions was given more than two years ago. Those decisions were favourable to the respective claimants but implementation of those decisions was withheld by the Secretary of State pending the outcome of the adjudication officer's appeals to the Commissioner. It was obviously desirable that the appeals to the Commissioner should be heard as soon as reasonably possible. For reasons of geographical convenience they were designated for hearing in Liverpool. They were initially listed

for hearing on 23 January 1990. But by a letter dated 9 January 1990 Mrs Maunders requested a postponement upon a number of grounds, one of which was that she was "in the process of obtaining Counsel's opinion as to the representation in these cases". The Commissioner appointed to sit in Liverpool in the relevant week granted the postponement. The cases were then relisted for hearing on 27 March 1990. But by a letter dated 15 March 1990 Mrs Maunders again requested a postponement "as Counsel's opinion is not yet available". On 19 March 1990 the relevant Commissioner issued the following direction:

> "I grant the claimant's representative's request for a postponement of the oral hearing of these cases on 27th March 1990.
>
> They will be relisted for oral hearing at Liverpool on Thursday April 26th, 1990. Save in the most exceptional circumstances, no further postponement will be granted."

It fell to me to take the Liverpool list in April 1990. Yet again Mrs Maunders made a belated application for a postponement. The grounds were that the relevant Welfare Rights Service had only very recently secured the agreement of counsel (whom she named) to represent the claimants; but there had been no time in which to complete the necessary arrangements. She added, however, that if a further adjournment was not granted she would be ready and able to proceed on 26 April 1990. At the opening of the hearing before me she confirmed her readiness so to proceed. I did not myself consider that any further delay was justifiable. I in no way regret that decision. As I have already indicated, Mrs Maunders' presentation of the claimants' cases was thorough and lucid.

3. Not unreasonably, it has been a long-standing principle of social security law that the rate of a claimant's personal benefit should be reduced where that claimant is in receipt of free in-patient treatment in a hospital or similar institution. The effect of the Hospital In-Patients Regulations is that a reduction is made to the rate of personal benefit when a claimant has been in a hospital or similar institution for more than 8 weeks and a further reduction is made after 52 weeks in a hospital or similar institution. That further reduction is substantial. For example, in the case of the claimant in CP/3/1989, in 1981 the reduced rate amounted to £5.45 and in 1988 it amounted to £8.25. Those reduced sums are sometimes referred to as the "hospital pocket money rate". The precise circumstances giving rise to the reduction are set out in regulation 2(2) of the Hospital In-Patients Regulations. Until 1 November 1987 Regulation 2(2) provided as follows:

> " (2) For the purposes of these regulations, a person shall be regarded as receiving or having received free in-patient treatment for any period for which he is or has been maintained free of charge while undergoing medical or other treatment as an in-patient -

(a) in a hospital or similar institution maintained or administered under the National Health Service Acts 1946 to 1976 or the National Health Service Act 1977 or the National Health Service (Scotland) Acts 1947 to 1976, or by or on behalf of the Secretary of State, or by or on behalf of the Defence Council; or

(b) pursuant to arrangement made by the Secretary of State or by any body in exercise of functions on behalf of the Secretary of State under those Acts in a hospital or similar institution not so maintained or administered;

and a person shall not be regarded as being maintained free of charge in a hospital or similar institution for any period if he is paying or has paid, in respect of his maintenance, charges which are designed to cover the whole cost of the accommodation or services (other than services by way of treatment) provided for him in the hospital or similar institution for that period."

With effect from 2 November 1987 regulation 2(2)(b) of the Social Security (Hospital In-Patients) Amendment (No. 2) Regulations 1987 effected the following amendment:

" (b) In paragraph (2) for the words from 'National Health' to '1947 to 1976' there shall be substituted the words 'National Health Service Act 1977 or the National Health Service (Scotland) Act 1978' and for the words from 'and a person shall not be regarded' to the end of the paragraph there shall be substituted the words -

'and such a person shall be regarded as being maintained free of charge in such a hospital or similar institution for any period unless his accommodation and services are provided under section 65 of the National Health Service Act 1977 or section 58 of the National Health Service (Scotland) Act 1978'."

It is upon the construction and application of regulation 2(2) of the Hospital In-Patients Regulations that these cases turn; and the time span is such that that regulation must be considered in both its original and its amended form.

4. Each of the claimants in these appeals has suffered and suffers from a degree of mental disorder. For some years prior to 24 June 1987 each was a patient in a hospital to which I shall refer as "L M Hospital". Whilst in L M Hospital each was subject to the full reduction in the rate of personal benefit - and there is not and never has been any dispute about that. But on 24 June 1987 each claimant took up residence in the Hostel. Did

such residence fall within the scope of regulation 2(2) of the Hospital In-Patients Regulations? As I have already indicated, that is the crucial issue in these appeals. No one contends that the Hostel can properly be described as a "hospital". But is it a "similar institution"? That is not, of course, the only question arising out of the construction and application of regulation 2(2) - but it is the main one in the context of these appeals. It cannot be determined without detailed reference to the basic purpose and function of the Hostel and the conditions under which residents live therein. To those I now turn; and it is some comfort that, amidst the complexities of these cases, the essential facts are not in dispute.

5.(1) As is well known, it has for some time been the declared policy of the Government to promote -

(a) the discharge from hospital of those whose mental condition has improved to the point where treatment in hospital is no longer necessary; and

(b) the return of such people to life in the general community.

Obviously, however, it is not always either practicable or desirable simply to discharge such people with the hope that somehow or other they will find a niche for themselves in the outside world. Accordingly - and very commendably - local health authorities and others have established what may be regarded as halfway houses where, with a measure of care and attention, mentally handicapped people who have been discharged from hospital can embark upon readjustment to the ordering and running of their daily lives.

(2) The Hostel is such an establishment. It is a large Victorian house at the end of a terrace, owned by the Lancaster Health Authority. There are beds for nine residents. There are five single bedrooms and two double bedrooms. It is staffed on a 24 hour basis by nurses (five trained and four untrained) who are employed by the Lancaster Health Authority. On rota, one member of such staff sleeps in the Hostel. I quote from a letter dated 23 July 1987 which was written to the Department of Health and Social Security by a principal psychiatric social worker in the service of the Lancaster Health Authority:

> "A nurse sleeps in merely because it would have been irresponsible for the Hospital Authorities to have left these ex-patients to flounder in the community without adequate support after the lengthy periods they have spent in hospital."

(3) The senior member of the staff at the Hostel is a gentleman to whom I shall refer as "Mr W". Mr W is a psychiatric nurse with 17 years experience. He gave evidence before the appeal tribunal and Mrs Maunders called him to give evidence before me. Let me say at once that I found his evidence as moving as I found it convincing. Before going to the Hostel to assume the role of

charge nurse/home leader he worked at L M Hospital. He told the appeal tribunal that his function at the Hostel was different from what it had been at L M Hospital. When at L M Hospital he had been responsible for all decisions about the lives of the patients who had since then been discharged to take up residence in the Hostel. In the Hostel he was not so responsible. I think that it is clear that the evidence which Mr W gave before me was very much more detailed than that which he gave to the appeal tribunal. That is in the nature of things. Mrs Maunders did not represent any of these claimants before the appeal tribunal - but they were there represented by a welfare rights officer who - so far as the record on the relevant Form AT3 indicates - appears to have performed his task very competently. But I very well know that, in the more leisurely atmosphere afforded by the Commissioner's court, cases tend to be presented in greater depth and with more detail than they are before the appeal tribunal; and, as I have said, that is in the nature of things.

6. In the context of the question whether the Hostel was an institution "similar" to a hospital, Mrs Maunders very helpfully identified 10 specific aspects of life in the Hostel to which, in turn, Mr W directed his evidence. In the following sub-paragraphs I deal with each of those aspects.

(1) Health and medication

Apart from the aforesaid nurses (trained and untrained), there is no medical staff at the Hostel. For health care purposes the residents are registered with a general practitioner just like any other normal member of the community. When in the Hostel they administer their own medication. But most of the residents have regular injections and for those they attend an out-patients clinic in Lancaster. The prescriptions for the relevant injections are held by both the general practitioner and the clinic. The clinic deals only with mental disorders and is staffed by both doctors and nurses.

(2) Money

The residents in the hostel hold their own benefit books and are at liberty to spend their benefit as they chose. That contrasts with the position in normal long-stay hospitals, where the benefit books are held by the hospital staff. Since the Hostel is owned by the local health authority, residents therein cannot lawfully be charged rent or rates. There is a weekly charge of £25 which is designed to cover the cost of food, cleaning materials, fuel, telephone charges and the licence and rental in respect of television. In view of the adjudication officer's application of regulation 2(2) of the Hospital In-Patients Regulations and of the Secretary of State's decision not to implement the decisions of the appeal tribunal, Lancaster Health Authority has been making loans to some of the residents in respect of that £25. Other of the residents, however, have been able to pay the £25. The

sums go into a communal "kitty". The money is kept in a cash-tin. Two residents hold a key to that tin. The budget has, apparently, gone into surplus. Such surplus is lodged in an account with the National Savings Bank which is in the name of two of the residents.

(3) Food

The residents themselves choose the meals which they wish to eat, do the shopping, make payment therefor with money drawn from the "kitty" and prepare the meals. Since they are elderly and growing older, members of the staff afford a measure of practical assistance. Residents who have done their share of the shopping go home by taxi.

(4) Clothing

Residents chose their own clothes from normal shops. This contrasts with the position in a long-stay hospital where the hospital would provide a fixed sum to be used for purchases either from a shop on the site or a visiting shop.

(5) Cleaning

The residents take responsibility for all cleaning, using materials bought with money from the "kitty". They wash their own bed linen.

(6) Fuel bills

The relevant Gas and Electricity Boards submit bills which bear the names of all the residents. As already indicated, those bills are paid from the "kitty".

(7) Poll Tax bills

The district authority has issued bills to each resident in respect of the full amount. The residents have claimed exemption on the grounds of severe mental impairment. This, of course, is to be contrasted with the position of patients in long-stay hospitals. Such patients are not liable to poll tax at all.

(8) Accommodation

In addition to the bedrooms, there are two lounges, a dining-room, a kitchen and a bathroom. The residents go into town to enjoy educational and recreational facilities. Such facilities are those available to and used by ordinary members of the public. Each resident has a key to the front door of the hostel. Members of the staff have no keys. If a vacancy occurs for a new resident, the existing residents decide who that new resident shall be. (Residents are recruited exclusively from patients discharged from L M Hospital.) In Mr W's words: "They have

their own space." That space is respected by other residents and by the staff.

(9) Internal organisation within the hostel

The residents determine their own daily routine. They individually prepare their own respective breakfasts and lunches. Visitors are encouraged - but visits are at the discretion of the residents.

(10) Professional services by staff

As I have already indicated, there is 24 hour cover; but from 8.00 pm until getting-up time there is only standby service to meet the possibility of support's being required. The staff work on four shifts. At any time in a normal day there might be three on duty. All the qualified nurses are psychiatric nurses.

7. At the hearing before me Mr W's job description was handed in. I quote what is set out therein under the heading "Role":

"To manage a home for nine people who have spent many years in a long-stay hospital. Providing and maintaining a quality of care and a warm supportive atmosphere in which relationships can be established and maintained with individuals. Such relationships would be warm, caring and respecting at all times the individual's rights and the personal dignity of clients, which will provide them with the opportunity for growth, physically, mentally, emotionally and spiritually."

Perhaps I may be permitted to say that, from what I saw of and heard from Mr W, I am sure that he fills that role admirably. I do not think that I need quote further from his job description. I endorse Mrs Maunders' submission that that job description makes it clear that the care to be provided is care in a social framework.

8. Mr Palin cross-examined Mr W. It was a restrained and very proper cross-examination - designed not to challenge, but to expand and elucidate, what Mr W had said. The residents in the Hostel can, of course, come and go as they please; and Mr W freely agreed that many mental hospitals now contain many voluntary patients who also may come and go as they please. That is all part of the current move to try to bring mentally handicapped people back into society. Mr W explained that the Lancaster Health Authority contributes to the "kitty" £35 a week in respect of food for the staff. Residents are free to abandon residence in the Hostel should they so choose. Mr W explained that should a resident indicate such an intention, he (Mr W) would inform the relevant general practitioner and take tactful steps to discourage the implementation of such intention. But - in the ultimate analysis - the resident would be free to go.

9. So how is all that to be regarded in the light of regulation

2(2) of the Hospital In-Patients Regulations? Both Mr Palin and Mrs Maunders agreed that the four salient questions were accurately summarised by the local adjudication officer in his written submission to the appeal tribunal. I set them out in the local adjudication officer's words:

(a) Is the claimant an in-patient?

(b) Is the claimant in a hospital or similar institution?

(c) Is the claimant undergoing medical or other treatment?

(d) Is the claimant being maintained free of charge in a hospital or similar institution?

That was the order in which the local adjudication officer set out those questions. It is question (b), however, which looms largest in these appeals. Accordingly, both the adjudication officer now concerned and Mr Palin dealt with it first - and I shall adopt the same course.

Is the claimant in a hospital or similar institution?

10. In common with "analogous", "similar" is a word somewhat favoured by legislative draftsmen but pregnant with litigation. I am of the firm view that neither word can be properly construed and applied without careful consideration of its context. In the context of the number of legs, eyes, ears and noses, a mule is "similar" to a mouse. But in many other contexts it would be farcical to describe a mule as "similar" to a mouse; although in most of such contexts it might be legitimate to describe a mule as "similar" to a horse. The context of regulation 2(2) of the Hospital In-Patients Regulations is the substantial reduction of the personal benefit payable to persons who, in effect, are not having to meet the basic expenses of living because their basic living needs are being provided, free of charge to such persons, by the hospitals in which they are patients. Such a policy accords with both commonsense and social justice. And one can see that there will be cases where, although the institution in which the relevant claimant is lodged is not a "hospital" within the strict meaning of that term, it is an institution so "similar" as to invoke like considerations of commonsense and social justice. But a line must be drawn somewhere. In a case the name of which I cannot now recall, Lord Denning MR (as he then was) had been rhetorically asked by counsel: "Where is the line to be drawn?". Lord Denning, in his judgment, commented that that line of argument seldom appealed to him and added: "The line can always be drawn along a reasonable contour". In the cases now before me I feel that the reasonable contour lies in a position which favours the claimants. Circumstances have relieved them of responsibility for rent and rates. (Had they not been so relieved, they would have been eligible for consideration pursuant to the housing benefit scheme.) Apart from that element, they are responsible for all their living expenses. As I have already made clear, it is present policy to encourage the restoration to the general community of all such

mentally handicapped people as are fit for such restoration. I cannot think that it was ever the intention of Parliament that such people, after discharge from hospital, should be deprived of the full personal social security benefit to which non-hospitalised claimants are entitled. To put it another way: Was it really the intention of Parliament that people in the position of these claimants should be deprived of their full benefit with the consequence that they have either to delve into their private resources or accept a loan from the local health authority (which loan, of course, comes from public funds and is, if the adjudication officer is right and the appeal tribunal and I are wrong, unlikely ever to be recovered). I can see neither commonsense nor social justice in that. It must be borne in mind that in each of these five cases the personal benefit involved is a contributory benefit. Now that these claimants have been returned to the general community, it must, surely, be the intention of Parliament that they should draw the full benefit to which their contributions have entitled them.

11. I am, of course, perfectly well aware that the intention of Parliament must be ascertained from, and only from, the words of the legislation in contemplation. But, as I have already stressed, the word "similar" is not a word which <u>by itself</u> is susceptible of precise interpretation. What I have sought to do is to interpret it in the context - and solely in the context - of the Hospital In-Patients Regulations.

12. Mrs Maunders suggested to me that I could either take a broad view or go step by step through the various definitions which Mr Palin deployed before me. Taking the broad view, I am satisfied - mainly upon the basis of the material which I have summarised in paragraphs 6 to 8 above - that the Hostel cannot properly be regarded as being "similar" to a hospital. However, out of deference to Mr Palin's careful and attractive submissions, I give those submissions specific consideration.

13. In section 128 of the National Health Service Act 1977 "hospital" is defined thus:

> " (a) any institution for the reception and treatment of persons suffering from illness,
>
> (b) any maternity home, and
>
> (c) any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation,
>
> and includes clinics, dispensaries and out-patient departments maintained in connection with any such home or institution, and 'hospital accommodation' shall be construed accordingly ..."

And "illness" is defined as including -

> "mental disorder within the meaning of [the Mental Health

Act 1983] and any injury or disability requiring medical or dental treatment or nursing ..."

Mr Palin also cited to me section 3(1) of the National Health Service Act 1977:

" 3. (1) It is the Secretary of State's duty to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements -

(a) hospital accommodation;

(b) other accommodation for the purposes of any service provided under this Act;

(c) medical, dental, nursing and ambulance services;

(d) such other facilities for the care of expectant and nursing mothers and young children as he considers are appropriate as part of the health service;

(e) such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service;

(f) such other services as are required for the diagnosis and treatment of illness."

14. Mr Palin was, I think, disposed to agree that none of those definitions - whether taken separately or read in conjunction with one another - brought the Hostel within the ambit of the term "hospital". But he prayed those definitions in aid in support of the contention that the Hostel was an institution "similar" to a hospital. He stressed sub-paragraph (c) of the definition of "hospital" which I have set out above:

" (c) any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation ...."

I deal below with the distinction between, on the one hand, care and attention and, on the other hand, treatment. I am satisfied, moreover, that any such rehabilitation as was afforded by the Hostel was social and not medical. To be fair to Mr Palin, however, his argument was not that sub-paragraph (c) covered the Hostel but that it furnished a useful guideline as to the type of institution which might be regarded as "similar" to a hospital. And he invoked section 3(1)(e) of the National Health

Service Act 1977 (see paragraph 13 above) as furthering that argument. It is by no means an inconsiderable argument. But I do not think that it obliges me to close my eyes to the characteristics of the Hostel to which I have alluded in paragraphs 6 to 8 above or to the commonsense conclusions to be drawn therefrom. Nor do I think that the mere fact that a person resides in a "facility" which it is the Secretary of State's duty to provide indicates that that person is residing in an institution "similar" to a hospital.

15. In respect of this limb of the argument Mr Palin referred to and relied upon a decision of the Commissioner. In R(S) 6/58 the claimant had been, before entering hospital, living in a hostel provided by a local authority under section 28(1) of the National Health Service Act 1946 for homeless ambulant infective tuberculous men. There was a visiting medical officer but no other medical or nursing services were provided in the hostel. The claimant was permitted to reside there as long as he wished and part of the cost was borne by the local authority. The Commissioner held that the hostel was prescribed accommodation for the purposes of the National Insurance (Hospital In-Patients) Regulations 1949, as amended in 1952 and 1955. Mr Palin relied in particular upon paragraph 12 of that decision as establishing that accommodation could be "prescribed accommodation" despite the fact that there was no resident nurse or other person with medical qualifications upon the relevant premises. I do not myself find R(S) 6/58 of any assistance in these appeals. The claimant in that case was suffering from a severe and infectious disease. Moreover, paragraph 12 of the decision opens thus:

> " 12. It was said in Decision R(S) 15/55 'It is important to recollect that the phrase to be construed is residing in "hospital accommodation or similar accommodation" not "in a hospital or similar institution". The use of the word accommodation points, I think, to the nature of the benefits enjoyed and not to mere physical presence in a particular type of building.'"

In the present appeals the crucial phrase is, of course, "in a hospital or similar institution". And it is clear that in R(S) 6/58 the Commissioner was considering legislative provisions which in other respects also differed substantially from the provisions with which I am concerned.

Is the claimant undergoing medical or other treatment?

16. Mr Palin quoted from paragraph 14 of decision R(P) 1/67:

> "The reason underlying the regulations is that benefit is intended to help support a person and, after an initial period of eight weeks when there may be some dislocation and overlapping expenses, it is thought right that the claimant who is being supported by the National Health Service should have her benefit reduced. I think that against this background it would be wrong to put a restrictive interpretation on the words 'medical or other

treatment'. The insurance officer's representative referred to a decision of the Court of Appeal which supports the view that the treatment provided under the National Health Service Act 1946 includes nursing treatment (see Minister of Health v General Committee of the Royal Midland Counties Home for Incurables at Leamington Spa [1954] 1 Ch 530 at 541, 547 and 549-550) and the phrase 'medical or other treatment' seems to me a wide one."

Mr Palin also cited decision R(S) 4/84 as authority for the proposition that for a day to be treated as a day of treatment for the purposes of regulation 2(2) it was necessary only that a person should receive treatment at some time during the course of such day. And he rhetorically asked: "Does it matter where such treatment is received?" That question was directed to the treatment which the claimants, or some of them, receive at the clinic to which I have referred in paragraph 6(1) above. I think that I can dispose of that treatment briefly. The relevant words in regulation 2(2) are ".... while undergoing medical or other treatment as an in-patient ...." . It is my view that it was not "as an in-patient" of any institution that any of these claimants received or receives treatment at the clinic in Lancaster. They were manifestly out-patients of that clinic; and I cannot see that where they resided at the relevant times affected the situation. As to whether they were or were not receiving "treatment" in the Hostel, Mrs Maunders accepted that "treatment" fell to be given a wide meaning; but she submitted that such meaning could not be extended to embrace the type of care and attention which these claimants receive in the Hostel. She referred to decision R(S) 16/51 in which, in the context of the National Insurance (Residence and Persons Abroad) Regulations 1948, "treatment" was restricted to "some activity administered by a person or agency other than the patient himself".

17. On balance, I incline to the view that the care and attention accorded to the residents in the hostel was not and is not of such a nature as can properly be described as "treatment". The issue is not, however, of crucial importance in these appeals since I have already decided - with rather more confidence - that the claimants were not and are not "in a hospital or similar institution".

Is the claimant an in-patient?

18. In the context of these appeals this is not a significant issue. It was common ground between Mr Palin and Mrs Maunders that if the Hostel is an institution "similar" to a hospital, then the claimants are undoubtedly "in-patients" thereof. But, since I have found that the Hostel is not an institution "similar" to a hospital, the claimants cannot properly be described as "in-patients".

Is the claimant being maintained free of charge in a hospital or similar institution?

19. Here, again, my finding in respect of the "hospital or similar institution" issue renders the question somewhat otiose. For the sake of completeness, however, I add the following:

(a) Mrs Maunders conceded that from the effective date of the amendment of regulation 2(2) (see paragraph 3 above) it could not be plausibly argued that the claimants were not being maintained free of charge. Manifestly the relevant accommodation and services were not and are not provided under section 65 of the National Health Service Act 1977 (which relates to private patients in national health service hospitals or similar institutions).

(b) As to the position before the amendment, Mr Palin referred to the very early decision reported as CS 591/49 KL. I quote the opening words of paragraph 6 of that decision:

> "6. To succeed in her claim the claimant must show that in respect of the maintenance in the hospital:-
>
> (a) she paid charges and
>
> (b) those charges were designed to cover the whole cost of her accommodation and services provided for her while in hospital (other than services by way of treatment)."

(The relevant words in that case were also "maintained free of charge".)

Mrs Maunders referred to Brutus v Cozens [1972] 2 AER 1297 and invited me to give the words "free of charge" their ordinary, everyday meaning. The claimants, she urged, were not being maintained free of charge for they had to find the aforesaid £25 a week. The submission has its attractions, but I cannot accept it. CS 591/49 KL has stood for four decades. No doubt subsequent legislation has been drafted in the light thereof. I decline to depart from it. It follows that I do not consider that these claimants can establish that they were not being "maintained free of charge". Such charges as they did and do pay do not cover either rent or rates in respect of their accommodation or the cost of such care and attention as is furnished by the staff.

Conclusion in respect of the effect of regulation 2(2)

20. A claimant does not, of course, fall within the ambit of regulation 2(2) of the Hospital In-Patients Regulations 1975 unless an affirmative answer can be given to each of the four questions which I have set out in paragraph 9 above. As appears from the foregoing, I am satisfied that an affirmative answer cannot be given to question (b). I have outlined my approach to

the other three questions; but - since the answer to question (b) is in the negative - such approach is somewhat superfluous. My conclusion is that, since none of these claimants falls within the ambit of regulation 2(2), none falls to have any deduction from the relevant personal benefit made by virtue of the Hospital In-Patients Regulations in respect of any period during which such claimant has been residing in the Hostel.

Summary of forensic history

21. In consequence of the claimants' move from L M Hospital to the Hostel the local adjudication officer reviewed the respective decisions pursuant to which their personal benefits had been reduced to the hospital pocket money rate. I am in no doubt that the circumstances fully justified such review. But the local adjudication officer decided that no revision was called for. Each claimant appealed to the appeal tribunal. The appeal in CP/68/1988 was heard on 7 June 1988. The tribunal decided in the claimant's favour - but the relevant form AT3 was completed in so terse a manner as to constitute a substantial failure to comply with regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986, which, in turn, amounts to vitiating error of law. The appeals in the other four cases were heard, by a differently constituted appeal tribunal, on 9 August 1988. In those cases the relevant forms AT3 were completed in substantially greater detail. Indeed, Mrs Maunders submitted that they adequately complied with regulation 25(2)(b) aforesaid. They showed, urged Mrs Maunders, that the appeal tribunal had addressed itself to the correct questions, had recorded adequate evidence in respect thereof and recorded findings of fact which explained and justified the (admittedly) very terse reasons. I am not without some sympathy with those submissions. I appreciate that appeal tribunals could not satisfactorily get through their volume of work were they to record their decisions at a length and in the detail which characterises the decisions of the Commissioner. But - on any showing - the issues raised by these appeals are complex; and, upon balance, I do not regard the combined effect of the recorded findings of fact and the recorded reasons as adequate. It was at the express request of both parties that I embarked upon what was, in effect, a complete rehearing of the appeals. Although the manner in which the relevant forms AT3 were completed reflects error in point of law, I am fortified by the reflection that I have on the central issue ("hospital or similar institution") come to the same conclusion as was reached by the relevant appeal tribunal in each of the cases now before me. The consequence is that the outcome of each of these appeals is identical to the outcome before the appeal tribunal; but - with the assistance of further evidence which was not before the appeal tribunals - I have sought to set out findings and reasons which will fully explain my conclusion to both parties.

Strikers Perry

MJG/SH/4/TP

Commissioner's File: CIS/266/1989

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Andrew John Shaw

Social Security Appeal Tribunal: Lancaster

Case No: 605:01674

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 27 June 1989 as that decision is erroneous in law and I set it aside. I give the decision which the tribunal should have given, namely that in respect of the claimant's claim for Income Support dated 12 July 1988, the claimant was not a person who was disqualified under section 19 of the Social Security Act 1975 for receiving unemployment benefit or a person who would have been so disqualified if otherwise entitled to that benefit. That is because, although the claimant lost his employment on 12 June 1988 as an employed earner by reason of a stoppage of work due to a trade dispute at his place of employment, he has proved that he was not directly interested in the dispute: Social Security Act 1975, sections 19 and 101 (as amended) and the Social Security Act 1986, section 23.

2. This is an appeal to the Commissioner by the claimant, a young man who was at the relevant time an apprentice under the Vickers Apprenticeship scheme. There was at that time a trade dispute at Vickers which lasted from 12 June 1988 (so far as the claimant was concerned), up to a resumption of work on 30 August 1988 (for details see below).

3. The appeal was the subject of an oral hearing before me in Liverpool on 23 July 1990, at which the claimant was present and was represented by Ms S Maunders of the Lancashire County Council Welfare Rights Organisation. The adjudication officer was represented by Mr N Butt of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to the claimant, to Ms Maunders and to Mr Butt, for their assistance to

me at the hearing. The claimant's appeal is against the unanimous decision of a social security appeal tribunal dated 27 June 1989 which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 13 July 1988 to the effect that (in respect of a claim for Income Support made on 12 July 1988) the claimant was not entitled to that benefit because of the combined provisions of section 19 of the Social Security Act 1975 and section 23 of the Social Security Act 1986. Those provisions together mean that the claimant could not receive any Income Support, he being a single person without a "family" and he was held to be subject to a "trade dispute" disqualification under the provisions (relating to unemployment benefit) of section 19 of the Social Security Act 1975.

4. Although I have eventually decided that I must hold the tribunal's decision to be erroneous in law, I should say that it is clear that the tribunal here took considerable trouble with this case. There had been a previous adjournment to obtain further detailed documentary evidence as to the Apprenticeship Scheme with Vickers. The tribunal, when it conducted its full hearing on 27 June 1989, made a full record of its decision on Form AT3. However, in my view, the question whether or not a given set of facts can amount to a "direct interest" within the meaning of section 19(1)(a) of the Social Security Act 1975 (as amended by section 44 of the Social Security Act 1986) itself involves a question of law. In my view the tribunal erred in law in its legal deductions from the admitted facts in this case.

5. Those facts were that the stoppage of work from 12 June 1988 to 30 August 1988 was undoubtedly due to a trade dispute, i.e. as to the terms and conditions of employment, and in particular as to the employers wishing to substitute for the workforce as a whole a system of fixed annual holidays at fixed dates rather than as hitherto allowing employees a flexibility of choice as to when during the year they would take their holidays. An overtime ban was imposed as a result of this and then there was a subsequent stoppage of work. But the holiday issue was undoubtedly the only issue that was involved in the trade dispute.

6. In order therefore to escape disqualification (because he undoubtedly lost his employment as the result of a stoppage due to the trade dispute) the claimant has to prove, on a balance of probabilities that he was "not directly interested in the dispute". The meaning of the words "direct interest" which have been in the legislation for many years has been the subject of many reported decisions some of which were cited to me at the hearing. The point has even been taken as far as the House of Lords in the case of Presho v. Adjudication Officer [1984] 2 W.L.R. 25, also reported as an Appendix to R(U) 1/84. The Presho case, as indeed many of the other cases, concerned a dispute as to wages and is not particularly helpful in a factual context in the present case where the dispute was not as to wages at all but as to holiday entitlements.

7. It was contended by Ms Maunders on behalf of the claimant

that he had no direct interest in the trade dispute though he did of course have some interest in the dispute, in that undoubtedly his holiday entitlement would be affected. However there is in the papers before the Commissioner a letter from the Regional Adjudication Manager of the Department of Employment dated 6 July 1988 to the employers asking questions to which the Employee Relations Manager of Vickers replied on 11 July 1988. I have tabulated the questions and answers in the quotation as follows:-

QUESTIONS	ANSWERS
5. Are apprentices: able to choose when to have their holidays now?	5. No: they are not permitted to be on holiday on any day they are due to attend college. They also have the same fixed annual holidays as do adults, currently Spring, Bank, Week, August Bank Holiday Monday (Hourly Paid only), and link between Christmas and New Year.
6. If, or when a fixed holiday is imposed, will apprentices have exactly the same fixed holiday?	6. Yes.
7. In the event that a fixed holiday includes any period during which apprentices etc would normally be required to attend college would they still be expected to attend college? If so, would extra days of holiday be allocated to them in compensation and when would those days be taken?	7. Yes to both questions."

8. I should add at this point that, as well as a requirement for attendance at further education courses at the local College of Technology, the claimant was also required to take examination courses and examinations as is evinced by paragraph 11(viii) of the general written conditions of Vickers apprentices reading as follows,

> "Associated further education to expand upon the largely practical skills learned at the workplace. Trainees will be enrolled on a suitable course of 'off the job' academic

studies usually at Barrow College of Further Education. (BTEC, City and Guilds etc). Courses selected will depend upon the vocational qualifications required for a particular Trade or Technical discipline and may be day or block release. Trainees will be expected to work towards successful completion of 2 full sessions of further education during their YTS entitlement. VSEL (Vickers) will pay College fees during the YTS course and trainees will be expected to conform to college rules and regulations particularly in respect of behaviour and attendance times."

9. Those conditions also make it clear that any apprentice who failed to keep up his college attendances or take the examinations runs the risk of dismissal. In relation to holidays, paragraph 5(iv)(B) of the Conditions of Apprentices reads as follows-

> "Time off and holiday should be agreed, well in advance of the occasion, with your Section Instructor so that proper arrangements can be made. Holiday entitlement during your first year of service with VSEL will be calculated according to the length of time you have been with the company. You will not normally be eligible to take a substantial period of paid holiday until you have completed basic Skill Centre Training (i.e. late July, early August). You should also avoid taking holidays during periods of further education attendance particularly any involving course examinations."

10. I have to consider the case law as to "direct interest" in the light of those facts, which are not disputed. The social security appeal tribunal in its findings of fact dealt with this matter in paragraphs 3 and 5 of those findings. In paragraph 3 they speak of the fixing of holidays automatically including apprentices and say "during a period of fixed holidays the apprentices would have no opportunity of working and learning their skills". But in paragraph 5 the tribunal says "[the claimant] would be automatically affected by the outcome of the strike in that, as already set out in our findings at (3) above, his holidays would require to be fixed in common with the work-force, to enable him to acquire his necessary training in the works subject only to attendance at college and examinations. In other words, there was a direct association between the appellant and his trainers amongst the other employees of VSEL".

11. In my judgment those conclusions are erroneous. The fact that undoubtedly the claimant's holidays were always subject to variation by the overriding necessity of attendance at college and the taking of examinations meant that, although he would undoubtedly have an interest in the outcome of the dispute as to holidays by the rest of the workforce, it was not a "direct" interest because there was a contingency which intervened namely that he must attend colleges and examinations. Whether in fact the college and examination requirements would 'cut across' any fixed holidays that were substituted for flexible holidays is in my view beside the point. The fact is that in theory and possibly in practice they could do so and that was enough to

prevent the interest being direct. The contingency of attendance at Further Education College and examinations had intervened (compare the Prosho case cited above and paragraph 8 of R(U) 13/71 approved in the Presho case.

12. That also in my view is consonant with the well known legal position of apprentices etc, i.e. that the relationship between them and their principal employer or 'master' is not solely that of employer and employee. There has always been a status relationship between them. Apprentices have a special role to fulfil. Their contract is partly a contract for employment but equally importantly a contract for education. It would be wrong in my view for them to be held to be directly effected by a trade dispute which covered a workforce whose contracts were merely employment contracts, unless it was clear that they could not in the circumstances of any particular case discharge the onus of proof imposed by section 19 of the 1975 Act. But by the very nature of things, apprentices frequently will be able to discharge that onus, as the claimant has in this case.

13. My having found in favour of the claimant on this ground means that I do not have to deal with the further contention which Ms Maunders addressed me that the claimant could take advantage of the provision of section 19(1)(a) which provides that, if it can be shown that the claimant's "place of employment" was a "separate branch of work" and the trade dispute did not apply to that "branch of work", then he would ipso facto escape disqualification. There was some evidence led to me on this point but it seems to me to be a point involving some considerable difficulties, particularly in regard to the reference in section 19 of the 1975 Act subsection (2)(a) to "separate businesses". In the circumstances I consider it better if I say no more about this. I merely record that there was some evidence on the point but leave the point to be decided in a case where it inescapably occurs, which it does not in this case.

14. Lastly, I should say that I have therefore by my decision in effect lifted the trade dispute disqualification in regard to the claimant's claim for Income Support dated 12 July 1988. The local adjudication officer will now therefore need to look at that claim for Income Support and any subsequent claim, presumably up to the date that the stoppage of work ceased on 30 August 1988 and determine the claimant's entitlement to Income Support on the financial side of the case. But the claimant is not to be affected by the special rule relating to a trade dispute disqualification.

(Signed) M J Goodman
Commissioner

(Date) **13 August 1990**