Requirements: Board and Lodging: in order for charges for extra services (eg attendance) to be met by Sup. Ben. under reg 9(4A), the services must be provided by the home, not by a third party.

WRB

DGR/SH/41

Commissioner's File: CSB/754/1988

Region: Wales & South Western

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Samuel Ernest Claud Pearce

Social Security Appeal Tribunal: Truro

Case No: 333/01906

1. For the reasons hereinafter appearing the decision of the social security appeal tribunal given on 16 June 1988 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the adjudication officer, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 16 June 1988. The claimant asked for an oral hearing, a request which was acceded to. At that hearing the claimant, who was not present, was represented by Mr D L Williams, a welfare rights development officer, whilst the adjudication officer appeared by Mr N Storey of the Solicitor's Office of the Departments of Health and Social Security.

3. The claimant, aged 66, lives with his wife, some 8 months older, in Treveor House, Camborne, Cornwall, an establishment run by the Abbeyfield Society. Initially, he paid for accommodation and midday and evening meals a charge of £74 a week, increasing to £105 rom 1 January 1988. The claimant and his wife are both in poor health. The former has suffered kidney failure and has to attend Derriford Hospital three times a week, whilst his wife, who requires attendance, has suffered brain damage as a result of a motoring accident and is unable to care for herself. The claimant has been at Treveor House since 30 May 1982. On 2 December 1987 the adjudication officer decided that the claimant was entitled to supplementary benefit of £57.80 per week from the prescribed pay day in the week commencing 23 November 1987, and to supplementary benefit of £88.80 per week from the prescribed day in the week commencing 28 December 1987. The claimant challenged the amount of the award, and succeeded before the tribunal, who purported to increase the claimant's benefit entitlement in respect of the cost of his accommodation at Treveor House, so as to include the £6 a week he was paying for laundry service, the £12 a week he was expending for attendance and domestic assistance in respect of his wife, and whatever sum might be required to defray extra dietary expenses. They accepted that they could not allow any additional requirements in respect of the above costs, but they decided that the amount awarded for board and lodging could be increased to cover them pursuant to regulation 9(4A) of the Supplementary Benefit (Requirements) Regulations 1983 [S.I. 1983 No.1399].

4. Mr Storey contended that there was no power to permit such increase available to the

tribunal under regulation 9(4A). Mr Williams, on the other hand, argued that the tribunal had properly interpreted the regulation, but if they had not, he made an alternative submission that the particular establishment, where a claimant was residing, was not a residential care home within the Requirements Regulations, and that in so far as the definition contained in head (c) of paragraph 6(1) of Schedule IA to the Requirement Regulations provided otherwise, it was ultra vires. Furthermore, if Treveor House could be excluded from the definition of a residential care home, then different regulations would operate, and these would be to the advantage of the claimant.

5. I will first deal with this alternative submission of Mr Williams. "Residential Care Home" is defined in paragraph 6(1) of Schedule IA as including, inter alia, an establishment:-

> "(c) that is run by the Abbeyfield Society including all bodies corporate or incorporate which are affiliated to that Society."

It is not in dispute, in this case, that Treveor House is run by the Abbeyfield Society, and that it falls within the statutory definition of a residential care home. However, Mr Williams pointed out that the residents at the home did not receive the same services and attention as residents at homes registered under Part I of the Registered Homes Act 1984. He drew my attention to a letter dated 1 February 1988 from the Abbeyfields Society which states, inter alia, as follows:-

> "We wish to confirm that Abbeyfield Supportive Houses are not normally subject to registration under the Residential Homes Act 1984. Only a few of our Extra Care or Frail Elderly schemes come within the scope of such a registration.
>
> The above Abbeyfield Camborne house falls into the Supportive category and does not provide nursing care of any description...."

Mr Williams elaborated on this to me, explaining that the residents had separate accommodation, and that there was a warden in attendance sleeping there at night, but that the position was substantially that of sheltered accommodation. In other words, residents at a home run by the Abbeyfield Society would not normally attract anywhere near the services of a normal residential care home. Mr Williams met the obvious rejoinder, that the claimant's interest would be best served if he moved out to a more satisfactory establishment, by explaining that his wife's medical condition was such that any change of accommodation might lead to disasterous results. Accordingly, the claimant was obliged to remain where he was without the care and attention that he might expect to receive at the general run of residential care homes. This was particularly galling for him, in that, by virtue of his residence, the attendance allowance he received in respect of his wife was included in his resources, whilst no attention was being provided by the proprietors of the home.

6. Mr Williams contended that it was unjust that the claimant should be obliged to reside in a "sub-standard" home, and that in so far as the definition set out in pargraph 6(1) of Schedule IA purported to define such a home as a "residential care home", it was ultra vires. This submission is, however, wholly misconceived. The criterion is not whether a particular provision contained in any of the Supplementary Benefit Regulations is just or unjust, or whether it favours one class of persons rather than another, but whether the relevant provision was made without authority. In my judgment, it was open to the Secretary of State to make regulations which defined what constituted a "residential care home", and provided his definition did not conflict with anything prescribed in the enabling Act, he was at liberty to adopt whatever definition he thought appropriate. The enabling act in the present instance was the Supplementary Benefits Act 1976, and Mr Williams was unable to point to any provision therein which operated to prevent the Secretary of State defining a "residential care home" in the way he did. Whilst I can see that, in the peculiar circumstances of the present case, the claimant feels a sense of outrage that he is obliged

to reside in a home where the facilities are not as extensive as those provided in a home registered under Part I of the Registered Homes Act 1984, this has no bearing on the question of ultra vires. Manifestly, the Secretary of State had power to define a "residential care home" as including an "establishment run by the Abbeyfield Society" and that is the end of the matter.

7. I now turn to the difficult question of whether paragraph 9(4)(a) enabled the claimant to claim an increase in the weekly amount for boarding and lodging to cover the extra charges he incurred in respect of attendance, laundry and special diet. Regulation 9(4A) read at the relevant time as follows:-

> "9. (4A) Where in addition to the weekly amount for board and lodging in the nursing or residential care home, as calculated in accordance with paragraph (4), a separate charge is made for the provision of heating, attendance, extra baths, laundry, any special diet within the meaning of paragraph 14 of Schedule 4 or domestic assistance, the weekly amount for board and lodging shall be increased by the amount of that charge."

The tribunal took the view that "the provision of heating, attendance, extra baths, laundry, any special diet ... or domestic assistance" could be effected by a third party, i.e. someone other than the proprietors of the Home, and that the charge made therefor was recoverable by the claimant by way of an increase in the weekly amount awarded for board and lodging. He stressed the word "separate", and attached significance to the fact that the word "additional" was not used. He contended, therefore, that the tribunal had correctly construed the regulation. Against this, Mr Storey argued that, when one read the crucial words "where in addition to the weekly amount for board and lodging ..., a separate charge is made for the provision of heating ....", the natural inference is that both the board and lodging and also the additional services were being provided from the same source. Any other view would give an unnatural meaning to the syntactical arrangement of the sentence. However, it could be said against this that the provision of the additional services is expressed passively, and if it was in contemplation that the proprietors of the home alone should provide such services, the regulation could have put the matter actively. More significant, in my view, is the inherent injustice in a claimant's having himself to pay the cost of the relevant services without recoupment where, for reasons entirely within the control of the home, he is unable to call upon the proprietors to provide them whereas had the home been prepared to co-operate, he would have recovered under regulation 9(4A). Surely, the criterion should be, not the agency by which the relevant services were provided, but the genuineness of the need for such services!

8. I attach no significance to the use in the regulation of the word "separate". Mr Williams pointed out that the word "additional" was not employed. However, nothing turns on this, in that the words "a separate charge" are qualified by the phrase "where in addition to the weekly amount for board and lodging", so that in effect the charge is described as being both "in addition to" i.e. "additional" and also "separate". But the charge would still be "separate" whether the services were provided by the home or a third party. The construction of regulation 9(4A) is a difficult matter but, on balance I accept Mr. Storey's argument. I consider that the structure and rhythm of the language used indicate that it was contemplated that the services in question were to be supplied only by the home itself. Indeed, one would normally expect that to be the source in any event, and therfore it would not be surprising to find that the draftsman had legislated accordingly.

9. It follows that the tribunal misconstrued the regulation and erred in point of law. I must therefore set aside their decision, and direct that the appeal be reheard by a differently constituted tribunal.

10. I have considered whether I might substitute my own decision for that of the tribunal, and thereby avoid having to remit the matter. However, there is a further complication in

this case, in that the calculation of the claimant's entitlement to supplementary benefit has proceeded on the basis that he should be awarded a sum for three evening meals which his wife bought at the Day Centre, whereas the amount for board and lodging included all meals except breakfast. Accordingly the claimant's entitlement to benefit will have to be recalculated, and the more appropriate forum at which this might be done is the tribunal.

11. I allow this appeal.

(Signed) D.G. Rice

Commissioner

Date: 24 July 1989