

Reg 9 Requirements

* 7/11 *

B+L limit - consid's when setting for nursing homes
- not enough to rely on say so of A.O. re
level of charges & area

- exclusion of medical requirements

- need for SSATs to give adequate reasons
+ findings of fact

IEJ/SG

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No: 14/09

1. (1) This is a claimant's appeal from the unanimous decision dated 25 June 1984 of a social security appeal tribunal ('the tribunal') brought upon the contention that the tribunal's decision was given in error of law and conducted on the claimant's behalf by her duly constituted appointee in the circumstance that the claimant is incapacitated. The appointee has requested an oral hearing (in private) of the appeal; but I am refusing that request as I am satisfied that the appeal can properly be determined without one. The adjudication officer now concerned concedes, (very properly if I may say so) that the tribunal's decision was given in error of law in respects I will later below indicate.
- (2) The appeal succeeds. I set aside the tribunal's decision as given in error of law and direct that the claimant's appeal from the decision of 11 May 1984 by an adjudication officer which was the subject of the claimant's appeal to the tribunal be re-heard by a differently constituted tribunal. I do not consider it expedient in the circumstances of the case to seek to give myself the decision which the tribunal should have given, as in my view a proper determination involves the ascertainment of additional facts to those at present in evidence.
- (3) The claimant's appointee is matron of the Nursing Home in which the claimant was a resident patient at the date of the claim the subject of the adjudication officer's decision of 11 May 1984, and this appeal is in fact brought by the appointee as in the nature of a test case in a field of substantial practical importance in more

general contexts than that of the present claimant alone. Whilst the proper conclusions at which to arrive in the instant case will be wholly at large before the tribunal re-hearing the appeal, for their determination, I see the issues of principle with which the appointee is concerned as meriting careful re-appraisal by the DHSS, and, perhaps, the legislature.

2. The basic facts are not in controversy and are as follows:-

- (1) The claimant, then aged 64, was on 30 April 1984 admitted to the Nursing Home of which the appointee is Matron and which I will refer to as 'BNH'. The claimant is a widow suffering from multiple sclerosis and was so admitted immediately following, and pursuant to antecedent arrangements for such admission upon, her discharge from a local NHS hospital where she had been an in-patient occupying a bed in an 'acute' ward. Responsible staff of the Health Authority concerned had gone to considerable pains to arrange for a placement of the claimant which would on the one hand free for other admissions to the hospital from which she was to be discharged the hospital bed, and call upon the hospital resources, which her continued admission there tied up; and on the other hand to place the claimant in residential care suitable to her particular needs. Those needs included a high level of nursing attendance, and the evidence before the tribunal included information by a Senior House Officer that 'having thoroughly researched the placement we are quite certain there is nowhere else which would be suitable'. The current level of charges at BNH was £280 per week (according to the adjudication officer - £210 according to BNH); and there is no evidence that BNH's charge was excessive having regard to the level of care and amenities which BNH sought to provide. The claimant had capital and income resources such as to render her eligible for supplementary pension, and application for supplementary pension was accordingly made on her behalf as from the date of transfer, citing her requirements as being the amount of the weekly charge by BNH.
- (2) The adjudication officer before whom that application came for adjudication made what I have no reason to doubt was a careful and proper assessment of the claimant's resources in conformity with the legislation as he understood it to bear. He made an award of supplementary pension from the prescribed pay day, Thursday, in the week commencing 30 April 1984. That was of £159.90 and was arrived at by assessing the

claimant's weekly requirements as being:

	£
Board and Lodging	160.00
Age increment	<u>15.35</u>
	175.35
Personal expenses	<u>9.85</u>
	185.20
and deducting Retirement Pension	<u>25.30</u>
Net	<u>£159.90</u>

- giving gross "incomings" of £185.20. These were in fact increased to £212.40 prior to the claimant's appeal from the adjudication officer's decision coming before the tribunal, by award to the claimant also of £27.20 per week Attendance Allowance, which is not taken as a deductible income resource in arriving at a claimant's supplementary allowance.

Thus the claimant could not at first meet BNH's charges at all even if those were £210 and not £280. After the award of Attendance Allowance she could do so, if the charges were £210, only by inroading substantially into the amount prescribed specifically for her personal expenses; and if those charges were in fact £280 there was a substantial overall shortfall throughout. At the core of the relevant assessments lay the adjudication officer's attribution of the sum of £160,000 per week as the requirement of the claimant for full board and lodging. That reflected what the adjudication officer conceived to be a due application in the circumstances of the case of regulation 9 of the Supplementary Benefit (Requirements) Regulations 1983 ('regulation 9').

3. (1) It is common ground that the claimant was the sole member of an assessment unit comprising only herself and that her normal requirements fell to be assessed for the purposes of supplementary pension on the basis that she was a 'boarder'. It is common ground also that the BNH charge was inclusive of board and lodging including all meals.

- (2) Regulation 9(1) provides as follows:-

"9.-(1) Where the claimant and any other members of the assessment unit are boarders paragraphs 1 to 4 of the table and 1 to 3 of Schedule 1 (amounts of normal requirements) shall have effect as if for the amounts for

the time being there specified there were substituted -

- (a) a weekly amount for board and lodging which, subject to paragraph (11), shall be determined in accordance with paragraph (4) but, subject to paragraph (10), shall not exceed the maximum amount in respect of the assessment unit as a whole referred to in paragraph (6); and
- (b) a weekly allowance for personal expenses determined in accordance with paragraph (12);

So however that, except where paragraph (11) applies, the amount applicable in aggregate under sub paragraphs (a) and (b) shall not be less than a minimum amount determined in accordance with paragraph (5)."

- (3) Paragraph (11) so referred to does not bear in the circumstances of the case;
 - (4) Paragraph (4) so referred to bears, in the circumstance that the BNH charge included all meals, to bring into reckoning the full weekly amount of the board and lodging charge incurred as modified by paragraph (10) so referred to (which did not in fact bear in the circumstances of the case) but subject nevertheless to the (overriding) stipulation "shall not exceed the maximum amount in respect of the assessment unit as a whole referred to in paragraph (6)."
 - (5) Although also material to be taken into reckoning in arriving at the claimant's proper entitlement to benefit, nothing controversial arises on the present appeal as regards the amount to be allowed under regulation 9(1)(b) by way of weekly allowance for personal expenses, save that in accordance with the assessment made in the claimant's case the whole of such allowance would clearly have to be diverted to assist in meeting the charges of BNH if those were £280, even allowance for attendance allowance; and virtually the whole, prior to the award of that, even if they were £210.
4. (1) The substantial issue upon the appeal is thus as to the proper application of regulation 9 in reference to the charges of BNH; and in particular, as to the proper application of regulation 9(6).
- (2) Regulation 9(6) provides as follows:-
- "(6) Subject to paragraphs (7) and (16) the maximum amount in respect of the assessment unit as a whole

referred to in paragraph (1)(a) shall be -

- (a) in respect of any dependant aged less than 11, $1\frac{1}{2}$ times the amount referred to in paragraph (5)(c); and
- (b) in respect of any member of the assessment unit other than a dependant to whom sub-paragraph (a) applies, the amount estimated by a benefit officer as representing the reasonable weekly charge for the relevant area for full board and lodging (inclusive of all meals) which is available in that area or, if the level of charges there is unusually high, in an adjoining area, and which is of a standard suitable for claimants resident in the type of accommodation which is provided either -
 - (i) in a nursing home or mental nursing home within the meaning of sections 1 and 2 of the Nursing Homes Act 1975 or in a nursing home as defined in section 10 of the Nursing Homes Registration (Scotland) Act 1938 or a private hospital within the meaning of Part II of the Mental Health (Scotland) Act 1960; or
 - (ii) in a home which satisfies the provisions of the Residential Homes Act 1980, or of section 61 of the Social Work (Scotland) Act 1968, or
 - (iii) in any other type of accommodation;

whichever may be appropriate to the accommodation provided in respect of the claimant in that assessment unit save that, in respect of persons referred to in Case C(7) or (8) of Schedule 2, the amount shall be the amount in respect of accommodation specified under head (iii) hereof."

5. Although it is not so indicated in terms in the case file, it appears to have been common ground before the tribunal, and I will infer, that BNH is a Nursing Home within the meaning of sections 1 and 2 of the Nursing Homes Act 1975; and it is also common ground both that the claimant was not such a person as is referred to in Case C(7) or (8) of Schedule 2 referred to in regulation 9(6) and that paragraph (10) referred to in regulation 9(1)(a) does not bear in the circumstances of the claimant's case.

6. Accordingly it follows that under the combined operation of regulation 9(1)(a) and 9(6) the prima facie requirement of the claimant was a weekly amount in the sum of the charge which she was

incurring for board and lodging, but subject to an overriding maximum flowing from the due application of regulation 9(6)(b).

7. Although upon a narrow reading of regulation 9(6) it might appear that if a benefit officer acting in good faith estimated a particular amount pursuant to regulation 9(6)(b) the amount so estimated fell to be regarded as 'on tablets of stone', and unchallengeable under the provisions for appellate adjudication, I have (although I am aware of no specific authority in point) no hesitation in concluding - and will proceed on the basis that - it is open to a tribunal entertaining an appeal from a decision by (now) an adjudication officer in which such an estimate materially figures to re-open the figure taken as his estimate and substitute, within the terms of reference under regulation 9(6)(b), their own estimate. Any other conclusion would, in my judgment, plainly contravene the clear intendment of the statutory provisions whereby an appeal against an adjudication officer's decision involves a full re-hearing of the case on its merits.

8. I should here interpose that whilst the amount duly arrived as the estimate under regulation 9(6)(b) in general constitutes the overriding limit in cases (other than that of a dependant) falling within regulation 9(6)(a), the impact of the reference 'subject to paragraphs (7) and (16)' to be found at the inception of regulation 9(6) does in certain cases permit an increase in what would otherwise be the overriding limit arrived at by such estimate. The paragraph (16) so referred to does not appear to bear in the circumstances of the present case, being by way of transitional provision. But paragraph (7) would appear to, since the claimant had clearly attained pensionable age and was thus within one of the Cases (to wit Case A) specified in Schedule 2 - so that (as the adjudication officer's computation correctly reflected, by the amount I have for brevity described as "age increment" in the computation set out in paragraph 2(2) above) the otherwise operation of "the amount estimated" did fall to be uplifted by a modest amount - but within no greater impact than is illustrated in paragraph 2(2) above.

9. (1) It is, I think, common knowledge first that many NHS hospitals nowadays have long waiting lists for admission due to limitations upon the availability of hospital beds; secondly that the long-term care of elderly and infirm members of the community is recognised as a social problem of our times which is inappositely met, where avoidable, by their long occupation of beds in hospital wards primarily intended for the relatively short-term admission of patients with acute conditions; thirdly that the transfer of such patients into private residential Nursing Homes is, where medically apposite, generally now regarded as a helpful reduction in the drain upon hospital services; and fourthly that the degree of care and supervision required in respect

of geriatric members of the community no longer capable of living in their own homes as a viable unit varies widely in individual cases.

- (2) However, with very limited exceptions (of which the assessment of requirements as regards board and lodging is not at present one), the scheme of provision of supplementary benefits is subject to a fundamental restriction by section 1(3) of the Supplementary Benefits Act 1976 as amended ('the Act') that:-

'The requirements of any person to be taken into account for the purposes of this Act do not include any medical, surgical, optical or, aural or dental requirements; ...'.

- (3) It is nevertheless clearly apparent from regulation 9(6) that the legislature does contemplate that supplementary pension or allowance will in qualifying cases be awarded in respect of nursing home patients, maintenance - to use a neutral term.

- (4) It is, however, a matter of common knowledge also that with the possible exception of the cost of drugs and special nursing, nursing homes generally make a single weekly inclusive charge to each patient.

10. (1) It is apparent from the Supplementary Benefits Handbook (Revised 1983), paragraph 6.14, that in the contemplation of the DHSS and in the absence of contractual arrangements between a Health Authority and a nursing home (the authority on the part of the Health Authority to make which is not stated in the Handbook but is clearly there assumed) a nursing home patient's requirements for supplementary benefit purposes:

"are determined on a board and lodging basis No help can be given for any amount included in the fees which the benefit officer has established as being for medical requirements."

and a footnote to that text cites section 1(3) of the Act.

- (2) It is nevertheless implicit that a "nursing home" provides some level of nursing care for its patients, and "facts of life" that apart from transient patients many nursing homes do provide a permanent home for patients unable to lead a viable life in homes of their own; that in addition to some likelihood that such a patient will require additional care and supervision after admission and in circumstances of advancing age there is at large an entire freedom of choice for nursing home proprietors as to the severity of condition of patients for which the home seeks to cater by

the level of nursing care it provides; and that this may vary independently of the amenities of the accommodation and the standard of cuisine it provides.

11. The task imposed on (now) the adjudication officer is tolerably clear-cut, but not a simple one. He has first to decide whether or not a claimant has a "need" for nursing home board and lodging at all. If a claimant surmounts that initial hurdle he has next to decide - without being given any statutory guidance as to the criteria - what nature of such accommodation and provision is "suitable". At large one would anticipate that this is the point at which he would come to grips with the nature of the claimant's medical needs, in particular for nursing care. But if he is to leave those out of account then the only criteria I can see to be in point and to be inferred are:

- (i) what I have termed in an earlier decision of my own as "the modest general standard of living to the provision of which the award of supplementary benefit is directed"; and
- (ii) such considerations of personal circumstance of the claimant as accessibility to and for visiting relatives.

The adjudication officer is then to look at the level of charges made for nursing home provision of board and lodging of that standard and arrive at his estimate of the "reasonable weekly charge" in that area (or in an adjoining area if he considers that in the relevant area unusually high).

And he is to fix the claimant's "requirement" accordingly.

However, implicit in that course of determinations, if the DHSS view expressed in the Handbook is correct, is the additional task of isolating both as regards the particular nursing home in contemplation and as to the "comparables" by which he is to arrive at the reasonable weekly charge, any element of the weekly charge as quoted which is referable to the satisfaction of "medical requirements".

And it appears to me to follow inexorably that the greater the need for the claimant to be in receipt of nursing care in a nursing home the less the likelihood of an award of supplementary allowance sufficing to maintain him there.

True it is that a point may be reached at which attendance allowance may help to bridge the gap. But I am aware of no "cash help" source other than supplementary allowance and attendance allowance which can so assist a claimant who has no resources of his own, or - and in this sense vicariously - some additional social security benefit such as retirement pension to assist him.

12. However, whilst I am anxious to afford the tribunal re-hearing the appeal as much assistance as I can, I can only indicate that in my view the DHSS Handbook correctly sets out the position as the law at present stands; and that in the light of what I have indicated in paragraph 7 above it will be for them to determine the "reasonable" weekly charge in the claimant's case in accordance with what I have indicated in paragraph 11 above, and as an issue of fact for their determination; but to then take also into account regulation 9(7) in arriving at their conclusion.

13. What the adjudication officer did in the present case was to look at the relevant area and compile a table of the range of charges (all inclusive weekly charges) made by, in all, 19 Nursing Homes in the area - of which 3 charged £100 or under, 4 £101 to £125, 7 £126 to £160, 2 £161 to £210, and 3 over £210. Of the last mentioned a footnote indicated that two specialised respectively in terminally ill cancer patients and treatment for alcoholism and chemical dependency, whilst another footnote indicated that in the three intermediate categories some homes charged varying amounts depending on the size, aspect and location of rooms, and whether the room was shared with other patients. And such adjudication officer determined £160 as, apparently, an amount which had been generally taken to be that considered as reasonable in supplementary benefit contexts since 21 November 1983 in the area in point. There is no indication that such adjudication officer made any specific enquiries or comparisons as regards any differential levels of care and attendance provided. I can at this point discard for one purpose, whilst bringing in point for another, the circumstance that it was thought appropriate on review for the claimant to receive attendance allowance. It is relevant only insofar as the award of attendance allowance demonstrates a certain degree of need for attention and/or supervision - and that may be relevant for the limited purpose of determining need or otherwise for nursing home accommodation. It is irrelevant both economically to the estimate of the reasonable weekly charge in the sense that it falls into the overall assessment of requirements and resources as an incoming, and as regards any amount which can be awarded by reference to medical requirements - for none can be.

14. The claimant's appointee has mounted in support of the present appeal a cogent written case in the course of which the points made include the following:-

- (1) the claimant as a heavy, doubly incontinent patient who had suffered from depression for over 30 years, had had her left breast removed for cancer and suffered from multiple sclerosis. She was too young to occupy a geriatric bed, so within the NHS she had been occupying an 'acute' bed, which within the group of hospitals in which it was located represented a weekly charge of £770 a week. She had waited nine months for admission to BNH during which the hospital bed she was occupying was in a psychiatric unit.

- (2) BNH could not at £160 per week economically afford to look after the claimant, although in fact equipped to provide the level of nursing care and attendance which the appointee considered appropriate to the claimant's needs, and to do so in circumstances - such as a single private room - which in her judgment would be beneficial to the claimant's well-being and longevity.
- (3) The limit of £160 in combination with the heavy demand for Nursing Home accommodation was an inducement to Nursing Home proprietors, to which BNH did not wish to succumb, to select self-caring patients requiring little attention in preference to more acute cases and for them to adopt, insofar as they dealt with more acute cases at all, undesirable reductions in the standard of care which was provided for those.
- (4) She adduced in support the Senior House Officer's letter from the hospital in which the claimant had been, containing materially and in addition to what I have already indicated that officer's opinion that the facilities provided by BNH were by far the most suitable for a lady in the claimant's condition; that it was felt that there was no place for her in an acute hospital ward, and that it was very desirable for her to stay at BNH. She adduced also two letters from a Social Worker at the same hospital supporting an award at a higher level of payment for the claimant's care and including an intimation 'undoubtedly, if you had been unable to offer her' [the claimant] 'residential care' [she] 'would have had to have stayed as a long stay patient on one of our over-subscribed acute admission wards (the waiting list for long stay wards can be a number of years). Additionally '[the claimant]'s diagnosis and her need for full medical nursing care would make long term placement at a psychiatric hospital very unsuitable.'
15. (1) The tribunal's record of decision shows that they gave close attention to the matters ventilated by the claimant's appointee in support of the appeal. However, their findings on fact were stated to be:-
- "the Tribunal finds that £160 per week is a reasonable weekly charge for full board and lodging in the area -" identifying the area.
- (2) Their unanimous decision confirmed that of the adjudication officer, and their reasons were stated to be:-
- "the Tribunal does not doubt the high standard of care at [BNH] but is bound by the words of Regulation 9(6)(b) of the Requirements Regulations."

(3) The adjudication officer now concerned indicates, rightly in my view, that whilst the acceptance or rejection of evidence was essentially a matter for the tribunal, where (as in the present case) there is a conflict - and the conflict here is that in summary the claimant's appointee did not accept that £160 was a reasonable charge - the tribunal needed to give reasons for their decision which would enable the parties to ascertain the basis upon which the tribunal had accepted or rejected their evidence and contentions in arriving at the conclusion which in fact the tribunal reached; and, in addition, that the tribunal had inadequately recorded findings of fact to support their decision, in particular insofar as they needed to investigate and make findings as to the basis of the adjudication officer's contentions as to the charges and suitability of the alternative accommodation; and that they needed to explore the suitability further than by an apparent mere acceptance of the 'say so' of the adjudication officer. On that foundation the adjudication officer now concerned submits, and I hold the submission well founded, that the tribunal's findings of fact and reasons for the decision fall to be held as an inadequate compliance with regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984.

(4) That is in my judgment a sufficient and compelling ground upon which must be founded my decision to set aside that of the tribunal, and I accept the further submission by the adjudication officer now concerned that the case is not one appropriate for my giving the decision which the tribunal ought to have given.

16. The tribunal re-hearing the appeal are to be furnished with a copy of my present decision as some assistance to them in pitfalls to be avoided, but are to bear in mind that all questions of fact will be again at large before them. Their decision should take due account of the criteria which I have indicated to be material under regulation 9(6)(b) and they are to make findings of fact and give reasons for decision which sufficiently comply with their obligations under the Adjudication Regulation above identified. They are to take particular account of what I have indicated in paragraph 12 above. I regret that I cannot be more helpful to them in an area in which I regard the present legislation as imposing significant difficulty for the statutory authorities in arriving at decisions which accord with commonsense. For whilst it is clearly necessary in the public interest to have an effective sanction against nursing home proprietors operating a "ring" so as to impose an inflated level of charges, it strikes me, at least, as unsatisfactory that - unless the gap is filled by contractual arrangements by Health Authorities such as the Supplementary Benefits Handbook contemplates - adjudication officers should - by constraint to exclude from these computations what may well be the legitimate needs of a nursing home patient for nursing care - be, in effect, "beating the air" by awards limited to

amounts which quite clearly will not enable a number of claimants to be provided with nursing home care in accordance with their needs, although available at a cost markedly below that of the hospital care to which presumptively those claimants must resort in default.

During the course of my preparing my present decision it has been publicly announced that certain revisions to the supplementary benefits scheme are in contemplation as regards nursing home accommodation; and I would hope that circumstances such as those demonstrated in the instant case will be taken into account in their formulation.

(Signed) I Edwards-Jones
Commissioner

Date: 17 December 1984

Commissioner's File: C.S.B. 912/1984
C A O File: AO 9081/84
Region: Wales and South West