ToC/SH/3

Commissioner's File: CSB/1162/1984
C A O File: AO 2082/SB/87
Region: London South

SUPPLEMENTARY BENEFITS ACT 1976
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF A TRIBUNAL OF COMMISSIONERS

Name: Mrs J A Mears
Appointee for Mrs Dora Catherine Finch (Deceased)

Social Security Appeal Tribunal: Bognor
Case No: 03/19/15

[ORAL HEARING]

1. Our decision is that the decision of the social security appeal tribunal dated 1 August 1986 affirming the decision of an adjudication officer issued on 20 March 1986 is erroneous in law but that nevertheless for the reasons set out in this decision and in the light of the further facts now before us their conclusion was correct. The decision of the adjudication officer is accordingly affirmed and the claimant's appeal from the tribunal is disallowed.

Representation

2. We held oral hearings of this appeal made by the claimant's representative on the same days as Tyler the associated appeal the reference to which on Commissioner's file is CSB/842/86.

The claimant died on 3 August 1987. Her daughter has been appointed to represent her in these proceedings. She did not attend. Mr E O F Stocker appeared for the adjudication officer.

Nature of the appeal

3. This is the third of the group of six appeals referred to in Tyler and is the third appeal relating to a nursing home. This appeal (which we shall call "Finch" is also concerned with the extent to which the charges made to the deceased claimant for board and lodging are allowable in calculating her supplementary benefit and are to be met out of her supplementary benefit entitlement. Only one set of statutory regulations falls to be considered. Adopting the definitions in Tyler they are the Camden Regulations, which have

been held by the Court of Appeal to be valid. So far as relevant they are set out in Tyler. The appeal was, at the suggestion of the Chief Adjudication Officer heard by the present Tribunal of Commissioners. The issues raised in this appeal relate to the type of home which received the claimant during the period in issue and whether, in the light of the Court of Appeal decision in the Case of Gowa v. Attorney General reported at [1985] 1 W.L.R. 1003 (in the House of Lords) a transcript of which is in the case papers, the claimant is entitled to rely on an estoppel in the light of assurances which her appointee says were given on five occasions to her by the local office of the Department of Health and Social Security.

The period in issue

4. There is no doubt about this. It is from 27 January 1986 when the claimant entered the nursing home to 28 April 1986 when she left it.

The relevant statutory provisions

5. These are set out in the Appendices to Tyler and Turner copies of which accompany this decision.

The adjudication officer's decision

6. By a decision issued on 20 March 1986 an adjudication officer decided:

> "supplementary pension of £120.20 determined and paid weekly from the prescribed payday Monday 27 January 1986"

7. The claimant, through her appointee, appealed against this decision saying that she was writing to appeal against the decision of the adjudication officer not to meet the first four weeks of her mother's stay at Seacroft medical Nursing Home in full that being £220 per week, total £880. When she was informed by Seacroft that her mother could be admitted on 1st February she was overjoyed but knew the cost of £220 was beyond her. She asked the officer on duty five times (at DHSS) if it would be in order, the last time the lady said "Please don't ask again, yes put your mother into the home. As it is an emergency we will meet the cost".

8. In his written submission on the appeal the adjudication officer stated that the facts before him were that the claimant was 90 years old and moved to her present accommodation on 1 February 1986. She had been resident at her own bungalow and her daughter had provided the best care she could for her; however her failing health necessitated a move to a Nursing Home. Initially she was required to pay fees for a single room at £220 but now incurred fees at £170 for a shared room. The daughter had stated that she had confirmed with the DHSS by telephone that the fees of £220 would be met by the Department before the claimant was installed in the nursing home. There was no record of these calls in the casepapers. An apology was issued on 20 March 1986 regretting the probability that she might have been misinformed.

9. The adjudication officer stated in his submission that:

> "The Home is registered under the Registered Homes Act 1984 as a Nursing Home providing accommodation solely for persons in need of personal care by virtue of paragraph 2(1)(f) of Schedule 1A to the Requirements Regulations as amended by the Supplementary Benefits (Requirements and Resources (Miscellaneous Provisions) Regulations 1985 (SI 1935/1985). Regulation 9(6) and Schedule 1A to the Requirements Regulations set out the maximum amounts which could be allowed for the requirements of someone in a Residential Care Home or Nursing Home."

The claimant was in receipt of Attendance Allowance at £20.45 per week and Retirement Pension of £38.55 per week combined with her weekly supplementary pension.

10. In giving reasons for his decision the adjudication officer stated that he had determined that the accommodation provided for the claimant was a nursing home for persons in need of personal care by virtue of paragraph 2(1)(f) of Schedule 1A to the Requirements Regulations. He referred the appeal tribunal to Commissioner's decision R(SB)8/83, in particular paragraph 5, on the doctrine of estoppel.

The social security appeal tribunal's decision

11. The tribunal heard the appeal on 1 August 1986 and dismissed it. Their unanimous decision was:

> "The decision of the Adjudication Officer is upheld in that the appellant is entitled to supplementary benefit at the rate of £120.20 determined and paid weekly from the prescribed payday Monday 27/1/86."

12. The tribunal's recorded findings of fact were:

> "The appellant is 90 yrs of age who was moved into a registered nursing home on the 1/2/86. The fees for the home were £220.00 weekly. The appointee (the daughter a Mrs Mears) states that prior to making the arrangements she telephoned the local supplementary benefit office, several times, telling them of the fees at £220.00 and on each occasion, she said, she was told 'that's OK make the arrangements, the dept will meet the fees'. The Adjudications Officer states that there is no record of such a call. It might have been considered as just a general enquiry, but even so he does not think it possible that the appointee could have been told that fees to £220.00 would be met. In the event the Adjudications Officer determined that the correct amount in accordance with the Requirements Regulations 9, Schedule 1A paragraph 2(1)(f) was at £170.00 plus Personal Allowance of £8.95 and the Age addition of 25p weekly. There were no additional requirements. The resources were £38.55 Retirement Pension, £20.45 Attendance Allowance both of which fell to be taken fully into account as resources leaving a balance of £120.20 paid weekly."

The tribunal's recorded reasons for their decision were:

> "The Tribunal had due regard to Regulation 9 of the Requirements Regulation and Schedule 1A thereto which prescribes the amounts payable under a Secretary of State decision. In this case, the Tribunal found that the claimant fell to be considered for the appropriate amount under paragraph 2(1)(f) of the Schedule at £170.00 weekly together with the personal allowance of £8.95 and the age allowance (over 80 years) of 25p. Total £179.20.
>
> The Tribunal then had regard to the Resources Regulations which prescribes that any Social Security payments (except in certain cases) are to be taken fully into account. In this case the Retirement Pension of £38.55 and because the appellant is residing in a nursing home, the Attendance Allowance of £20.45 were to be taken fully into account. Total Resources available £59.00, leaving a balance of £120.20 paid weekly from the prescribed payday (Monday) the 27/1/86."

13. The daughter (and appointee) of the claimant applied for leave to appeal against this decision. She repeated that she had asked five times if it was in order for her mother to be admitted to Seacroft medical nursing home on the 1st of February because she realised £220 a week for a single room was a lot of money and she knew sadly that she did not have it. The officer of the day had eventually become very upset by her repeating ther same inquiry and told her not to phone again but "take mother there as it was an emergency". She added

that she "would like to point out, only at the Court of Appeal [sic] did she find that Seacroft is indeed not registered as a medical, but as a rest home".

14. In a written submission on the application, the adjudication officer submitted that it was not in dispute that Seacroft was a nursing home as defined in paragraph 6 of Schedule 1A to the Requirements Regulations and that there had been no dispute over the level of care which the Area Health Authority said the home could provide. In respect of estoppel the adjudication officer relied on paragraph 6 of decision R(SB)8/83 to which reference has already been made. In his submission the tribunal's decision was not erroneous in law. Mr Stocker, on behalf of the adjudication officer adheres, to this submission.

Is the appeal tribunal's decision erroneous in law?

15. Yes, it is. The appeal tribunal clearly accepted the facts asserted by the adjudication officer in his written submission. The chairman's note says "No fresh evidence". The adjudication officer had stated in that submission:

> "The Home is registered under the Registered Homes Act 1984 as a Nursing Home providing accommodation solely for persons in need of personal care by virtue of paragraph 2(1)(f) of Schedule 1A to the Requirements Regulations as amended by the Supplementary Benefits (Requirements and Resources) Miscellaneous Provisions Regulations 1985 (SI 1985/1985)"

Neither the Registered Homes Act 1984 nor the Nursing Homes and Mental Nursing Homes Regulations 1984 contain any provision for the register of a nursing home to contain particulars of the accommodation provided: see our decision in Turner CSB/1085/86. (Indeed, the nursing homes are not registered. It is the person who carries it on who is registered: see section 23 of the Act.) The adjudication officer's statement that the home was registered solely for persons in need of paragraph 2(1)(f) of Schedule 1A misapprehends and mis-states the law. The tribunal should not have accepted it and in so doing they erred in law. If, contrary to our view, the tribunal did not accept the adjudication officer's statement, their decision is founded on no basis at all, for there was no other evidence before them.

16. The tribunal should have applied the tests set out in Turner at paragraphs 29-33. They should have called for a copy of the certificate of registration and particulars of the register kept by the Area Health Authority and considered the facilities and accommodation provided by the home and for the claimant.

Applying the nursing home tests

17. A copy of the certificate of registration of the proprietor of Seacroft nursing home dated 14 April 1975 has now been obtained and is in the case papers. It states "medical cases 23". The "Register" maintained by the Chichester Health Authority and supplied, for the first time, in these proceedings, in September 1987 gives the same particulars under the heading "Particulars of type of home" and adds "Medical - Adult/Elderly - long and short stay (1987 25 patients)". Underneath that the Register states - "No special facilities". A revised certificate was issued on 30 June 1987 and that under Conditions states that the number of persons for whom accommodation is provided at any one time shall not exceed 25 in the following categories -

"2. Medical Adult/Elderly"

18. Throughout the period in issue, Seacroft Nursing Home was simply for medical cases, the number not to exceed 23. There was no restriction of the categories of care for which it could cater. It was simply a registered nursing home with a limit of 23 on the number of patients. Persons needing nursing (which is a form of personal care) for any physical or

mental condition could be looked after. Paragraph 3(1) of Schedule 1A accordingly applies, but paragraphs 3(2) and (3) do not, for the reasons given in Turner. It is accordingly necessary to look at paragraph 3(4) and consider what sort of care the claimant was actually receiving. In the original letter of appeal it is explained:

> "When my mother fell on her birthday 24.1.86 she was very shocked and bruised almost losing the use of her legs which meant apart from washing, dressing, cooking for and generally caring for her excluding bathing, I had to nurse her 24 hours a day, getting her on and off the commode night and day. This I did gladly but after seven days because of my own poor health and mother's weight I knew with great regret I must seek help."

She then explained how she placed her mother in the nursing home and continued:

> "I do so wish my mother to remain at the nursing home where she is happy and well cared for ..."

The same letter states that the claimant had started to receive Attendance Allowance two weeks before her fall, and the assessment in the case papers shows, from its figures, that it was at the lower rate. In the light of this evidence, it is arguable that the claimant was receiving personal care by virtue of physical disablement, that is to say, within the terms of paragraph 2(1)(d) of the Camden Regulations. The only other alternative provision that could apply, on the evidence before us, is paragraph 2(1)(f) which relates to physical or mental conditions not referred to in the preceding paragraphs. There is no evidence of mental disorder, mental handicap, past or present alcohol dependence or terminal illness to which categories (a) to (c) relate.

There is, however, no difference between the rates payable in respect of care by virtue of physical disablement and those payable for paragraph 2(1)(f) conditions, both being throughout the period in issue at the rate of £170 a week (see the Camden Regulations) except where paragraph 2(2) applies, which it could only do in the present case if the claimant were physically disabled before attaining pensionable age (60 years) that is to say some 30 years prior to the period in issue. It would indeed make no difference if pensionable age was 65; for there is no suggestion that the claimant had been physically disabled, so long ago. "Physical disablement" in paragraph 2 has the same meaning as that expression has for the purposes of the Registered Homes Act 1984 and any regulations made thereunder: see paragraph 6(2) of the Camden Regulations. "Physical disablement" is not defined in the Registered Homes Act 1984; but "disablement" is defined for the purposes of Part I of that Act (residential care homes) as follows:

> "disablement" in relation to persons, means that they are blind, deaf or dumb or substantially and permanently handicapped by illness, injury or congenital deformity or any other disability prescribed by the Secretary of State."

No other disabilities have been prescribed by the Secretary of State. The claimant had, at the age of 90 years, failing sight and hearing. She had had her fall at the same age and was in receipt of Attendance Allowance for the first time shortly beforehand. This is the evidence, and fairly strong evidence, of physical disablement; but it is all of recent vintage.

19. For these reasons we have come to the conclusion that the care most consistent in terms of paragraph 3(4) of Schedule 1A with that which the claimant was receiving was either physical disablement occurring after or reaching age of 60 or a condition falling within paragraph 2(1)(f) in either of which cases the appropriate rate allowable for each week during the period in issue is £170: see the Fifth Appendix to Tyler.

Estoppel

20. The daughter of the claimant in this case, acting on her behalf, and knowing that the cost of entering Seacroft of £220 a week would be beyond her, "asked the officer on duty five times (at DHSS) if it would be in order, the last time the lady said "Please don't ask again, yes put your mother into the home as it is an emergency we will meet the cost, so you see there is no misunderstanding on my part....." According to the written submission of the adjudication officer to the appeal tribunal an apology was issued on 20 March 1986 regretting the probability she may have been misinformed.

21. (1) An estoppel cannot prevent a duty enjoined by statute from being carried out; see Maritime Electric Company Limited v. General Duties Limited [1937] A.C. 610 PC at page 620. This decision was applied by the (then) Chief Commissioner in decision R(P)1/80. See also decision R(SB)8/83 and R(SB)54/83) paragraph 12. The Maritime Electric case was distinguished by Lord Justice Stephenson in the Gowa case on the ground that the statutory power of the Secretary of State and the Governor of a territory to grant applications for the registration of citizens of the United Kingdom and Colonies (in case before the Court of Appeal) was very different from the statutory obligation imposed on the appellant in Maritime Electric for the benefit of all local users of electricity, because there the Judicial Committee of the Privy Council decided that a party could not raise against himself an estoppel so as to create a state of things which he was under a legal disability from creating, whereas in Gowa the Governor of Tanganyika was under no disability from awarding the appellant CUKC status; he had the power to award it and was not extending his power beyond its limits by creating an estoppel.

(2) In the House of Lords, where Gowa v. A.G. is reported in [1985] 1 WLR 1003, the case was decided on different grounds which did not give rise to the consideration of estoppel. Four of their Lordships expressed no opinion on this issue. Lord Roskill, stated that he must not be taken to be assenting to or disagreeing with the views expressed by the majority of the Court of Appeal.

(3) Now the power to award UK citizenship under the Gowa case was in fact discretionary but the statutory duty of an adjudication officer to decide the appropriate rate to be allowed under the Camden Regulations for a person in receipt of care in a nursing home is not discretionary. No discretion at all is involved. The officer cannot fix a lower or higher rate than that specified in the relevant category and he has no discretion to select the category, which must be determined in accordance with the regulations. The princple of the Maritime Electric case clearly applies and that of Gowa does not.

22. As with so many of the cases in the social security field where questions of estoppel are raised, the conclusive answer to any question as to whether there can be an estoppel is that the representation relied on by the claimant was not made by the adjudication officer who has made the decision under dispute, or with his authority, but by some other official of the DHSS. That representation cannot bind the adjudication officer.

Conclusion

23. This appeal must accordingly fail. The adjudication officer correctly decided that the appropriate rate was £170 a week. We think that, for the reasons already given, the appropriate category was physical disability but that the claimant has not shown that she was so disabled before she attained pensionable age, with the result that the lower rate of £170 specified in paragraph 2(1)(d) applies. If the claimant cannot be regarded as physically disabled during the period in issue, the only other available category is 2(1)(f) where the rate

is also £170 a week.

24. Mr Stocker suggested that representations should be made to the Secretary of State for an ex gratia payment on the grounds that the claimant had incurred loss as a result of being misled by officers of the Department of Health and Social Security. (Her loss appears to have been (£220-£170) x 4 = £200). The appointee of the deceased claimant may wish to consider adopting this course. No doubt she will also wish to seek legal advice as to whether there is a remedy against the Secretary of State in respect of negligent advice by an officer of the Department. Such a remedy was suggested as a possibility in decision R(U)5/78 at paragraph 11, where the Commissioner was confronted with a breach by the Department of Employment of their statutory duty under Article 83 of Regulation EEC No. 574/72 to "ensure that the unemployed person has been informed of his obligations under Article 69 of the Regulation and under the present article." The Commissioner wrote:

> "My decision does not mean that the claimant is without remedy for the failure of the Department of Employment to comply with their duty. The Department hold themselves out to advise on matters appertaining to unemployment benefit. Indeed, the local tribunal observed that claimants are constantly advised to enquire at local offices as to their entitlement to benefits. In my opinion, the claimant has a claim in damages against the Crown, in this instance the Department of Employment, for breach of their duty and possibly negligence. There is thus no question of a payment as an act of grace. I am not, however expressing a considered opinion and no doubt the claimant will seek legal advice, if necessary, as to a claim for damages, but I am informed that the claimant's benefit possibly will be considered in the light of my decision in this appeal."

25. In the case of Jones v. Department of Employment, reported in The Times on 27 November 1987, the Court of Appeal held that an adjudication officer owed no duty of care to a benefit claimant for a negligent decision because that would be contrary to the statutory procedure for the determination of benefit and to section 117 of the Social Security Act 1975. The position in respect of an official of the Department of Health and Social Security who gives negligent advice, and does not form part of the statutory adjudication process at all, may well be quite different and he may owe a duty under the principle of Hedley Byrne v. Heller [1964] A.C. 465. Whether or not this is so, the question of any remedy of this nature does not fall to be decided by the statutory authorities (who include the Commissioners) and we make no further comment. It will be for the claimant to seek advice elsewhere.

26. Our decision is set out in paragraph 1.

(Signed)

V G H Hallett
Commissioner

(Signed)

R F M Heggs
Commissioner

(Signed)

R A Sanders
Commissioner

Date: 11 February 1988