

DGR/SH/9/MD

COM 310 Commissioner's File: CSB/1422/1985
C A O File: AO 2076/86
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: Victor Pearson

Social Security Appeal Tribunal: Torquay

Case No: 17/2

[ORAL HEARING]

1. For the reasons hereinafter appearing, the decision of the social security appeal tribunal given on 2 September 1985 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. However, in reaching this decision the new tribunal will proceed on the basis that the maximum sum to which the claimant is entitled in respect of his accommodation at "Rosemount" is the amount specified in paragraph 1(1)(b) of the appropriate Schedule 1A to the Supplementary Benefit (Requirements) Regulations 1983 [S.I.1983 No.1399].
2. This is an appeal by the adjudication officer, brought with my leave, against the decision of the social security appeal tribunal of 2 September 1985. Owing to the complications inherent in the relevant regulations I directed an oral hearing. Although the claimant was not present or represented, and as a result I was without the benefit of argument on his behalf, the adjudication officer appeared by Mr C A M E d'Eca of the Solicitor's Office of the Department of Health and Social Security. I am indebted to him for his submission. As exactly the same issues arose in the further appeal on Commissioner's file CSB/141/1985, where once again the claimant was not present or represented, whilst the adjudication officer appeared by Mr d'Eca, I heard both cases together.
3. The relevant facts of this case are simple and not in dispute. On 14 May 1985 the claimant, who had previously been living with his daughter, moved to "Rosemount", a residential home for the elderly. His income consisted of a retirement pension of £37.35 per week and an occupational pension of £6.21 per week. The charge at the home for full board and lodging was £140 a week. The adjudication officer decided that the claimant was entitled to supplementary benefit of £112.29 per week on the basis that the maximum amount payable in respect of board and lodging for his accommodation was £110 per week. I am puzzled as to how he reached the figure of £112.29 and will refer to that later. However, the crucial matter is the maximum sum payable in respect of the claimant's accommodation.

4. The claimant, who by virtue of his senile dementia has to have an appointee to pursue his claim, appealed to the tribunal against the adjudication officer's decision, and in the event the tribunal overturned it. They decided that the maximum sum allowable for his accommodation was £140 per week.

5. Regulation 9(1) of the Supplementary Benefit (Requirements) Regulations 1983 provides that the normal requirements of a claimant who is a boarder shall be modified and calculated in accordance with regulation 9(4). The sum so arrived at shall not, subject to regulation 9(10) [irrelevant to this appeal], exceed the "maximum amount" referred to in regulation 9(6). That last regulation reads as follows:-

- "9. - (6) Subject to paragraphs (7) and (17) [not relevant], the maximum amount in respect of the assessment unit as a whole referred to in paragraph (1)(a) shall be the aggregate of the following amounts:-
- (a) in respect of each member of the assessment unit who is a dependant aged less than 11, $1\frac{1}{2}$ times the amount referred to in paragraph (5)(c); and
 - (b) in respect of each other member of the assessment unit, the appropriate amount specified in or as the case may be determined in accordance with Schedule IA."

Schedule IA read at the date of claim and the date of the hearing before the tribunal as follows:

"MAXIMUM AMOUNTS FOR BOARDERS

Residential Care Homes

1. - (1) Subject to paragraphs 3 and 5 [paragraph 5 is not relevant and is in any event ultra vires], where the accommodation provided for the claimant is a residential care home for persons in need of personal care by virtue of -
- (a) old age, the appropriate amount shall be £110.00 per week; or
 - (b) past or present mental disorder but excluding mental handicap, the appropriate amount shall be £120.00 per week; or
 - (c) past or present drug or alcohol dependence, the appropriate amount shall be £120.00 per week; or
 - (d) mental handicap, the appropriate amount shall be £140.00 per week; or
 - (e) physical disablement, the appropriate amount, in the case of persons to whom sub-paragraph (2) below applies shall be £170 per week or, in any other case, shall be £110 per week; or
 - (f) any other condition not falling within sub-paragraph (a) to (e) above, the appropriate amount shall be £110 per week.
- (2) For the purposes of (e) this sub-paragraph applies to persons under

pensionable age, or persons over pensionable age who before attaining pensionable age have become physically disabled."

A new Schedule 1A was substituted in November 1985 by the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions (No.2) Regulations 1985 [S.I.1985 No.1835] increasing the maximum amounts. However, for convenience I will refer to the earlier version of Schedule 1A.

6. It will be noted that paragraph 1(1) is made expressly subject to paragraph 3. This paragraph reads as follows:-

"3. - (1) Where the accommodation provided for the claimant is -

- (a) both a residential care home and a nursing home, or
- (b) a residential care home or a nursing home

being a home for, or a home registered under the Registered Homes Act 1984 for, persons in need of personal care by virtue of any two or more of the physical or mental conditions referred to in paragraphs 1 or 2, the appropriate amount shall be set out in the following sub-paragraphs of this paragraph.

- (2) Where the home is so registered and where the personal care that the claimant is receiving in that accommodation corresponds to a category of personal care for which that accommodation is so registered, the appropriate amount shall be that amount, subject to paragraph 5, in paragraphs 1 or 2, as the case may be, as is consistent with that personal care.
- (3) Where the home is so registered but where the personal care that the claimant is receiving in that accommodation does not correspond to any of the categories of personal care for which the accommodation is so registered, the appropriate amount shall be the lesser amount, subject to paragraph 5, in paragraphs 1 or 2, as the case may be, that is consistent with those categories.
- (4) In any other case not coming within sub-paragraphs (2) or (3) above, the appropriate amount shall be that amount, subject to paragraph 5, in paragraph 1 or 2, as the case may be, having regard to the nature of the personal care that the home provides, as is consistent or reasonably consistent with the personal care that the claimant is receiving in that accommodation."

[Paragraph (2) is concerned with nursing homes]

7. Mr d'Eca explained what he considered to be the principles underlying the regulations. According to him, a claimant's entitlement to benefit for board and lodging, where he is living in a residential care home, is subject to a maximum. For a home to constitute a "residential care home" it must be an establishment defined in paragraph 7 of Schedule 1A i.e. an establishment:-

- "(a) registered under Part I of the Registered Homes Act 1984 including such a home which but for section 1(4) of that Act would be registered; or
- (b) in respect of which an application to so register has been made and until registration or refusal of registration, provided that the home or its manager or its proprietor has not been previously refused registration or had

registration terminated; or

- (c) that it is run by the Abbeyfield Society including all bodies corporate or incorporate which are affiliated to that society; or
- (d) that is managed or provided by a body constituted by Act of Parliament or incorporated by Royal Charter; or
- (e) in Scotland, which is a home registered under section 61 of the Social Work (Scotland) Act 1968 or is an establishment provided by a housing association registered with the Housing Corporation established by the Housing Act 1964 which provides care equivalent to that given in residential accommodation provided under Part IV of the Social Work (Scotland) Act 1968."

According to Mr d'Eca, where a residential home care is registered for one particular purpose, then no problem arises, in that the maximum sum payable can be ascertained by reference to the relevant sub-paragraph of paragraph 1(1) of Schedule 1A. It is only when the residential care home is registered for two or more purposes that there is any difficulty, and that is catered for by paragraph 3(1)-(3). However, not all residential care homes are in fact registered, as is clear from the definition provision in paragraph 7, and in order to deal with that difficulty paragraph 3(1) refers to "a home for.... persons in need of personal care by virtue of any two or more of the physical or mental conditions referred to in paragraphs 1 or 2" as well as to a home registered under the Registered Homes Act 1984 for persons in such need. The registered homes are dealt with under sub-paragraphs (2) and (3), whilst the homes not so registered are catered for by sub-paragraph (4).

8. I am attracted by the lucidity of this exposition, but unfortunately the drafting of the regulations does not accord with it. The first problem is that paragraph 1(1) is drafted so widely. Although Mr d'Eca contended that, where a residential home was registered for one particular purpose, the maximum sum payable was simply ascertained by reference to the sum applicable to that purpose, that is not the effect of the words used in paragraph 1(1). First, a residential care home will include an unregistered home if it falls within the definition set out in paragraph 7, secondly where a home is registered, it is not registered for any particular purpose, and thirdly, even if it were, there is nothing to indicate that the appropriate amount is necessarily determinable by reference to the purpose for which it was registered. The terms of paragraph 1(1) suggest that, once a home qualifies as a residential care home, then the relevant amount will be determinable by reference to the kind of care being provided.

9. It is important to emphasize that the Registered Homes Act 1984 does not contemplate registration for any particular purpose. All it provides for is that registration is required under Part I of the Act "in respect of any establishment which provides or is intended to provide, whether for reward or not, residential accommodation with board and personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs, or past or present mental disorder" (see section 1). Moreover, although, in response to the information called for under Schedule 1 to the Residential Care Homes Regulations 1984, the particulars to be recorded in the registers kept by the registration authorities pursuant to Schedule 3 include the following:-

"The number, sex and categories of residents (excluding persons registered or persons employed at the home and their relatives) indicating the various categories by reference to the following code; -

Old Age I

Mental disorder, other than mental handicap, past or present MP

Mental Handicap MH

Alcohol dependence, past or present A

Drug dependence, past or present D

Physical disablement PH

Add, if the resident is -

(i) over 65 years of age E

(ii) a child C,"

nevertheless there is nothing to indicate anywhere that the applicant is registered for a specific category. Admittedly there is power under section 5(3) of the Act to impose conditions which might have the effect of precluding the registered person from carrying on certain activities, but this does not affect the nature of the registration. It is a registration simpliciter which is required when it is proposed to undertake certain prescribed activities.

10. It is therefore all the more surprising to read in paragraph 3(2) and (3) of Schedule 1A references to "a category of personal care for which that accommodation is so registered" and "to any of the categories of personal care for which the accommodation is so registered". A residential care home is simply not registered for any category of personal care. However, as paragraph 3(2) and (3) must have been intended to have some meaning, the best that I can do, with what is on any footing inept drafting, is to assume that where, in making an application for registration, different categories of personal care are specified as being the purposes for which the home is to be carried on, and where in consequence a registration is subsequently granted without the imposition of any condition precluding the undertaking of any particular category, the registration, although not expressed to be for any categories of personal care and not needing to be so expressed, can loosely be considered as having been granted for the provision of the particular categories of personal care set out in the application.

11. Now, if the above construction is right, then certain consequences flow. Where a residential care home provides personal care of one type only, then paragraph 1(1) applies. Where, however, it provides personal care falling within two or more of the categories set out in paragraph 1(1), then the outcome will depend upon whether the home is registered or not. If it is, and if further it can be regarded as having, within the principles set out in paragraph 10, been registered therefor, then sub-paragraph (2) or sub-paragraph (3), as the case may be, of paragraph 3 will apply. But in the case of an unregistered home sub-paragraph (4) is the relevant provision.

12. In the present case, it was the contention of Mr d'Eca, and of the adjudication officer in his written submissions, that "Rosemount" was "a home which is registered for one category only, namely old age". In view of the construction of paragraphs 1 and 3 of Schedule 1A which I have adopted above, I will assume that what was really meant was that in the application for registration only one category was mentioned, namely the category of old age. In that event, paragraph 1 will apply, but for the reasons set out in paragraph 8 of this decision the maximum amount of benefit in respect of board and lodging is not restricted to the amount applicable to the category "old age". Once the relevant home constitutes a residential care home the criterion for determining the limit of an award is the actual personal care being rendered. The claimant in the present case suffers from senile dementia and the tribunal took the view that this condition constituted a "mental handicap" within sub-paragraph (d), where the appropriate amount is stated to be £140 [now £150] per week. However, in regulation 1(2) of the Residential Care Homes Regulations 1984

[S.I. 1948 No. 1345] "mental handicap" is defined as "a state of arrested or incomplete development of mind which includes impairment of intelligence and social functioning", whilst mental disorder (defined in section 35 of the Registered Home Act 1984) is wider, embracing "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind" I do not see why, in the absence of any relevant definition in the Requirements Regulation, these definitions should not apply to Schedule 1A. Senile dementia does not constitute a state of arrested or incomplete development of mind; it is something which arises in consequence of the deterioration of a mind otherwise properly developed. Accordingly, it is a mental disorder within sub-paragraph (b), where the relevant amount is £120 [now £130] per week.

13. I do not think that any useful purpose would be gained by my reciting how the tribunal reached their decision on the interpretation of paragraph 1 and paragraph 3 of Schedule 1A. It does not accord with the approach set out above and is therefore erroneous in point of law. Moreover, the tribunal further erred in regarding the claimant's condition as falling within sub-paragraph (d) rather than (b) of paragraph 1(1). Accordingly I must set aside their decision. As to the amount of benefit to which the claimant is entitled for his accommodation, because all the facts have been found, I can conveniently substitute my own decision. However, as regards the exact amount of supplementary benefit payable, in view of the claimant's resources, I hesitate to say what this is. For the original adjudication officer appears not to have included among the claimant's income resources his retirement pension, and as from 29 April or 29 July 1985, as the case, may be attendance allowance if it has been awarded has to be taken into account as part of the claimant's income. On these issues I received no argument. Accordingly I think the proper course is for me to direct that the appeal on these matters only be reheard by a differently constituted tribunal who will determine the exact amount of the claimant's entitlement to supplementary benefit.

14. For completeness, I should say that in so far as paragraph 13 of the decision on Commissioner's file CSB/0070/1986 is at variance with what I have said here, I respectfully elect not to follow it.

15. I allow this appeal in part.

(Signed) D.G. Rice
Commissioner

Date: 9th October 1986