

CSB/0070/1986

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APPELLANT'S NAME: Ethel May Gregory (Mrs)

COMMISSIONER'S FILE: CSB/0070/1986

This decision is starred because I have rejected the submission of the Department that the class of patient for whom a residential care home provides is in the case of a home registered under the Registered Homes Act 1984 determined solely by reference to the terms of registration for purposes of schedule 1A to the Requirements Regulations. The particular schedule 1A considered in this case has been revoked but there is a new one in substantially the same terms.

JGM



JGM/2/LS

Commissioner's File: CSB/0070/1986

C A O File: AO 2220/86

Region: London South

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Ethel May Gregory (Mrs)

Social Security Appeal Tribunal: Bognor Regis

Case No: 03/04 05

1. My decision is that the decision of the social security appeal tribunal dated 25 October 1985 was erroneous in point of law and is set aside. It must be referred back to another tribunal.
2. The claimant is a woman aged over 80 who has for some years lived in a residential care home, which at the relevant time was registered under the Registered Homes Act 1984 whether directly or indirectly through the operation of section 17(2)(b) of the Interpretation Act 1978. She had been in receipt of supplementary pension prior to 29 April 1985 when the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985 [SI 1985 No. 613] (to which I shall refer as "the 1985 Regulations") came into force. She was awarded the attendance allowance at the higher rate (not as I understand it having been previously awarded it at all) from 27 May 1985.
3. The present appeal arises out of a decision by the adjudication officer awarding to the claimant a supplementary pension at the rate of £70.86 per week from 29 July 1985. This figure was arrived at by taking into account a variety of complex provisions, some of them transitional only; the calculation is shown in a Form AT 2(A) included in the case papers. I do not propose to deal in this decision with every detail in the calculations, but only with those about which I can see that there has been controversy. All figures will be open to challenge when the matter is returned to the appeal tribunal.
4. Controversy first arose when from 29 July 1985 the adjudication officer first took into account the claimant's attendance allowance as a resource. He did this by virtue of regulation 11(4A) of the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No. 1152] (the Resources Regulations) introduced into those regulations by regulation 4(12) of the 1985 regulations. In relation to those in receipt of supplementary pension before the coming into force of the 1985 regulations this provision came into force only from 29 July 1985. Regulation 9(17)(d) of the Supplementary Benefit (Requirements) Regulations 1983 [SI 1983 No. 1399] (the Requirements Regulations) introduced into those regulations by regulation 4(6) of the 1985 regulations affords a measure of relief from the effects of this, but the adjudication officer took the view, which does not seem to have been contested, and which at first sight seems correct to me, that if the claimant was first awarded attendance allowance after the coming into force of the 1985 regulations she cannot avail herself of regulation 9(17)(d).
5. I believe that it was the change in the position of the attendance allowance which first had the effect that the claimant's resources (including her supplementary pension) became

insufficient to enable her to meet the charges at the home. And this led her and her advisers to consider other aspects of the computation of her requirements, and in particular the limitation of the amount of her requirements as a boarder in the home to a figure less than the home's charges, which at the relevant time were £145 per week.

6. The claimant as a person residing in accommodation in which some cooked meals were provided was for supplementary benefit purposes classified a boarder. Under regulation 9(1)(a) and (4) of the Requirements Regulations boarders are (subject as provided in the regulations) entitled to include among their requirements the actual amount paid. But there has at all times been provision placing a ceiling on the amount that can be so included. Before the coming into force of some interim regulations revoked by the 1985 regulations the ceiling was by reference to an estimate of the charges payable in the area. I understand that under these provisions the claimant had been limited to £125 per week. The 1985 regulations set out to introduce a more readily ascertainable maximum; and the relevant provisions were to be found in Schedule 1A to the Requirements Regulations as introduced by the 1985 regulations. Paragraph 1 of that schedule specified weekly maximums (referred to as appropriate amounts) where the accommodation provided for the claimant was a residential care home for persons in need of personal care by virtue of certain conditions listed in sub-paragraphs (a) to (f), a particular appropriate amount being specified in each sub-paragraph. The present appeal relates to sub-paragraphs (a) relating to person in need of personal care by reason of old age (where the weekly maximum was £110) and sub-paragraph (e) relating to person in need of such care by reason of physical disablement (where the weekly maximum in relation to person within paragraph 1(2) was £170 and in relation to other persons was again £110. Paragraph 1(2) related to those under pensionable age or who before attaining pensionable age had become physically disabled.

7. Paragraph 5 of the schedule purported to give to the Secretary of State power to vary these appropriate amounts. But a comparable power conferred by paragraph 6 was held to be invalid by the Court of Appeal in Secretary of State for Social Services v Cotton (11 December 1985, not reported), and it was held by a tribunal of Commissioners in the decision of file CSB/255/86 that the like power in regulation 5 was invalid, but that this invalidity did not affect the basic validity of paragraph 1, though expressed to operate subject to paragraph 5, or the validity of regulation 11(4A) of the Resources Regulations, (which refers to paragraph 1) mentioned in paragraph 4 above.

8. It was held by the appeal tribunal in the present case that the maximum appropriate to the claimant was the £170 weekly mentioned in paragraph 1(e). This conclusion must have involved a finding first that the home in question was a home for persons in need of personal care by virtue of disablement; and secondly that the claimant had been physically disabled since before she attained pensionable age. She was born in December 1903 and thus attained pensionable age in December 1963. The adjudication officer in appealing against the tribunal decision attacks both of the above. He was represented at the oral hearing before me by Mr D. James of the Solicitors Office of the Department of Health and Social Security. The claimant did not appear and was not represented.

9. The argument for the claimant on the first of these points is that she is as well as being old, physically disabled; and that she needs personal care by reason of her physical disablement. She gets such care in the home which is among other things a home for persons in need of personal care by virtue of physical disablement. This argument is not without its attractions. Paragraph 1 can be operated without difficulty of construction if the home in question is a home for persons in need of personal care by reason of one only of the conditions listed in sub-paragraph (a) to (e) (a single purpose home). But as will appear it is possible, indeed probable that such a home will be a home for persons in need of personal care by reason of conditions that appear in more than one of those sub-paragraphs. The operation of paragraph 1 in those cases is provided for in paragraph 3, which may or may not be exhaustive. It is necessary to consider the statutory provisions in more detail.

10. "Residential Care home" is defined in paragraph 7(1) of Schedule 1A as including an establishment registered under Part I of the Registered Homes Act 1984. The definition, which is exhaustive, comprehends a number of establishments not so registered. The residential home where the claimant resides is, however, so registered. Part I (sections 1 to 20) of the Act provides for the registration of establishments which provide or are intended to provide residential accommodation with both 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, such establishments being called "residential care homes". Section 2 makes it an offence for any person to carry on a residential care home without being so registered. Section 5(3) of the Act empowers the registration authority among other things to make registration subject to conditions as to the age, sex or category of persons who may be received in the home. Section 5(5) makes it an offence not to comply with any such condition. Section 16 empowers the Secretary of State to make regulations as to the conduct of such homes including the records to be kept. The Residential Care Homes Regulations 1984 [SI 1984 No. 1345] have been made pursuant to such power.

11. It follows from the above that the registration authority may impose restrictions as to the category of persons that may be taken into the home and that these categories may or may not co-incide with the different categories listed in paragraph 1 of schedule 1A of the Requirements Regulations. The latter bear a close resemblance to the categories in the schedule to the Residential Care Homes Regulations 1984 [SI 1984 No 1345]. Difficult questions arise where a person falls into more than one category, as by being both old and physically disabled. And this can easily happen, since, in my judgment, a home registered for persons in need of personal care by virtue of old age may admit a person who additionally is in need of such care by virtue of physical disablement without contravening the provisions of registration unless there is also a condition that bars the reception of persons in need of care by virtue of physical disablement. On the other hand such a home cannot admit a person in need of care by virtue of physical disablement who is not in need of such care by virtue of old age. In other words if a home is registered in relation to one category only of the persons mentioned in paragraph 1 it is a necessary condition of admission into the home that the person shall fall into that category; but it does not matter that that person may also fall into some other category.

12. The application of paragraph 1 to such homes, is to be extracted from paragraph 3 of schedule 1A which is provided 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 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 as 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 at that accommodation corresponds to a category of personal care for which that accommodation is so registered, the appropriate amount shall be the 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 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.

It should be noted that paragraph 5 having been found invalid (as above mentioned) the reference to that paragraph should be ignored.

13. Paragraph 3(1) indicates two categories of home, viz. (1) homes for personal care persons in need of personal care by virtue of two or more of the conditions in paragraphs 1 or 2 (multiple purpose homes), and (2) homes registered under the Residential Homes Act 1984 for persons in need of care by virtue of two or more such conditions (registered multiple purpose homes). On a literal interpretation the former class (class (1)) includes all multiple purpose homes which fall within the definition of residential care home without actually being registered under Part I of the Registered Homes Act 1984 which are not necessarily registered multiple purpose homes; the latter class (class (2)) includes only registered home that are multiple registered multiple purpose homes. Mr James however submitted that class 1 did not include registered homes at all. But if this is right there is a lacuna in that homes which are infact multiple purpose homes but are registered as single purpose homes are not provided for in paragraph 3, although homes which are in fact, say triple purpose homes but are registered as dual purpose homes are. I conclude, therefore that a residential care home which in fact is a multiple purpose home but whose registration is limited to one purpose only is not a home in class (2) but is a home in class (1). If it is a home in class (1) paragraphs 3(2) and 3(3) which apply only to homes which are "so" registered (viz registered for multiple purposes,) will not apply to it. But paragraph 3(4) will apply and entitle the claimant to have applied to her an appropriate (or maximum) amount determined by reference to what is consistent or reasonably consistent with the personal care that he is in fact receiving, which could well be found to include personal care needed by virtue of physical disablement. I have felt some hesitation in reaching this conclusion because I am not sure that it tallies with the decision of the Commissioner who gave the decision on file CSB/148/1986. Furthermore I detect in paragraph 5(2) and (3) a tendency to require that in cases where a home is registered, its purpose as a home shall be concluded by finding out the purpose for which it is registered (any other purpose in fact aimed at and/or achieved being disregarded). But I can find no reference to registration as the test in paragraph 1 and paragraph 3 is defective if it is to be the test.

14. This means that the tribunal should have considered both (1) whether the home was a registered home; if so whether it was registered for persons in need of personal care by virtue of any and if so which of the conditions in paragraph 1, and (2) whether it was a multiple purpose home (whether or not a registered multiple purpose home). They should have then applied paragraph 3(2) or 3(3) if the home was a registered multiple purpose home if applicable; or alternatively paragraph 3(4) if the home was not a registered multiple purpose home or in any other case in which neither 3(2) nor 3(3) was applicable. They could have disregarded paragraph 3 if the home is not a multiple purpose home at all. Indeed there should be no problem in applying paragraph 1 in that case. For the purpose of deciding for what class or classes of persons the home is registered the tribunal should have looked at the application for registration and the certificate of registration or copies thereof. It was not in my judgment adequate to rely on a loose summary in the Form AT2. Indeed it appears to me that the last tribunal did not consider the impact of paragraph 3 at all and their decision was erroneous in point of law and I set it aside accordingly:

15. It is possible that the new tribunal will reach a conclusion that the claimant is entitled

to have her appropriate amount (or maximum) fixed by reference to paragraph 1(e), as for instance if the home is found to be a multiple purpose home though not a registered multiple purpose home and a favourable decision is reached under paragraph 3(4). This however will not assist her unless also she is found to have been physically disabled before she reached pensionable age. The last tribunal decided this question in the claimant's favour on the evidence of a letter from a doctor whose patient she had been only since 1972, when she was 68 or 69. This letter stated that she had had a mastectomy operation in 1962 which had left her with a weak and oedematous right arm. Their conclusion on this issue must have been that ever since the operation she had been physically disabled in terms of paragraph 1(e). It would appear that their attention was not drawn to paragraph 7(2) of schedule 1A which provided that among other things the expression "physical disablement" should for the purposes of paragraph 1 have the same meaning as for the purposes of the Registered Homes Act 1984 and regulations made thereunder. That Act contains no definition of "physical disablement", but it contains in section 29(1) a definition of "disablement" applicable for the purposes of Part I of the Act; and I have no doubt that for the purposes of that part (which relates to residential care homes) the phrase "physical disablement" would be construed in conformity with that definition, which reads:

" "disablement", in relation to a person 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."

In my judgment the term "physical disablement" in paragraph 1(e) should be construed in conformity with this. And the previous tribunal, not having considered this provision, erred in law. And I should question whether the doctor's letter constituted evidence sufficient to support a finding that the claimant's physical disablement before she was 60 was such as to render her substantially and permanently handicapped in terms of the foregoing definition.

16. The adjudication officer's appeal is disallowed.

(Signed) J G Monroe
Commissioner

Date: 1st August 1986