

CSB/0087/1986



113/86

APPELLANTS NAME: Anne Samuels (Mrs) Appointee Brian Samuels
COMMISSIONER'S FILE: CSB/0087/1986

I have starred this decision because I have dealt therein with the construction to be placed on paragraphs 1 and 3 of Schedule 1A to the Supplementary Benefit (Requirements) Regulations and taken a different view to those held by some other Commissioners.

JJS



JJS/3/LS

Commissioner's File: CSB/0087/1986

C A O File: AO 3269/SB/85

Region: Midlands

**SUPPLEMENTARY BENEFITS ACT 1976
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION
OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name: Anne Samuels (Mrs) Appointee Brian Samuels

Social Security Appeal Tribunal: Nottingham

Case No: 85/005/08

1. My decision is that the decision of the social security appeal tribunal is not erroneous in point of law and I dismiss the claimant's appeal.
2. This is an appeal from a decision of the Nottingham Social Security Appeal Tribunal given on 8 October 1985 disallowing an appeal against the decision of the adjudication officer issued on 10 May 1985 that supplementary benefit was payable at the rate of £53.78 a week only.
3. The case relates to the board and lodging limit applicable to the claimant in respect of her accommodation in a residential care home, and secondly whether or not attendance allowance should be taken into account when assessing the benefit.
4. The relevant legislation governing the first of the issues to which I have referred in the previous paragraph is the Supplementary Benefit (Requirements) Regulations 1983, as amended by the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985. Regulation 9 deals with the modification of the normal requirements of boarders and it is 9(6) which I have to consider in the instant appeal, I set it out:

"Subject to paragraphs (7) and (17), 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) [not relevant]; 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 1A."

Schedule 1A, in so far as it is material, reads as follows

SCHEDULE 1A

Regulation 9(6)(b)

Maximum Amounts for Boarders

Residential care homes

"1.-(1) Subject to paragraphs 3 and 5, 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 £170.00 per week or, in any other case, shall be £110.00 per week; or
- (f) any other condition not falling within sub-paragraphs (a) to (e) above, the appropriate amount shall be £110.00 per week.

(2) For the purposes of (e) above, this sub-paragraph applies to persons under pensionable age, or persons over pensionable age who before attaining pensionable age had become physically disabled.

Nursing homes

2.-(1) Subject to paragraphs 3 and 5, where the accommodation provided for the claimant is a nursing home for persons in need of personal care by virtue of -

- (a) past or present mental disorder but excluding mental handicap, the appropriate amount shall be £148.00 per week; or
- (b) mental handicap, the appropriate amount shall be £168.60 per week; or
- (c) past or present drug or alcohol dependence, the appropriate amount shall be £148.60 per week; or
- (d) physical disablement, the appropriate amount, in the case of persons to whom sub-paragraph (2) below applies, shall be £198.60 per week or, in any other case, shall be £138.60 per week; or
- (e) terminal illness, the appropriate amount shall be £198.60 per week; or
- (f) any other condition not falling within sub-paragraphs (a) or (e) above, the appropriate amounts shall be £138.60 per week.

(2) For the purposes of (d) above, this sub-paragraph applies to persons under pensionable age, or persons over pensionable age who before attaining pensionable age had become physically disabled.

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 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 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 paragraphs 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.

5. In so far as the second issue is concerned the relevant regulation is regulation 11(4A) of the Supplementary Benefit (Resources) Regulations 1981

- "11(4A)
- (a) Subject to the following sub-paragraphs of this paragraph, income resources to which paragraph 4(b) applies which are paid or payable to a boarder in accommodation to which paragraphs 1, 2 and 3 of Schedule 1A (residential care homes and nursing homes) to the Supplementary Benefit (Requirements) Regulations 1983 relate, shall not be disregarded.
 - (b) The amount of income resources not to be disregarded by virtue of this paragraph shall not exceed the amount of the higher rate of attendance allowance payable under section 35(3) of the Social Security Act.
 - (c) Sub-paragraphs (a) and (b) above shall not have effect before 29th July 1985 in the case of such a person who was in receipt of supplementary benefit immediately before 29th April 1985 or would have been in receipt of such benefit but for that person's temporary absence from his accommodation in circumstances as set out in regulation 9(17)(h)(ii) or (iii) of those regulations."

6. The claimant is a widow in her late seventies. She has been resident at Peacehaven Nursing Home since 1979. In addition to various physical ailments, she has a degree of senile dementia and she requires a fair amount of supervision and practical help with dressing, undressing etc.. The claimant contributed nearly £15,000 from her capital and nearly £9,000 from her pension to fees at the nursing home before her capital fell below the supplementary pension level. The fees at the nursing home at the relevant date were £157.60. The claimant has spent periods in a mental hospital suffering from depression, but her son does not wish to remove her from the nursing home because she is

happy there and has been unhappy and abused in two previous homes. There is a shortfall between the fees at the nursing home and the claimant's total weekly income from retirement pension, supplementary pension and attendance allowance and the shortfall is being met by her son. It is fair to say he has acted with decency and generosity throughout.

7. On 29 April the same son, who is also the claimant's appointee, made a claim for supplementary benefit on her behalf. The adjudication officer was informed by the Thanet Social Security Office that according to their records the nursing home was registered, under Part 1 of the Registered Homes Act 1984 (the Act), as a Residential Care Home providing personal care for persons in need of care by virtue of old age. The adjudication officer decided that the claimant was entitled to a supplementary pension of £53.78 per week. The amount allowed for board and lodging was limited to £110 per week and £8.50 was allowed for personal expenses, making a total of £118.50. Against this figure the adjudication officer offset the sum of £64.72, being retirement pension of £36.12 and attendance allowance of £28.60. The final figure was £53.78.

8. The claimant, through her appointee, appealed against this decision on 6 June 1985, and at the hearing of the appeal on 8 October 1985 the tribunal confirmed the adjudication officer's decision. In their reasons for the decision the members of the tribunal referred to the main point in contention as being the meaning to be given to Schedule 1A of the Supplementary Benefit (Requirements) Regulations 1983 as amended. It had been contended on behalf of the claimant that what mattered in determining the appropriate rate under the schedule was the actual state of the person needing personal care, and as she needed personal care by virtue of mental disorder the appropriate amount was £120 per week. The members of the tribunal were unable to accept that under Schedule 1A the amount was determined by the claimant's state. Reference was made to the opening words of paragraph 1(1), "subject to paragraphs 3 and 5, where the accommodation provided for the claimant is a residential care home for persons in need of personal care by virtue of..." and it was pointed out that the paragraph did not open with the words "where a claimant in a residential care home needs personal care by virtue of..." and that one would have expected the draughtsman to have used words similar to those if it was the claimant's state rather than the nature of the accommodation which determined the appropriate amount. The members of the tribunal consider that paragraph 3 of Schedule 1A confirmed the point that where a home is registered under the Registered Homes Act 1984 for persons in need of personal care by virtue of a condition referred to in paragraphs 1 or 2, it is the category of personal care for which the accommodation is so registered which decides the appropriate amount. Reference was made to sub-paragraph 3 of paragraph 3 which deals with the situation where a home is registered under the 1984 Act for persons in need of personal care by virtue of any two or more of the physical and mental conditions referred to in paragraphs 1 or 2 of Schedule 1A, but the personal care that the claimant was receiving at the nursing home did not correspond to any of the categories of personal care for which it was registered; the appropriate amount was then to be the lesser amount consistent with those categories. The tribunal held that when a home is registered under the 1984 Act for persons in need of personal care by virtue of only one of the physical or mental conditions referred to in paragraphs 1 or 2 of Schedule 1A, the appropriate amount must be consistent with that one category - even if the personal care that the claimant is receiving in that accommodation does not correspond to that solely registered category.

9. On appeal to the Commissioner it is argued, in a written submission on behalf of the claimant, that the home in the instant case is not registered for "persons in need of personal care by virtue of any two or more of the physical conditions referred to in paragraphs 1 or 2," (paragraph 3(1)); it is registered for one category only (persons in need of personal care by virtue of old age). It is contended that the consequence of this is that neither paragraphs 3(2) or (3) apply (both of which refer to a home "so registered") can apply and it falls for the amount to be decided as provided in paragraph 3(4). It is contended by the adjudication officer now concerned that before sub-paragraphs (2), (3) or (4) can be applied the circumstances in sub-paragraph (1) need to be met; as the tribunal in the instant

case have found that the home is registered to provide care under only one category then paragraph 3 of Schedule 1A can be of no benefit to the claimant. It is further submitted by the adjudication officer that as the claimant was not in receipt of supplementary benefit immediately before 24 April 1985, her attendance allowance fell to be taken into account in full from the date of her claim and he relies in support of that contention on regulation 11(4A)(a) of the Supplementary Benefit (Resources) Regulations.

10. Paragraph 1 of Schedule 1A is expressed to be subject to paragraphs 3 and 5. It was held by the Court of Appeal in the case of Secretary of State for Social Services v Cotton, 11 December 1985 but not yet reported, that paragraph 6 of the schedule (as it then stood) was ultra vires; paragraph 6 contained a comparable power to that contained in paragraph 5. A Tribunal of Commissioners in CSB/255/1986 dealt with the implication of the Court of Appeal's decision in relation to paragraph 1 of Schedule 1A and regulation 11(4A) of the Supplementary Benefit (Resources) Regulations and decided that although it followed from Cotton that paragraph 5 was ultra vires, this did not affect the validity of paragraph 1 or of regulation 11(4A) of the Resources Regulations. I mention this first simply in order to put it aside from the main question in the case before me.

11. The first part of the claimant's argument, namely that because the home is not registered for persons in need of personal care by virtue of any two or more of the physical conditions specified in paragraph 1, it does not fall to be considered under paragraph 3(2) and (3), is, in my opinion, well founded but I think that results in a consequence adverse to the claimant, namely that paragraph 3 does not apply at all to such an establishment. The scope of the paragraph is governed by the provisions of sub-paragraph (1) which refers to a residential care home and a nursing home, both of these terms are defined in paragraph 7 of the schedule and the definitions cover a variety of establishments; the sub-paragraph then goes on to refer to "a home", a word which is designed to cover both a nursing home and a residential care home as defined, other than one registered under the Act, it then goes on to refer to a home registered under the Act. A home and a home registered under the Act is expressed to be one catering for persons in need of care by virtue of two or more of the physical or mental conditions referred to in paragraphs 1 and 2. It then provides that the amount appropriate to such an establishment is the amount set out in the succeeding sub-paragraphs. Sub-paragraphs (2) and (3) cover the amounts where the establishment is "so registered" i.e. registered under the Act, but it is clear that these sub-paragraphs do not relate to amounts where the establishment is not so registered. The definitions of nursing home and residential care home specify a number of establishments which do not require to be registered under the Act. What is to happen in relation to the amounts payable in respect of these establishments where they care for two or more categories of ailments? It seems to me that they are intended to be covered by sub-paragraph (4) and that such is the purpose of that sub-paragraph. In my judgment there is a comprehensive scheme contained within paragraph 3 itself designed to cover the amounts payable in respect of accommodation in establishments which provide different categories of care as distinct from those which are intended to provide one kind of care. If one were to widen the scope of sub-paragraph (4), one would have the absurd position that a person in a home which registered itself in respect of the care of persons in need of personal care by virtue of one of the conditions referred to in paragraphs 1 and 2 and who receives care not corresponding to that condition would receive the amounts specified in those paragraphs on the basis of the personal care he receives, while if the home registered itself in respect of two or more conditions and the person receives personal care not corresponding to one of those conditions, he would be paid the lesser amount. On the construction which I have put on the paragraph there can arise a discrepancy in the payments based on different categories of homes. But it is not unreasonable to suppose that the legislature intended that more reliance could be placed on the efficiency and probity of chartered bodies and the like as distinct to that of registered establishments. One must bear in mind that paragraph 3 is not applicable where the registration is in respect of one category of care only. The claim in the instant case falls to be decided under the provisions of paragraph 1. This paragraph covers the situation where the registration of the accommodation is in respect of one type

of care only and it seems to me that the payment is restricted to that accommodation alone. If it were otherwise, I could not reconcile the use of the term of art "residential care home" in sub-paragraph (1) nor could I understand why a different criterion is to apply to cases which fall under paragraph 3. I can not see any reasonable alternative construction of paragraph 1.

12. The short answer to the second question raised on the appeal is that the claimant did not claim supplementary benefit until after 29 April 1985 and as a result is not entitled to the concession provided for by regulation 9(17) of the Supplementary Benefit (Requirements) Regulations.

(Signed) J J Skinner
Commissioner

Date: 7 November 1986