

JM/SH/5/MD

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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: Martin John Workman (Appointee) for Constance Workman (Mrs)

Social Security Appeal Tribunal: Greater Birmingham

Case No: 214/05

[ORAL HEARING]

1. In this appeal the claimant is a widow aged 72 and undoubtedly in very poor physical condition. The conduct of the proceedings is in the hands of her son, duly appointed by the Secretary of State to act upon her behalf. The appeal is brought by leave of the chairman of the social security appeal tribunal and is against a decision of that tribunal dated 3 December 1985 which confirmed a revised decision issued by the adjudication officer on 1 October 1985. As will appear below, the matter is of the utmost urgency. At the request of the appointee's representative and with the assent of the adjudication officer, the proceedings before the Commissioner have been expedited. In the particular circumstances of this case, that has given rise to a problem which I explain in paragraph 20 below.
2. I held an oral hearing of the appeal. The appointee was most ably represented by Ms E Wallace, of the Birmingham Tribunal Unit. I am equally indebted to Mrs G S Kerrigan, of the Solicitor's Office of the Department of Health and Social Security, who represented the adjudication officer. The facts of the case are undoubtedly distressing - but I am afraid that there is nothing which I can properly do to assist either the claimant or her appointee.
3. In recent years the claimant has suffered two strokes. She has also suffered further physical misfortunes. There is in the papers a long and circumstantial letter dated 2 December 1985 and written by the matron of the home in which the claimant is presently being cared for. With characteristic objectivity and helpfulness, Mrs Kerrigan has invited me to treat - for the purposes of this appeal - the facts set out in that letter as agreed by the adjudication officer. I need not repeat the details here. The picture is of an elderly and severely incapacitated lady who is, quite manifestly, incapable of looking after herself or, indeed, of subsisting without constant supervision and attention.
4. In May 1985 the hospital in which the claimant was a patient advised that she should be discharged because no further treatment was available which would ameliorate her condition. The social worker appointed to the claimant's case considered trying the

claimant in her (the claimant's) own home. A single afternoon's test sufficed to show that that was hopeless. The local social services department informed the appointee that they did not have available any suitable accommodation. But they furnished the appointee with a list of recommended homes and their charges. After careful consideration, the appointee selected a residential rest and retirement home, to which I shall refer simply as "the Home". Before taking the claimant to the Home the appointee checked the position about payment of the Home's charges. It was clearly confirmed to him that those charges would be met by the supplementary benefit fund. The claimant moved into the Home on 15 May 1985 for a trial period of four weeks. That trial was successful. The facilities and care available to the claimant (including speech therapy rendered necessary by the consequences of her strokes) were highly satisfactory - and the claimant settled down well in her new environment.

5. And, indeed, for more than four months the claimant received supplementary pension sufficient to cover the charges of the Home (£135.00 a week) and to leave her with £10.30 for personal expenses. But there had been a departmental oversight. With effect from 29 April 1985 the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985 ("the Miscellaneous Provisions Regulations") had wrought wholesale alterations - mainly detrimental to claimants - in the treatment of those who, for the purposes of the Supplementary Benefit (Requirements) Regulations 1983, are regarded as "boarders". The claimant's supplementary pension had been - erroneously - calculated in the light of the legislation as it stood until 28 April 1985. Her supplementary pension was recalculated in the light of the changes effected by the Miscellaneous Provisions Regulations. The result was a decision, issued on 1 October 1985, by which the claimant's pension was reduced to £110.00 per week in respect of her accommodation plus £8.50 for personal expenses. The Miscellaneous Provisions Regulations contained a provision which protected the position of those over pensionable age who were already in a residential care home when the change in the regulations took place - but that, of course, is of no avail to the claimant.

6. The claimant's position, in consequence, became - and remains - acute. Her son and appointee is currently making up the shortfall. But he cannot do so within his means. He is already in debt by reason thereof. If the situation cannot be remedied by these proceedings he will be forced to move his mother to another - and more modestly priced - home.

7. I turn now to the relevant statutory provisions. In common with the rest of the legislation about boarders, they are of brain-numbing complexity. I doubt whether anyone pretends that they are readily comprehensible even to a well educated layman.

8. Pursuant to regulation 4(8) of the Miscellaneous Provisions Regulations, a new Schedule 1A was inserted into the Requirements Regulations. It is entitled "Maximum Amounts for Boarders". I am afraid that I cannot do justice to the arguments in this appeal without quoting the whole of the first three paragraphs of that Schedule.

"Residential care homes

1. (1) Subject to paragraphs 3 and 5 [paragraph 5 has no application to this appeal], 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 £148.60 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) to (e) above, the appropriate amount 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 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."

9. The Miscellaneous Provisions Regulations substituted the following for what had been regulation 9(6) of the Requirements Regulations:

"(6) Subject to paragraphs (7) and (17) [which have no bearing upon this case], the maximum amount in respect of the assessment unit as a whole referred to in paragraph (1)(a) shall be at 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 1A."

And, as can be seen from the long quotation in paragraph 8 above, in the case of claimants in residential care homes or nursing homes the "appropriate amount" is - putting it very generally - related to the type and degree of care which is being given. But I stress that that is putting it very generally. The actual regulations are more precise - and more complex. And they import the concept of registration.

10. In paragraph 7(1) of Schedule 1A, "residential care home" is defined as an establishment -

- "(a) registered under Part 1 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 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) [this refers to Scotland]."

11. It is common ground that the Home is registered under Part I of the Registered Homes Act 1984. Section 1(1) of that Act provides as follows:

"(1) Subject to the following provisions of this section, registration under this Part of this Act is required in respect of any establishment which provides or is intended to provide, whether for reward or not, 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."

12. It is common ground that the Home was registered in respect only of "persons in need of personal care by reason of old age". Ms Wallace stressed that at the time when the Home registered under the Act, Schedule 1A was not on the statute book. The Home had no particular reason for carefully scanning the other possible subjects of registration. In fact and truth, Ms Wallace urged, the Home caters for physical disablement. That, of course, may well be true - but the adjudicating authorities (of which I am one) have to apply the letter of the legislation.

13. One other aspect of the argument can be disposed of shortly. Whether or not the home is acting as a "nursing home", I certainly cannot, for the purposes of applying Schedule 1A, treat it as such. Nursing homes are themselves defined in the Schedule. The only head of that definition under which the Home could possibly come is -

"... any premises within the meaning of sections 21 or 22 of the Registered Homes Act..."

Those sections (in Part II of the Act) explain the statutory meaning of "nursing home" and "mental nursing home". Section 23 makes it a criminal offence to carry on such a home without being registered under Part II of the Act. It is to be noted, moreover, that section 1(3) provides:

"(3) Registration under this Part of this Act does not affect any requirement to register under Part II of this Act."

And section 23(2) provides:

"(2) Registration under this Part of this Act does not affect any requirement to register under Part I of this Act."

I say with some confidence that there is nothing in the evidence which would justify a finding that the Home is a "nursing home" - and, in view of section 23 of the Act, such a finding might be an acute embarrassment to the Home.

14. So where does all that welter of legislation leave the claimant? Prima facie, her case falls squarely under paragraph 1(1)(a) of Schedule 1A - and the "appropriate amount" is £110.00 per week, the sum awarded by the adjudication officer in the revising decision which lies at the base of this appeal. But Ms Wallace nails her submissions to paragraph 3 to which, of course, paragraph 1 is expressly subject. In the course of the hearing we looked very carefully at paragraph 3 - and I have looked at it even more carefully since. Although the drafting undoubtedly raises difficulties, I have come to the conclusion that there is no construction which can reasonably be put upon paragraph 3 which will produce an "appropriate amount" in excess of £110.00 per week. The closing words of sub-paragraph (1) of paragraph 3 make it plain that, unless the provisions of sub-paragraph (1) are satisfied, no assistance can be derived by a claimant from any of sub-paragraphs (2), (3) or (4).

15. So how does the case stand in the light of paragraph 3(1)? The relevant words can be reduced to the following -

"Where the accommodation provided for the claimant is.... a residential care 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...."

As I have made clear, the Home is undoubtedly registered under the 1984 Act - and is so registered in respect only of persons in need of personal care by virtue of old age. In the passage "being a home for, or a home registered under the Registered Homes Act 1984 for," the draftsman has, in my view, been at pains to make it clear that, in the case of registered homes, it is to the registration that one must look to establish the category or categories of care in question. And I do not think that Ms Wallace dissents from that proposition. And, of course, if the proposition is correct, the Home does not qualify under paragraph 3(1), for it is not "registered.... 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".

16. But, urges Ms Wallace, the claimant's case does not stop there. The qualification is couched in the alternative. And - submits Ms Wallace - those alternatives are not mutually exclusive; it is open to a claimant to bring himself or herself under whichever is more favourable to his or her case. The Home is "a home for.... persons in need of personal care by virtue of... two... of the physical... conditions referred to in paragraphs 1 or 2". (The two, she submits, are "old age" and "physical disablement"). That, she contends, is plain fact -and it stands regardless of the registration.

17. Those submissions of Ms Wallace are not without their attraction. Indeed, if sub-paragraph (1) of paragraph 3 stood alone, I should be tempted to accept them. But it does not stand alone. Both sub-paragraphs (2) and (3) open with the words: "Where the home is so registered..." and in each sub-paragraph the words which follow make it plain that the relevant provisions hinge upon the categories of personal care for which the relevant accommodation is so registered. Since it is legitimate - indeed obligatory - to construe paragraph 3 as a whole, I am constrained to reject Ms Wallace's construction. It would be gravely repugnant to the wording of sub-paragraphs (2) and (3).

18. But the practical outcome of this appeal does not turn upon whether I accept or reject Ms Wallace's construction. Were I to accept that construction, sub-paragraph (4) would apply - because we would be in the realm of "any other case not coming within sub-paragraphs (2) or (3)". But the "appropriate amount" prescribed in sub-paragraph (4) is "that amount.... 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". The personal care which this claimant is actually receiving is "by virtue of" old age and physical disablement. Physical disablement (paragraph 1(1)(e)) carries an appropriate amount of £170.00 per week in respect of a category of persons within which the claimant does not fall; and for all others an appropriate amount of £110.00 per week. So the claimant can derive no practical advantage from bringing sub-paragraph (e) into contemplation. And the like consideration would apply if she could bring her case within sub-paragraph (3). I must make it clear, however, that I do not consider the claimant's case as falling within paragraph 3 at all.

19. It follows that I consider that the appeal tribunal reached the correct conclusion - and in view of the novelty and complexity of the provisions before it, that was not a negligible achievement. As was submitted by both Ms Wallace and Mrs Kerrigan, it faltered in its approach to paragraph 3(4) of the Schedule. It appears to have treated that sub-paragraph as biting, not only where sub-paragraphs (2) and (3) did not apply, but also where sub-paragraph (1) did not apply - and that, of course, was erroneous (see paragraph 14 above).

20. The problem to which I refer in paragraph 1 above is this: the judgments of the Court of Appeal in the recent case of R v Secretary of State for Social Services, ex parte Cotton not only declared to be ultra vires certain provisions (not material to this case) of the Miscellaneous Provisions Regulations but raised doubts as to whether other provisions were intra vires and/or properly enacted. On 11 April 1986 a Tribunal of Commissioners sat to consider the broader implications and effect of the Cotton case. That it was so to do was known to the appointee and to Ms Wallace when, at their request, I expedited the hearing of this appeal. In the normal case the determination of this appeal would have been postponed until the decision of the Tribunal of Commissioners was to hand. But the appointee and Ms Wallace expressly asked me to decide the issues which I have decided in this decision and to prescind - as I have done - from all issues of ultra vires. That, of course, is without prejudice to any right of appeal in the light of the decision of the Tribunal of Commissioners.

21. With effect from 25 November 1985 paragraphs 1 to 3 of Schedule 1A derive their force from the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions (No. 2) Regulations 1985. The wording is identical save for the up-rating of the various "appropriate amounts". The amount presently appropriate to this claimant is £120.00 per week.

22. As I have already said, the conclusion reached by the appeal tribunal was, in my view, correct. To the (somewhat limited) extent that that conclusion was supported by erroneous reasoning, I have sought to remedy the deficiency.

23. The appointee feels - with some justification - that he has been put to loss and his mother put to needless upheaval by reason of the erroneous advice which he was given at the outset (see paragraph 4 above). As I explained at the hearing, I have no jurisdiction in that aspect of the matter. The remedy - if there be one - must be sought elsewhere.

24. I am afraid that I have no alternative but to disallow the claimant's appeal.

(Signed) J. Mitchell
Commissioner

Date: 18th April 1986