~~COPY~~ MASTER
Claimant in residential care home – construction of Sch 1A Reqs Regs – Cmnr simply refers to the guidance contained in other decisions (see para 7).

JGM/3/LS

Commissioner's File: CSB/0252/1986
C A O File: AO 2847/SB/86
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

1. My decision is that the decision of the social security appeal tribunal dated 3 December 1985 was erroneous in point of law and it is set aside. The matter must be referred to another tribunal.

2. The claimant is a woman well over pensionable age who at the material time was resident in a residential care home registered as such under the Registered Homes Act 1984. As such a resident she is classified as a boarder for purposes of supplementary benefit and is entitled (subject to certain statutory limitations) to have included among her requirements the fees payable to such home. The statutory limitations have been the subject of successive changes or attempts at changes that have in fact given rise to litigation; and such litigation has held up the determination of the present appeal.

3. Under regulation 9(6) of the Supplementary Benefit (~~Resources~~ Requirements) Regulations 1983 as originally enacted the amount allowed was limitated (broadly) to what was reasonable by reference to the weekly charges prevailing in the area. However a first attempt at modifying this was made by the Supplementary Benefit (Requirements) Amendment and Temporary Provisions Regulations 1984 (often called "the Freeze Regulations"), which broadly allowed the Secretary of State for Social Services to fix the maximum. The validity of these regulations was however successfully attacked; and the Court of Appeal, affirming the decision of Simon Brown J, held them to be invalid in the case of Regina v Secretary of State for Social Services Ex parte Elkington (unreported 5 March 1987). It was held also by Brown J (the Court of Appeal not dealing with the point) that the effect of the invalidity of the provision was that the previous provision of regulation 9(6), though in form revoked by the Freeze Regulations, continued to operate.

4. The Freeze Regulations were in any case due to expire on 1 May 1985 but they were in fact superseded with effect from 29 April 1985 by the Supplementary Benefit (Requirements and Resources) Miscellaneous Amendments Regulations 1985 (the April 1985 Regulations). These among other things introduced into the Requirements Regulations a new Schedule 1A which imposed fixed limits on the amount allowable as requirements of residents in various categories of residential care home, and conferred (in paragraph 5(2)) a power for the Secretary of State to vary these limits. They also provided that in the case of persons who were boarders in accommodation to which certain paragraphs of the new schedule 1A applied (including residential care homes) any attendance allowance paid should in the case of those who like the claimant were already in receipt of a supplementary allowance, be counted as a resource with effect from 29 July 1985. In consequence of the enactment of these regulations the adjudication officer issued a decision

fixing the claimant's supplementary pension for 29 April 1985 by reference to the new limits and indicating that the claimant's attendance allowance would be treated as a resource with effect from 29 July 1985. I should add that the April 1985 Regulations introduced at paragraph (17) of regulation 9 of the Resources Regulations some provisions protecting to some extent the amount of pension payable at 29 April 1985 or the later cessation of the disregard of attendance allowance. I am not entirely clear how far it was provided in the decision that these provisions should be taken into account with effect from 29 July 1985.

5. However the Court of Appeal affirming the decision of Mann J in Regina v Secretary of State for Social Services, Ex parte Cotton (13 December 1983 unreported) held that paragraph 6(2) of the new schedule 1A which empowered the Secretary of State to fix limits for certain other classes of boarder was beyond the powers of the Secretary of State and invalid. And it followed for the same reason that the powers conferred on the Secretary of State in paragraph 5(2) to vary the limit under paragraph 5 of the same schedule were invalid. On the basis of this the appeal tribunal in the present case held that the decision of the adjudication officer in this case, having been based on a provision that had been held invalid, was erroneous in law and they set it aside. I am not entirely clear what they supposed was the net result of their decision. The adjudication officer now appeals to the Commissioner.

6. Since the decision at first instance in the Cotton case there have been further developments. The Supplementary Benefit (Requirements and Resources) Miscellaneous Amendments (No 2) Regulations 1985 (the November 1985 Regulations) came into force on 25 November 1985. These replaced the April 1985 Regulations but contained in a revised schedule 1A monetary limits to the amounts allowance to boarders in various categories (including those in residential care homes) in very much the same terms as had the previous April 1985 Regulations but without the offending provisions of the former paragraph 5(2). The validity of these regulations was unsuccessfully attacked in the case the subject of the decision of the Court of Appeal Regina v Secretary of State for Social Services, Ex parte Camden Borough (5 March 1987 unreported). Further in the case that went to the Court of Appeal under the name Kilburn v Chief Adjudication Officer a Tribunal of Commissioners in the case on file CSB/255/1986 held (A) that the invalidity of the power conferred by paragraph 5(2) of the original schedule 1A to the Requirements Regulations of varying the limits imposed by earlier paragraphs of that regulation did not invalidate the limits themselves and (B) that even if it did, this would not render ineffective the amendment of the provision that attendance allowance should in the case of persons in among other things residential care homes should be counted, and not disregarded, as a resource. The Court of Appeal (5 March 1987 unreported) confirmed the latter part of the decision without expressing any view on the former part; and accordingly both stand. It follows that the tribunal erred in law in deciding that the matter had been wrongly dealt with under an invalid regulation. I set their decision aside accordingly.

7. This is not the end of the matter as the new tribunal will have to determine the amount of benefit that is payable from 29 April 1985 to the date of their new decision. This will involve the interpretation not only of the provisions of the new schedule 1A, the limitations, though not the amount in which are for practical purposes the same in the April 1985 and the November 1985 versions of the regulation. The effect of the limitations is that schedule has given rise to differences of opinion as to their construction, which have been the subject of a number of Commissioner's decisions (see files CSB/1922/1985, CSB/70/1986, CSB/87/1986, CSB/148/1986, CSB/5[illegible]/1986, CSB/387/1986 and CWSB/34/1986). I understand that the Chief Commissioner has decided that the matter is to be considered by a Tribunal of Commissioners, at a hearing fixed for 14 and 15 July 1987. I cannot do more by way of guidance on that aspect of the case than refer to the decisions last mentioned. In addition it may be necessary to consider the provisions of regulation 9(17)(b) and (d) of the Requirements Regulations referred to in paragraph 4 above. For this purpose it may be necessary to ascertain what was the claimant's entitlement immediately before 29 April 1985, that is to say by reference to the original regulation 9(6) and not under the

Freeze Regulations.

8. The appeal is allowed.

(Signed) J G Monroe
Commissioner

Date: 3 June 1987