

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF A TRIBUNAL OF COMMISSIONERS

Name: Doreen Howard (Mrs)

Social Security Appeal Tribunal: Hounslow

Case No: 10/10-02

Decision

1. Our decision is that the decision of the social security appeal tribunal dated 28 October 1985 is erroneous in law. We set it aside and refer the case to another social security appeal tribunal for determination in accordance with our directions.

Representation

2. The claimant in this appeal was represented by Mr R. Drabble, of Counsel, instructed by Messrs. Lithgow Petter & Eldridge, Solicitors. The adjudication officer was represented by Mr E. O. F. Stocker.

Nature of the appeal

3. (1) This is the fifth of the group of appeals referred to in Tyler (CSB/842/1985) and is the second appeal relating to a residential care home. (One of the original grounds of appeal was that the home in question was a nursing home; but this contention has been withdrawn and we do not need to consider it further). As in the other appeals, the present appeal is concerned with the extent to which the board and lodging charges made to the claimant in the home in question ("Homemead") are allowable in calculating the claimant's supplementary benefit and are to be met out of her supplementary benefit entitlement. As explained in Nicholas (the fourth of this group of appeals, reference CSB/480/1986) at paragraphs 22 to 31, it is crucial for this purpose in cases where, as here, the home is a residential care home to determine whether the home in question was registered under the Registered Homes Act 1984. This appeal illustrates the importance of verifying, from the certificate of registration, whether the residential care home was registered during the period in issue and of ascertaining, from the register, the categories of care specified in the register.

(2) Copies of the five associated appeals accompany this decision.

(3) The definitions in Tyler are adopted.

The period in issue

4. The period in issue in this appeal is from 12 September 1985 to 27 July 1987. 12 September 1985 is the date of the adjudication officer's decision which was under appeal

to the social security appeal tribunal. 27 July 1987 is the day before that from which such decision fell to be reviewed. The reason for review is that the board and lodging charges at Homemead Nursing Home had been increased, as from 28 July 1987, from £154.00 to £167.00 a week (see the adjudication officer's written submission dated 7 October 1987).

The relevant law

5. The pre-Cotton, Cotton and Camden Regulations, the 1986 Regulations and the 1987 Regulations were each in force during part of the period in issue: see paragraph 7 of Tyler. The relevant provisions of these regulations are set out in the Second, Third and Fourth Appendices to that decision. The relevant provisions of the Registered Homes Act 1984 and of the Residential Care Homes Regulations 1984 are set out in Turner (CSB/1085/86).

The adjudication officer's decision

6. By a decision issued on 12 September 1985, an adjudication officer decided (according to form AT2):

"That the accommodation provided for the claimant is a residential care home for persons in need of personal care by virtue of old age (Regulation 9 and Schedule 1A to the Supplementary Benefit (Requirements) Regulations)."

7. On 24 September 1985, the claimant appealed against that decision saying that her DHSS supplementary benefit for board and lodging charges at the registered residential home Homemead was reduced from £140.00 per week to £128.15 per week as from 6 May 1985. The board and lodging charge in excess of £110.00 per week that had been paid to residents before the introduction of the new legislation would, according to Government announcements, continue to be paid. In the meantime, the residential charges had been increased to £154.00 per week. The claimant wished to appeal against the decision of the DHSS Office classifying Homemead in the same supplementary benefit bracket as a sheltered home for the elderly. There were 24 hour care staff with qualified nurses and the allowance should be the same as for a nursing home.

8. In his written submission on the appeal, the adjudication officer stated that the facts before him were that the claimant was a 61 year old woman who moved to "Homemead" on 7 February 1985. Her income consisted of retirement pension of £36.78 per week and an occupational pension of £12.36 per week. She moved to Homemead on her discharge from hospital and had to pay fees of £154.00 per week for the residential home. "Homemead" was, the adjudication officer stated, registered under Part I of the Registered Homes Act 1984 as a residential care home providing accommodation for persons in need of personal care by virtue of old age. As regards the claimant's appeal, that part relating to the reduction of the amount allowed for her fees from £140.00 to £128.15 per week had been superseded. The office limit set before 29 April 1985 had been reviewed and all the appropriate arrears had been paid and her assessment from 29 April 1985 included an additional requirement to preserve her benefit at that rate.

9. As regards the outstanding matter under appeal, the reasons for the adjudication officer's decision were stated to be that "Homemead" was registered under Part I of the Registered Homes Act 1984 and should be classified as a "Residential Care Home" and that the appropriate national limit should be applied.

The social security appeal tribunal's decision

10. The tribunal heard the appeal on 28 October 1985. The chairman's note of evidence was:

"For the Appellant it was stated.

No understanding of 1st Registration of home under 1948 Act. P/V National Assistance Act. Outlined the history. Cecil houses runs two kinds of home: sheltered and residential. Referred to Registered Homes Act 1984 and the negotiations taking place between Local Authority.

Contends because of conditions of registration should be classified as Nursing Home. Has to have Qualified Nurses. But don't want to have dual registration.

Was registered under previous Acts as Old Peoples Homes. 1984 Act distinguished Registered Home giving a certain degree of constant care. The DHSS should look at registration under previous Acts, not only on Local Authority decisions.

2. Contends that date of award is incorrect. Backdated award to 1.1.85. New regulations came into force 29.4.84, instead of £140 should be £154 (the local limit was £140).
 3. Housing Benefit - £110 is already allowed - Residents qualify as boarders contended £140 is ridiculous."
11. The tribunal's recorded decision, which was unanimous, was:
- "To confirm the decision."
12. The tribunal's recorded findings of fact were:

"The appellant is a 61 year old woman who moved to Homemead on 7.2.85. The Appellants means consists of Retirement Pension of £36.18 per week and an Occupational Pension of £12.36. The Appellant moved to "Homemead" an her discharge from hospital she has to pay fees of £154.00 a week for the residential home. Homemead is registered under part 1 of the Registered Homes Act 1984 as a Residential Care Home providing accommodation for persons in need of personal care by virtue of old age."

Their recorded reasons for decision were:

"The question of the determination of the category into which a particular home falls is a matter for the Local Authority concerned."

Was the tribunal's decision erroneous in law?

13. (1) It clearly was. Their decision contains an error of law on its face; for it states that "the question of the determination of the category into which a particular home falls is a matter for the Local Authority concerned". That is not so. It was for the tribunal hearing the appeal to answer this question.
- (2) In considering the appeal, it fell to the tribunal to determine the following questions:
- (a) whether the home in question ("Homemead") was a residential care home in terms of paragraph 7 of the Cotton and paragraph 6 of the Camden Regulations
 - (b) if it was, to ascertain the category and "the appropriate amount" applicable to the claimant under paragraph 1 of Schedule 1A of (from 12 to 24 November 1985) the Cotton Regulations and of (from 25 November 1985) the Camden Regulations, as from time to time amended and

- (c) then to consider for what period, if any, the claimant was entitled to the benefit of the "protected amount" under regulation 9(17) of those regulations.

The findings of fact and reasons for the tribunal's decision manifestly fail to deal with these questions and this failure constitutes a breach of regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984, as amended, and constitutes a further error of law.

14. In a case where it is asserted that the board and lodging charges which the claimant seeks to have allowed are restricted on the ground that the home in question is a residential home registered under the Registered Homes Act 1984, it is essential, in our view, to call for a copy of the register: see our decision in Nicholas at paragraph 31. Reliance should not be placed on hearsay assertions; since the contents of the register in such cases is, as explained in Nicholas, crucial.

15. (1) A copy of the registration of the proprietor (it is he, not the home itself which is actually registered) of Homemead has been obtained, at our direction and is exhibited to the written submission dated 17 October 1987 of the adjudication officer now concerned. Inspection of this copy at once raises the question as to when Homemead was first registered under the Registered Homes Act 1984. The registration is dated January 1986. Below the date of registration is the entry "Certificate No.4". Beside the reference to the date of registration there is the entry, under "date of issue of certificate" of the date "May 1986". At the bottom of the photocopy of the register is the statement "1st registered March 1955". It is thus clear that there was a registration under some earlier Act than the Registered Homes Act 1984.
- (2) We were referred in argument to no provision either in the Requirements Regulations, nor the Interpretation Act 1978, nor elsewhere, which enables registration under an earlier Act to be treated as registration under the Registered Homes Act 1984 for the purpose of Schedule 1A of the Cotton or Camden Regulations.
- (3) Mr Drabble, representing the claimant, pointed out that the application to be registered under the 1984 Act was made on 30 May 1985, according to the application for leave to appeal to the Commissioner, which is dated 28 February 1986 and is signed by the claimant. He drew attention to the copy register showing registration as at May 1986 and to the certificate of registration in the case papers, which is dated 9 May 1986.
- (4) Mr Stocker, on behalf of the adjudication officer, submitted that the likelihood was that "Homemead" was registered under the Registered Homes Act 1984 at the date of the appeal tribunal's decision (28 October 1985).
- (5) Mr Drabble and Mr Stocker both submitted that the case must be referred back to another tribunal to ascertain the date when "Homemead" (i.e. the proprietor of "Homemead") was first registered under the Registered Homes Act 1984. We agree with them. The application for registration under the Registered Homes Act 1984 brings "Homemead" within the definition in sub-paragraph (b) of paragraph 7 of Schedule 1A of the Cotton Regulations and of paragraph 6 of that Schedule in the Camden Regulations. But the fact that the register is dated January 1986 states "1st registered March 1955" raises the question whether or not, "Homemead" was, before 1986, registered under the Registered Homes Act 1984. If it was not, the relevant category of care from 12 September 1985 (the beginning of the period in issue) up to the date of registration (? January 1986) should be determined by applying the tests set out in Turner at paragraphs 29 to 31, as explained in Nicholas at paragraph 31(8). From the date

of registration under the Registered Homes Act 1984, different tests apply: see Nicholas paragraphs 31(1) to 31(7). The date of registration under the 1984 Act is crucial.

- (6) We set aside the decision of the appeal tribunal dated 28 October 1985 and, for the above reasons, refer the case to another tribunal which should, in accordance with the usual practice, be entirely differently constituted.

Directions to the new tribunal

16. The period before the new tribunal will be 12 September 1985 to 27 July 1987: see paragraph 4 above.

17. The tribunal can, in the light of the application for registration dated 30 May 1985 and referred to in paragraph 15(3) above accept that as from 12 September 1985 "Homemead" was a residential care home within the meaning of paragraph 7 of Schedule 1A of the Cotton Regulations and from 25 November 1985 under paragraph 6 of that Schedule in the Camden Regulations.

18. There should be a further written submission to the tribunal by the adjudication officer now concerned, covering the issues arising in this appeal, in the light of our decisions in the present and the associated appeals, copies of which should be before the tribunal. In particular, that submission should consider, and support by adequate evidence, the date when "Homemead" was first registered under the Registered Homes Act 1984. Was it January 1986, as shown in the register before us? Or was it at some earlier date between May 1985 (the date of the application for registration) and January 1986 and, if so, when? A copy of the relevant register and any certificates of registration ante-dating that of May 1986 should be produced.

19. It is the claimant's contention that Schedule 1A of the Cotton Regulations is entirely invalid. This contention was rejected by us in Tyler. It was the alternative submission of her representative that the board and lodging charges in respect of the claimant's stay at "Homemead"

- (1) can not be restricted to less than "the protected amount" of £140
- (2) should not in fact be restricted to less than the amount from time to time being the higher of the two "appropriate amounts" set out in sub-paragraph (e) of paragraph 1(1) of the Cotton Regulations down to 24 November 1985 and of the Camden Regulations from 25 November 1985.

Thus, on 12 September 1985, when the charge was £154.00 a week, it is contended that the full amount of the charge should be allowed, since this was less than the higher of the two rates then in force under sub-paragraph (e), namely £170.00 a week. It follows that the full charge would remain payable for the remainder of the period in issue, since that period terminates at the date of the revision upwards of the charge. (See the Fifth Appendix to Tyler for the rates from time to time appropriate under sub-paragraph (e)).

20. (1) In respect of the period from January 1986 the tests set out in paragraph 31 of Nicholas should be applied. It is clear that the proprietor of "Homemead" was registered under the Registered Homes Act 1984 in respect of that home, as a residential care home in two categories namely "old age" and "physically disabled persons over the age of 65". Asking the question set out in paragraph 31(3) of Nicholas namely, is the home registered as a residential care home providing accommodation for persons in need of personal care by virtue of the condition specified in sub-paragraph (a) of paragraph 1(1) of Schedule 1A (old age) the answer is Yes. Asking the same question in respect of sub-paragraph (e)

(physical disablement) the answer is, again, "Yes". The fact that only certain persons, namely those over 65, are catered for does not alter the answer to the question, since the home is clearly registered as providing for physical disablement. It does not make any difference that a particular claimant is not within that group of persons, being under the relevant age; for the class of care in issue is that specified in sub-paragraph (e) of paragraph 1(1) of the Cotton or Camden Regulations, which contains no reference to the age of 65.

- (2) The tribunal should therefore accept that there are two classes of care, namely (a) and (e) which are physical or mental conditions in respect of which "Homemead" is registered in respect of the period from January 1986.
- (3) The next step is for the tribunal to apply paragraph 3(2) of Schedule 1A, as explained in paragraph 31(6) of Nicholas. This involves a consideration of that paragraph in the Cotton Regulations for the period up to 24 November 1985 and in the Camden Regulations thereafter. The tribunal should determine as a fact whether the personal care which the claimant is receiving in Homemead corresponds to "old age" care or "physical disablement" care. If it corresponds with neither, the lower (i.e. old age) rate is appropriate: see paragraph 3(3) of Schedule 1A.
- (4) If the tribunal decide that the personal care actually received by the claimant corresponds with "physical disablement" care, they should then consider whether the claimant is entitled to the higher or lower rate.
- (5) In order to fall, as the claimant contends she does fall, within the higher rate in sub-paragraph (e) the claimant must show, and the onus is on her, that she was physically disabled before she attained the age of 60, and that she was still so disabled while in the residential care home.

If the answer to these questions in (5) above is "Yes", the higher rate applies and the claimant will, so long as that higher rate (as varied from time to time) (see the Fifth Appendix to Tyler for the rates) exceeded the actual charge made to the claimant at Homemead residential care home, be entitled to the actual weekly charge and should be allowed that charge in the computation of her weekly benefit. If the answer to that question is "No", the lower rate applies with one possible exception. If the claimant was physically disabled during her time in the home, but was not so disabled before attaining the age of 60 years, the question arises as to whether paragraph 1(2) of Schedule 1A of the Cotton and Camden Regulations may infringe EEC Directive 79/7 relating to equal treatment for men and women in social security. In that case, the tribunal should call for a legal submission on this question. It is too complex a subject for detailed directions to be given here; and the point was not the subject of argument before us in this appeal.

- (6) If the claimant was not receiving personal care corresponding to that for physical disablement provided by Homemead but she was receiving personal care corresponding to that provided by Homemead for old age the appropriate rate will be that specified in sub-paragraph (a) of paragraph 1(1) of Schedule 1A of the Cotton or Camden Regulations.
- (7) If the claimant was receiving personal care which corresponds to neither old age nor physical disablement, the appropriate rate will be that appropriate to the lower of the two, namely "old age", the rate for which is specified in sub-paragraph 1(1) of Schedule 1A of the Cotton or Camden Regulations.
- (8) Where the appropriate rate in paragraph 1 is less than the protected rate (a concept analysed and explained in Tyler at paragraph 43) the claimant will be entitled to the protected rate. Assuming that it is accepted that the protected

rate in the present case was £140.00 a week (as seems to be the case; see the Assistant Manager's letter dated 6 January 1986 at page 11 of the case papers) it will be this rate that is payable, until 27 July 1986 so long as it is greater than the appropriate rate in Schedule 1A: see paragraph 9(17) of the Cotton and Camden Regulations. The appropriate rates under paragraph 1 from time to time in force are specified in the Fifth Appendix to Tyler. From 27 July 1986, the protected rate is increased by £10.00 (i.e. to £150.00 under regulation 9(18) of the Camden Regulations) (set out in the Fourth Appendix to Tyler) and it will be the greater of this rate and the appropriate rate which is payable.

21. As regards any period in respect of which "Homemead" was not registered under the Registered Homes Act 1984 (e.g. the period from 12 September 1985 to January 1986?), if the home was providing care for physically disabled persons and if the claimant was receiving care which was consistent or reasonably consistent with that care then, provided that she was herself physically disabled from before attaining the age of 60 (pensionable age for a woman) (see our directions at the end of paragraph 20(5) above) the appropriate rate will be the higher rate specified in category (e): see paragraph 3(4) of Schedule 1A of the Cotton and Camden Regulations, unless it is less than the protected rate: see paragraph 20 above.

22. The attention of the tribunal is drawn to the letter dated 15 October 1987 addressed by the General Manager of Cecil Houses to the claimant's instructing solicitors, which states that the claimant's physical disability did arise before she reached the age of 60 and included cardiac function failure (mild), swollen legs and arthritis.

23. As to the meaning of "physical disablement", see paragraph 11(2) of our decision in Nash (CSB/1771/86). "Pensionable age" is 60 years in the case of a woman. The higher rate for physical disablement, specified in sub-paragraph (e) of paragraph 1 of Schedule 1A of the Cotton and Camden Regulations, is payable to persons over that age who before attaining that age had become physically disabled by virtue of paragraph 1(2) of Schedule 1A to the Cotton and Camden Regulations. If in the light of this evidence and that of her doctor dated 10 November 1987 setting out the claimant's earlier medical history, the tribunal accept that the claimant was so disabled before attaining age 60, they should then go on to find whether or not the claimant was actually receiving care for such disability if she was not disabled before the age of 60 see our directions at the end of paragraph 20(5) above.

24. The tribunal should take note that if the actual charge for board and lodging in Homemead (which is in Teddington, the LONDON area) from 28 July 1986 exceeds the appropriate amount specified in paragraph 1 of Schedule 1A of the Camden Regulations, the appropriate amount specified in that paragraph should be increased by the excess up to £17.50; see paragraph 2A of the Camden Regulations as amended by regulation 8(6) of the 1986 Amendments. The relevant provision is set out in the Fourth Appendix to Tyler.

25. In giving their decision, the appeal tribunal should also deal with all other relevant points raised by or on behalf of the adjudication officer or the claimant. The record of their decision should comply with regulation 28(2) of the Social Security (Adjudication) Regulations 1986 or any other regulation that replaces it.

26. Our decision is set out in paragraph 1.

(Signed) V G H Hallett
Commissioner

(Signed) R F M Heggs
Commissioner

(Signed) R A Sanders
Commissioner

Date: 11 February 1988