

SDP - not normally resides

WMW/GM

Commissioner's File: CSIS/100/93

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY
APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: [REDACTED]

Social Security Appeal Tribunal: Glasgow Central

Case No: 552 43935

1. This claimant's appeal succeeds. I hold the appeal tribunal decision dated 8 April 1993 to be erroneous in point of law and accordingly set it aside. I remit the case to the tribunal for determination afresh in light of the guidance which follows.

2. From its inception in April 1988 the claimant was awarded income support. In June 1991 she was awarded an attendance allowance. In June 1992 she sought leave late to appeal the income support awarding decision upon the ground that it should have included an allowance of the severe disability premium (SDP) for at least the period April 1988 to October 1989 -

"... on the ground that I have no non-dependants living with me."

A chairman then decided to extend the time for lodging an appeal against the awarding decision and thus the case came before the tribunal. Their decision was that the appeal was unsuccessful. Their reasons for decision were this -

"The appellant's daughter used the appellant's dwelling house as her official address for formal correspondence and sometimes stayed there. She did not live anywhere else regularly and the appellant had not informed the Department of any change. When the daughter acquired her own accommodation on 28.6.92 the Department were informed."

From the note of evidence it is clear that where the daughter had been residing from time to time had been the main focus of the evidence. The tribunal made the following findings of fact -

1. The appellant was in receipt of attendance allowance from 8.4.91.
2. The daughter of the appellant used the appellant's address for all official correspondence.
3. The daughter of the appellant sometimes stayed at the appellant's home but did not live anywhere else regularly.

The claimant now again appeals, with leave of a Commissioner.

2

3. The grounds of appeal are that the tribunal have not applied the "normally resides" test; that they erred by concluding that the address for "official correspondence" defines "one's normal residence"; and that they have failed to give reasons to justify their conclusion that the claimant normally resided at her mother's house or to deal with the possibility that she had no normal residence at all. The adjudication officer supports the appeal on grounds which I largely accept, as hereinafter appears.

4. In the first place, although it may be largely a technical point, the tribunal have not dealt with the particular ground of appeal to them, namely entitlement to SDP for April 1988 to October 1989. They should have refused the premium for that period because during it, and indeed until April 1991 the claimant could not qualify by reason of non-satisfaction of regulation 17 of the Income Support (General) Regulations 1987 (the "ISG Regulations"). That, under reference to Part III of Schedule 2 to the regulations, provided the mechanism for entitlement to any premium requiring first a condition to be satisfied. Paragraph 13 of the Schedule gave the condition that a claimant be "a severely disabled person" and that expression was then defined in sub-paragraph (2) as someone if, and only if, she was in receipt of attendance allowance (13(2)(a)(i)). There were two other qualifications required. The first was that there were no non-dependants "residing with her" and the second is, or was that at the material time, that no invalid care allowance was in payment under section 37 of the Social Security Act in respect of caring for her. As the adjudication officer now concerned points out, the last qualification has never been considered and it should be the first question for the new tribunal.

5. Turning to the remainder of the appeal, which should cover the period down to the date of the new tribunal's hearing, issues will no doubt primarily centre upon the presence or absence of non-dependants residing with the claimant. For practical purposes the period will open with the award of attendance allowance in June 1991. The definition of "non-dependant" in force in June 1991, but only until November 1991, provided for by said regulation 3(1) -

"... any person, except someone to whom paragraph (2) applies, ~~who normally resides with a claimant.~~" [My emphasis].

The italicised provision is the one which caused so much trouble for the old tribunal: They seem to have read the question as one as to where was the claimant's daughter's normal residence. The two questions are not necessarily the same and can be quite different. The question here concerns only the discovery of whether anyone, and if so who, normally resided with the claimant. The logical starting point is as to whether anyone resided with the claimant during the period in question. Where a person resides normally indicates where he or she has their home. And so the question, in the first place, is indeed whether anyone had their home in the same house as the claimant. But the wording here has also a more continuous meaning about actually being there and so "normally resides". That will introduce the second question, namely whether the claimant's daughter normally lived with the claimant - or whether she was normally to be found living somewhere else. And it will matter not where else. On these questions the address that the daughter gave for correspondence is a possible indicator. Equally, having regard to the other places in which she dwelt from time to time, it may be that the tribunal will conclude that the daughter had no "fixed abode" and so no home or residence. Ultimately it is a matter for common sense and judgment. But the two questions basically are whether the claimant's daughter made such home as she had with the claimant and, and perhaps more importantly, whether she was normally to be found dwelling there. Unless both questions are answered in the affirmative then the rest of the definition "non-dependant" matters not.

3

6. I should now say that I reject the adjudication officer's submission that paragraph 4(8) of Schedule 3 to the SG Regulations assists in determining where a person "normally resides". That provision is one of a number providing circumstances in which an individual is or is not to be treated as occupying a dwelling as his home for the purposes of housing costs. I do not think that involves questions similar to the one here which is whether the daughter normally resided with her mother or not. It is not a question whether she actually normally resided and whether her absence from her normal residence might allow to continue to be her normal residence. The emphasis is on the "with".

7. If, and only if, the daughter - or anyone else because the question should be left open - is found to have been normally resident with the claimant will it be necessary to consider the provisions of sub-paragraph (2) of regulation 3. During the period June to November 1991 the probable provision primarily to be considered will be (2)(d). Its application will depend upon whether the daughter, was during that period liable to make payments on a commercial basis to the claimant in respect of their occupation of the dwelling. As the adjudication officer points out, under reference to CIS/754/91, "liable to make payments" involves and requires a finding of legal as opposed to a moral or other obligation. That point appears also in the Appendix to CSIS/40 and 28/92 ("the Appendix"), albeit necessarily for the purposes of those cases somewhat reversed, at paragraph 3). Next it is correct as the adjudication officer has submitted, that some caution is required when considering whether in a family situation there was any real intention to create a full legal relationship. The daughter, presumably being capax, and the claimant, also the new tribunal will have to consider whether upon the evidence put before them there has really been established, according to the normal tests, a binding contract for the daughter to make payments to the claimant in respect of her occupation of the dwelling. Even if that is made out the final part of the test is as to whether such payments were "on a commercial basis". As pointed out in the Appendix that must be something not far removed from an account which might be arranged with a paying lodger and on something of an arms length test. I refer the new tribunal to paragraphs 32 and 33 of the Appendix.

8. From November 1991 regulation 3(2) was again changed so that if the daughter, or anybody else, has been found to have normally resided with the claimant they could thereafter only be excluded from "non-dependant" if some part of paragraph (2), (2A) or (2B) was satisfied. In (2A) the provision about "a close relative" would certainly exclude the daughter, and anyone else for the matter of that comprehended by the definition of "close relative" in ISG Regulation 2(1). Sub-paragraph (2) may require to be considered, but not on the information in the bundle. I concentrate therefore on sub-paragraph (2B). That will require the daughter, or anyone else, to have been shewn to have been either a co-owner of the dwelling with the claimant or at least jointly liable with the claimant to make payments to a landlord in respect of their occupation. That is to say that the daughter would have to be established to be either a co-owner or, in practical terms, a co-tenant. But again there is the proviso in (2C) that, as respects the daughter, sub-paragraph (2B) can only apply if the co-ownership or joint tenancy arose either before 11 April 1988 or on or before the date on which the claimant first occupied the dwelling. I have to say that although I have had to remit these questions to the new tribunal I am driven to the conclusion, provisional although it may be, that if the daughter is held to have normally resided with the claimant after November 1991 there is in practical terms very little prospect of her being excluded from the category of "non-dependant" thereafter.

9. Finally, as the adjudication officer now concerned points out, the daughter on any view appears to have left such residence as she had in the claimant's house in June 1992. If thereafter

4

there is found to have been no non-dependant normally residing there, then the tribunal will require to make an award of entitlement to the SDP from and after 28 June 1992. That must be subject to the right of an adjudication officer to review and is also the subject to his right to put any relevant change before the tribunal.

(signed)

W M Walker
Commissioner

Date: 17 June 1994