



WMW/JOB

Commissioner's File: CSIS/2/91

SOCIAL SECURITY ACTS 1975 - 1990

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

DECISION OF SOCIAL SECURITY COMMISSIONER

1. I hold the decision of the Cumbernauld Social Security Appeal Tribunal dated 12 June 1990 to be erroneous in point of law. Accordingly I set it aside. I refer the case to the tribunal for determination afresh in light of the guidance which follows.

2. This case came before me at a hearing at which the claimant appellant was represented by Mr Alan Caskie of Messrs Ian S Smart & Company, Solicitors, Cumbernauld and the adjudication officer respondent was represented by Mr William Ferrie, Solicitor, of the Office of the Solicitor in Scotland to the Secretary of State for Social Security. I am indebted to them for their assistance.

3. The factual background is not in dispute and is in small compass. In January 1990 Mrs Weir, then in receipt of income support, advised the Department that she was about to be admitted to a nursing home. Her question was as to her entitlement to benefit thereafter. On 16 February 1990 an adjudication officer determined that it fell to be assessed in accordance with paragraph 7(a) of Schedule 4 to the Income Support (General) Regulations 1987, in terms of regulation 19 thereof. The claimant appealed.

4. It appeared from the adjudication officer's submission to the tribunal that he had been influenced greatly in determining which sub-paragraph of paragraph 7 of the Schedule to apply by a doctor's decision on the category of admission of the claimant as evidenced by document 9 of the bundle. The argument before the tribunal was that regard should have been had beyond that document to the care actually being provided. There was certainly some evidence presented to the tribunal about that and they made findings of fact detailing Mrs Weir's history, current physical condition, abilities and the category of her admission. The unanimous decision was to overturn that of the adjudication officer and to hold Mrs Weir entitled to income support calculated in accordance with paragraph (d)(ii) of said regulation 7. That seems to have been a change of the basis of the assessment rather than of the financial figure. And of course, strictly, the assessment was of the appropriate amount to be taken into account in calculating the amount of income support to be awarded.

5. The reasons for decision were given thus -

"The tribunal accepted the legal argument put to them that they were entitled to look beyond the doctor's form showing the category of care

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which the Nursing Home claimed to provide and examine the care which it was in fact providing. It was obvious from the evidence that Mrs Weir does not suffer from any mental disorder but is partially physically disabled by reason of her eyesight and Arthritis. However, she has not yet reached the stage of physical disablement which would take her within Para 8 of Regulation 19 as she can sunstantially [sic] care for herself."

The curious word in the last sentence is obviously a misprint for "substantially" and equally the reference to "Para 8" is not of regulation 19 of, but is itself in Schedule 4 to, the General Regulations.

6. As Mr Caskie pointed out, part of the issue before the tribunal was as to whether or not for the purposes of paragraphs 7 and 8 of the Schedule Mrs Weir had become "physically disabled" and if so when. Their failure to deal with these was, he submitted, an error of law warranting success of the appeal. I agree. And as Mr Ferrie, in a clear submission, pointed out the question is slightly more complicated because the word "disablement" which appears in paragraph 7(d), but not in paragraph 8, is given a specific definition by regulation 20(4) namely that it is to have the same meaning as it has for the purposes of the Registered Homes Act 1984 and Regulations made thereunder. That Act and Regulations do not apply to Scotland but a definition therein contained is nonetheless there made applicable for the purpose of paragraph 7(d). And the definition of "disablement" in section 20(1) of the 1984 Act provides for persons who -

".. are blind, deaf or dumb or substantially and permanently handicapped by illness, injury or congenital deformity .."

or any other disability that may be prescribed. So, Mr Ferrie submitted, the tribunal in considering "the stage of physical disablement" mentioned in their reasons against paragraph 8 of the Schedule should have referred to the definition of "disablement" in said section 20. I am not, myself, persuaded that that is entirely correct. The phrase in paragraph 8 is simply "physically disabled". But I accept Mr Ferrie's submission so far as concerning the phrase "physical disablement" in paragraph 7(d) and I further accept submissions, made in effect by both representatives, that the tribunal have misdirected themselves by concentrating upon what Mrs Weir suffered from rather than the category of care which the nursing home claimed to provide. I consider that they also misdirected themselves by taking document 9 to show the category of care provided by the home. I agree that it is legitimate - indeed it is essential - to look beyond that form at the care which was being provided. In my judgment document 9 only indicated the basis upon which Mrs Weir had been admitted to the home. These are the reasons why I have held the decision to be unsound in law. I must now turn to the regulations for myself.

7. The broad question argued before me was the proper interpretation of paragraphs 7 to 10 of Schedule 4 to the General Regulations. They are controlled by regulation 19. With the inclusion of paragraph 6 there is there contained a corpus of provisions for determining how to calculate the weekly applicable amount for an individual residing in a residential care home or a nursing home so far as relates to the home itself. Paragraph 6 is for care homes and 7 for nursing homes. Each is subject to the following three paragraphs (four in the case of a home in Greater London). Each of 6 and 7 contains a list of types of care. For each the home is related to the type by the words - "... for persons in need of personal care by virtue of ..." Thus

far, therefore, the type or category of care provided is the determinative factor. And paragraph 7 so far as apparently relevant to this case provides -

"Subject to paragraphs 8 to 11, where the accommodation provided for the claimant is a nursing home for persons in need of person care by virtue of -

- (a) past or present mental disorder but excluding mental handicap the appropriate amount shall be £... per week;
- .
- .
- .
- (d) physical disablement, the appropriate amount shall be -
 - (i) in the case of a person to whom paragraph 8 applies £... per week or;
 - (ii) in any other case £... per week;
 - .
 - .
 - .
- (f) any condition not falling within sub-paragraphs (a) or (e), the appropriate amount shall be ... per week."

In each case apart from sub-paragraph (d) the appropriate amount is directly set out. In (d) the appropriate amount is made to depend upon paragraph 8. (There is a similar exception in the comparable list in paragraph 6.) Paragraph 8 provides -

"For the purposes of paragraphs 6(e) and 7(d) this paragraph applies to a person under pensionable age or a person over pensionable age who, before attaining pensionable age, has become physically disabled."

That settles which rate is to be received by those in homes for persons in need of personal care by virtue of physical disablement. At that point the determining factor is switched from the type of care provided by the home to factors relative to the individual concerned.

8. But, as was pointed out in submission, the position is then further complicated because paragraph 9 appears to conflict with paragraph 7. At the least, Mr Ferrie submitted, there is some confusion. Paragraph 9 reads -

"The appropriate amount applicable to a claimant in a residential care home or nursing home shall, subject to paragraph 10, be determined -

....."

Sub-paragraph (a) then provides a very simple answer for residential care homes registered under the 1984 Act since it is sufficient to look to their recorded particulars. But sub-paragraph (b) alone applies to the present case. It provides -

" where the home is a residential care home not so registered or a nursing home, by reference to the type of care which, taking into account the facilities and accommodation provided, the home is providing to the claimant."

That does seem to be a further switch away from the type of care the home is providing in general to the care provided to, or it may even in practice be required by, the individual. Yet this time the switch is not clean; the general provision must still be subject to a "taking into account".

9. Mr Ferrie argued that paragraph 9(b) was provided only as an assistance to determining between the different sub-paragraphs of paragraph 7 in any particular case. He pointed out that the tribunal had not sought to approach the matter upon that basis. I accept Mr Caskie's submission that paragraph 9(b) requires regard to be had both to the needs of the individual, and so what is provided for him or her, as well as the overall facilities and accommodation provided by the home, which in a particular case may be rather different. And there may be good reason for that if one results in a more expensive provision and so, no doubt, a higher appropriate amount under paragraph 7. So it may be that the new tribunal will conclude that two sub-paragraphs of paragraph 7 apply. If both produce the same appropriate amount no further difficulty need arise since that amount is the sole object of the whole exercise. That can then be reflected simply in the decision. But if two different appropriate amounts are thereby discovered there will remain a problem.

10. Equally it may be that a particular home provides for persons in need of more than one kind of personal care: i.e. multi- rather than general - or even single - purpose homes. And in that regard it is helpful to refer to R(SB) 13/88, a case dealing with corresponding provisions in the former supplementary benefit scheme where similar, but clearer, provisions applied where a residential care or a nursing home had more than one care purpose. If there was only one purpose then that necessarily was the definition of the care provided. But if there were two or more types of care provided then some way of resolving the conflict had to be found so as to be able to determine which category was to rule in a particular case.

11. The resolution of the problem of two different figures for the appropriate amount in any case in my opinion is answered by paragraph 10 of Schedule 4. It is another of those to which paragraphs 6 and 7 are expressly subjected. Its opening words are -

"Where more than one amount would otherwise be applicable, in accordance with paragraph 9, to a claimant in a residential care home or a nursing home, the appropriate amount in any case shall be determined in accordance with the following sub-paragraphs."

There can only be more than one amount if paragraph 9(b) is involved. Paragraph 10(2) and (3) refer to residential care homes, respectively registered under the 1984 Act or not so registered. So I come to the last sub-paragraph. It provides -

"(4) In any case not falling within sub-paragraph (2) or (3), the appropriate amount shall be whichever amount of the amounts applicable in accordance with paragraph 6 or 7 and 9 is, having regard to the types of personal care that the home provides, most consistent with

personal care being received by the claimant in that accommodation."

In R(SB)13/88 at paragraph 31 it was stated by the Tribunal of Commissioners that -

"If the home is found as fact to be for persons in need of personal care by virtue of any two or more physical or mental conditions, then ... the appropriate amount shall be that ... having regard to the nature of the personal care provided, ... is consistent with the personal care that the claimant is receiving in the accommodation."

The similarity between the resolution provided for cases of double qualification under the supplementary benefit scheme and that now of Income Support is striking. Its operation is simple if the double qualification arises because the home provides for more than one category and the particular claimant's needs fall within one of them. In that event it is the coincident one that will apply. But if the double qualification arises because the home provides for one, or more, categories and the claimant needs personal care by reason of another category resolution will be more difficult. The answer may well be that if the home has taken in the individual it must be providing, at least for him, the type of care he needs and that could determine the issue. But since this question does not appear to arise in this case I need say no more about it.

12. The new tribunal will require to consider and decide first the type or category of personal care provided by this particular nursing home. In all probability, if it is not a multi-purpose home, the care provided for Mrs Weir will rule. Primary facts must be found based upon the evidence, and it may be the investigations of the tribunal. Secondary facts may require to be determined from the primary facts. As always it will be important to record the relevant evidence and findings together with reasons as to how the tribunal reached its conclusions and decision. I caution against accepting a medical statement as to the ground of admission being too readily taken as determinative of the care required or provided. The ground of admission may well be narrow. If conflicting types of care are involved that appears to me to require resolution by preferring that which most nearly coincides with the actual care being received insofar as that can be said to be "provided by the home". In an extreme case it may be that resort will have to be had to a third category.

13. The appeal succeeds.

(signed) W M Walker
Commissioner
Date: 3 April 1992