



Department of Social Security

The Adelphi, 1-11 John Adam Street, London WC2N 9HT

Telephone 0171 962 8279 GTN 391 28279 Fax 0171 962 8683

Clive Durdle
Springboard Housing Association
Springboard House
2A Cloughton Road
London
E13 9PN

Our ref: ISP3/RNH/IO

Your ref:

Date: 29 November 1996

Dear Mr Durdle

Temporary Absence from Registered Care Homes

Thank you for your letter of 12 November. Your letter has been passed to me to respond to your point regarding the recent Commissioner's decision on the payability of retaining fees where a person is transferred to another residential care or nursing home on a trial basis.

As you point out, the Commissioner in CIS 5414/1995 concluded that a retaining fee could be payable to a person with preserved rights who was temporarily resident in another care home. This decision, which was against the long-standing policy intention, was contradicted by a different Commissioner in a subsequent case CSIS 833/1995. In the second case, the Commissioner concluded that a retaining fee was not payable where a resident was temporarily resident in another care home. I have attached a copy of this decision in CSIS 833/1995 which you may find useful.

I understand that the Chief Adjudication Officer is to pursue a further appeal in order to clarify whether the wording in regulations 19 and 21 preclude the payment of a retaining fee in these circumstances. Central Adjudication Services have advised that they have no plans to change the guidance to Adjudication Officers in the meantime.

I hope this is helpful.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Ian O'Neill".

Ian O'Neill
Income Support Policy (ISP 3)

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:

Social Security Appeal Tribunal:

Case No:

RECEIVED
30 AUG 1996

1. My decision is that the decision of the social security appeal tribunal dated 31 March 1995 is erroneous in law and is set aside. The decision which I give in its place is that the claimant is not entitled to a retaining fee under regulation 21 of, and paragraph 16(c) of Schedule 7 to, the Income Support (General) Regulations 1987 when entitled to income support calculated in accordance with regulation 19 of, and Schedule 4 to those regulations in respect of the period from 17 April 1994 to 22 April 1994 during which she was resident at the Badaguish Centre, Aviemore. The reasons for my decision are explained hereunder.
2. This is an appeal by the adjudication officer with leave on a question of law against the majority decision of a social security appeal tribunal on 31 March 1995. The facts of the case are agreed. The claimant, who suffers from Downs Syndrome and an enlarged colon, has been in residential care in a Rudolph Steiner Home at Camphill, Blair Drummond, since 1987. While resident in that home she receives income support under regulation 19 and Schedule 4 to the Income Support (General) Regulations 1987 as a person with preserved rights residing in a residential care home. She has had short periods of absence from the home from time to time either staying with her parents or transferring to another residential establishment within the Camphill community. During her absences a retainer fee was payable at Camphill. Prior to April 1994 this was always paid as part of the claimant's income support at the rate of 80% under regulation 21(1) and paragraph 16(c) of Schedule 7 to the General Regulations.
3. During the period from 5 April to 26 April 1994 the claimant was temporarily absent from Camphill. For most of the period she was with her parents but from 17 April to 22 April she was a resident in Badaguish, another residential care home run by the Rudolph Steiner Organisation. No question arises in this case regarding the periods when the claimant was with her parents. However the adjudication officer on 24 June 1994 disallowed the claim for the retainer element for the period from 17 to 22 April 1994 upon the ground that the claimant remained in residential accommodation during that period. The claimant's appointee appealed to a social security appeal tribunal.

4. The social security appeal tribunal at Stirling, in a majority decision, allowed the claimant's appeal. The dissenting member considered that the claimant could not qualify for an award of income support under both regulation 19 and regulation 21 of the General Regulations in respect of the same period. The adjudication officer has now appealed to a Commissioner and maintains that the tribunal misdirected themselves in their interpretation of regulation 21 and Schedule 7, substantially for the same reason as was given by the dissenting member.

5. Regulation 19(1) of the Income Support (General) Regulations 1987 provides materially as follows:-

"19.-(1) ... where a claimant has a preserved right and either -

(a) lives in a residential care or nursing home; or

(b) [inapplicable]

his weekly applicable amount shall, except in a case to which regulation 21 (applicable amounts in special cases) or Part II of Schedule 4 (persons to whom regulation 19 does not apply) applies, be calculated in accordance with Part I of that Schedule."

Regulation 21(1) of the General Regulations provides materially as follows:-

"21.-(1) ... in the case of a person to whom any paragraph in column (1) of Schedule 7 applies (applicable amounts in special cases), the amount included in the claimant's weekly amount in respect of him shall be the amount prescribed in the corresponding paragraph in column (2) of that Schedule; ...".

6. Paragraph 16 of Schedule 7 to the General Regulations is headed "Persons temporarily absent from a hostel, residential care or nursing home". Column 1 of paragraph 16 provides materially as follows:-

"16. Where a person is temporarily absent from accommodation for which he is liable to pay a retaining fee, and but for his temporary absence from that accommodation his applicable amount would be calculated in accordance with regulation 19 (applicable amounts for persons in residential care and nursing homes), and

....

(c) he is absent for a period of at least one week from that accommodation being accommodation either in a residential care home or nursing home and he is not required to be available for employment."

Column 2 of paragraph 16 provides for an increase in income support to take account of the retaining fee of an amount not exceeding 80% of the applicable amount under paragraph 1(1)(a) of Schedule 4 (which reflects the weekly charge for the accommodation including all meals and services).

7. The adjudication officer submits that the phrase "except in a case to which regulation 21 ... applies" contained in regulation 19 makes it clear that both regulations are not to be applied at the same time. His submission continues:-

"Because Schedules 4 and 7 are controlled by regulations 19 and 21 respectively, it also follows that one cannot apply Schedules 4 and 7 at the same time. The effect of this is that, because the claimant was not absent from the type of accommodation to which regulation 19 applied, regulation 19(1) and Schedule 4 apply in respect of the residential care home fees but regulation 21 and Schedule 7 cannot be applied in respect of a retaining fee, in relation to accommodation at the residential care home."

I accept that submission. The claimant thus remained entitled to income support as a resident in a residential care home whilst in the alternative Centre at Aviemore but was precluded at the same time from entitlement to the payment of a retainer fee in respect of her normal residential care home at Camphill. That conclusion is I think reinforced in the circumstances of the present case by the fact that, as the tribunal themselves noted, paragraph 16 of Schedule 7 is said to apply where but for the person's temporary absence from his normal accommodation his applicable amount would be calculated in accordance with regulation 19. In the present case the claimant remained in accommodation warranting an applicable amount under regulation 19 albeit she was in different premises. It is hardly to be supposed that a retaining fee would be available in respect of one residential care home whilst a claimant was resident in another residential care home and entitled to the appropriate income support to cover the charges made there.

8. The majority decision of the tribunal is accordingly erroneous in law and I set that decision aside. I can however conveniently substitute my own decision for that of the tribunal. For the reasons just given my decision is as set forth in paragraph 1 above.

9. The appeal of the adjudication officer is allowed.

(signed)

J G Mitchell

Commissioner

Date: 20 August 1996

Peter Newton
Correspondence Unit
Department of Social Security
The Adelphi
1 - 11 John Adam Street
LONDON WC2N 6HT

Your Ref: TOA/96/017906
12 November 1996

Dear Mr Newton

Temporary Absence from Residential Care or Nursing Homes

Thank you for your letter of 11 October 1996.

You state in paragraph 3 that the retaining fee is not payable if the temporary absence is in another residential care or nursing home. This is confirmed by AOG 28162 Jan 94.

However Welfare Rights Bulletin 134 October 1996 reports CIS 5415 1995 which rejects the argument that Reg 19 deals with a type of accommodation rather than a particular home. A retaining fee is therefore payable for a person with preserved rights who is temporarily absent in another residential care or nursing home.

I would welcome your comments.

Yours sincerely

Clive Durdle
Senior Policy and Information Officer

Commissioner to determine the amount payable 16(1) Sec 7

15 Dec 1995

Mr. [Name] to US

Under Reg 17 / Sec 4

For same person



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSIS/833/95

* 83/97

SOCIAL SECURITY ADMINISTRATION ACT 1992

**APPEAL FROM THE SOCIAL SECURITY APPEAL TRIBUNAL UPON A
QUESTION OF LAW**

**DECISION OF COMMISSIONER IN APPEAL REMITTED BY THE COURT OF
SESSION, SCOTLAND**

COMMISSIONER: J G MITCHELL QC

Appellant: Adjudication Officer

Respondent:

Tribunal: Stirling

Tribunal Case No: 514 120-4

DECISION OF SOCIAL SECURITY COMMISSIONER

1. I affirm the decision of the social security appeal tribunal dated 31 March 1995 that the claimant is entitled to an amount not exceeding 80% of the applicable amount referred to in paragraph 1(1)(a) of schedule 4 to the Income Support (General) Regulations 1987 for the period from 17 April to 22 April 1994 (both dates included).

2. This decision is given by me in obedience to the following interlocutor of the Court of Session pronounced on 15 October 1997 in the claimant's appeal against my decision as Social Security Commissioner dated 20 August 1996:-

"Edinburgh 15 October 1997. The Lords, having resumed consideration of the Appeal and Answers, allow the Appeal, quash the decision of the Social Security Commissioner dated 20 August 1996, and decern; remit the matter to the Social Security Commissioner to consider afresh; continue the Appeal on the question of expenses."

3. The history of this case is, in brief, that the claimant, who suffers from Downs Syndrome and acts through an appointee, normally lives in residential care in a home at Blair Drummond and whilst there receives income support under regulation 19 of and schedule 4 to the Income Support (General) Regulations 1987 as a person with preserved rights residing in a residential care home. She was temporarily absent from that home for a period in April 1994 and during part of that period, from 17 to 22 April, she was resident in another residential care home called Badaguish. During the latter period the claimant continued to receive income support under regulation 19 and schedule 4. An adjudication officer refused a claim for the payment of a retainer fee payable at Blair Drummond in respect of those days. Regulation 21(1) and paragraph 16(c) of schedule 7 to the General Regulations provide for the payment of such a retainer in appropriate circumstances. The claimant appealed to a social security appeal tribunal who in a majority decision allowed the claimant's appeal on 31 March 1995 and found the claimant entitled to payment of the retainer for those days.

4. The adjudication officer appealed to a Commissioner on a question of law against the decision of the tribunal. On 20 August 1996 I set aside the decision of the social security appeal tribunal as erroneous in law and held that the claimant was not entitled to a retaining fee under regulation 21(1) and paragraph 16(c) when she was entitled to income support calculated in accordance with regulation 19 and schedule 4 in respect of the days in question.

5. The claimant appealed, with my leave, to the Court of Session against my decision. During the hearing of that appeal a concession was made by counsel on behalf of the respondent to the effect that it was now considered by the Department of Social Security that benefit had been wrongly paid to the claimant under regulation 19 and schedule 4 for her period in Badaguish and accordingly it was accepted that the claimant was entitled to the retainer under regulation 21(1) and paragraph 16(c). In consequence of that concession the Court quashed my decision and remitted the case to me to consider afresh.

6. It was all along accepted that the claimant was liable to pay the retaining fee provided for under regulation 21(1) and paragraph 16(c) and it is now accepted that the claimant is entitled to payment of the retainer under those provisions. The sole ground upon which the

decision of the social security appeal tribunal was maintained before me to have been in error of law was that payment of the retainer under regulation 21(1) and paragraph 16(c) was excluded by the claimant's entitlement under regulation 19 and schedule 4 to the full payment for her period in Badaguish. Since it is now maintained that the claimant was not so entitled, the premise upon which the adjudication officer's appeal against the decision of the tribunal was based has been disclaimed and my decision based upon that premise has of course been quashed.

7. Neither party has made any further submission to me following the remit by the Court. In the result it is sufficient for me now to affirm the decision of the tribunal as stated in paragraph 1 above. I would only emphasise that the Court have expressed no opinion upon the correctness or otherwise of the Department's altered view regarding the claimant's entitlement under regulation 19 and schedule 4 and that matter is not a question for decision by me in this appeal.

(signed)
J G MITCHELL QC
Commissioner
Date: 18 November 1997