HIPR — SDA — Entitled to Care Benefits On Day Leave Hospital + Long Stay

THE SOCIAL SECURITY COMMISSIONERS

11/99

Commissioner's Case No: CSS/617/97

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

COMMISSIONER: W M WALKER QC

ORAL HEARING

Appellant:

Respondent: Adjudication Officer

Tribunal: Edinburgh

Tribunal Case No: 5/05/97/05521

DECISION OF SOCIAL SECURITY COMMISSIONER

1. This claimant's appeal succeeds. I hold the decision of the Edinburgh social security appeal tribunal dated 5 March 1997 to be erroneous in point of law and, accordingly, I set it aside. I think it appropriate now myself to give the decision which I consider that the tribunal should have given upon the facts of the case.

2. That decision is to allow the appeal from an adjudication officer's decision issued on 19 November 1996 whereby he reviewed an earlier decision awarding severe disablement allowance (SDA) to the claimant. The review was in respect of a relevant change of circumstances, namely that the claimant was on hospital leave from 8 until 11 November 1996 (both dates included). In the revised decision the adjudication officer held there to be entitlement to SDA at the full weekly rate only for the period from 9 to 11 November 1996 (both dates included). In place of that revisal I now hold the claimant entitled to severe disablement allowance at the full weekly rate from 8 to 11 November 1996 (both dates included).

3. This case came before me for oral hearing, granted by a Nominated Officer in response to a request made on behalf of the claimant. At that hearing the claimant was represented by Mr Mark Brough of the Action Group (for children and adults with learning disabilities and their carers) and the adjudication officer was represented by Mrs Susan Sutherland, of the Office of the Solicitor in Scotland to the Department of Social Security. I am grateful to both for careful and helpful submissions. I regret that it has taken an undue amount of time to prepare and have issued this decision. That has been due to a number of factors, not all of which were under my control. I apologise for the delay.

4. From paragraph 2 it will appear that at issue was one day's payment of benefit. I was given to understand, however, that this was something of a test case, at least so far as this claimant is concerned, in respect of entitlement during periods of home leave from hospital. The factual background is relatively simple and outwith dispute. The claimant had been a patient in Gogarburn Hospital for many years but was regularly allowed home for several days a week, usually at weekends. On the weekend giving rise to this case he left hospital early on the morning of Friday 8 November 1996 and returned on the evening of Monday 11 November 1996. I gather, from the original letter of appeal to the tribunal by the claimant's mother, document 21 of the bundle, that the exclusion of Friday from the period of entitlement followed the promulgation of Mr Commissioner Mesher's decision CIS/571/94, in October 1995. I was informed by Mrs Sutherland that it is to be reported as R(IS) 8/96. The tribunal's reasoning indicates that adjudication practice may not have been universal in other benefits with similar issues. It is no disrespect to the submissions advanced to me that I mention them only where necessary to explain the views at which I have arrived. Very broadly, the tribunal were faced with a choice between following CIS/571/94, that is R(IS) 8/96, or R(S) 4/84. It is also no disrespect to the tribunal's reasoning that I have reached a different view. In carefully set out reasons they explained, putting it briefly, that they preferred Mr Commissioner Mesher's decision to that of Mr Commissioner Hallett in part because of a change in the law and in part because the latter had not had for consideration various authorities extensively dealt with by the former. They noted that in certain of the earlier authorities somewhat different wording in different regulations had been under consideration. They were persuaded that despite those differences it would not make sense

for there to be different interpretations of regulations applying or made to apply for similar purposes to disability living allowance, the former attendance allowance and to the Social Security (Hospital In-Patients) Regulations 1975 (the I-PR) themselves. The arguments deployed before me rehearsed, refined and developed those before the tribunal. My concern for the apparently inequitable result of following for this benefit R(IS) 8/96, as expounded in R(S) 4/84 which concerned the same benefit, has led me, ultimately, to a different route and conclusion.

5. Amongst other provisions, entitlement to SDA is subject to regulations 4 and 5 of and Schedule 2 to the (I-PR). Thereby, after 6 weeks of free in-patient treatment, SDA falls to be adjusted by being reduced to what is known as the personal expenses rate. Regulation 4A provides for an adjustment in reverse, exceptionally in the social security system on a day by day basis, for any days of temporary absence from hospital. When anyone is in receipt of free in-patient treatment is to be determined by reference to regulation 2(2).

6. Regulation 2(2) of the I-P R as in force for the purposes of this case, that is to say as amended by the Social Security (Miscellaneous Provisions) Amendment (No 2) Regulations 1992, reads:-

> "For the purposes of these regulations, a person shall be regarded as receiving or having received free in-patient treatment for any period for which he is or has been maintained free of charge while undergoing medical or other treatment as an in-patient
>
> (a) in a hospital [such as that involved in this case] under.....the National Health Service (Scotland) Act 1978.....; or [not relevant];
>
> and such a person shall for the purposes of paragraph (a) be regarded as being maintained free of charge in a hospital or similar institution unless his accommodation and services are provided under [health service statutory provisions which do not apply to this case]."

7. To set the scene and provide the background against which I have travelled in reaching my conclusion I must first survey the authorities cited and uncited. The oldest which has been referred to in later cases is that of C.U. 54/48 (KL). It concerned a claimant who returned from France and the question was whether he fell to be disqualified for benefit:-

> "For any period during which [he] is absent from Great Britain...." [Section 29(1) of the National Insurance Act 1946.]

The Deputy Commissioner concerned noted that the law normally paid no regard to fractions of a day. He considered that:-

> "Consequently, the claimant can say that on 11 July he was in Great Britain and the insurance officer can say that he was absent from Great Britain."

Because it had been the day on which he had left the country the finding was that:-

> "In such circumstances it is convenient to assume that the state of things which first occurred in a day persisted throughout that day."

Upon that basis the day of departure was not counted as a day of absence and so was allowed for benefit purposes and the day of return was so counted as so was disallowed. But it is clear that there was no attempt directly to analyse or interpret the statutory phrase. The decision was simply "convenient" or pragmatic.

8. C.U. 54/48 was followed in C.S. 131/49, the oldest case referred to by the tribunal or cited to me. The question there was whether a period between two in-patient treatments fell to be disregarded so that the days of treatment could be regarded as continuous. It involved the National Insurance (Overlapping Benefits) Provisional Regulations 1948. By regulation 9(4)(b) a temporary interval could be ignored but "temporary interval" was defined as:-

> ".....a period not exceeding 28 days."

The questions posed by the Deputy Commissioner concerned were "when did the first period of in-patient treatment end" and "when did the second period begin". He found no reason not to follow the same principle as in C.U. 54/48 and said that consequently:-

> "....since the period of treatment has to be calculated in days, it is convenient to assume that that state of things which existed at the beginning of the day lasted throughout the day."

He therefore disregarded the last day of the interval as not qualifying as a day of in-patient treatment. That is to say that it fell to be regarded as part of the interval. Again there was no analysis of the legislation.

9. The next authority is R(S) 8/51. A situation not unlike the present arose. The regulations then in force raised an issue whether a home visit had exceeded 28 days. The Deputy Commissioner concerned simply applied C(S) 131/49 and its pragmatic approach. In R(S) 9/52 the question again was whether two periods of treatment should be regarded as continuous or not. The Deputy Commissioner concerned noted that periods of free in-patient treatment had to be calculated in weeks of seven days for the purposes of the regulations there in question and founded upon C.S. 131/49 which, he said, had interpreted the provisions of a regulation in similar terms to those before him. But it was upon the same pragmatic approach that the case was decided. At paragraph 8 of the decision he said that:-

> "The period [sic: "practice"?] of calculating a period from the happening of an event by the exclusion of the day in which the event happens, has been approved by the Court. (Compare Lester v Garland - 15Ves 248 at page 257)."

10. The trend in the "absence from Great Britain" cases was challenged by R(S) 1/66 in which, perhaps for the first time, the wording of such regulations was analysed and a decision was based thereon. That relevant wording was that in Section 49(1)(a) of the National Insurance Act 1965 which replaced that of section 29(1) of the Act of 1946. Mr Commissioner Micklethwait had to determine whether the claimant was disqualified from

receiving benefit on the day that she had both left Canada and arrived in Great Britain. That issue took the Commissioner back to C(U) 54/48 and others which he declined to follow. At paragraph 10, he noted that the section imposed a disqualification on a person otherwise entitled to benefit. The question then arising was whether the date of return:-

> "....was included in a "period during which" the claimant was absent from Great Britain. This involves considering the meaning of the words "period" and "during" in the context."

The Commissioner went on to explain that in C.S. 6/65 the word "during" had been taken to mean either "throughout" or "on a particular occasion in". He referred to an observation by Rowlatt J in Inland Revenue Commissioners v St Luke Hostel Trustees, Registered (1930) 36 TLR 412 that:-

> "...if one is describing a thing which occupies the whole of a period such as presence in a given place, "during" is an admirable word for it."

The Commissioner concluded that "during" in the legislation before him meant "throughout" and at paragraph 14 that that legislation involved considering only complete calendar days. Since the claimant had not been absent from Great Britain during "(that is, throughout)" the day of return, that day could not form part of the period of absence. He concluded upon a construction of the wording before him that, in the absence of any legislation to the effect that a person should be treated as absent from Great Britain throughout a day even though in fact during part of it she was not so absent, that such a day was not a day of disqualification. To that extent, therefore, the "start of the day" test was departed from.

11. Next came what Mr Brough called the seminal decision of Mr Commissioner Hallett in R(S) 4/84. There the claimant, undergoing a course of education, had to sleep overnight in a hospital for medical treatment. She was in hospital each night from 10pm until 8am. The legislation there in question was the original version of I-P R 2(2). Only the full-out words at the end of regulation 2(2) were changed in 1992. The original such words were:-

> "and a person shall not be regarded as being maintained free of charge in a hospital.....for any period if he is paying or has paid, in respect of his maintenance, charges which are designed to cover the whole cost of the accommodation or services (other than services by way of treatment provided for him in the hospital....for that period."

The Commissioner accepted that the minimum period for consideration was a day. He went on to consider for what, if any, period that claimant had been maintained free of charge in the terms of the regulations in order to discover whether she fell during the like period to have been receiving "free in-patient treatment".

He observed that:-

> "Two conditions require to be satisfied to fill this prescription (1) for that day the claimant must have been maintained free of charge by the hospital and (2) she must have been undergoing medical or other treatment as an in-patient during the day. The

> claimant clearly satisfies the second condition. But, in my judgment, she does not satisfy the first. During the hours 10pm to 8am the claimant was maintained by the hospital free of charge. But during the day (of 24 hours) she was not. For from 8am to 10pm the claimant had to maintain herself elsewhere. The hospital made her no charge. But they did not maintain her at all for the major part of the day. The claimant in fact during the day-time part of the 24 hour day had to meet the expenses of meals (provided by the college), taxis etc while attending college. She was in a quite different position from the ordinary in-patient in a hospital, who has no expenses to meet and is maintained free of charge in the hospital. Such an in-patient has virtually no expenses, everything being found for her and it is in respect of that type of patient that the regulations provide for a reduction in the amount of various personal benefits which would otherwise be payable."

12. The full-out words were amended by regulation 2(2)(b) of the Social Security (Hospital In-Patients) Amendment (No 2) Regulations 1987. Thereby they came to read:-

> "and such a person shall be regarded as being maintained free of charge in such a hospital or similar institution for any period unless his accommodation and services are provided under [certain sections of the National Health Service legislation which did not and do not apply]."

13. Two decisions CS/249/89 and CIS/371/90, then explained the effect of that amendment. They were not put before me but were referred to in a later decision by Mrs Commissioner Heggs. The former by Mr Commissioner Rice, determined that if the second condition in R(S) 4/84 was satisfied then the first condition was deemed to be satisfied. Mr Commissioner Rice then said that a person was to be treated as being maintained free of charge, whether or not that was in fact the case, provided only that he was in the hospital 24 hours a day. He concluded that the justification relied upon by Mr Commissioner Hallett in R(S) 4/84 was no longer of application. CIS/371/90 I refer to later. I come, next, to the decision of Mrs Commissioner Heggs, namely CIS/192/91.

14. That case dealt with another single day period. The Commissioner referred, at paragraph 15, to decision CS/249/89 and differentiated it from R(S) 4/84 by the amendment to the "full out" words. Mrs Commissioner Heggs analysed R(S) 4/84 and accepted that it had decided that a claimant who had had to maintain herself *for the major part* of the 24 hour day meant that that claimant was not in receipt of "free in-patient" treatment but felt that that decision was not authority for holding that anything less than 24 hours actual presence in a hospital took a claimant outwith regulation 2(2). She did not agree with decision CS/249/89 that the effect of the amendment to the full out words was "to treat a person as being maintained free of charge, whether or not such was the case, provided only that he is actually in the hospital 24 hours a day". She concluded that these full-out words deemed a claimant to be maintained free of charge irrespective of any absences during a 24 hour period. I am not clear whether she also meant that any presence in the hospital in a 24 hour period would discount that day. The day of return might then also be discountable. Mrs Commissioner Heggs was, she felt, supported by CIS/371/90.

15. The passage upon which Mrs Commissioner Heggs founded from CIS/371/90 was this:-

> "...I have given anxious consideration to the construction of the "full-out" words and in particular as to whether it would be possible to restrict them to cases arising under regulation 2(2)(a) but it seems to me that they are clear and unambiguous and I cannot do so. They embrace both sub-paragraph (a) and (b). The language, construed its context, produces a harsh result but it seems to me that it necessarily requires that result. I have considered both the object of the regulations and the history of the amending regulation. The object of the regulation was that a person should not receive a double advantage out of public funds, namely free hospital treatment and the cost of maintaining himself outside hospital. R(S) 4/84 decided that a claimant was not be regarded as "receiving or having received free in-patient treatment" within the meaning of the regulation when she took her meals outside a hospital and only slept there at night. That was the state of the law prior to the making of the amending regulation in 1987. I have considered whether the amended definition was intended to cure such a lacunae and apply only to National Health Hospitals. But if that was the intention, it would be a simple matter for the draftsman to draft accordingly."

I fully understand that that passage determined that the new full-out words applied to both conditions in regulation 2(2) but, with great respect, I do not entirely see that they determined anything that tends to negate the view of Mr Commissioner Rice about the 24 hours presence in hospital rule. Moreover, I note that the passage in question was dealing with a submission that otherwise the full-out words would be meaningless since any absence during any 24 hour day could be used to disqualify that day as a day of free in-patient treatment. I understand that as a general rule, but the question before Mr Commissioner Rice as now before myself was the effect of an absence from hospital for all or virtually all of the day: and day as opposed to night. Mrs Commissioner Heggs was considering a case where the absence from hospital was for rather less - 4½ to 6 hours of the day. I conclude without further comment that decision CIS/192/91 is not helpful to the resolution of the present case.

16. I now come to decision CIS/571/94 which was the immediate authority for the adverse decision in this case. It concerned recovery of income support paid in respect of a period when the claimant had been an in-patient. By reason of regulation 21(3) of the Income Support (General) Regulations 1987 Mr Commissioner Mesher had to consider the same I-PR provision now before me. At paragraph 15 he referred to R(S) 1/66, noted that Mr Commissioner Micklethwait had not disapproved C(S) 131/49 which had applied C(U) 54/48 and that his decision had been based on the construction of the relevant and particular statutory provision before him. I note that the adjudication officer's representative before Mr Commissioner Mesher had supported the R(S) 1/66 approach upon the basis that a day could only be regarded as one during which an individual was receiving free in-patient treatment if he so received "throughout" that day. The Commissioner, however, concluded that R(S) 1/66 had only been decided without conflicting with earlier authority because Mr Commissioner Micklethwait had concluded that there was only a disqualification for receiving benefit for a day if it was one "throughout which" the person had been absent from Great Britain. The "normal" rule from C(U) 54/48 could have been seen under those circumstances to be artificial. He then noted that neither regulation 2(2) of the I-P R nor any of the provisions importing that definition into the Income Support Scheme made reference to a person being defined as a patient for "any period *during* which" the person was receiving free in-patient treatment. He concluded that there was thus not the legislative peg on which

R(S) 1/66 had been hung. Accordingly, he restored the C(U) 54/48 approach despite, as he said, any artificiality but added that it seemed to him to be no more artificial a rule than one which deemed a person not to be receiving free in-patient treatment on a day on which the person was in hospital from midnight until 10pm. I note that, in that particular case, the individual was absent from hospital with home leave for most weekends and had unrestricted permission to leave the premises provided that he returned by about 10pm, except when required to attend therapy sessions. Having considered the tribunal findings of fact narrated at paragraph 6 I am not quite sure how the Commissioner concluded that that claimant had been in hospital from midnight until 10pm. He had certainly been in the hospital "every night". The rule set out in paragraph 18 for the guidance of the new tribunal was that where a person was admitted to or returns to hospital on a day, that day was to be treated as a day on which that person was not receiving treatment as an in-patient, but a day on which a person is discharged from or leaves hospital is to be treated as such a day. There was thereby in effect a simple restoration of the original pragmatic rule from C.U. 54/48 (KL).

17. Finally I come to the latest decision cited to me, again by Mr Commissioner Mesher, namely CDLA/11099/95. The case concerned the proper interpretation of regulation 8 of the Social Security (Disability Living Allowance) Regulations 1991. It provided that:-

> ".....it shall be a condition for the receipt of a disability living allowance which is attributable to entitlement to the care component for any period in respect of any person that during that period he is not maintained free of charge while undergoing medical or other treatment as an in-patient.....
>
> (a) in a hospital.....under the National Health Service Act of 1977....."

But then there followed slightly different "full out" words which were self-contained in regulation 8(2). They read:-

> "(2) For the purposes of paragraph 1(a) a person shall only be regarded as not being maintained free of charge in a hospital or similar institution during any period when his accommodation and services are provided under [the same provisions as mentioned in H I-P regulation 2(2)]."

Mr Commissioner Mesher concluded, at paragraph 16, that because that provision is in a negative form, it was:-

> ".....satisfied only for a period made up of complete calendar (ie midnight-to midnight) days throughout which the claimant is not undergoing medical or other treatment as an in-patient."

That was based upon the "absence from Great Britain" cases. He considered, also, regulation 2(2) of the In-Patient Regulations and the consequences of R(S) 4/84. He agreed with Mrs Commissioner Heggs in CIS/192/91, largely upon the basis that Mr Commissioner Hallett could only have held his second condition to be satisfied on the basis that undergoing treatment over night as an in-patient in the hospital, and so for less than 24 hours in each midnight to midnight day, was enough. He then referred to his own decision CIS/571/94 and his note that the state of affairs existing at the start of each day was to be assumed to continue

throughout the day. He made it clear that he had not had to decide whether the rule applied only to days at either end of a period or to all days in which treatment was in issue.

18. These authorities, although urged upon me by Mrs Sutherland as requiring a decision in favour of the adjudication officer, are not in my judgment entirely in point in this case. I agree with what was said by Mr Commissioner Hallett as to the purpose underlying the original version of I-P R2(2). I understand the effort by Mr Commissioner Rice in CS/249/89 to give effect to that purpose despite the change in the full-out words. I note that otherwise the authorities refer to the regulation in respect of benefits where it is either the ruling provision or has been translated almost word for word into the ruling provision. I do not think that the authorities given upon other benefits necessarily rule upon the present case. I must go back to basics.

19. The In-Patient Regulations were made, amongst other powers, under 82(6) of the Social Security Act 1975, the precursor of the present section 113(2) of the Social Security Contributions and Benefits Act 1992. Said section 82(6) provided for the making of regulations:-

> "(b) for suspending payment of benefit to a person during any period in which he is undergoing medical or other treatment as an in-patient in a hospital or similar institution."

The provisions cited in paragraph 5 above are such regulations. As it seems to me the real issue here is as to the period during which this claimant, who was throughout *entitled* to benefit, fell to be *relieved* of the partial suspension of the *payment* thereof. It is the termination of that suspension, and of course its reimposition, that are really in question. By the primary legislation there can only be suspension "during any period" in which the individual is undergoing appropriate treatment. Regulation 2(2) of the I-P R then defines when a person is receiving such treatment. Applying the rule so well set out in the earlier authorities that the minimum time that can be considered for inclusion in a period is a day and the approach in R(S) 1/66 that "a period during which" can only be satisfied throughout each relevant day then, upon an analysis of the relevant legislation, rather than the application of any convenient rule, I conclude that there is only authority to suspend benefit in this case for days *throughout each of which* the claimant was an in-patient as then defined in the regulations. The first and last days of his leave do not satisfy those requirements because he was not an in-patient throughout the whole of each such day. That I find to be the short answer to this case although I may say that it has taken time to perceive it. I derive, I think, some support for it from the approach and views set out in R(S) 1/66 and R(S) 4/84 although I-PR regulation 2(2) is different. However the I-PR, and in particular regulations 4 and 5, have to be considered in the context of the purpose of the relevant statutory powers.

20. In reaching my decision I have been concerned only to consider the effect of the I-PR upon those with an existing entitlement to this particular benefit. The effect on other benefits, which I can see may be different, I do not consider because there the question appears to be of qualification for, that is basic entitlement to, benefit; here it is only the extent to which a power to partially suspend, and so to modify the amount in payment, may properly be exercised. I have not considered any question of the <u>vires</u> of making the I-PR in that setting; it maybe thought to arise in consequence but had I been concerned on that score I would have

reopened the hearing. Accordingly I leave any such issue until and if it arises directly. Finally, I am comforted to think that this decision provides an equitable result without any real question of double benefit arising.

21. For the foregoing reasons I consider that the tribunal decision was in error of law. I should add that Mrs Sutherland submitted, correctly in my view, that as the tribunal had not explained why they rejected R(S) 1/84 there had been in any event an error of law, although she also submitted that I should substitute my own decision to the same effect as that of the tribunal. It occurs to me that there may be a further error in the tribunal decision in respect that in the first reason for their decision the tribunal referred to the Court of Appeal decision in the case known as McKiernon and as to whether it or a legislative change amounted to a material change of circumstances so as to warrant a review. They concluded that the basis for review and revisal in the present case was not a relevant change of circumstances, but that the original decision had been in error of law. That was incorrect. The adjudication officer here was entitled to review and revise the running award of benefit upon a material change of circumstances, being that the claimant had left hospital for a period of weekend leave and, so far as necessary, adjust his entitlement accordingly. No doubt when he returned there might be a further requirement to review and revise. In the present case the revisal by the adjudication officer covered both and I have followed that for simplicity. Technically, however, the ground of review set out in paragraph 2 above should properly have been both a relevant change of circumstances (section 25(1)(b) of the Administration Act) and an anticipated such change (section 25(1)(c)). Paragraph 3 of box 5 of the adjudication officer's submission to the tribunal seems to accept that some such was the procedure and makes no criticism of it. Nor do I.

22. For the foregoing reasons this appeal must be allowed and my decision is as set out above.

(signed)
W M WALKER QC
Commissioner
Date: 11 January 1999