

JGMI/DH

COMMISSIONERS DECISION

Commissioner's File: CSSB/186/86

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LO Edinburgh

Ref No: 8511/194228

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Margaret SCOTT (Miss)  
appointee for Agnes SCOTT (Mrs)

Social Security Appeal Tribunal: Edinburgh & Lothians

Case No: 05/03

/ORAL HEARING/

1. My decision is that the decision of the social security appeal tribunal dated 21 February 1986 is erroneous in law and is set aside. The decision which I substitute as the decision which the tribunal should have given is that the weekly amount for board and lodgings applicable to the claimant after 1 September 1985 under regulation 9(1)(a) of the Supplementary Benefit (Requirements) Regulations 1983, as amended, remains £190 per week, being the relevant protected amount determined under regulation 9(17)(b) of those regulations.
2. This is an appeal by an adjudication officer with my leave against the majority decision of a social security appeal tribunal which upheld the claimant's appeal against the decision of an adjudication officer who had held in effect that an increase of £9.50 per week in the nursing home charges payable by the claimant could not be included in the claimant's requirements for supplementary benefit purposes. The question arises out of amendments to the Supplementary Benefit (Requirements) Regulations 1983 ("the 1983 Regulations") effected by (1) Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985 with effect from 29 April 1985 ("the April 1985 Regulations") and (2) the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions (No. 2) Regulations 1985 ("the November 1985 Regulations") which revoked and replaced the April 1985 Regulations with effect from 25 November 1985.
3. Payment of the increased nursing charge awarded by the majority decision of the social security appeal tribunal was suspended by the Secretary of State pending the outcome of the present appeal. An expedited oral hearing of the appeal was held before me at which the adjudication officer was represented by Miss R Kearns of the Solicitor's Office of the Department of Health and Social Security. The claimant's daughter, who is her appointee, attended the hearing and was represented by the claimant's grandson, Mr H L Scott. I am indebted to both

representatives/

representatives for their submissions.

4. The claimant is an elderly lady now aged 96 and suffering from physical and mental disablement. She is in receipt of supplementary pension and a war widow's pension. She was assessed as being in need of 24 hour supervision and considerable nursing care and on 1 October 1984 was admitted to a nursing home in Haddington. The full weekly nursing home charge of £190 per week was accepted as reasonable by the adjudication officer for the purposes of the 1983 Regulations, as then in force, and was included in the computation of the claimant's weekly requirements for supplementary benefit purposes. When the 1983 Regulations were amended with effect from 29 April 1985 as above-mentioned the claimant continued to receive the same amount of benefit in respect of nursing home fees as was applicable prior to that date. When informed that the nursing home fee was to be increased by 5% from 1 September 1985 to a total of £199.50 per week the adjudication officer took the view that the increase could not be met under the regulatory provisions then in force and issued his decision to that effect. The claimant's appointee thereupon appealed to a social security appeal tribunal. It should be stated that the adjudication officer, no doubt after enquiry, accepted that the nursing home in question came within the definition of a "nursing home" for the purposes of the relevant provisions of the 1983 Regulations as amended. The available evidence supports that conclusion and no attempt has been made at any stage to argue the contrary. I therefore proceed upon the basis that that matter is not in issue.

5. Regulation 9 of the 1983 Regulations makes special provision for the normal requirements of a claimant who is a boarder. Regulation 9(1)(a) makes provision for a weekly amount for board and lodging which, subject to certain paragraphs not here applicable, is to be determined in accordance with paragraph (4) but is not to exceed the maximum amount referred to in paragraph (6) of that regulation. In terms of regulation 9(4) the weekly amount in a case such as the present is to be "the full weekly amount" of the charge for board and lodging. Paragraph (6), as it had effect prior to 29 April 1985, broadly speaking imposed a maximum of the amount estimated by the adjudicating authority as representing a reasonable weekly charge for the relevant area. With effect from 29 April 1985 regulation 4(1) of the April 1985 Regulations substituted the following paragraph for paragraph (6):-

"(6) Subject to paragraphs (7) and (17), the maximum amount in respect of the assessment unit as a whole referred to in paragraph (1)(a) shall be the aggregate of the following amounts-

(a) in respect of each member of the assessment unit who is a dependant aged less than 11,  $1\frac{1}{2}$  times the amount referred to in paragraph (5)(c); and

(b) in respect of each other member of the assessment unit, the appropriate amount provided by Schedule 1A."

6. The corresponding provision of the November 1985 Regulations was in the same terms. Schedule 1A referred to above was introduced into the 1983 Regulations by the April 1985 Regulations. For convenience the

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following quotation from the Schedule contains in square brackets the increased figures applicable to cases under paragraph 2 introduced with effect from 25 November 1985 by the November 1985 Regulations.

"Nursing homes

2.-(1) Subject to paragraphs 3 and 5, where the accommodation provided for the claimant is a nursing home for persons in need of personal care by virtue of-

- (a) past or present mental disorder but excluding mental handicap, the appropriate amount shall be £148.60 [~~£180~~] per week; or
- (b) mental handicap, the appropriate amount shall be £168.60 [~~£200~~] per week; or
- (c) past or present drug or alcohol dependence, the appropriate amount shall be £148.60 [~~£180~~] per week; or
- (d) physical disablement, the appropriate amount, in the case of persons to whom sub-paragraph (2) below applied, shall be £198.60 [~~£230~~] per week or, in any other case, shall be £138.60 [~~£170~~] per week; or
- (e) terminal illness, the appropriate amount shall be £198.60 [~~£230~~] per week; or
- (f) any other condition not falling within sub-paragraphs (a) to (e) above, the appropriate amount shall be £138.60 [~~£170~~] per week.

(2) For the purposes of (d) above, this sub-paragraph applies to persons under pensionable age, or persons over pensionable age who before attaining pensionable age had become physically disabled.

3.-(1) Where the accommodation provided for the claimant is-

- (a) both a residential care home and a nursing home or
- (b) a residential care home or a nursing home

being a home for, or a home registered under the Registered Homes Act 1984 for, persons in need of personal care by virtue of any two or more of the physical or mental conditions referred to in paragraphs 1 or 2, the appropriate amount shall be as set out in the following sub-paragraphs of this paragraph.

(2) Where the home is so registered and where the personal care that the claimant is receiving in that accommodation corresponds to a category of personal care for which that accommodation is so registered, the appropriate amount shall be that amount, subject to paragraph 5, in paragraphs 1 or 2, as the case may be, as is consistent with that personal care.

(3) Where the home is so registered but where the personal care

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that the claimant is receiving in that accommodation does not correspond to any of the categories of personal care for which the accommodation is so registered, the appropriate amount shall be the lesser amount, subject to paragraph 5, in paragraphs 1 or 2, as the case may be, that is consistent with those categories.

(4) In any other case not coming within sub-paragraphs (2) and (3) above, the appropriate amount shall be that amount, subject to paragraph 5, in paragraph 1 or 2, as the case may be, having regard to the nature of the personal care that the home provides, as is consistent or reasonably consistent with the personal care that the claimant is receiving in that accommodation.

#### Hostels

4. Subject to paragraph 5, where the accommodation provided for the claimant is a hostel, the appropriate amount shall be £70.00 per week.

5.(1) Any amounts specified in paragraphs 1, 2 or 4 shall cease to be applicable if having regard to prevailing conditions and circumstances such amount is no longer appropriate, in which case the appropriate amount for the purposes of those paragraphs shall be the amount determined in accordance with sub-paragraph (2) below.

(2) Any question as to whether any amount is no longer appropriate or as to the appropriate amount for the purposes of sub-paragraph (1) above shall be determined by the Secretary of State in his discretion; and his decision of such questions-

- (a) shall be given generally and not in relation to a particular case;
- (b) may be revised from time to time as he considers desirable;
- (c) may make different provisions for different classes of case or otherwise for different circumstances;
- (d) shall be published in such form as he considers suitable; and
- (e) shall be conclusive for the purposes of this Schedule."

7. Paragraph 5 quoted above was revoked by the November 1985 Regulations and not replaced. Regulation 9(6) of the 1983 Regulations as amended is subject to the provisions of regulation 9(17) added with effect from 29 April 1985 by regulation 4(6) of the April 1985 Regulations and repeated by the November 1985 Regulations. Regulation 9(17) contains the following provisions:-

"(17)(a) Notwithstanding the provisions of paragraphs (6) to (14), sub-paragraphs (b) to (g) below shall have effect where the claimant was in receipt of supplementary benefit as a boarder immediately before 29 April 1985.... and .... continues after that date to be a boarder in the same accommodation; ....

(b) Where -

- (i) the accommodation is a residential care home or a nursing home, and
- (ii) the claimant or his partner had attained pensionable age on or before 29 April 1985,

the appropriate amount for the purposes of paragraph (6) shall be the weekly amount determined to be appropriate under paragraph (1)(a) prior to that date (hereinafter in this paragraph referred to as "the protected amount") so long as the protected amount exceeds the amount that would otherwise be the appropriate amount under that paragraph (6). . . . ."

8. The social security appeal tribunal overturned the adjudication officer's decision and awarded an increase of £9.50 per week to cover the full amount of the claimant's increased liability in nursing home charges. In their reasons the tribunal have explained that they considered paragraph 2(f) of Schedule 1A prescribing a figure of £138.60 per week to be in the claimant's case the appropriate amount representing the maximum amount for the purposes of regulation 9(6). They noted that this figure had been increased to £170 per week with effect from 25 November 1985. The majority of the tribunal then took the view with reference to the provisions of regulation 9(17) that it was the claimant's tenancy of a place in the nursing home which was "protected" under those provisions and that this enabled the current weekly charge, as a reasonable increase on the previous rate, to be met in full. It was submitted by the adjudication officer and freely conceded by the claimant's representative that this attempt by the majority of the tribunal to deal sympathetically with the claimant's case was erroneous in law. I agree. The choice of paragraph 2(f) of Schedule 1A as providing the appropriate amount in this case for the purposes of the maximum under regulation 9(6) is not supported by relevant findings and the provisions of paragraph 3 of Schedule 1A and the definitions given or adopted by reference in paragraph 7 of that Schedule material to cases under paragraph 2 do not appear to have been taken into consideration. Furthermore what is "protected" under regulation 9(17) is plainly an amount and that amount is "the weekly amount determined to be appropriate under paragraph (1)(a) prior to that date" (29 April 1985), so long as the protected amount exceeds the amount which would otherwise be appropriate under regulation 9(6). The decision of the tribunal is clearly erroneous in law and must be set aside.

9. But the issues of law in this case go deeper. Paragraph 6 of Schedule 1A, also introduced by the April 1985 Regulations, provided in relation to ordinary board and lodging accommodation for the Secretary of State to determine in his discretion any question as to the location of board and lodging areas and the amount appropriate in relation to each area where the accommodation provided was not in a residential care home, a nursing home, or a hostel. Sub-paragraph (2) of the paragraph contained provisions for the Secretary of State to determine these questions in the same way as was provided in the 5 subheads of paragraph 5(2) quoted above in this decision. In the Secretary of State for Social Services v Cotton (11 December 1985, not reported) the Court of Appeal held that paragraph 6(2) was beyond the powers conferred on the

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Secretary of State by section 2(1A) of the Supplementary Benefits Act 1976 as amended, broadly on the ground that whereas that section empowered him to make regulations giving himself power to adjudicate on questions arising in individual cases of the kind mentioned in section 2(1), it did not enable him to give himself power to make general decisions akin to subordinate legislation. In the case on Commissioner's file CSB 0255/1980, the decision of a Tribunal of Commissioners, it was conceded on behalf of the Secretary of State and accepted by the Commissioners that it followed from the Cotton decision that paragraph 5(2) of Schedule 1A was also void for the same reason.

10. Since paragraph 5 provides for the Secretary of State determining that amounts specified in any of paragraphs 1, 2 or 4 of the Schedule should cease to be applicable in certain circumstances, the question arises whether, as a consequence of paragraph 5 being held to be ultra vires, paragraph 2 dealing with the appropriate amounts relevant to nursing homes should be regarded also as being void. Upon that matter the Tribunal of Commissioners in paragraph 20 of decision CSB 0255/1986 stated:-

"20. In our judgment paragraph 1 can properly be allowed to stand even shorn of the qualifications in paragraph 5. We do not consider that the result of omitting paragraph 5 (in the language of the Olsen decision) is to make so radically or substantially a different law as to warrant a belief that the Secretary of State would not, if all could not be carried into effect, have enacted paragraph 1 (or 2 or 3 or 4) independently ie. without qualifying it by paragraph 5. He is familiar with the need for an annual uprating by regulations to take account of, among other things, inflation and the fact that his proposed method of by-passing the need for up-rating regulations in the present context was unsuccessful does not in our judgment mean that the whole fails. In our view paragraph 1 can stand."

While the foregoing observations related specifically to paragraph 1 of Schedule 1A it is in my judgment clear from what the Commissioners say that their reasoning applies equally to paragraph 2. I therefore conclude that paragraph 2 of the Schedule can stand despite the deletion of paragraph 5. In this context it remains only to note again that paragraph 5 has been omitted from the Schedule as re-introduced by the November 1985 Regulations.

11. The wording of paragraphs 1 to 3 of Schedule 1A has given rise to certain questions of interpretation discussed in unreported Commissioner's decisions. If any of the amounts specified in paragraph 2 which were capable of being applicable to the claimant had exceeded the protected amount determined prior to 29 April 1985 it would be necessary to deal with the legal difficulties arising in the construction of those paragraphs and to remit the claimant's case to another tribunal to determine the relevant amount applicable to her. It was however accepted by both representatives (correctly in my view) that upon a proper application of the schedule to the facts found there could be no question of establishing an appropriate amount under paragraph 2 which exceeded the figure of £190 represented by the protected amount. It is only necessary to observe that in this case, the application of the "consistency" provisions of paragraph 3(4) makes it possible largely

to bypass the difficulties otherwise arising from the wording of the provisions of paragraphs 1 to 3. Since there is no question of the amounts applicable to care in respect of mental handicap or terminal illness being relevant in the claimant's case or of the applicability of sub-paragraph 2(2), all the amounts of possible relevance under paragraph 2, even as increased as at 25 November 1985 are less than the protected amount. Paragraph 3(4) is applicable because the present case involves a claimant in Scotland. Since the Registered Homes Act 1984 does not apply to Scotland, the provisions of sub-paragraphs 3(2) and 3(3) operative in the case of homes registered under that Act can have no application.

12. As regards the appropriate amount determined under the provisions of regulation 9(17), the claimant's representative has pointed out, and I accept, that if the amount so protected is fixed by reference to the amount applicable immediately prior to 29 April 1985 the result does not, contrary to certain Ministerial statements, wholly eliminate the risk, with its attendant anxiety, of an elderly person such as the present claimant having to remove, through inability to meet the full amount of the charges, from a nursing home whose charges were regarded as reasonable and met in full prior to 29 April 1985. A protected amount "frozen" at that date does not enable account to be taken of subsequent increases in the charges even where, as in this case, they are only in line with inflation. It was acknowledged by the claimant's representative that the short-fall would probably be small and might be covered in other ways as has fortunately been achieved in this case. The provision in regulation 9(17) refers to the weekly "amount" and not the weekly level of charge determined to be appropriate prior to 29 April 1985. The words used are clear and do not appear to me to admit of a construction that protection extends to the current level of a charge previously accepted as reasonable by the adjudication officer. I am therefore obliged to conclude that the "protected amount" applicable in the present case is the amount of £190 per week determined for the purposes of paragraph 1(1)(a) of regulation 9 prior to 29 April 1985. Since that amount has, to date, exceeded any possible amount determined under paragraphs 2 and 3 of Schedule 1A it is expedient for me to give the decision which the tribunal should have given in this case. My substituted decision is as set out in paragraph 1 of this decision.

13. The appeal of the adjudication officer is allowed.

(signed) J G Mitchell  
Commissioner  
Date: 3 November 1986