

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR ATTENDANCE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

CWA 6/1982
CWA 7/1982

R(A) 383

QR 1283

1. My decisions are that (a) from and including 18 August 1980 attendance allowance is not payable in respect of the claimant on whose behalf a claim was made on that date; and (b) from and including 9 February 1981 attendance allowance is not payable in respect of the claimant on whose behalf a claim was made on that date.
2. Following claims to attendance allowance, made on behalf of one claimant on 18 August 1980 (hereinafter referred to as case A) and on behalf of another made on 9 February 1981 (hereinafter referred to as case B), the insurance officer gave the following decision in relation to the earlier claim "Attendance allowance is allowed from and including 18 8 80 at the weekly rate of £12.40 increasing to £14.45 from 24 11 80. Attendance allowance is not payable for any day of residence in scheduled accommodation from and including 18 8 80 because attendance allowance was not payable immediately before the claimant entered scheduled accommodation". Save that the date given was 9 February 1981 and that the weekly rate referred to was £21.65, his decision in relation to the later claim was to the same effect. Appeals to the local tribunal were made from both these decisions. Both appeals were dealt with at the same time at a hearing. The tribunal's decision in relation to both cases was "The unanimous decision of the Tribunal is that the Appeal be dismissed and the submission (as amended) of the Insurance Officer in paragraph 7 of the case papers is upheld". Appeals from these decisions to the Commissioner were then brought, following the granting of the necessary leave by the chairman of the tribunal. Both appeals came before me on 20 July 1982 and, by the express agreement of all those concerned, were dealt with at the same time. The representatives in relation to case A and B were, respectively, Mr. N. Cooke and Mr. D. Halpert, both barristers-at-law. Mr. R. Aitkin, a member of the solicitor's office of the Department of Health and Social Security, appeared for the insurance officer.
3. There was no dispute, and I accept, that the following statutory provisions, regulations and direction are of relevance:

Section 35(6)(b) of the Social Security Act 1975 (there is no

suggestion that section 35(6)(a) is applicable to either case) which provides that -

"(6) Regulations may provide that an attendance allowance shall not be payable in respect of a person for any period when he is a person for whom accommodation is provided -

(a)

(b) in circumstances in which the cost is, or may be, borne wholly or partly out of public or local funds, in pursuance of those enactments or of any other enactment relating to persons under disability or to young persons or to education or training".

Regulation 4 of the Social Security (Attendance Allowance) (No.2) Regulations 1975 [S.I.1975 No.598] provides, in relation to the cases with which I am concerned, that -

"4., attendance allowance shall not be payable in respect of a person who has attained the age of 16 for any period during which he is a person living in accommodation provided for him in pursuance of, or provided for him in circumstances in which the cost of the accommodation is or may be borne wholly or partly out of public or local funds in pursuance of, any of the enactments mentioned in the Schedule to these regulations".

The relevant enactment mentioned in the Schedule to these regulations is section 21(1)(b) of and paragraph 2 of Schedule 8 to the National Health Service Act 1977.

Regulation 21(1)(b) provides in relation to the cases with which I am concerned that -

"21.-(1), the services described in Schedule 8 to this Act in relation to -

(a)

(b) prevention, care and after-care,

(c)

are functions exercisable by local social services authorities, and that Schedule has effect accordingly".

Paragraph 2(1)(a) of Schedule 8 lays down that -

"2.-(1) A local social services authority may, with the Secretary of State's approval, and to such extent as he may direct shall, make arrangements for the purpose of the prevention of illness and for the care of persons suffering from illness and for the after-care of persons who have been so suffering and in particular for -

(a) the provision, equipment and maintenance of residential accommodation for the care of persons with a view to preventing them from becoming ill, the care of persons suffering from illness and the after-care of persons who have been so suffering;".

On 23 April 1974 the Secretary of State directed local authorities to make arrangements for "The provision, whether in premises managed by the Council or otherwise, of residential accommodation (including residential Homes, hostels, group homes, minimum support facilities or other appropriate accommodation) for persons who are ordinarily resident within the area of the authority and for persons in the authority's area who have no settled residence and the care of persons for the time being in accommodation so provided" (see LAC 19/74 (D/L 90/17)). The local authority concerned with case B is the same as that concerned with case A.

4. The following information in relation to case A would appear to be relevant. The claim was made in relation to Mr. H.W.W., who is described as a low grade sub-normal person aged 64 years. It was made by the house superintendent (who, apparently, is also the proprietor) of the private home (which is registered by the local authority as a residential home for mentally disordered persons) at which Mr. H.W.W. has resided since November 1974. He had been transferred to this home from a county council home for the mentally ill, to which he had been admitted in January 1973. The house superintendent stated on 12 December 1980 that the Local Authority Social Services had arranged for his admission, but had not arranged to pay the whole or part of the cost. She answered "Yes" to the following question: "is the WHOLE COST of accommodation and services in your hospital/home being met privately?". It was stated at the hearing before me that the weekly payment made to the home was currently £56 and that this sum was derived from the invalidity benefit Mr. H.W.W. received, together with the interest on his capital. He is the subject of an Order of the Court of Protection, which appointed Mr. J., the Director of Social Services for the County in which the home is situated, as Receiver. The Director stated on 4 February 1981 "No supplementation is being paid at present to [the house superintendent] the Proprietor, in respect of Mr. [H.W.W.] by the County Council. The claim for Attendance Allowance in respect of [Mr.H.W.W.] was submitted in full knowledge of officers of this Department, by [the house superintendent], and the amount you have allowed although paid to me, will be paid to her". On 16 February 1981, in answer to an enquiry by the Department of Health and Social Security in relation to the statement that no supplementation was being paid in respect of Mr. H.W.W., reference was made to a letter sent to the proprietor of the home in January 1980, followed by the following statement: "Supplementation was paid to the Proprietor in respect of Mr. [H.W.W.] to the 22nd November, 1980 at the rate of £4 per week". The letter read as follows:

"C.... COUNTY COUNCIL SUPPLEMENTATION"

I am writing to inform you of certain changes C.... County Council are obliged to introduce which affect the supplementation payments made to you as a proprietor of a Registered Boarding House for Mentally Disordered Persons.

The supplementation was first introduced in 1971 and this authority is empowered to make this payment under the provision of Section 12 of the Health Services & Public Health Act 1968 (now superseded by the National Health Service Act 1977, Section 8) and as you are aware, the payment is made on a per capita basis for those clients placed with you by this authority only. Proprietors have subsequently, in some cases, been successful in obtaining an Attendance Allowance payable by the Controller at Norcross Unit, for their residents and I am advised by the Controller that payments made under Section 12 of the above Act preclude

the payment of Attendance Allowance. This means that you are therefore not legally entitled to receive supplementation from this authority together with an Attendance Allowance for the same client.

I would presume that you would opt to continue receiving the higher Attendance Allowance and unless I hear from you to the contrary, I regret that supplementation payment for those of your clients for whom you receive the Attendance Allowance will cease to be made as from 27th January, 1980. Supplementation will continue for those in respect of whom you are not in receipt of Attendance Allowance. Should you, at any later date, choose to apply for an Attendance Allowance in respect of a client for whom you are already receiving this authority's supplementation, I would be glad if you would inform me in advance of the date of your application so that supplementation can be discontinued.

In future, before this authority's supplementation can be paid in respect of a newly placed client you should produce to me evidence of the refusal of the Controller to make an Attendance Allowance in respect of that client.

I very much regret the necessity for this decision and thank you for your co-operation".

5. The following information in relation to case B would appear to be relevant. The claim was made in relation to Mr. P.L.W., who is aged 67 years and is described as a schizophrenic of low mentality. It was made by the principal of the "after care home", at which Mr. P.L.W. has resided since 27 October 1980, who has been duly appointed to act on his behalf. She stated on 20 March 1981 that the home was a private establishment, that the local authority did not arrange the admission and did not arrange to pay the whole or part of the cost. She answered "Yes" to the following question: "is the WHOLE COST of accommodation and services in your hospital/home being met privately?" and added, "At one time the Local Authority did make a small supplementation. This ceased in Jan.80 [? 1981] because it conflicted with the regulations covering attendance allowance. We now have no assistance from any government body". The Director of Social Services of the local authority stated that the arrangements to accommodate Mr. P.L.W. were made by a probation officer "IN LIASION WITH THIS DEPT. [MR. W.] IN NEED OF COMPANY OF OTHERS". In answer to the following question: "If your Local Authority is not actually providing the accommodation, is it contributing towards the cost of it either directly to the Home or to any person responsible for paying fees or making a contribution?" he stated, "SUPPLEMENTATION PAID FOR NOVEMBER & DECEMBER 1980 & JANUARY 1981 NOTHING SINCE WE WERE ADVISED THAT THE PROPRIETOR HAD APPLIED FOR ATTENDANCE ALLOWANCE" and stated that the payments had been made under the following statutory provisions: "NATIONAL HEALTH SERVICE ACT 1977 SECTION 21 PARAGRAPH 2 OF SCHEDULE 8". He indicated subsequently that the payments made had been at the weekly rate of £4. It was stated at the hearing before me that the weekly payment received by the home was currently £47 and that the source of this sum was invalidity benefit together with supplementary benefit.

6. Mr. Cooke contended at the outset that section 35(6) did not authorise the wide provisions of regulation 4 and that there had been a failure to observe the strict terms of the enabling power. He based his argument on a comparison of the wording of each provision. Having noted the relevant wording and noted, in particular, the wide powers conferred by section 35(6), I am satisfied that his contention is not well founded.

7. I have found it difficult to follow the approach which has been adopted by the Department of Health and Social Security in relation to the interpretation of regulation 4 and, in particular, that part thereof which refers to "circumstances in which the cost of the accommodation..... may be borne". They would appear to have taken the view that once part of the cost had been borne in relation to a particular individual then attendance allowance was no longer payable in respect of him, even though the local authority had ceased to bear any of the cost. However, they appear to have taken the view that if, in fact, the local authority had not chosen at any time to invoke the power to bear part of the cost, then payment of attendance allowance in respect of the person concerned is not precluded. Thus, it was stated in a letter dated 18 March 1980 from the Department to the Director of Social Services of the local authority concerned with the present cases that "If a claimant subsequently forfeits a Local Authority contribution or the Local Authority ceases its contribution, a situation has merely been created where the cost MAY be borne out of public funds and attendance allowance is still not payable. There is however no bar to the payment of attendance allowance when a severely disabled person's admission to a non-Local Authority Home has been arranged by relatives who are bearing the full cost of his accommodation. As soon as the Local Authority starts to help out the person with the fees under a scheduled enactment attendance allowance is not payable". In a subsequent letter dated 14 September 1981 it was stated, "Thus, if the LA are approached informally to make the arrangements for admission but do not assist with the cost under a scheduled enactment, then payment of AA can continue until the power of the scheduled enactment is invoked by the LA in order to assist with the cost", and "Whether it is paid to a resident in a voluntary/private Home rests on whether the LA have exercised the powers granted to them for the provision of accommodation which extends to the making of discretionary payments to maintain the home by grants or alternatively to financially support such residents in the Home as require it. Where they have not invoked the powers AA continues to be payable".

The approach adopted in this context by and on behalf of the insurance officers' concerned has varied considerably. In his submission to the local tribunal the insurance officer asserted that "the correct interpretation of Regulation 4 is that where a person is accommodated in premises which are not provided directly by the local authority out of public funds under a scheduled enactment, attendance allowance can be payable except in circumstances where the cost of the accommodation is, or may be met wholly or partly out of public funds under a scheduled enactment", and that "the words "or may be" in both the enabling power and in regulation 4 are intended to cover those circumstances where a local authority has a discretion to meet the cost of accommodation, in whole or in part, under powers contained in a Scheduled enactment but either declines to use that discretionary power or later withdraws its use in order to enable the payment of an attendance allowance to be made instead". At the local tribunal the insurance officer resiled from this approach, and in his submission to the Commissioner the insurance officer maintained that "the words "or may be" in both the enabling power (Section 35 of the Social Security Act 1975) and regulation 4 are intended to cover those circumstances where a local authority has a discretion to meet the cost of accommodation in whole or in part, under powers contained in a scheduled enactment and where, as in this case, that discretionary power has been exercised but later withdrawn so as to enable the payment of attendance allowance to be made instead".

At the hearing before me, Mr. Aitkin adopted a novel approach. He maintained that what had to be determined was (a) whether a discretion existed in the particular case to bear the cost or part of the cost of the accommodation and if it did (b) whether there was a "real possibility" that it would be exercised in favour of bearing the cost or part of it.

The local authority would appear to have accepted that while the weekly payments of £4 per head continued, payment of attendance allowance in respect of the 2 persons with whom I am concerned was precluded by reason of the provisions of regulation 4. It would also appear that they anticipated that once the weekly payments ceased, attendance allowance (which was substantially greater in value than the weekly payments) would become payable and, in order to assist those concerned with accommodating these persons, they stopped making the payment in relation to them, only to be faced with decisions to the effect that payment of the allowance was still precluded in both cases.

8. In their submissions to me, Mr. Cooke and Mr. Halpert invited me to regard the reference to "may" in regulation 4 to mean "must", that is to say that regulation 4 referred to cases in which the local authority had no option other than to bear the whole or part of the cost of the accommodation. They also pointed out that if the decision of the local tribunal was well founded, then those concerned with accommodating these unfortunate people would be in the position of being deprived of both the benefit of an attendance allowance and of a contribution from the local authority, and might well have to cease to operate with grave consequences for all concerned. I do not accept either of these arguments. As to the first, I consider that the essence of regulation 4 is to deal with a situation in which a discretionary power exists. As to the second, I accept that this might well be the result unless alternative action was taken to assist those concerned. I do not accept that these circumstances help me in attempting to interpret regulation 4. However, I have no doubt that the proprietors of the homes concerned in these cases and the local authority entertain a strong sense of grievance if only by reason of the fact that it would appear that for many years payment of attendance allowance was made without question in cases in which the facts were substantially the same as those in the present cases.

9. Mr. Cooke and Mr. Halpert invited me to regard the weekly payments of £4, which had been made, as payments which had not been made in relation to the provision of accommodation, but as payments made for the provision of amenities and to improve the standard of care (the payments are described by the Director of Social Services in a letter dated 5 March 1981 as an "amenities grant"). Mr. Aitkin also urged me to accept that this was so and argued that, if it was so, there was no bar to the payment of attendance allowance to the persons concerned. I am unable to accept this invitation. The suggestion that the payments did not relate to the provision of accommodation was only made very belatedly. It would appear that the original label attached to these payments was "responsibility pay". They were then described for some years as "supplementation" and continued to be so described up until at least the time when the payments made in these 2 cases ceased. In the answers quoted in paragraph 5, the Director of Social Services indicated quite clearly that the supplementation related to the cost of providing accommodation and that the payments were being made by virtue of the exercise of the powers conferred by the "National Health Service Act 1977 section 21 paragraph 2 of Schedule 8". He was only invited to quote the "precise section" of the appropriate enactment. It would, in

my view, have been appropriate if he had added, after his reference to paragraph 2 of Schedule 8, a reference to sub-paragraph (1)(a).

10. After carefully considering all the written and oral submissions, the interpretation I put upon regulation 4 is that advanced by the insurance officer in his submission to the local tribunal, which I have quoted in paragraph 7. In my judgment, the basic question to be determined is whether at the relevant time the cost of the accommodation provided for the person concerned could be borne wholly or partly by the local authority concerned in pursuance of the exercise of the powers conferred by section 21(1)(b) and paragraph 2(1)(a) of Schedule 8. If the answer is "Yes", attendance allowance is not payable in respect of that person irrespective of whether any part of the cost has been borne at some time in the past. It would appear to me that any other interpretation involves a failure to have regard to the reference in both section 35(6)(b) and regulation 4 to "may be". The local authority had taken the view that they had the power, by reason of the enactment to which I have referred, to bear part of the cost of the accommodation of the person concerned in each case before me and had chosen to exercise that power. They had only ceased to exercise that power because of their interpretation of the position in relation to entitlement to attendance allowance. They appear to have been satisfied that not only had they the general power to bear part of the cost of the accommodation of persons in these residential homes, but were also satisfied that the circumstances of the 2 particular individuals concerned were such as to entitle them to exercise their powers in relation to them. (I should have liked to have been provided with more detailed information in relation to this aspect of the matter. The circumstances in case A are not identical with those in case B. However, I have come to the conclusion that the differences are not such as to give rise to the need for different decisions. One further complication arises by reason of the fact that it emerged at the hearing before me that the homes concerned do not operate a tariff of charges and that what the proprietor of a particular home receives in payment for the accommodation she provides for a particular individual depends, very largely, upon the resources available in relation to that individual. The sum received varied with each individual).

I have come to the conclusion that the local authority was entitled to exercise the powers they had chosen to exercise in relation to the bearing of part of the cost of the accommodation of both persons concerned in this case by reason of the provisions of the relevant enactment and that, as these powers have continued to exist, attendance allowance is not payable in respect of either of them. Accordingly, my decisions are those set out in paragraph 1.

11. The appeal brought on behalf of each claimant is disallowed.

(Signed) E. Roderic Bowen
Commissioner
3 August 1982

Commissioner's Files: C.W.A.6/82 and C.W.A.7/82
C.I.O's Files: I.O.7008/AA/82 and I.O.7004/AA/82
Regional Files: Wales: Unregistered Papers