

COMMISSIONERS DECISION
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Region: Wales and South Western

SUPPLEMENTARY BENEFITS ACT 1976

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

Name:

Social Security Appeal Tribunal:

Case No:

1. My decision is that the decision of the social security appeal tribunal dated 13 March 1986 was erroneous in point of law and it is set aside. The matter must be referred to another tribunal.

2. The claimant is a man aged over 80 who has been blind as the result of an industrial accident for about 35 years, ie from well before he attained pensionable age. He is said also to be mentally confused. He is now a patient in a nursing home registered under Part II of the Registered Homes Act 1984; and as such he is classified as a boarder in terms of the Supplementary Benefit (Requirements) Regulations 1983 (see Requirements Regulations). These regulations have been the subject of repeated amendments relevant to the present issue, having been amended in particular in December 1984, April and November 1985 and July 1986. Basically a boarder is entitled to have included in his or her requirements the entire cost of his or her board and lodging. But this has been made subject to some limitation by reference to some standard of what may be called "reasonableness". Originally this was covered by regulation 9(6)(b) of the Requirement Regulations. But, probably because this involved the assembly of information about charges prevailing locally and thereby created administrative problems, successive attempts have been made to lay down what may be called rule-of-thumb limitations. The amending regulations above referred to were all directed to achieving this. But the validity of each of the first three sets of regulations has been challenged. As things stand the 1984 amendment has been held to have been invalid but the amendments of April and November 1985 have been held to have been valid. But appeals to the Court of Appeal are pending on all these points and it is at present impossible to say with certainty which of the amendments are good and which are not or whether if the amendments are invalid the pre-amendment provisions still stand or not.

3. The present appeal covers a period beginning 3 October 1985 after the commencement date of the amendments of April 1986, and the tribunal decision now appealed from was given after the coming into force date of the November 1985 regulations. I am conscious also that subsequent decisions of the Courts or of some Tribunal of Commissioners may show that the guidance given in this decision is ill-founded and may thus have been displaced by higher authority by the time that the new tribunal comes to consider this case..

4. The April 1985 amendment was introduced by the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985 and it is to these that I chiefly refer. These introduced the first version of Schedule 1A to the Requirements Regulations, which is the version referred to in this decision. And paragraph 2 of that Schedule fixed monetary maximums for the weekly amount allowable as a requirement of boarders in nursing homes, a different maximum being allowed in respect of different categories. Paragraph 5 of the Schedule purported to give to the Secretary of State power to vary those maximums. But in the light of the decision of the Court of Appeal in Secretary of State for Social Services v Cotton (11 December 1985 not reported) it is accepted that this power of variation is invalid. But in the decision on file CSB/255/1986 a Tribunal of Commissioners held that the invalidity of paragraph 5 did not vitiate paragraph 1, which can, by disregarding references in paragraphs 1, 2 and 3, operate without the Secretary of State having any power of variation. This last decision is one of those subject to appeal to the Court of Appeal.

5. Paragraph 2 set out a list of cases in sub-paragraphs (a) to (f) of paragraph 2(1), where the home is a home for persons in need of personal care by virtue of one or more of the conditions listed in those sub-paragraphs. The present case concerns the conditions specified in sub-paragraphs (d) and (f) and, if the claimant's mental confusion amounts to mental disorder, (a). The condition specified in sub-paragraph (f) is a residual class of conditions which include old age, and the weekly maximum under that sub-paragraph is £138.60. That in sub-paragraph (d) is physical disablement, where the weekly maximum in the case, among others, of those over pensionable age who became disabled before attaining that age is £198.60. That in sub-paragraph (a) is mental disorder, where the weekly maximum is £148.60. I add that paragraph 1 of Schedule 1A makes comparable provisions in relation to residential care homes though overall the maximums are lower.

6. The adjudication officer decided that the home in which the claimant was residing was a home for persons in need of personal care by reason of mental disorder and fixed the maximum at £148.60 per week. The claimant's appeal was allowed on obscure grounds that were related to the seemingly irrelevant fact that the home catered not just for those suffering from mental disorder but also for those suffering from mental handicap. They made no reference however to the definition of these two terms in paragraph 7(2) of Schedule 1A. This was plainly relevant if the question whether the home catered for persons suffering from these conditions was really before the tribunal. Both terms are defined as having the same meanings as they have for the purposes of the Registered Homes Act 1984 and regulations made thereunder. Section 55 of that Act, which applies to both residential care homes and nursing homes, defines "mental disorder". "Mental handicap" seems to be defined only in the Residential Homes Regulations, but I think that that definition must, in the context of Schedule 1A, be treated as applying to both classes of home. It is defined in regulation 1 of those regulations as meaning "a state of arrested or incomplete development which includes impairment of intelligence or social functioning". It is clear that the present claimant did not suffer from mental handicap, and if the tribunal in the course of their findings intended to imply that there was in this case any significance in their conclusion that the home catered for mental handicap they erred in law. If they did not, their reasons were irrelevant and thus inadequate.

7. The interpretation of paragraphs 1, 2 and 3 of Schedule 1A presents major difficulties. Paragraph 1, makes provision in relation to residential care homes, which are defined in paragraph 7(1) as including homes registered under the Registered Homes Act and certain classes of homes not so registered. Paragraph 2 (which is set out in the next paragraph) makes parallel provisions in relation to nursing homes which are defined in regulation 7(1) as nursing homes within the meaning of the Registered Homes Act 1984 (irrespective of whether they are registered under it) and certain other homes. Paragraph 3 (which is set out in paragraph 13 below) provides for the adjustments to be made where either a residential care home or a nursing home is a home for, or is registered under the Registered Homes Act 1984 for, persons in need of personal care by reason of two or more of the physical or mental conditions listed in paragraphs 1 and 2. It is drafted on the assumption that neither the differences in the definitions of "residential care homes" and "nursing homes" nor their different treatment in the Registered Homes Act 1984 necessitates any distinction in paragraph 3. The paragraph makes a distinction for the first time between a home for persons in need of care by virtue of a condition and homes registered for any such persons. It is not well co-ordinated with the Registered Homes Act 1984 and the regulations thereunder, viz. in particular the Residential Care Homes Regulations 1984 (the Residential Homes Regulations) and the Nursing Homes and Mental Nursing Homes Regulations 1984 (the Nursing Homes Regulations).

8. Paragraph 2 of Schedule 1A provided as follows:

"2.-(1) Subject to paragraphs 3 and 5 [paragraph 5 is not relevant and is in any event ultra vires], 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 metal handicap, the appropriate amount shall be £148.60 per week; or
- (b) mental handicap, the appropriate amount shall be £168.60 per week; or
- (c) past or present drug or alcohol dependence, the appropriate amount shall be £148.60 per week; or
- (d) physical disablement, the appropriate amount, in the case of persons to whom sub-paragraph (2) below applies, shall be £198.60 per week or, in any other case, shall be £138.60 per week; or
- (e) terminal illness, the appropriate amount shall be £198.60 per week; or
- (f) any other condition not falling within sub-paragraph (a) to (e) above, the appropriate amount shall be £138.60 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."

A new Schedule 1A was substituted in November 1985 by the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions (No 2) Regulations 1985 increasing the maximum amounts. However, for convenience I will refer to the earlier version of Schedule 1A.

9. It is clear that the first enquiry is whether the accommodation provided for the claimant is a nursing home for persons in need of personal care by virtue of any one or more and if so which of the conditions listed in sub-paragraphs (a) to (f). The tribunal asked themselves this question but seen to have concluded that this yielded the whole answer, and that having concluded that the home catered for mental handicap they need look no further into the nature of the personal care required by the claimant. In fact, as will appear, that question also arises as well in some cases as the question what is the nature of the personal care that the claimant is receiving.

10. How should the various questions be answered? I take first the first question which may be paraphrased as "what category or categories of persons is the home a home for?" The natural answer to this question is "the categories of persons for whom in fact it holds itself out as providing personal care". In view of the fact that the Registered Homes Act 1984 in section 29(2) authorises the imposition of conditions for registration of nursing homes and in section 29(4) makes it an offence to fail to comply with any such condition, the natural answer above ought to be qualified by adding at the end the phrase "without failure to comply with any condition of registration." The claimant is over 80 and is blind and mentally confused his need for personal care is the result of a combination of old age and physical and mental disablement. It is doubtful whether the claimant would be in need of personal care in a nursing home at all if he were affected only by old age. There can be few nursing homes that cater mainly for the elderly that are not in practice found to be catering for those who as well as being elderly are physically or mentally disabled. And the homes could quite naturally be described as homes for those in need of personal care by virtue of old age and disablement.

11. If the natural answer to the question suggested above is (as I am disposed to think it is) right, subject to the qualification about compliance with conditions of registration, then in each case that comes before a tribunal there should be evidence of what those conditions are. These are presumably contained in some document addressed to those responsible for the running of the home. In the present case the evidence included the certificate of registration of the home, which under the heading "description" stated that it was a mental nursing home, and set out a condition as to the number of persons received into the home should not exceed 64. No conditions as to the categories of patients were included in the certificate and (although this is not conclusive) in the absence of any other evidence, the tribunal could properly have concluded that none were imposed. The area health authority has confirmed that the home is suitable also for the mentally handicapped. The question for the tribunal was what was the or were the category or categories of patients for which the home was a home; in this case the adjudication officer submits that it was for the area health authority to "categorize" nursing homes. I can however find nothing in the regulations to suggest that a tribunal in deciding the question of fact was bound to accept the opinion of the area health authority as to what were the categories for which the home is a home as conclusive; and if the tribunal were so to treat it they would be committing the error of law identified by Watkins J in Sampson v Supplementary Benefits Commission [1979] SB 19 where he held that it was wrong for the Commission to shackle themselves by interpreting the phrases "advanced education" and "non-advanced education" by reference solely to the opinion of the local

education authority. In the same way it is wrong for a social security appeal tribunal to shackle itself by the categorisation of the area health authority even if the area health authority's categorisation is directed to the point. The categorisation of the home in the present case as a mental nursing home is not directed to any point in Schedule 1A but to the point that the Registered Homes Act 1984 distinguishes between "nursing homes" and "mental nursing homes" the latter of which are defined in section 22. I do not set out the definition here but would observe that it ends with the words "..... whether exclusively or in common with other persons". It is manifest that a mental nursing home within the definition can cater for persons not suffering from mental handicap or mental disorder. The question what it is a home for has to be determined as a question of a fact by looking to see what categories of patients that it sets out to provide for, not (in the case of a registered home) being a category prohibited by the conditions of registration.

12. This is the first question that the tribunal must decide. If it emerges that there is more than one category it will almost certainly be necessary to consider paragraph 3 of the schedule in order to determine which is the relevant category of patient. This paragraph, which applies equally to residential homes and nursing homes, uses the phrase "registered for"; and one might expect that it would be for the registering authority to decide what a home is registered for. But in fact, as was pointed out in the Commissioner's decision on file CSB/1422/1985 at paragraph 9, the Registered Homes Act 1984 does not provide for registering homes for any particular category of resident or patient, it merely refers to registering them. The nearest that it comes to the concept of registering for a purpose is the power to impose conditions, which makes it possible to say that a home is not registered for a purpose where there is a condition that it shall not be used for that purpose. Part I of the Act which relates to residential care homes, and the Residential Homes Regulations provide for categorising residents rather than homes, and seems to me clearly to contemplate that homes may cater for more than one class of resident. Part II, which relates to nursing homes, and the Nursing Homes Regulations provide for categorising homes but not into the categories mentioned in paragraph 2 of Schedule 1A. And in my judgment the purpose for which a home is registered can be ascertained only by reference to the conditions imposed. If a home is registered under the Act without any restriction as to the categories of residents then it is registered for all categories. I must add that this does not seem to have been the view of the author of the decision above mentioned on file CSB/1422/1985. Furthermore it has no relevance to the construction of paragraph 1 of Schedule 1A, which is concerned only with "homes for" a particular category or categories of resident. That in my judgment is a question of fact to be answered in the light of the considerations mentioned in paragraph 11 above.

13. If the new tribunal conclude that the home in question in this case is a home for one category of patients only then they will have no difficulty in applying paragraph 2. But if, as seems perhaps more likely, they conclude that it is a home for more than one category of resident patient the tribunal will have to go on to consider paragraph 3 of Schedule 1A which provides as follows:

"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 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 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-paragraph (2) or (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."

14. This provision was intended, one would think, to deal exhaustively with the case of homes for residents/patients in two or more categories, and it is limited by sub-paragraph (1) to cases where the home is either a home for, or a home registered for, two or more categories. One view of the construction of the paragraph is that registered homes fall within it only if they are registered for two or more categories, the provision about homes for two or more categories applying only to unregistered homes; the opposite view is that a registered home which is registered for only one category but is a home for two or more categories is within the paragraph. The first view leaves a lacuna if there can exist a home registered for one category only which is in fact a home for two or more categories, which on that view would be outside paragraph 3 altogether. But despite what I said in my decision on file CSB/70/1986 I now think that, in the light of the conclusions reached in paragraph 11 above on the meaning of a "home for ...", and in paragraph 12 above on the meaning of a "home registered for" a case cannot arise in which you have a home registered for only one purpose which is in fact a home for two or more categories. Accordingly I need not decide which of the above two interpretations of paragraph 3(1) of Schedule 1A is right. I shall assume that the new tribunal will either reach a conclusion that the home in this case is registered for and is a home for one category only, in which case they will apply paragraph 1 without the need for recourse to paragraph 3, or they will find that it is a home registered for two or more categories, in which case they will

apply either paragraph 3(2) or paragraph 3(3), paragraph 3(4) being excluded by their finding of registration for two or more categories. They will apply paragraph 3(2) if, they find that the category of personal care which the claimant is receiving is for a condition from which he is suffering and corresponds to a category of care for which they find the home registered, ie if they find the home registered for the category of person in need of personal care by virtue of disablement. Otherwise they will apply paragraph 3(3). The real questions for determination are whether the home is for and is registered for patients suffering from physical disablement within paragraph 2(d), and if so whether the claimant, who clearly falls within paragraph 2(2), having regard to the definition of disablement in paragraph 7(2) of Schedule 1A incorporating section 20(1) of the Registered Homes Act 1984, is receiving care appropriate to that condition. There may, if he cannot avail himself of this, be a like question about mental disorder. It has to be remembered that from 25 November 1985 the amendments of April 1985 were superseded by those of November 1985, under which the maximums were raised, though the basic provisions of paragraph 1, 2 and 3 of Schedule 1A remained unaltered.

15. I allow the appeal and remit the matter to another tribunal, who should determine the matter in the light of the guidance give above or in any relevant further decision especially of higher authority to which their attention is drawn.

(Signed) J G Monroe
Commissioner

Date: 30 January 1987