Attendance Allowance should not be withdrawn simply because claimant moves to another Member State and no longer satisfies domestic residence & presence conditions – Reg 1408/71 – following Newton decision of MA.

JJS/1/LM **Commissioner's File:** CA/512/1990

6/92

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR ATTENDANCE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [redacted]

Appeal Tribunal: [redacted]

Case No: [redacted]

1. My decision is that the decision of the Reading social security appeal tribunal given on 8 May 1989 is erroneous in point of law and accordingly I set it aside. In exercise of my jurisdiction I give the decision which the tribunal should have given, namely that the claimant is entitled to attendance allowance from and including 26 September 1988 despite his absence from Great Britain in another Member State of the European Community.

2. This is a claimant's appeal against the decision of the Reading social security appeal tribunal given on 8 July 1989.

3. Attendance allowance at the higher rate had been in payment to the claimant since 11 May 1987. The award was to end on 9 July 1992. The claimant left Great Britain on 23 September 1988 and took up residence in the Canary Islands for health reasons. He informed the Department of Social Security that he did not intend to return to Great Britain. By a decision issued on 7 November 1988 the adjudication officer reviewed the earlier decision awarding attendance allowance because in his opinion the fact that the claimant went to the Canary Islands constituted a relevant change of circumstances. His revised decision for the period from and including 24 September 1988 was that the claimant was not entitled to attendance allowance because he was not present in Great Britain and could not be treated as being so present as his absence therefrom was not for a temporary purpose.

4. The claimant appealed to the tribunal. The members found as fact that he left Great Britain on 23 September 1988 to live permanently in Tenerife in the Canary Islands where he had been advised to go for the purpose of his health. He was suffering from a condition which was assisted by living permanently in a warm and dry climate. The tribunal were satisfied on the evidence that the claimant could not be treated as being present as his absence from Great Britain was not for a temporary purpose. They decided that he was not entitled to attendance allowance from and including 26 September 1988.

5. The claimant appealed to the Commissioner. On 2 August 1991 the senior nominated officer issued a direction requesting the adjudication officer to make a further submission dealing with the effect of the judgment of the European Court of Justice in the case of Roger Stanton Newton and the Chief Adjudication Officer; and in particular to deal with the question of whether the principles outlined in that case apply equally to attendance allowance. It is conceded by the adjudication officer now concerned that such principles do apply to attendance allowance. He accepts that the decision of the tribunal is erroneous in point of law and he invites me to substitute my own decision for theirs.

6. The facts in Newton's case were that the claimant was in receipt of mobility allowance and then went to live permanently in France. He ceased thus to satisfy the conditions of being ordinarily resident and present in Great Britain. He was a person to whom Article 2(1) of Council Regulation (EEC) 1408/71 applied. The question posed to the Court was whether the council regulation assured continued entitlement to mobility allowance; in particular whether mobility allowance is a benefit within the scope of Article (1)(b) of Council Regulation (EEC) 1408/71 without being excluded under Article 4(4). If so, whether such a person continued to receive mobility allowance by virtue of Article 10 of the same Regulation while residing in another Member State. The European Court provided an interpretation of community law. It ruled that in cases of persons who are or have been subject as employed or self-employed person to the legislation of a Member State, an allowance provided for under the legislation of that Member State which is granted on the basis of objective criteria to persons suffering from physical disablement affecting their mobility and to the grant of which the persons concerned have a legally protected right must be treated as an invalidity benefit within the meaning of Article 4(1)(b) of Council Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their family moving within the community, as amended and updated by Council Regulation (EEC) No. 2001/83 of 2 June 1983. It was further ruled that where an allowance for handicapped persons constitutes an invalidity benefit within the meaning of Article 4(1)(b) of Regulation No. 1408/71, Article 10 of that Regulation precludes the withdrawal of that benefit on the sole ground that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated. The question I have to consider is whether the principles enunciated by the European Court apply to the payment of attendance allowance. It is conceded by the adjudication officer now concerned that they do. The United Kingdom, by their declaration under Article 5 of Regulation 1408/71 specified the legislation and schemes referred to in Article 4(1) and (2). The declaration specified the Social Security Act 1975, excluding section 37 and section 37A, and amending legislation, (OJ 19.9.80 No. C241/2). Section 35 of the Social Security Act 1975 provides for attendance allowance and consequently the United Kingdom declared attendance allowance to be within the scope of

Article 4(1). Furthermore, by an entry in Annex VI, Point L.11 to Regulation 1408/71 the United Kingdom provided that attendance allowance should be considered as an invalidity benefit for the purposes of, inter alia, Article 10 of that Regulation. I have had regard to the ruling of the European Court in Elizabeth Berrens v Risksdienst Voor Arbeids-Voorziening Bruxelles (1979) ECR 2249 and I am satisfied that the foregoing must be accepted as proof that the Regulation applies to attendance allowance. I find on the basis of the Newton case that in the case of a person, like the claimant, who has been an employed worker in the United Kingdom and has acquired the right to an invalidity benefit from the United Kingdom, the resident and presence conditions contained in regulation 2 of the Attendance Allowance (No. 2) Regulations do not prevent the continued payment of that benefit by reason only of his transfer of residence to another Member State as happened with the claimant in this case.

5. On Commissioner's file CM/511/90 I have given a separate decision allowing the claimant's appeal on the question of mobility allowance.

(Signed) J J Skinner
Commissioner

Date: 14 January 1992