

(25)

Reconsideration Self-Funding Decavit
Give Entitlement to AA

JBM/JCR/11

Commissioner's File: CA/7126/1995

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Bad news for
retrospective self funders

1. My decision is that the decision of the Aberystwyth social security appeal tribunal dated 16 May 1995 is erroneous in point of law. Accordingly I set it aside and give the decision that the appeal tribunal should have given namely that attendance allowance is not payable from 17 October 1993 to 6 March 1994 (both dates included).

2. This is an appeal by the adjudication officer with the leave of the tribunal chairman against the unanimous decision of the appeal tribunal in respect of the decision of the adjudication officer first involved in these appeals. The claimant requested an oral hearing. The Commissioner made the following direction dated 18 October 1995:-

"I have considered the circumstances of the case and the claimant's request for an oral hearing of the appeal and I direct such a hearing.

The parties should be prepared to argue whether in the circumstances of the case the local authority could be said to have made payments to the home on the claimant's behalf pending the appointment of a receiver to administer her assets."

Accordingly on 10 April 1996 I held an oral hearing at the Civil Justice Centre Cardiff. The adjudication officer was represented by Mr P Brown of Counsel and the appointee (Mr J Evans) represented himself. To both of them I am indebted.

3. The facts as dealt with by the adjudication officer first involved in these appeals in his written submission to the appeal

tribunal are stated as follows:-

"Mrs J Hallam was awarded attendance allowance at the higher rate from and including 1.9.93. However there was no payability as she had been in hospital since 1.3.93.

On 16.10.93 she left hospital and entered Plas Cwmcynfelin Nursing Home for which West Glamorgan County Council paid the fees of £310 per week up until 4.3.94. Payment was made by the County Council upon the understanding that once Mrs Hallam's nephew Mr J Evans had obtained a Court of Protection Order the full amount would be repaid. On 27.6.94 Mr J Evans repaid the County Council £6200 for the period 16.10.93 to 4.3.94. From 5.3.94 West Glamorgan County Council had no further involvement in Mrs Hallam's stay at Plas Cwmcynfelin. Attendance Allowance was reinstated at the higher rate from and including 7.3.94. Mrs Hallam died on 17.12.94."

I have a copy of the Court of Protection Order entered on 3 December 1993 appointing the appointee as receiver. Following the death of the claimant on the date referred to immediately above the Secretary of State on 14 February 1995 appointed the claimant appointee to act for the deceased claimant. In respect of the above matters and of the submission of the adjudication officer now involved in these appeals dated 30 August 1995 the appointee has had the opportunity to comment and has in fact so commented by his observations dated 4 October 1995. I have of course also had the advantage of the appointee's submissions made orally before me.

4. The relevant statutory provisions are:-

sections 21, 22 and 26 of the National Assistance Act 1948 as amended

section 67 of the Social Security Contributions and Benefits Act 1992 as amended

regulations 7 and 8 of the Social Security (Attendance Allowance) Regulations 1991 as amended (SI 1991 No 2740)

5. Mr P Brown in his helpful address at the oral hearing handed to me "Outline Submissions On Behalf Of The Adjudication Officer" dated 9 April 1996 which I have added to the case papers and labelled A. I set out these submissions in full in paragraph 6 below. Mr Brown's submissions were that he accepted the submission of the adjudication officer now involved in these appeals dated 30 August 1995 as further elaborated in the outline submissions marked A and referred to immediately above. Basically he submitted that the West Glamorgan Council had acted within their powers. He took me through the case papers which he submitted supported this submission and through the relevant statutory provisions referred to in paragraph 4 above. Mr Evans in his able address to me at the oral hearing handed me a certificate of registration of the nursing home Plas Cwmcynfelin

dated 24 January 1994, a letter dated 4 April 1995 from the office manager of that nursing home and a letter by D P Marr dated 29 March 1996 which I have labelled respectively B1, B2 and B3. He took me through the relevant statutory provisions and the factual background. In essence his submission was that the local authority (that is the West Glamorgan Council) were in no way involved in placing the claimant in the nursing home, the nursing home was not within the Part III provisions of the National Assistance Act 1948, and that the decision of the appeal tribunal was a common sense decision and should be upheld.

It is no disrespect to the two advocates who appeared before me at the oral hearing that I do not set out in full their useful submissions then made.

6. In my judgment the decision of the appeal tribunal is erroneous in point of law. The appeal tribunal failed to consider whether there was or might have been an "arrangement" falling within Part III of the National Assistance Act 1948. Mr Brown's outline submission dated 9 April 1996 (upon which he elaborated during the course of the oral hearing) is as follows:-

"1. The Appeal

1.1 This is an appeal by the adjudication officer against the decision of the Aberystwyth Social Security Appeal Tribunal, given on 16th May 1995, in which the Tribunal decided that Attendance Allowance was payable in respect of Mrs Joan Hallam for the period 17th October 1993 to 6th March 1994 [T64].

2. History of the Claim

2.1 On 10th February 1993, the claimant made an application for Attendance Allowance. The claim was disallowed.

2.2 On 1st March 1993 the claimant was admitted to hospital following a stroke.

2.3 Upon admission to hospital, on 17th May 1993 a request for review of the decision relating to Attendance Allowance was made. On 30th September 1993 the Adjudication Officer revised the decision and awarded the claimant Attendance Allowance at the lower rate from 10th February 1993. Payability of the award was suspended, as the claimant was in hospital at the time [T1].

2.4 On 16th October 1993, the claimant was discharged from hospital, and on 17th October 1993 she was admitted to a private nursing home.

2.5 Following her transfer to the nursing home, a further application for review was made on 1st November 1993 [T3]. The Adjudication Officer reviewed his earlier decision and on 6th January 1994 awarded the higher rate of Attendance

Allowance from 1st September 1993. Payment was again suspended, because the claimant was in certain accommodation [T26].

2.6 On 3rd December 1993, Mr John Evans was appointed the claimant's Receiver, the claimant being the subject of a Court Protection Order [T29].

2.7 In the period from 17th October 1993 (claimant's admission to the nursing home) to 5th March 1994, the fees for the nursing home were paid by the Social Service Department of the West Glamorgan County Council (the arrangement under this was done is discussed in section 4 below).

2.8 On 30th June 1994, the Receiver wrote to the Attendance Allowance Unit, advising them that West Glamorgan had ceased financial support for the claimant, that West Glamorgan had invoiced him for £6,200 for financial support already provided, and that he had repaid this sum on 27th June 1994. The Receiver asked whether the claimant could now be paid her Attendance Allowance [T31, see also T27 and T28]. In response to a query from the Attendance Allowance Unit, the Receiver indicated that the claimant had been self-funding "from date of admission to the home on 16/10/93" [T33].

2.9 The Receiver was thereupon sent an Attendance Allowance payable order in the sum of £594.10, to cover the period from 27 June 1994 to 25th September 1994.

2.10 In a letter dated 24th August 1994, the receiver queried why the claimant was not entitled to Attendance Allowance from October 1993 [T34-36].

2.11 The Adjudication Officer treated the Receiver's letter of 25th August 1994 as an application for a review, and on 24th September 1994 reviewed the Adjudication Officer's decision of 6th January 1994. The revised decision concluded that the claimant was not entitled to Attendance Allowance from 30th March 1993 until 26th June 1994 because she was "receiving free in-patient treatment in a hospital or similar institution and resident in certain accommodation which is or may be provided from local or public funds" [T37].

2.12 The Receiver appealed against the revised decision [T40]. The Appeal Tribunal allowed the appeal, concluding that Attendance Allowance was payable from 17th October 1993 until 6th March 1994.

2.13 The claimant died on 17th December 1994.

3. The Law

3.1 Regulation 7 of the Social Security (Attendance

Allowance) Regulations 1991 provides:

"(1) Except in the cases specified in paragraphs (2) and (3) and subject to regulations 7A and 8, a person shall not be paid any amount in respect of an attendance allowance for any period where throughout that period he is a person for whom accommodation is provided -

(a) in pursuance of -

(ii) Part III of the National Assistance Act 1948 ..."

3.2 Regulation 8(6) of the Social Security (Attendance Allowance) Regulations 1991 provides that:

"Regulation 7 shall not apply except ... in any particular case for any period during which -

(a) ...

(b) the whole cost of accommodation is met -

(I) out of his own resources, or partly out of his own resources and partly with assistance from another person or a charity;

(ii) on his behalf by another person or a charity."

3.3 Under Part III of the National Assistance Act 1948, a local authority may make arrangements for providing residential accommodation for persons in need of care and attention (section 21(1)). Subject to section 26, such accommodation is to be provided in "premises managed by the authority", or by another local authority: section 21(4).

3.4 Section 22 of the NAA 1948 provides for the recovery from a person who has been provided with accommodation under Part III of a payment to be calculated on the basis of a standard rate fixed for the accommodation, which "shall represent the full cost to the authority of providing that accommodation" (s.22(2)).

3.5 Section 26(1) of the NAA 1948 provides:

"(1) Subject to subsections (1A) and (1B) below, arrangements under section 21 of this Act may include arrangements made with a voluntary organisation or with any other person who is not a local authority where -

(a) that organisation or person manages premises which provide for reward accommodation falling within subsection (1)(a) or (aa) of that section, and

(b) the arrangements are for the provision of

such accommodation in those premises."

3.6 Subsection 26(2) allows the local authority to make payments in respect of accommodation provided under subsection 26(1), and to recover a refund from the person to whom the accommodation is provided.

4. Submissions

4.1 It is common ground that the claimant met the medical criteria for an award of attendance allowance. Moreover, the Adjudication Officer has not disputed the evidence that it was agreed between West Glamorgan and the Receiver that the sums advanced by the authority to cover the claimant's fees would be repaid by the Receiver.

4.2 The question is therefore whether, in the light of the fact that the nursing home fees were being paid in the first instance by the local authority, the claimant should be considered self-financing. On behalf of the Adjudication Officer, it is submitted that she should not; that the case is an "arrangement" falling within Part III of the NAA 1948; and that the Appeal Tribunal erred in law in failing to consider whether there was or might have been such an arrangement. Accordingly, and by reason of Regulation 7(1), it is submitted Attendance Allowance is not payable for the period during which the nursing home fees were being paid by West Glamorgan.

4.3 In responding to the Attendance Allowance Unit's questionnaire, West Glamorgan stated:

- (1) that it had paid money towards the cost of the claimant's stay at the nursing home from 16th October 1993 "ongoing until Receivers order is granted" [T22];
- (2) that it had done so pursuant to either Part III of the National assistance Act 1948 or paragraph 2 of Schedule 8 to the NHS Act 1977 [T23].

4.4 In a covering letter, the Director of Social Services explained [T25] that:

"As Mrs Hallam was ordinarily resident in West Glamorgan prior to her admission I have agreed to the payment of the nursing home fees - £310.00 per week. These fees will be repaid in full when access to her funds is possible."

4.5 West Glamorgan's response and letter are entirely consistent with the payment of claimant's nursing home fees being "an arrangement" under section 26. Conversely, if the payments were not made under section 26, it is difficult to understand the statutory basis on which they were made. The authority has no general power, outside

section 26, to make loans for the provision of accommodation in nursing homes. It is respectfully submitted that the Commissioner should be slow to come to a conclusion that the payments were made ultra vires when there is an obvious legal framework (i.e. s. 26) within which they can be placed.

4.6 The Tribunal appears not to have considered the possibility that, notwithstanding the fact that the Receiver was ultimately liable to refund the cost of the nursing home, the arrangement might still fall within Part III of the NAA 1948. In so doing, it erred in law.

4.7 Although it is not entirely clear who (physically) placed the claimant in the nursing home, it is likely that this was arranged by the receiver. However, even if this is the case, it is irrelevant:

- (1) the Act refers simply to the local authority's power to "make arrangements for providing residential accommodation". There is no requirement that the local authority be responsible for all the arrangements relating to the placement. An agreement to cover the cost of the nursing home is still an "arrangement for providing residential accommodation", even if other arrangements have to be made to settle the details;
- (2) in practice, it will often (if not usually) be the case that the precise details of when and how the claimant will be admitted to the nursing home are worked out by the claimant or members of her family;
- (3) if it were not irrelevant, it would be possible to subvert the Act by ensuring that the only agreement or "arrangement" entered into by the local authority was with the claimant or her family, and that all arrangements with the nursing home itself were made by the claimant or her family rather than the local authority.

4.8 This case is not caught by regulation 8(6), because the cost of the accommodation is not met out of the claimant's own resources."

I accept the above submission although I have grave reservations as to 4.7(3) set out immediately above. It is the Commissioner's duty to construe the relevant statutory provisions as he sees them and I do not see that I need be concerned with the possibility resulting in a payment of benefit by using an arrangement so to do. "Arrangement" is a word of wide meaning. The local authority when completing the attendance allowance form DS46(NX) dated 6 December 1993 at box 2 thereof ticked the "yes" box in regard to their "following the rules" in respect of the

enactments "Part III of the National Assistance Act 1948 or paragraph 2 of Schedule 8 to the NHS Act 1977. However they failed to state in answer to question 2 "Under what enactment this placement was made" leaving that box blank. Nevertheless in completing the form the local authority considered that they were acting within their powers and I think on the construction of the relevant documentation that those powers were contained in Part III of the National Assistance Act 1948. When the local authority has statutory powers under which it is empowered to act it would to my mind be a considerable step (in the absence of clear evidence) to hold that they were acting ultra vires. Though Plas Cwmcynfelin is a private nursing home run for profit I think it is within the provisions of Part III section 26(1) of the National Assistance Act 1948. In answering the question 1 on the attendance allowance form DS46(NX) dated 6 December 1993 the authority ticked the "yes" box-the question being "was your authority involved in placing this person in the residential accommodation?" I do not think I need go so far as to say that involvement is a word of wide meaning - I think the local authority were involved in that they provided the necessary cash.

7. In accordance with my jurisdiction my decision is as set out in paragraph 1 of this decision. I give the decision that the appeal tribunal themselves should have given. The facts are fully before me. I arrive at my decision with some reluctance - as I stated at the oral hearing the conflict is between a common sense solution advocated by Mr Evans and the technical legislation one on which I have come down. However I am a creature of statute and must resolve the issues before me on the basis of construction of the relevant statutory provisions as I see them. The facts of the present case are somewhat unusual and unlikely to be replicated on a number of cases. However, similar issues might arise where a claimant though capable of dealing with his or her affairs cannot immediately raise the necessary cash by reason for example of the home being slow to sell.

8. Accordingly the adjudication officer's appeal is allowed.

(Signed) J.B. Morcom
Commissioner
(Date) 3 May 1996