

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14 of the Social Security Act 1998. It is:

The decision of the Scarborough appeal tribunal under reference U/01/010/2003/00382, held on 15 January 2004, is not erroneous in point of law.

The appeal to the Commissioner

2. This is an appeal by a claimant, brought with the leave of the district chairman who constituted the appeal tribunal. He requested that the case be dealt with urgently in view of the claimant's circumstances. Accordingly, on 21 March 2004 I gave case management directions allowing each party only two weeks in which to make observations on the appeal. I am grateful to the parties for meeting that tight timetable.

3. The Secretary of State does not support the appeal.

History and background

4. The claimant has a mental illness and learning disabilities. She was awarded a disability living allowance consisting of the mobility component at the lower rate and the care component at the middle rate. The issue for the tribunal was whether that award was payable.

5. The Secretary of State decided that the award was not payable for any day when the claimant attended a particular Residential Care Home. She stays at that home during the week and with her family at weekends. Her attendance at the home is funded by her local authority, in exercise of its social services function, under section 117 of the Mental Health Act 1983.

The legislation

6. Regulation 9 of the Social Security (Disability Living Allowance) Regulations 1991 governs payability of an award of disability living allowance. Its evident purpose is to prevent a claimant receiving double funding from the public purse. Regulation 9(1) provides:

(1) ... a person shall not be paid any amount in respect of a disability living allowance which is attributable to entitlement to the care component for any period where throughout that period he is a person for whom accommodation is provided-

(a) in pursuance-

(i) of Part III of the National Assistance Act 1948; or

(ii) of Part IV of the Social Work (Scotland) Act 1968 or section 7 of the Mental Health (Scotland) Act 1984;

- (b) in circumstances where the cost of the accommodation is 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 ...'

7. The Mental Health Act 1983 was a consolidating statute. Its long title is, therefore, not particularly informative – 'An Act to consolidate the law relating to mentally disordered persons'. However, it is sufficient to suggest that the legislation is concerned with persons who have a disability. The definitions in section 1(2) indicate its scope – they define 'mental disorder', 'severe mental impairment', 'mental impairment' and 'psychopathic disorder' and cognate terms. Section 177 is headed 'After-care'. It provides:

- '(1) This section applies to persons who are detained under section 3 above, or admitted to a hospital in pursuance of a hospital order made under section 37 above, or transferred to a hospital in pursuance of a hospital direction made under section 45A above or a transfer direction made under section 47 or 48 above, and then cease to be detained and (whether or not immediately after so ceasing) leave hospital.
- '(2) It shall be the duty of the Primary Care Trust or Health Authority and of the local social services authority to provide, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the Primary Care Trust or Health Authority and the local social services authority are satisfied that the person concerned is no longer in need of such services; but they shall not be so satisfied in the case of a patient who is subject to after-care under supervision at any time while he remains so subject.'

In other words, it applies to persons who have been detained and then released, but who need some form of continuing care. The issue is: are persons receiving after-care following release persons under a disability? The answer is: yes.

8. The general purpose of the 1983 Act is evident from its long and short titles. This is amplified by the definitions that show the scope of the legislation. And the purpose of section 117 is clear from its terms. Looking at section 117 with or without its context, it appears to be an enactment relating to persons under disability.

The arguments for the claimant

9. The Secretary of State decided that the Mental Health Act 1983 was an enactment relating to persons under disability. The tribunal agreed, commenting that the language was unambiguous. In giving case management directions, I wrote that I would need to be persuaded otherwise. I have considered the arguments put to the appeal tribunal and to me on appeal. Neither individually nor collectively do they persuade me that section 117 of the Mental Health Act 1983 is not an enactment relating to a person under a disability.

10. The claimant's representative has made the following points.

The 1983 Act is not included in the decision-maker's guide

11. That is correct. But that guide is not legislation. It may in some circumstances be used as an aid in interpreting legislation. The circumstances of this guidance do not make it appropriate to use it as an aid to interpretation.

12. Regulation 9(1)(b) contains a general expression that brings other legislation within its scope by description rather than by legislative name. That approach to interpretation can lead to uncertainty. But it has two advantages: it prevents relevant legislation being omitted by oversight; and it allows the scope of regulation 9 to be updated automatically, without the need for amendment, as relevant legislation is passed or repealed.

13. Given the nature of regulation 9(1)(b), it would not be appropriate to limit its scope by reference to the list of relevant legislation that the author of the guidance for decision-makers happened to identify. The legislative wording recognises the difficulties of a comprehensive list.

A CPAG publication suggests that the 1983 Act may not be covered

14. This may be, but the value of the publication as an aid to the interpretation of regulation 9(1)(b) is no greater than the arguments that it contains. The relevant passage does not express a firm opinion. It merely states that it is not clear whether section 117 is covered. It makes two points that would produce an interpretation favourable to the claimant. One is that the 1983 Act is not included in the decision-maker's guide. I have already dealt with that argument. The other point is that the 1983 Act is not specifically identified by name in regulation 9. That is correct, but that does not address the issue of whether that Act is covered by the general wording of regulation 9(1)(b).

Comparative position in respect of income support entitlement in Scotland and the remainder of Great Britain

15. The claimant's representative has compared the extent of the claimant's entitlement to income support with what she would be entitled to if she lived in Scotland and if she were accommodated under different legislation. I do not find that comparison relevant to the interpretation of regulation 9(1)(b). It may be that there are some anomalies in the position between Scotland and the rest of Great Britain or between entitlement to income support and payment of disability living allowance. But that cannot affect the clear meaning of regulation 9(1)(b). These arguments do not identify any principle by reference to which the Mental Health Act 1983, or just section 117, can be removed from the scope of general words that clearly include it.

Disposal

16. I dismiss the appeal.

**Signed on original
on 26 April 2004**

**Edward Jacobs
Commissioner**