THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/5035/1998

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY ACT 1998

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER JACOBS

Claimant:	*Angela McDowall*
Tribunal:	*Wrexham*
Tribunal's Case No:	*S/97/182/1997/08765*

Decision:

1. My decision is as follows. It is given under section 14(8)(a)(i) of the Social Security Act 1998.

1.1 The decision of the Wrexham Social Security Appeal Tribunal held on 12th May 1998 is erroneous in point of law: see paragraphs 17 to 20.

1.2 Accordingly, I set it aside and, as I can do so without making fresh or further findings of fact, I give the decision that the tribunal should have given.

1.3 My decision is:

Suspension of payment of the claimant's entitlement to Attendance Allowance and then to the care component of Disability Living Allowance is not authorised. She must be paid at the appropriate rates from and including 4th July 1989. The Secretary of State must pay arrears owing as a result of the suspension.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the Social Security Appeal Tribunal brought by the adjudication officer with the leave of the tribunal's chairman. When the Social Security Act 1998 came into force in respect of Disability Living Allowance, the Secretary of State replaced the adjudication officer as a party to the proceedings on this appeal.

3. I directed an oral hearing of this appeal. It was held in London on 12th July 2000. The claimant was not able to attend, but she was represented by Mrs P Evans, a Welfare Rights Officer from her local County Council. The Secretary of State was represented by Miss A Powick of the Office of the Solicitor to the Departments of Health and Social Security. I am grateful to them both for their clear and succinct submissions, and to Miss Powick for her realistic approach to the case.

The issue for decision

4. This case concerns payment (i) of the claimant's award of an Attendance Allowance at the higher rate and (ii) of the care component at the highest rate element of the claimant's award of a Disability Living Allowance. Her 'entitlement' to those awards is not in doubt. But an adjudication officer suspended payment from and including 4th July 1989. The claimant appealed against this decision to a Social Security Appeal Tribunal. The tribunal allowed the appeal.

The legislation

5. The only legislation quoted as authority for the suspension of payment is the Disability Living Allowance legislation, specifically regulation 8 of the Social Security (Disability Living Allowance) Regulations 1991. The current version of regulation 8 reads:

'(1) Subject to regulation 10, it shall be a condition for the receipt of a disability living allowance which is attributable to entitlement to the care component for any period in respect of any person that during that period he is not maintained free of charge while undergoing medical or other treatment as an in-patient-

(a) in a hospital or similar institution under the NHS Act of 1977, the NHS Act of 1978 or the NHS Act of 1990;

...

(2) For the purposes of paragraph (1)(a) a person shall only be regarded as not being maintained free of charge in a hospital or similar institution during any period when his accommodation and services are provided under section 65 of the NHS Act of 1977, section 58 of, or paragraph 14 of Schedule 7A to, the NHS Act of 1978 or paragraph 14 of Schedule 2 to the NHS Act of 1990.'

6. The previous version of regulation 8 was only in force for a few months in 1992. During the period of the Attendance Allowance award, the position was governed by regulation 3 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975. On the facts of this case, there is no material difference between the terms of the legislation in force at different times since July 1989. For convenience, the case can be dealt with under the terms of the current version of regulation 8.

Standards of adjudication

7. I dealt with similar issues in CDLA/3578/1998. In paragraph 70 of that decision, I was critical of the standard of the adjudication on these issues. This case has reinforced my concerns. It is my experience that decisions suspending payment of Disability Living Allowance are made inconsistently both for the same claimant and as between claimants in the same accommodation, and that decisions are made on the basis of conclusions drawn from inadequate information.

8. Take this case as an example. Payment of the claimant's award of the care component was suspended, although payment of the mobility component was not, despite the fact that both components are governed by legislation in the same terms. Also, payment of the claimant's award was suspended on the basis that she was in a hospital or similar institution, while payment to the other residents in her bungalow was not suspended, presumably on the basis that the bungalow was not a hospital or similar institution. Finally, the evidence put to the tribunal by the adjudication officer fell well short of showing that the conditions for suspension were met. Miss Powick accepted that she could not support some of the statements of 'fact' made to the tribunal or in the written submission to the Commissioner.

The tribunal's findings of fact

9. The tribunal's findings of fact were not in dispute at the hearing before me. In summary, these are the facts of the case. The claimant was discharged from the hospital in which she had previously lived on 4th July 1989. Since then she has lived with other residents in a specially converted bungalow on a housing estate. The bungalow is owned by the

Community Care Trust. The claimant pays no rent. However, the Trust has an arrangement for maintenance with a local Housing Association, the charges for which are paid by the claimant. She receives Housing Benefit for those charges. She also receives Income Support. She requires 24 hour care, which is provided by care assistants. There is no doctor or nurse on the premises, although they are available when required in the same way as they are available to any other patient living in the community. As well as the maintenance charges, the claimant has to pay for gas, electricity, water rates, food, clothing, toiletries and other personal expenditure. She goes shopping with her carers in a car that was bought and is run under the Motability scheme using the claimant's award of the mobility component.

The tribunal's reasoning

10. The tribunal's conclusion was that the claimant was not living in a hospital or other institution. The claimant was receiving care in a private house and the only common denominator between the hospital where she had previously lived and the bungalow was ownership. That fact alone could not make the premises similar to a hospital. There was no obvious difference between the facts of this case and the facts in CDLA/7980/1995, in which the Commissioner had held that the premises occupied by the claimant were not an 'institution'.

Was the tribunal's conclusion wrong on the facts?

11. No, it was not.

12. If the claimant's bungalow were a hospital or similar institution, it would be one with these features. The patients have to pay for water, heating, light and cooking. They have to pay for their own food, which they have to buy for themselves, using transport which they have to buy and run. They also have to pay for the decoration, maintenance and repair of the premises. If medical assistance or nursing is needed, this has to be obtained from the normal services available to other members of the community. That is not like any hospital that I can imagine. Nor is it remotely similar to one.

13. This conclusion is support by another feature which the tribunal did not mention. The courts and the Commissioners have interpreted 'undergoing medical or other treatment as an in-patient ... in a hospital or similar institution' in the light of the definitions of 'hospital' and 'illness' in section 128(1) of the National Health Service Act 1977. See the decisions of the Court of Appeal in White v. Chief Adjudication Officer and the Secretary of State for Social Security on 21st July 1993 and Botchett v. Chief Adjudication Officer on 7th May 1996. Also, those definitions have to be read together: see the decision of the Court of Appeal in Minister of Health v. Royal Midland Counties Home for Incurables, Leamington Spa, General Committee [1954] 1 All England Law Reports 1013.

14. The definitions are:

'hospital means-

(a) any institution for the reception and treatment of persons suffering from illness;

(b) any maternity home;

(c) any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation,

and includes clinics, dispensaries and out-patient departments maintained in connection with any such home or institution, and "hospital accommodation" shall be construed accordingly'.

'illness includes mental disorder within the meaning of the Mental Health Act 1983 and any injury or disability requiring medical or dental treatment or nursing'.

15. Taking those elements from these definitions that best support the adjudication officer's decision on the facts of this case produces this definition of hospital - a hospital is an institution for the reception and treatment of persons who require nursing on account of a disability. The claimant does not come within that definition, since the only attention she receives in the bungalow is from care assistants, who are not nurses.

16. Also, the description of the bungalow does not sound to me much like an 'institution' as interpreted by the Commissioner in CDLA/7980/1995, paragraph 9. He said that the words 'hospital or similar institution'

'connote some sort of formal body or structure which controls all aspects of the treatment or care that is provided including the premises in which that treatment or care is carried out. They mean more than just a building in which care a [sic] treatment takes place.'

To me, the bungalow sounds like a private home with someone in attendance to help the claimant as required.

Was the tribunal's reasoning wrong in law?

17. In White, the Court of Appeal held that it was wrong to determine the nature of an institution by comparing the new accommodation with some other accommodation, such as the hospital where the claimant previously lived. The issue had to be addressed directly and not by comparison: was the accommodation within the meaning of 'hospital or similar institution'? See pages 23 and 23 of the transcript. In Botchett, the Court of Appeal said that it was dangerous to determine these issues by comparing the facts of the case with the facts in the White case. The issues were better addressed directly on the facts of the case and not by comparison with the facts in other cases. See page 6 of the transcript.

18. There are statements in the tribunal's reasoning that can be read as suggesting that the tribunal undertook a comparative exercise rather than applying the facts to the terms of the legislation. The comparison with the claimant's former hospital residence may fall foul of White and the comparison with the facts in CDLA/7980/1995 may fall foul of Botchett.

19. I am sure that the chairman would not have put the tribunal's reasons in the terms that he did if the adjudication officer had taken the trouble of putting the Court of Appeal

decisions to the tribunal. I also doubt whether the tribunal reached its decision on the basis of an exercise of comparison. It may well be that the comparative points are merely in addition to the tribunal's main reason, which was that these premises were in no way similar to a hospital.

20. On balance, I am prepared to assume for the sake of argument, but with little conviction, that Miss Powick was correct in arguing that the tribunal undertook a comparative exercise. That approach to its reasoning was wrong in law. So, the tribunal's decision must be set aside.

Should there be a rehearing?

21. No. A rehearing is not needed. The tribunal made findings of fact that were supported by the evidence and came to the correct decision in law on those findings. I can give my own decision on the tribunal's findings. That decision is to the same effect as the tribunal's. It is in paragraph 1.3.

22. The effect of this decision is that the claimant will now be paid the benefit that has been withheld from her for a period of just over eleven years.

Signed on original

Edward Jacobs
Commissioner
12th July 2000