

1 CA - Appeal in Another Member
State - Member of Council

Note - Appointed Member for Claimant
True Decision 1 Shows Re treated when
Carer (1/2) was assessed as assessed
Carer +
Was not present
Asylum!

WMW/HJD

Commissioner's File: CG/4/92

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. This adjudication officer's appeal succeeds. I hold the decision of the tribunal dated 1 February 1991 to be erroneous in point of law and accordingly set it aside. In exercise of the power conferred by section 23(7)(a) of the Social Security Administration Act 1992 I give the decision which the tribunal should have given.

2. That decision is that the adjudication officer was not warranted in making his decision issued on 12 July 1990 whereby he reviewed the decision of an adjudication officer awarding invalid care allowance to the claimant from and including 25 April 1988 in respect of a relevant change of circumstances and whereby he gave a revised decision holding the claimant not entitled to invalid care allowance from and including 12 March 1990. The practical effect is that the awarding decision running from and including 25 April 1988 remains in force on and after 12 March 1990.

3. It will be clear from the form of my decision that although the adjudication officer's appeal has succeeded, the claimant has really won the case. That apparent paradox comes about because the adjudication officer gave his review decision upon the basis that the claimant's absence from Great Britain had disqualified her from receiving invalid care allowance. Her absence was so that she and the disabled child in respect of whom the allowance was awarded could accompany her husband to France whither he had been posted by his UK employer. The tribunal overturned that decision and sought to provide findings of fact and reasons sufficient to bring the decision within an exemption to the requirement that a recipient of the allowance be present in Great Britain in terms of regulation 9(1)(b) of the Social Security (Invalid Care Allowance) Regulations 1976. The exemption in question is that contained in paragraph (2)(b) whereby it is provided that if the -

".. absence is temporary and for the specific purpose of caring for the severely disabled person who is also absent from Great Britain"

But of course that could not properly be done since there was nothing to suggest that this claimant's absence was "for the specific purpose" mentioned. If her absence had a specific purpose it was so that she could accompany her husband and maintain the family during his posting in France. The

adjudication officer's appeal as originally marked, and the grounds therefor as later stated, concentrated upon the "specific purpose" point.

4. In the event the family returned to live in Scotland. In the meantime the adjudication officer felt that the provisions of Council Regulation (EEC) No. 1408/71, might have some bearing on the case and the Department's lawyers were asked for advice. In July 1992 a further submission was lodged drawing attention to the cases of Newton and Drake and submitting in effect that the probability was in light of these decisions that the European Court of Justice would, if consulted, rule that an invalid care allowance when paid to a person within the scope of the regulation was a benefit covered by it so that by virtue of Article 10 of the Regulation it could not be withdrawn when the claimant transferred her place of residence to France. But it was also submitted that there was insufficient material to warrant any conclusion as to whether the claimant was a person covered by the Regulation by reason of Article 2 thereof and its reference to "employed or self-employed persons" as those to whom the Regulation applied - these being defined in Article 1(a). Thus matters stood when it was determined by a Commissioner that an oral hearing of the appeal should be held. For that reason the case was transferred to Scotland and came before me.

5. At the oral hearing the claimant appeared by herself and with her husband. The adjudication officer was represented by Mr Cackette, of the Office of the Solicitor in Scotland to the Department of Social Security.

6. Mr Cackette opened by intimating that he was under instruction to request an adjournment because the Department desired to lodge a further submission, which might involve further questions of community law, as I understood it, to deal with the benefit circumstances of the claimant herself. He informed me that the factual issues involved had developed over the previous two days and involved a question as to the past contribution record of the claimant and questions relative thereto. As I understood it that all had to do with the reserved question as to whether the claimant was covered by Regulation EEC 1408/71 in the sense of whether she fell to be regarded as an employed or self-employed person within its Article 1(a). I refused Mr Cackette's motion because it did not seem to me that any question of the sort to which he was pointing properly arose in this case and that for the reasons which follow.

8. The ground upon which the adjudication officer terminated the claimant's entitlement to invalid care allowance (ICA) was because her move to France was regarded as a change of circumstances. That in turn was dependent upon her presence in Great Britain being a competent condition for the continuance of the award - competent in the sense of consonant with European Law. Having regard to the two cases of Newton and Drake which were put before me I have no doubt that in light of the views of the European Court of Justice in them invalid care allowance falls to be regarded as an invalidity benefit within Article 4.1(b) of EEC 1408/71. The claimant was clearly in right of that allowance up to and including 11 March 1990. It was not suggested that it was then dependant upon contribution basis in respect of herself. (If a contribution basis was involved one would have expected it to be that of her husband.) Article 2 of EEC 1408/71, at paragraph 1, certainly defines those to whom the Regulation applies and in particular of course Article 10 in respect of the matters covered as defined in Article 4. Article 10.1 provides that invalidity benefits are not to be subject to suspension or withdrawal or confiscation -

".. by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated."

The claimant satisfied all that by residing in the territory of France, a Member State, which was other than that in which the institution responsible was situated, namely Great Britain. But what appeared not to have been taken into account was that Article 2.1 did not just apply to employed or self-employed persons but to them -

".. as well as to the members of their families .."

It seemed, in the circumstances so far as revealed to me, that at least throughout March 1990 the claimant's husband was certainly an employed person and so the claimant would come within Article 2.1. as a member of his family. That is enough for the decision of the only issue in this case before the adjudication officer, the tribunal, and the Commissioner namely whether the absence from Great Britain made any difference to the claimant's right to ICA. It did not. Accordingly the original awarding decision must be restored.

9. Lest the matters adverted to by Mr Cackette on the instructions of the Department relate to matters of contribution, employment, or self-employment relevant to a date or period after March 1990 that would in any event not be a matter for consideration within this appeal. My decision, accordingly, does not prevent any review of the claimant's entitlement to ICA thereafter in respect of any good ground, and if so advised.

10. The appeal succeeds, but only upon a technicality.

(signed) W M Walker
Commissioner
Date: 19 February 1993