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to ENR Re Tol Sec Sec Jurisdiction  
Case

★ 32/94.

DGR/SH/28

Commissioner's File: CG/015/1993

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALID CARE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Appeal

Case No

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 5 November 1992 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide:-

- (i) that the award of invalidity care allowance from and including 28 October 1985 should be reviewed by reason of a relevant change of circumstances pursuant to section 104(1) of the Social Security Act 1975,
- (ii) that the claimant is not entitled to invalid care allowance for the inclusive period from 31 December 1990 to 3 March 1991, because she did not satisfy the residence conditions during that period, and was unable to rely on regulation 9(2)(b) of the Social Security (Invalid Care Allowance) Regulations 1976 [S.I.1976 No.409],
- (iii) that the claimant failed to disclose the material fact that she was, during the relevant period, living abroad, and did not satisfy the residence conditions, with the result that she received an overpayment of £253.80,

- (iv) that the overpayment is recoverable from the claimant be reason of her aforesaid failure to disclose, and
- (v) that the claimant is not entitled to invalid care allowance from and including 1 April 1991, because she does not satisfy the caring requirements set out in regulation 4 of the aforesaid Regulations.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 5 November 1992. The claimant asked for an oral hearing, a request which was acceded to. At that hearing the claimant, who was not present, was represented by Mr D Phillips of the National Association of Citizens Advice Bureaux, Welfare Rights Unit, whilst the adjudication officer appeared by Mrs G Haresign of CAS.

3. Certain facts in this case are not in dispute. During the period from 28 November 1990 to 3 March 1991 the claimant, her husband and her son, Hassan were abroad on holiday in Karachi. They did not return as early as they had intended, because Hassan became ill whilst in Pakistan. Hassan was during this period a severely disabled person, and his mother, the claimant, was his carer pursuant to regulation 4 of the Social Security (Invalidity Care Allowance) Regulations 1976.

4. On 25 March 1991 a letter was received from the claimant's husband stating that the family had been abroad on holiday, but that they had returned on 3 March 1991 except for his son Hassan, who had been taken ill and was still in Karachi. In the light of that information, the adjudication officer reviewed the original award, on the ground that the claimant's departure abroad constituted a relevant change of circumstances, and his revised decision was to the effect that there was no entitlement to invalid care allowance for the inclusive period from 31 December 1990 to 3 March 1991 (the claimant then not being resident in this country and unable to invoke the benefit of regulation 9(2)(b)), and that the overpayment arising, amounting to £253.80, was recoverable from the claimant, pursuant to section 53 of the Social Security Act 1986, by reason of her failure to disclose the material fact that she had, during the relevant period, been living abroad. He further decided that as from 1 April 1991 the claimant was not entitled to invalidity care allowance, because she was unable to satisfy the provisions of regulation 4.

5. In due course, the claimant appealed to the tribunal, who in the event upheld the adjudication officer. Certain matters were not in dispute before the tribunal. The claimant continued to be entitled to benefit during the first four weeks of her stay abroad. Moreover, she was entitled to benefit for a period of four weeks up to and including 31 March 1991 because of her entitlement to the four weeks break allowed by regulation 4(2). Moreover, it was not in dispute that as from 1 April 1990 the claimant ceased to qualify. What was the crucial matter in

dispute was whether or not the claimant was entitled to benefit during the period from 31 December 1990 to 3 March 1991. If there was no entitlement for that period, I do not think it was in dispute that there had been an overpayment of £253.80 or that it was recoverable from the claimant for non-disclosure of her residence abroad, pursuant to section 53 of the Social Security Act 1986. Certainly, no matter was challenged before me excepting the question of entitlement for the period from 31 December 1990 to 3 March 1991.

6. Regulation 9 of the Social Security (Invalid Care Allowance) Regulations 1976 reads, so far as is relevant to this appeal, as follows:-

- " 9. - (1) Subject to the following provisions of this regulation, the prescribed conditions for the purposes of section 70(4) of the Act (person not to be entitled to an invalid care allowance unless he satisfies prescribed conditions as to residence or presence in Great Britain) in relation to any person in respect of any day shall be -
- (a) ....
  - (b) that he is present in Great Britain; and
  - (c) ....
- (2) For the purposes of paragraph 1(b) .... of this regulation, a person who is absent from Great Britain on any day shall be treated as being present in Great Britain -
- (a) if his absence is, and when it began was, for a temporary purpose and has not lasted for a continuous period exceeding 4 weeks; or
  - (b) if his absence is temporary and for the specific purpose of caring for the severely disabled person who is also absent from Great Britain and where attendance allowance or the core competent of disability living allowance at the highest or middle rate prescribed in accordance with section 72(3) of the Act or a payment specified in regulation 3(1) of these regulations is payable in respect of that disabled person for that day."

[For convenience I set out the regulation in its latest form.]

7. It is not in dispute that the claimant's absence was temporary, and it is accepted that Hassan was in receipt of attendance allowance. The crucial issue was whether the claimant's absence was "for the specific purpose of caring" for Hassan.

8. The tribunal took the view that the claimant with her family had gone to Pakistan, not for the specific purpose of looking after Hassan, but for a holiday, visiting relatives living in Pakistan. Unfortunately, instead of leaving the matter there the tribunal added a gloss to the statutory provision. They said:-

"We interpret this to mean that the disabled person has an identifiable and specific need that can only be satisfied out of Great Britain."

There is, of course, no such requirement stipulated in regulation 9, and if the tribunal wished to say that this was the practical effect of the statutory provision, they should have explained why they reached that conclusion. Some elaboration was called for. Accordingly, there was a breach of regulation 25(2)(b) of the Adjudication Regulations, and on that count I must set aside the tribunal's decision as being erroneous in point of law.

9. However, it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently dispose of the matter myself. Mr Phillips referred me to R(S) 6/61 where, in a claim for sickness benefit, there fell for interpretation the words "a person shall not be disqualified for receiving sickness benefit ..... by reason of being temporarily absent from Great Britain ..... for the specific purpose of being treated for incapacity which commenced before he left Great Britain." These words now occur in regulation 2(1)(b) of the Social Security Benefit (Persons Abroad) Regulations 1975 [S.I.1975 No.563]. In R(S) 6/61 the learned Commissioner said at paragraph 7 as follows:-

" I accept that one major element in the claimant's decision to go to South Africa was his intention to avail himself of the facilities for treatment, of which he had been notified. There were obviously other elements in his decision; such as (a) his natural desire to visit his daughter and her husband in their home, and (b) his hope that the climate of South Africa would be beneficial. For the claimant had a very definite programme of treatment in mind; treatment of a specific nature, to be administered by a specific agency, who (as he had been informed) were willing to administer it. This was no mere vague intention or unsettled plan; and in my opinion it sufficiently satisfies the requirement of the regulation that the claimant's absence must be for the specific purpose of being treated. The regulation does not say 'for the sole purpose of being treated'; and I do not think that such a restriction ought to be read into it."

10. I readily accept that, in the context of the present regulation, which, of course, relates to caring allowance, not sickness benefit, "specific" does not mean "sole". However, the purpose has to be, as was said in R(S) 6/61 in connection with sickness benefit, a "major" purpose. In the present case, the claimant went to Pakistan with her family for the purpose of having a holiday and visiting her relations. She did not go abroad for the purpose of caring for Hassan. She could perfectly well have done that at home. There was no suggestion that Hassan had to go to Pakistan for medical treatment or some other compelling reason, and that, as a necessary consequence, the claimant, as his carer, had to accompany him. The motive for going to Pakistan is quite clear from the statements made by the claimant and her husband, and from the chairman's note of evidence, recited in paragraphs 6 and 7 of the written submissions of the adjudication officer now concerned dated 24 November 1993. Doubtless, Hassan derived certain advantages from the holiday, but there was no compelling need for him to leave this country, and accordingly no compelling reason requiring his mother, as his carer, to go abroad as well. Hassan went abroad merely because his parents did so, and he had to accompany them.

11. The regulation does not say at sub-paragraph (b)

"if his absence is temporary and during such absence he continues to care for the severely disabled person who is also absent from Great Britain."

If the claimant was to get within regulation 9(2)(b), it was not enough for her merely to look after Hassan in the course of the absence. She had to show that her absence abroad was for the specific purpose of caring for him. The object (or at least a major object) of the exercise had to be to care for him. Although it is possible to envisage circumstances where such a situation would obtain, eg. where the severely disabled person goes to a foreign country for an operation, but in the circumstances of this case there was no such reason for the claimant going abroad. She simply went there with her husband for a holiday, and her care of Hassan was merely a natural consequence of taking him as well.

12. Accordingly, it follows from what has been said above that the claimant cannot invoke regulation 9(2)(b), and as a result she is not entitled to the allowance for the relevant period. There was an overpayment of £253.80, a sum which I gather is not in dispute, and clearly this amount is recoverable from the claimant because of her failure to disclose what she knew or ought to have known was a material fact. I am satisfied that all the conditions set out in paragraph 13 of (R(SB) 64/83) have been satisfied. I accept that the claimant was entitled to the allowance for the first four weeks of her absence abroad, and that she was entitled to a four weeks break terminating on 31 March 1991. I also accept that the claimant is not entitled to benefit as from 1 April 1991.

13. Accordingly, my decision is as set out in paragraph 1.

**(Signed)** D.G. Rice  
Commissioner

**(Date)** 3 March 1994