

CPAG

MHJ/1/LM

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

THE SOCIAL SECURITY COMMISSIONERS PROCEDURE REGULATIONS 1987
REGULATIONS 24(1)

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER - CORRECTION

Page 1 Paragraph 2 lines 5-7 delete

"upon a reference to the tribunal by the adjudication
officer, against the tribunal's decision that the -"

insert

"against the tribunal's decision, in respect of the
reference by the adjudication officer to them,
that the -"

(Signed) M H Johnson
Commissioner

Date: 9 August 1993

Commissioner's File: CG/057/91
Star number: 103/92

.. 837(1)(a) Intro
if care for more than
one person 5 total care more than 35 hrs a week.  103/92

MHJ/1/LM

Commissioner's File: CG/057/91

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY CARE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that -

- (a) the unanimous decision of the Reading social security appeal tribunal given on 17 July 1991 is erroneous in point of law and is accordingly set aside;
- (b) from 10 April 1989 invalid care allowance is payable to the claimant for such periods during which she was regularly engaged in caring for her two severely disabled sons, A and P, either singly or jointly, for an aggregate of at least 35 hours a week, provided that during such periods the claimant otherwise satisfied the conditions of entitlement to the allowance.

2. The claimant, to whom I shall refer as Mrs W, appeals with leave of the chairman against the decision of the tribunal, which dealt with her entitlement during certain periods to invalid care allowance for her sons, A and P, and further (and the sole issue with which I am concerned in this appeal), upon a reference to the tribunal by the adjudication officer, against the tribunal's decision that the -

" ... care for each of two severely disabled persons cannot be aggregated in respect of the number of hours in any benefit week to satisfy the conditions of caring for at least 35 hours in a benefit week."

3. I held an oral hearing of this appeal on 9 October 1992 at which Mrs W was represented by Mrs Sandra Figgess, of the Oxfordshire Welfare Rights Barton Information Centre. The adjudication officer was represented by Mr L. Loveday of the Central Adjudication Services. I am grateful to both Mrs Figgess and Mr Loveday for their assistance, but I feel bound to say that where, as in the instant case, a pure question of law arises and

an oral hearing is directed (as it was on 17 July 1992), so that that issue may specifically be dealt with, I would have expected the adjudication officer to be legally represented. It is not really an adequate substitute for the adjudication officer who is to present the case at the oral hearing to have a telephone conversation with the Solicitors' Department, which is what Mr Loveday told me he had done.

4. At the period in issue invalid care allowance was governed by section 37 of the Social Security Act 1975 (now section 70 of the Social Security Contributions and Benefits Act 1992), which, in so far as it is relevant to the instant case, provided that -

"Invalid care allowance

37.-(1) Subject to the provisions of this section, a person shall be entitled to an invalid care allowance for any day on which he is engaged in caring for a severely disabled person if -

- (a) he is regularly and substantially engaged in caring for that person; and
- (b) he is not gainfully employed; and
- (c) the severely disabled person is either such relative of his as may be prescribed or a person of any such other description as may be prescribed.

(2) In this section, "severely disabled person" means a person in respect of whom there is payable either an attendance allowance or such other payment out of public funds on account of his need for attendance as may be prescribed.

.....

(7) No person shall be entitled for the same day to more than one allowance under this section; and where, apart from this subsection, two or more persons would be entitled for the same day to such an allowance in respect of the same severely disabled person, one of them only shall be entitled, being such one of them as they may jointly elect in the prescribed manner or as may, in default of such election, be determined by the Secretary of State in his discretion.

(8) Regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as engaged, or regularly and substantially engaged, in caring for a severely disabled person, as gainfully employed or as receiving full-time education.

(9) An invalid care allowance shall be payable at the weekly rate specified in relation thereto in Schedule 4,

Part III, paragraph 3."

The circumstances mentioned in section 37(8) are set out in regulation 4(1) of the Social Security (Invalid Care Allowance) Regulations 1976 [SI 1976 No. 409] ("the ICA Regulations") which provides as follows -

"Circumstances in which persons are or are not to be treated as engaged or regularly and substantially engaged in caring for severely disabled persons

4.-(1) A person shall be treated as engaged and as regularly and substantially engaged in caring for a severely disabled person on every day in a week if, and shall not be treated as engaged or regularly and substantially engaged in caring for a severely disabled person on any day in a week unless, as at that week he is, or is likely to be, engaged and regularly engaged for at least 35 hours a week in caring for that severely disabled person."

5. Mrs W has the misfortune to have two severely mentally handicapped sons, A and P, both of whom are now in their 20s and for some time past have lived in residential accommodation. It is not disputed that they are "severely disabled persons" within the meaning of the Act, or that they come within section 37(1)(c) and that Mrs W fulfils the condition of section 37(1)(b). The issue in this case concerns the interpretation of section 37(1)(a). Because of their extreme disabilities it is not possible for Mrs W to have both A and P at her home at the same time. She does, however, have them at home separately, although it would seem that neither of them normally spent at least 35 hours with her during any one "benefit week". A "week" is defined by Schedule 20 to the 1975 Act, save for certain exceptions which do apply here, as -

"A period of 7 days beginning with midnight between Saturday and Sunday ..."

6. It appears, however, that there were occasions when A and P were at home separately with Mrs W for periods which altogether totalled more than 35 in a benefit week. In those circumstances the adjudication officer referred to the tribunal the question whether the hours of care for two (or, presumably, more) severely disabled persons can be aggregated in order to satisfy the condition of "at least 35 hours a week in caring" of regulation 4(1) of the ICA Regulations. The adjudication officer sought legal advice which, it appears from the papers before me, was to the effect that, in section 37(1)(a) of the 1975 Act and in regulation 4(1) of the ICA Regulations the fact that the word "that", which is clearly singular, qualifies the word "person", which is also singular, was sufficient indication of a "contrary intention" within the meaning of section 1(1)(b) of the Interpretation Act 1889, which provides that -

"1.-(1) In this Act ... unless the contrary

intention appears -

.....

- (b) words in the singular shall include the plural, and words in the plural shall include the singular."

The provisions of the 1889 Act did not extend to subordinate legislation and, therefore, if it was considered necessary or desirable to do so, specific reference to the Act had to be included as, indeed, generally appears to have been the case in pre-1978 social security regulations, including regulation 2(3) of the ICA Regulations, as follows -

"(3) The rules for the construction of Acts of Parliament contained in the Interpretation Act 1889 shall apply for the purposes of the interpretation of these regulations as they apply for the purposes of the interpretation of an Act of Parliament."

7. Section 25(1) of the Interpretation Act 1978 repealed the 1889 Act in its entirety (save for certain provisions applying to Northern Ireland; Schedule 3). Section 25(2) now provides that -

"(2) ... a reference to the Interpretation Act 1889 ... shall be construed as referring to this Act ... "

However, section 23(1) of the 1978 Act provides that -

"23.-(1) The provisions of this Act ... apply ... to subordinate legislation made after the commencement of this Act ... ",

but only to the very limited extent set out in Part II of Schedule 2 to subordinate legislation made before the commencement of the Act. In practice the difference may well be academic, but it follows that, so far as the ICA Regulations (which came into force on 12 April 1976) are concerned, it is necessary to continue to have regard to section 1(1)(b) of the 1889 Act, rather than the same provisions which appear in section 6(c) of the 1978 Act.

8. In her letter dated 8 November 1991 to the Clerk of the tribunal Mrs Figgess concludes -

" ... we would argue that the word 'that' is simply a consequence of the sentence being written in the singular so that the plural version would appear as follows:

'A person shall be entitled to an Invalid Care Allowance for any day on which he is engaged in caring for severely disabled persons if:

- (a) he is regularly and substantially engaged in caring for those persons.'

In other words 'that' or 'those' refers back to the disabled person or persons mentioned but does not exclude the plural interpretation."

It was substantially that argument that Mrs Figgess addressed to me, and she also contended that the purpose of the legislation was to entitle a carer to the allowance if he (or, of course, she) was unable to undertake employment by reason of being regularly and substantially engaged in caring for the severely disabled, either singly or severally.

9. Authoritative guidance on the construction of the gender and number provisions of the Interpretation Act are, as Megarry J remarked at page 241H of No 20 Cannon Street v Singer Ltd [1974] 1 Ch 229, "meagre". However, in that case the learned judge held, at page 242H, that -

"... subject always to the context, the Interpretation Act 1889 authorises a process of selective pluralising or, for that matter, singularising."

Clearly, where the Act provides that words shall "include" the singular or plural that cannot mean that every word in the passage in question has to be transposed into a singular or plural mode. The application of the Interpretation Act must entail a common sense construction of the legislation under consideration and, in the instant case, I am not persuaded by Mr Loveday's reliance upon the essential singularity of the word "that" in section 37(1) of the 1975 Act. I do not see that the wording either of that section or of regulation 4 of the ICA Regulations contains anything which implies, far less requires, a "contrary intention" within the meaning of the Interpretation Act. The plural of "person" is "persons" and of "that" is "those", and I agree with the reading of the section put forward by Mrs Figgess and set out in the preceding paragraph.

10. It follows that a plural reading of section 37(1) alone, without taking account of the deeming provisions of regulation 4, would confer entitlement to invalid care allowance on a claimant if, on any day, he either cared for two or more severely disabled persons together or cared for each of them separately for part of the day. Section 37(8) provides for regulations to "prescribe the circumstances in which a person is or is not to be treated ... as engaged or regularly and substantially engaged in caring for a severely disabled person" which, in view of what I say above, can equally well be read, adopting a plural interpretation, as "... caring for severely disabled persons".

11. Applying a plural interpretation to regulation 4(1) of the ICA Regulations produces -

"A person shall be treated as engaged and regularly and substantially engaged in caring for severely disabled

persons on every day in a week if, and shall not be treated as engaged or regularly and substantially engaged in caring for severely disabled persons on any day in a week unless, as at that week he is, or is likely to be, engaged for at least 35 hours a week in caring for those severely disabled persons."

The practical effect of that regulation - whether read in the singular or the plural - is to make invalid care allowance a weekly, rather than a daily benefit in the sense that, for example, unemployment benefit is.

12. In my judgment, where a claimant cares for two or more severely disabled persons the proper test is whether he is or is likely to be caring for those persons for at least 35 hours a week, and whether he cares for them both (or all) at the same time or for each of them separately is immaterial. In my view the crucial consideration is the overall length of time for which the carer is engaged in caring. I am reinforced in that conclusion by the fact that section 37(7) begins -

"(7) No person shall be entitled ... to more than one allowance under this section ... "

and goes on to provide for joint carers to elect which of them shall be entitled to receive the allowance. However, in my judgment, the opening words of the subsection envisage the possibility of a claimant caring for two or more severely disabled persons; in those circumstances, however many persons a claimant may be caring for, plainly only one allowance will be payable. As it is the length of caring, rather than the number of persons cared for, which determines entitlement, it is only reasonable that entitlement to one allowance will also arise on the basis of the total length of caring for a number of persons. I can see nothing in the wording of either section 37 or regulation 4 to prevent such an interpretation.

13. The tribunal, who were obviously sympathetic to Mrs W, took great care in their deliberations but found themselves unable to accede to Mrs Figgess' submission that the legislation was susceptible to a plural interpretation. They held that -

"The intention of Section 37 is to focus on a particular severely disabled person",

and, with regard to the Interpretation Act, that -

"The contrary intention to include the plural in section 37 is clearly expressed ... If the plural was to be included it could have been clearly expressed. It was not."

The Interpretation Act, whether of 1889 or 1978, requires that a "contrary intention" should appear, not, as would seem to be the tribunal's view, that if a plural construction is to be included it is to be "clearly expressed". That, as I see it, is contrary to the purpose of the Interpretation Act. For the

reasons set out above I cannot agree that any "contrary intention" appears on the face of the legislation in question, nor do I accept the tribunal's view of the intention of section 37. In my judgment the tribunal's decision is accordingly erroneous in point of law and I set it aside.

14. This is plainly a case in which I can and should exercise my discretion under section 23(7)(a)(i) of the Social Security Administration Act 1992. As it is common ground that Mrs W fulfils the conditions of section 37(1)(b) and (c), and as I find that she fulfils the condition of section 37(1)(a), I hold that she is entitled to invalid care allowance for any week during which she meets the requirements of regulation 4(1) of the ICA Regulations, as interpreted above in this decision, that is for any week during which she is regularly and substantially engaged for at least 35 hours in caring for either or both of her severely disabled sons, A and P. As I do not have (and, for the purposes of the point in issue in this case, it was not necessary for me to have) particulars of the days and weeks in question, I am unable to specify what payments may be due to Mrs W. That will have to be determined by an adjudication officer in accordance with this decision and, I trust, can be agreed between the parties. In the event of any dispute arising as to the implementation of this decision the matter is to be referred to me.

15. The claimant's appeal is allowed.

(Signed) M H Johnson
Commissioner

Date: 19 November 1992