

RAS/1/LM

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SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Simon Crompton

Social Security Appeal Tribunal: Ashton-under-Lyne

Case No: 621/02392

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 15 December 1988 is erroneous in law. I set it aside and direct that the case be reheard by a differently constituted tribunal.

2. The claimant in this case is a single man in his early twenties. He lives with his parents in their house. Both he and his father are seriously disabled and the father gets an attendance allowance. The claimant is in receipt of income support and claims to be entitled to a severe disability premium pursuant to paragraph 13 of Schedule 2 to the Income Support (General) Regulations 1987. That claim was refused by an adjudication officer and the claimant's appeal to the tribunal was disallowed. I heard the appeal in this case at the same time as I heard the appeal in CIS/180/89 and, so far, the two cases are identical. And for the reasons explained in my decision in the other case (a copy of that decision is annexed) the tribunal's decision in this case is erroneous in law and I allow the claimant's appeal. However I cannot in this case give the decision the tribunal should have given because at the hearing Mr Rowland, who represented this claimant, said that it may be the case that the claimant and his parents have in effect quite separate quarters in the parents' house; it may therefore be that the test as I formulated it in the other case would not be satisfied in that the claimant and his mother might not jointly occupy the premises in the sense of equality of access and use. That is why I am remitting this case for rehearing by another tribunal who will have to decide that particular matter.

(Signed) R A Sanders
Commissioner

Date: 17 May 1990

SOCIAL SECURITY ACT 1986

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DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. The claimant is a single woman in her mid thirties. She is seriously disabled and lives with her parents. Her father is himself seriously disabled and receives an attendance allowance. The claimant had been in receipt of supplementary benefit from 1968; since April 1988, when the supplementary benefit scheme was replaced by the income support scheme, she has been in receipt of income support. She also gets a severe disablement allowance and an attendance allowance. Now if a person who is seriously disabled qualifies for income support she can get what is called a severe disability premium if she qualifies, pursuant to paragraph 13 of Schedule 2 to the Income Support (General) Regulations 1987 (as then in force), to be treated as a "severely disabled person". Paragraph 13 of that Schedule, so far as relevant to this case, provides -

"13.-(1) The condition is that the claimant is a severely disabled person.

(2) For the purposes of sub-paragraph (1), a claimant shall be treated as being a severely disabled person if, and only if -

(a) in the case of a single claimant or a lone parent -

(i) he is in receipt of attendance allowance, and

(ii) subject to sub-paragraph (3), he has no non-dependants aged 18 or over residing with him, and

(iii) no-one is in receipt of an invalid care allowance under section 37 of the Social Security Act in respect of caring for him;

(b) if he has a partner -

- (1) he is in receipt of attendance allowance; and
- (ii) his partner is also in receipt of such an allowance or, if he is a member of a polygamous marriage, all the partners of that marriage are in receipt thereof; and
- (iii) subject to sub-paragraph (3), he has no non-dependants aged 18 or over residing with him,

and either there is someone in receipt of an invalid care allowance in respect of caring for only one of the couple or, in the case of a polygamous marriage, for one or more but not all the partners of the marriage, or, as the case maybe, there is no one in receipt of such an allowance in respect of caring for either member of the couple or any partner of the polygamous marriage.

(3) For the purposes of sub-paragraph (2)(a)(ii) and (2)(b)(iii) no account shall be taken of -

- (a) a person receiving attendance allowance; or
- (b) a person to whom regulation 3(3) (non-dependants) applies; or
- (c) subject to sub-paragraph (4), a person who joins the claimant's household for the first time in order to care for the claimant or his partner and immediately before so joining the claimant or his partner was treated as a severely disabled person."

And the issue throughout has been whether in the circumstances the claimant satisfied paragraph 13(2)(a)(ii) of the Schedule. Consideration of that matter requires a glance at paragraph 13(3) and a long appraisal of the definition of "non-dependant" in regulation 3 of the 1987 Regulations. That is because the claimant's entitlement to a severe disability premium depends on whether, on the facts of this case, regulation 3(2)(c) of those Regulations applies. Regulation 3 provides as follows -

"3.-(1) In these Regulations, "non-dependant" means any person, except someone to whom paragraph (2) applies, who normally resides with a claimant.

(2) This paragraph applies to -

- (a) any member of the claimant's family;
- (b) a child or young person who is living with the claimant but who is not a member of his household by virtue of regulation 16 (membership of the same

household);

- (c) a person who jointly occupies the claimant's dwelling;
- (d) subject to paragraph (3), any person who is liable to make payments in respect of his occupation of the dwelling to the claimant or the claimant's partner;
- (e) a person who lives with the claimant in order to care for him or a partner of his and who is engaged by a charitable or voluntary body (other than a public or local authority) which makes a charge to the claimant or his partner for the services provided by that person.

(3) A person, other than one to whom sub-paragraph (a) to (c) or (e) of paragraph (2) applies, who lives in board and lodging accommodation or in a hostel within the meaning of regulation 20(2) (applicable amounts for persons in hostels) shall be a non-dependant.

(4) For the purposes of this regulation a person resides with another only if they share any accommodation except a bathroom, a lavatory or a communal area.

(5) In this regulation "communal area" means any area (other than rooms) of common access (including halls and passageways) and rooms of common use in sheltered accommodation."

In fact, what it all comes to at the end of the tortuous path through the provisions, is whether regulation 3(2)(c) applies to the claimant's mother. Is she "a person who jointly occupies the claimant's dwelling"? She is the person who has to satisfy the test. Before I come to that I should say that the claim in this case for a severe disability premium was rejected by an adjudication officer. The claimant then appealed to the tribunal and they, in a majority decision, upheld the adjudication officer. The majority said, in effect, that the claimant's mother did not pass the regulation 3(2)(c) test. The claimant now appeals to the Commissioner. At the oral hearing of her appeal she was represented by Mr M. Rowland of Counsel instructed by the Child Poverty Action Group; the adjudication officer was represented by Mr N. Butt of the Solicitor's Office, Departments of Health and Social Security.

2. I have said that the claimant satisfies all the requirements for payment of a severe disability premium except, it is said, the requirement in paragraph 13(2)(a)(ii) of the Schedule that "subject to sub-paragraph (3), she has no non-dependants aged 18 or over residing with her". Now sub-paragraph (3) is in effect a list of people of whom, for the purposes of sub-paragraph (2)(a)(ii) and (2)(b)(iii), no account is to be

taken so one does not "take account" of the claimant's father because, as I have said, he receives an attendance allowance. But the claimant's mother does not fit into any of the categories of person of whom account is not to be taken and so, pursuant to paragraph 13(2)(a)(ii) of the Schedule, one has to decide whether she is a "non-dependant" residing with the claimant as that expression is defined in regulation 3. If the mother is not a non-dependant the claimant gets her severe disability premium; if she is, the claimant does not. Plainly the claimant's mother starts off as a "non-dependant" because she and the claimant normally reside together. So the first three lines of the definition of "non-dependant" in regulation 3(1) are satisfied. But anybody who satisfies that test drops out of the definition if she is on the paragraph (2) list. And, as I have said, what is relevant here is whether the claimant's mother can be said to be "a person who jointly occupies the claimant's dwelling" - sub-paragraph (c) in the list. I should say at this point that the mother does not fit within sub-paragraph (a) because of the definition of "family" in section 20(11) of the Social Security Act 1986, and neither sub-paragraphs (d) or (e) could apply. The tribunal majority took the view that because the claimant lived with her parents as a member of their household that meant that the mother did not jointly occupy the claimant's dwelling. The dissenting member took the view that that was not so because the claimant contributed "to the financial viability of the home". For my part, I am not sure that the factors identified by the majority or by the minority assist with determining whether sub-paragraph (c) applies. The real question, as it seems to me, is whether the words "jointly occupies" are to be given whatever might be their plain, ordinary meaning or a technical meaning. The Shorter Oxford English Dictionary includes among relevant meanings of the verb "to occupy" to reside in, dwell, stay and abide and that it seems to me indicates plainly enough the plain ordinary meaning of "occupy". And Mr Rowland said, in relation to "jointly occupies" that all that was required was that a person in fact should occupy a dwelling with another on the basis of equal sharing. Mr Butt contended that there were at least two indications that "jointly occupies the claimant's dwelling" must be given a technical meaning. Those indications were firstly that if those words did not have such a meaning then everyone who "normally resides with the claimant" that is to say everyone who comes within regulation 3(1) would be taken out again by paragraph 2(c) and the provision would be ineffective. Secondly, the words "the claimant's dwelling" showed that what was in mind was something belonging to the claimant or at least something in which he had a proprietary interest; "the claimant's dwelling" was not appropriate to describe a situation where, as in the present case, the claimant lived in a house owned by his parents. And Mr Butt thought he derived support from paragraph (2)(d) and the reference there to "the dwelling" which was, he said, a reference to "the claimant's dwelling" in paragraph (2)(c). Mr Rowland replied by saying firstly that "jointly occupies" was different from "normally resides with" because, while the second expression was satisfied if those in question normally lived in the same premises, the first expression required that those premises

should be "jointly" or equally occupied. In this connection it is interesting to note that paragraph (4) of regulation 3 provides that for the purpose of the regulation a person resides with another only if they share any accommodation except a bathroom, a lavatory or a communal area; that of course does not necessarily mean "shares equally" or "jointly". Secondly Mr Rowland contended that "the claimant's dwelling" meant no more than where she lived and it was put that way because the method of paragraph (2) is to look at the situation in each case from the perspective of the person other than the claimant; furthermore, paragraphs (c) and (d) dealt with different and separate matters and could not be run together. Mr Rowland also referred to R(SB) 28/84 as showing that words which might be expected to have a technical meaning in other legislation might well be given their ordinary everyday meaning in social security legislation. In that case the words "in the care of a local authority" were to be given their ordinary literal meaning; they did not mean in care pursuant to a care order.

3. Mr Butt submitted that the purpose of paragraph 13 was to exclude a claimant from entitlement to a severe disability premium if any person over 18 resided with him and could look after him unless that person fell within one of the exceptions. I must say that if that is the purpose and that purpose is achieved, Mr Butt's relatively simple proposition has taken on a very complicated form. Mr Butt went on to say that in his view the paragraph (c) exception applied where either the claimant owned the dwelling or the leasehold or had a tenancy with the right to sublet and the interests of the claimant and the other person were co-extensive, or the claimant and the other person were jointly liable for all the outgoings in respect of the dwelling. Mr Butt would not contemplate that the paragraph (c) exception applied where, as presumably in the present case, the claimant had a licence to occupy his parents' home jointly with them. He agreed that on his interpretation of paragraph (c) if the parents chose to convey the home to themselves and their daughter she would qualify for the severe disability premium but not if they did not.

4. It seems to me that one cause of the problem is that the expression "non-dependant" in the provisions in question has been given what is on any view a completely artificial meaning. It seems to have nothing to do with dependency in the ordinary sense of that word; in the legislation a non-dependant in principle is somebody who lives with the claimant but that person ceases to be a non-dependant if she "jointly occupies the claimant's dwelling". The drafting of these provisions is in my view very unsatisfactory. It is perhaps not surprising that regulation 3(2)(c) of the 1987 Regulations has now been amended. The effect of regulation 3 of the Income Support (General) Amendment No. 3 Regulations 1989 is to add after "the claimant's dwelling" the words "and either is a co-owner of that dwelling with the claimant or his partner whether or not there are other co-owners or is liable with the claimant or his partner to make payments in respect of his occupation of the dwelling". It may be that the provision as now amended has the meaning that Mr Butt

wanted to give it in its unamended form - though I would not be surprised to find that regulation 3(2)(c) as amended still causes problems. For my part I can see nothing in the unamended words to suggest that if a single claimant is to qualify for a severe disability premium the person with whom she normally resides must jointly own the dwelling with the claimant or be liable with the claimant to make payments in respect of the occupation. There is, as I see it, nothing in the subject matter - severe disability premium as an addition to income support - to suggest that a claimant ought to get the premium if she and her mother jointly own the property but not if they jointly occupy their home as owner and licensee. In my view "jointly occupies the claimant's dwelling" does not have a technical meaning, if only because it is impossible to say with accuracy what such a meaning would be. And, while I can see the difficulty of giving an ordinary natural meaning to words which are hardly in ordinary everyday use, on balance I think it is right to give the words "jointly occupies the claimant's dwelling" their most straight-forward meaning and say that the provision applies if in fact the persons in question who normally reside together jointly occupy the premises in the sense of equality of access and use as distinct from a situation where restrictions are imposed in relation to those matters: I should say that I do not know why that should determine whether a claimant should get a premium for disability anymore than I understand why entitlement should depend on who has the legal title for the property in question.

5. It follows that, if what I have said is correct, the tribunal's decision is erroneous in law and I accordingly allow this appeal. There is nothing in the known facts of this case to indicate that the claimant and her parents lived in the home together otherwise than on an unrestricted and equal basis; in my view the condition is satisfied and the claimant is entitled to the severe disability premium. No doubt the parties can agree as to the period of entitlement. If however there is any difficulty about giving effect to this decision the case can come back to me on the application of either party.

(Signed) R A Sanders
Commissioner

Date: 17 May 1990