

SDP - "IN RECEIPT OF AA" Zee
A Disabled Child Means
"in respect of The Child"

→ DWLD

CPAG ★
56/93

RFMH/SH/9

Commissioner's File: CIS/144/1993

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 14 October 1992 is not erroneous in point of law. As a result this appeal fails.

2. This is the claimant's appeal against the decision of the social security appeal tribunal of 14 October 1992, leave having been granted by the tribunal chairman. I held an oral hearing of the appeal. The claimant did not attend but was represented by Mr G Tucker from the Newham Rights Centre. The adjudication officer was represented by Mr J Pollard from the Central Adjudication Service.

3. The facts are not in dispute. The claimant was in receipt of income support from 11 April 1988. She was divorced and lived with her children. Her daughter, then aged 14, was disabled with spina bifida and the claimant was paid attendance allowance and mobility allowance in respect of her. The disabled child premium was included in the income support award. However, on 20 April 1988 the adjudication officer decided that the claimant was not entitled to a severe disability premium from 11 April 1988 because she did not satisfy the conditions for such a payment. Thereupon the claimant appealed to the tribunal.

4. The claimant attended and was represented by Mr Tucker at the hearing of the appeal before the tribunal on 14 October 1992. In the event the tribunal dismissed the appeal. After recording the relevant findings of fact, the reasons for decision read:-

"The only point at issue in this particular appeal is whether or not the claimant is in receipt of Attendance Allowance within the meaning set out in Paragraph 13 of Schedule 2. She has no non-dependents aged 18 or over living with her and she is not in receipt of Invalid Care Allowance. The Tribunal take the view that a proper interpretation of Paragraph 13 of Schedule 2 is that the claimant does not fall within the definition. Paragraph 2(a) wherein the definition of a severely disabled person is contained means that Attendance Allowance must be in payment in respect of the claimant not whereas in this case it is paid to the claimant but in respect of another person. They are fortified in this view by looking at Sub-Paragraph (iii) of the same Subsection 2(a) where clearly it is intended that the Invalid Care Allowance therein referred to should be in payment in respect of caring for the disabled person. The Tribunal appreciate the argument that by virtue of Regulation 6 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 it is provided that a person shall be entitled to an attendance allowance in respect of a child in the case of Sub-Paragraph (a) it shall be his mother if the child is living with her. The view of the Tribunal is that this does not bring the claimant in this case within the definition of Paragraph 13 of Schedule 2, but the effect of Regulation 6 of the Social Security (Attendance Allowance) (No. 2) Regulations merely to provide authority to pay to another person when clearly it is not possible for the Attendance Allowance to be paid to the disabled person himself because of his age. The Tribunal take the view that the effect of Regulation 6 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 merely entitles the claimant in this case to actually receive payment of Attendance Allowance. It is merely a device for facilitating a cash transfer. It does not entitle her to Attendance Allowance in her own right. The Tribunal take the view that a commonsense interpretation of the various Regulations clearly means that someone such as the claimant in this case who clearly is not disabled shall not be treated as disabled for technical reasons. They take the view that Schedule 2, Paragraph 13 clearly has in mind that the Attendance Allowance should be in payment in respect of the disabled person. It is conceded by all that the effect of the amendment made to Schedule 2 of the Income Support (General) Regulations 1987 on 9 April 1990 when Paragraph 14(B) was added effectively bars this claim as from 9 April 1990. The Tribunal take the view for the reasons set out above that in fact the claimant is not entitled prior to that date. Regulation 6 of the Social Security (Attendance Allowance) (No. 2) Regulations clearly states that the mother is

entitled to an Attendance Allowance but in respect of the child. The addition of these words clearly indicate to the Tribunal that the mother of the child was not intended to be able to state that the Attendance Allowance was payable in respect of her in order to bring her within the province of Paragraph 13 of Schedule 2."

5. Regulation 17(d) of the Income Support (General) Regulations 1987 ("the Regulations") provides for the inclusion of the amount of any premiums which may be applicable to the claimant determined in accordance with Parts III and IV of Schedule 2 in the calculation of a claimant's applicable amount. Paragraph 13 of Part III of Schedule 2 to the Regulations contains the conditions for the payment of a severe disability premium. This provides, so far as relevant:-

- " 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)-(iii) ..."

The sole question at issue in the present appeal is whether the claimant was "in receipt of attendance allowance" for the purposes of paragraph 13(2)(a)(i), it being accepted that she satisfied all other conditions of entitlement.

6. The claimant was in receipt of a disabled child premium under paragraph 14 of Schedule 2. This provides so far as relevant:-

"14. The condition is that a child or young person for whom the claimant or a partner of his is responsible and who is a member of the claimant's household -

- (a) has no capital or capital which, if calculated in accordance with Part V in like manner as for the claimant, except where otherwise provided, would not exceed £3,000; and
- (b) is in receipt of attendance allowance or mobility allowance or both ... or
- (c) is blind or treated as blind within the meaning of paragraph 12(1)(a)(iii) and (2)."

7. Paragraph 14B of Part III of Schedule 2 was introduced with effect from 9 April 1990 and provides:-

" 14B. For the purposes of this Part of this Schedule, a person shall be regarded as being in receipt of any benefit if, and only if, it is paid in respect of him and shall be so regarded only for any period in respect of which that benefit is paid."

8. Section 35(1) of the Social Security Act 1975 provides that a person shall be entitled to attendance allowance if he satisfies the prescribed conditions. Regulation 6 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 ("the Attendance Allowance Regulations") modified section 35(1)-(4) in its application to children. It is not in dispute that the claimant was entitled to an attendance allowance "in respect of a child who satisfies or is treated as having satisfied" the prescribed conditions under section 35(1) as modified by regulation 6(2)(a) of the Attendance Allowance Regulations and that under the provisions of regulation 6(4) the claimant was "the person who in any given case shall be entitled to an attendance allowance in respect of a child". Regulation 1(2) of the Attendance Allowance Regulations defines "a child" to mean a person who is under the age of 16.

9. Mr Tucker submitted that section 22(3) of the Social Security Act 1986 provided that "the applicable amount for a severely disabled person shall include an amount in respect of his being a severely disabled person". Section 22(4) provided that "regulations may specify circumstances in which persons are to be treated as being or as not being severely disabled". Section 22(4) was a "deeming" provision and there was nothing to indicate that the person to be treated as severely disabled had in fact to be so. There were many instances in social security legislation where a claimant could be treated as satisfying conditions of entitlement because of "deeming" provisions - for example under regulation 5(3) of the Regulations a person was treated as engaged in remunerative work during any period when he was absent from work "either without good cause or by reason of a recognised, customary or other holiday". Mr Tucker then turned to paragraph 13(2)(a)(i) of Schedule 2 to the Regulations which specifically provided that "a claimant shall be treated as being a severely disabled person if .. in the case of .. a lone parent he is in receipt of attendance allowance and ..". This provision gave effect to the provisions of section 22(4). In the present case the claimant was treated as being the severely disabled person because she satisfied the condition that she was "in receipt of attendance allowance". As the words "in receipt" were not defined they fell to be given their ordinary everyday meaning. On that basis the person who was "in receipt" of an attendance allowance could reasonably be interpreted as being the person who was actually receiving the payment of the award. The introduction of paragraph 14B supported this interpretation as it specifically changed the law in this respect. As a result the claimant was entitled to a severe disability allowance during the inclusive period from 11 April 1988 to 8 April 1990.

10. Mr Tucker then referred me to decision R(SB) 12/87 in support of his argument that "in receipt" fell to be defined as "entitlement to receipt". In that case the adjudication officer had given a decision to the effect that the claimant was entitled to supplementary benefit although it had not actually been paid. In that context the Commissioner held at paragraph 7 "I do not see any reason why it would have been intended to distinguish between receipt of benefit in the sense of actual payment and entitlement to receipt of it".

11. Mr Tucker submitted that his interpretation of "in receipt of" for the purposes of paragraph 13 to Schedule 2 was not inconsistent with the interpretation of the same words in paragraph 14. That paragraph concerned the award of a disabled child premium for a child or young person. The award of a severe disability premium under paragraph 13(2) clearly excluded the award of a disabled child premium if the parent was in receipt of attendance allowance in respect of the child. The paragraph was still operative so far as a young person was concerned or a child who was in receipt of mobility allowance or was blind.

12. Mr Pollard submitted that the House of Lords judgment referred to at paragraph 19 of R(SB) 6/86 established the principle that the literal meaning of a statute could be disregarded if "the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake. If words "have been inadvertently used", it is legitimate for the court to substitute what is apt to avoid the intention of the legislature being defeated .." He noted that section 35(1) of the Social Security Act 1975, as amended, stressed the entitlement of attendance allowance "in respect of a child". The payment of attendance allowance in the present case was not for the claimant but in respect of her child. The contention that "in receipt of" applied to the claimant and not to the child created an absurdity. It confused payment with entitlement. The claimant was merely the payee of an award in respect of the child's needs. Mr Tucker's interpretation would have far reaching results eg. an appointee appointed by the Secretary of State on behalf of a person incapable of administering his affairs would be entitled to receive a premium in his own right. Such an interpretation defeated the intention of Parliament to assist the person with a specific need. Paragraph 14 of Schedule 2 referred to a child being "in receipt of" attendance allowance as a condition for the disabled child premium. Consequently if "in receipt of" was not given the plain meaning in paragraph 13 there was nothing to support the view that it should be given the plain meaning in paragraph 14. Attendance allowance was not paid to the child but to the person responsible for the child, in this case the parent. If the meaning of "in receipt of" applied to paragraph 13 it also applied to paragraph 14, with the result that no disabled child premium could ever be awarded for a disabled child because the parent and not the child would be "in receipt of" attendance allowance. To make "in receipt of" apply to the parent for the purposes of paragraph 13 would contradict the meaning of the same

phrase in paragraph 14. Further, the intention of paragraph 13 was to award a premium to a person who was severely disabled. To consider awarding the premium to a person who was manifestly not a disabled person but a parent, receiving attendance allowance in respect of a child, was clearly absurd. In his view paragraph 14B was introduced to clarify the position and not to affect a change in the law.

13. I reject Mr Tucker's submission and accept the submission of Mr Polland. I can find no support for the argument that the claimant should be deemed to be a severely disabled person for the purposes of paragraph 13(2) of the Schedule 2. Mr Tucker's interpretation of the words "in receipt of attendance allowance" in paragraph 14(b) is unrealistic and misconceived. Regulation 43(1) of the Social Security (Claims and Payments) Regulations 1987 has similar provisions for the payment of mobility allowance to a parent in respect of a child. The result of Mr. Tucker's interpretation would be that a child could never satisfy the conditions contained in paragraph 14(b) and I reject as absurd the contention that the intention of Parliament was to limit the application of this sub-paragraph to a young person or to a child who was blind or treated as blind in any case where the parent was in receipt of severe disability premium in respect of that child.

14. Under the provisions relating to attendance allowance set out above a child cannot be in receipt of attendance allowance in the sense of receiving the payment of the award. The child's parent is entitled to the benefit in respect of the child and receives payment of it. Accordingly I take it for the purposes of paragraph 14 that "in receipt of attendance allowance" must mean that the child satisfies the conditions of entitlement. To construe those words otherwise would mean that no disabled child premium could ever be awarded because the parent and not the child would be "in receipt of attendance allowance". Paragraph 13 contains the additional conditions for the payment of severe disability premium and uses the same words "in receipt of attendance allowance" but in relation to the claimant. The conditions for premiums laid down in the various paragraphs of Schedule 2 must be construed as a whole. The claimant cannot "blow hot and cold" by seeking in effect to rely on one meaning of the words "in receipt of attendance allowance" in paragraph 14 and a wholly different and contradictory meaning in paragraph 13. Either the child is in receipt of attendance allowance and the claimant satisfies paragraph 14 or the claimant is in receipt of attendance allowance and satisfies paragraph 13. Both cannot be the case. I hold that the words "the claimant .. is in receipt of .. attendance allowance .. in paragraph 13 are to be construed in the same sense which provides paragraph 14 with the meaning, that the claimant satisfies the condition of entitlement.

15. Finally in my view the purpose of paragraph 14B of Schedule 2 is to make it clear that a person is only in receipt of a benefit when he is, the same person "in respect" of whom that benefit is paid.

16. The tribunal decision fully complied the requirements of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986. The tribunal recorded full findings of fact based on the evidence before them and applied the law correctly to those findings.

17. For the reasons set out above the tribunal's decision was not erroneous in law. The claimant's appeal is dismissed.

(Signed) R.F.M. Heggs
Commissioner

(Date) 2 August 1993