

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: Stephen Jackson

Social Security Appeal Tribunal: Bolton

Case No: 612 09328

[ORAL HEARING]

1. For the reasons I gave in CIS/180/89 and CIS/372/90 (copies of those decisions being annexed) the claimant is entitled to a severe disability premium pursuant to paragraph 13 of Schedule 2 to the Income Support (General) Regulations 1987 as from the date when he satisfied the condition imposed by sub-paragraph (2)(a)(i) of that provision.

(Signed) R A Sanders
Commissioner

Date: 5 December 1990

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DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. The claimant is a severely disabled single woman who lives with her parents. The extent of her disabilities is shown by the fact that she receives a severe disablement allowance, an attendance allowance and a mobility allowance. She has been in receipt of income support since 11 April 1988 and her "weekly applicable amount" in accordance with regulation 17 of the Income Support (General) Regulations 1987 has throughout included an amount payable by way of disability premium pursuant to paragraph 11 of Schedule 2 to those Regulations. Paragraph 13 of that Schedule makes provision for what is called a severe disability premium which is payable at a higher rate than the premium payable pursuant to paragraph 11. By a decision issued in October 1989 an adjudication officer decided that the claimant was not entitled to the paragraph 13 premium because she did not satisfy all of the conditions of sub-paragraph (2)(a)(i) to (iii) of paragraph 13. A social security appeal tribunal confirmed the adjudication officer's decision. I held an oral hearing of the claimant's appeal against the tribunal's decision. She was represented at that hearing by Mr R. Drabble of Counsel instructed by Mr N. Warren of the Birkenhead Resource Unit. Mr T. Prosser of Counsel instructed by the Solicitor to the Departments of Health and Social Security represented the adjudication officer.

2. Section 21 of the Social Security Act 1986 makes provision for payment to a person who is entitled to income support of what is called "the applicable amount". Section 22 of that Act provides, so far as relevant, as follows -

"22.-(1) The applicable amount shall be such amount or the aggregate of such amounts as may be prescribed.

(2) The power to prescribe applicable amounts conferred by subsection (1) above includes power to

prescribe nil as an applicable amount.

(3) In relation to income support the applicable amount for a severely disabled person shall include an amount in respect of his being a severely disabled person.

(4) Regulations may specify circumstances in which persons are to be treated as being or as not being severely disabled."

(5) -(9) not relevant.

Regulation 17 of the Income Support (General) Regulations provides that, subject to other provisions which are not relevant to this case, a claimant's weekly applicable amount are to be the aggregate of various amounts that are appropriate in his case. The amounts are to be found in various Schedules to the Regulations. So far as relevant to this case, there is a basic amount payable in accordance with Part I of Schedule 2. And Part III of that Schedule provides for payment of certain additional sums called "premiums". The conditions on which a "disability premium" is to be paid are in paragraphs 11 and 12. That is the premium which this claimant already gets. The higher rate "severe disability premium" which she has asked for but does not get is dealt with in paragraph 13 which provides, so far as relevant, as follows -

"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) an invalid care allowance under section 37 of the Social Security Act is not in payment to anyone in respect of caring for him;

(b) not relevant to this case.

(3) F o r t h e p u r p o s e o f 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.

(3A) not relevant to this case.

(4) not relevant to this case."

That is not the end of the trail because "non-dependant" in sub-paragraph (2)(a)(ii) is the subject of a complicated definition in regulation 3 which provides that -

"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 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;
- (d) 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) revoked.

(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 but not if each person is separately liable to make payments in respect of his occupation of the dwelling to the landlord.

(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."

Now all the words after "the claimant's dwelling" in regulation 3(2)(c) were added by amendment as from 9 October 1989. I deal with the meaning and effect of those words in three other cases heard immediately following this one. So far as this present case is concerned it is not in issue (since my decision in CIS/180/1989 dealing with the meaning of the provision before the amending words were added to regulation 3(2)(c)) that the claimant satisfied the conditions for payment of a severe disability premium from 11 April 1988 (when the income support scheme replaced the former supplementary benefit scheme) until 8 October 1989 when the amendment to regulation 3 to which I have just referred took effect. After that date however it is accepted that whatever might be the meaning and effect of the provision as amended this claimant does not satisfy it. However, what Mr Drabble submits on her behalf is that sub-paragraphs (2)(a)(ii) and (iii) of paragraph 13 to Schedule 2 are ultra vires. If he is right about that it is accepted that the claimant is entitled to the severe disablement premium not only down to 8 October 1989 but beyond.

3. The ultra vires point arises in this way. As I have indicated above section 22 of the 1986 Act provides that "... the applicable amount for a severely disabled person shall include an amount in respect of his being severely disabled" (my emphasis). And then sub-section (4) empowers the Secretary of State to make regulations which "specify circumstances in which persons are to be treated as being or as not being severely disabled". So does sub-section (4) allow the Secretary of State to impose whatever terms and conditions he chooses or does it empower him to do no more than define "severely disabled person" (which is otherwise undefined) by reference to the extent of the person's disability? Paragraph 13(2)(a) (read with paragraph 13(1)) of Schedule 2 to the 1987 Regulations in effect requires a single claimant or lone parent to satisfy three conditions before he can get the severe disability premium. Sub-paragraph (2)(a)(i) - receipt of attendance allowance - clearly goes to the matter of disability. A person is of course entitled to an attendance allowance only if he is so disabled as to satisfy the medical conditions imposed by section 35 of the Social Security Act 1975. On any view sub-paragraph (2)(a)(i) must be within the power contained in section 22(4) of the 1986 Act. But sub-paragraph (2)(a)(ii) has nothing at all to do with disability; it has to do with whether a particular kind of person (defined by the complicated provisions set out above relating to non-dependants in regulation 3 of the 1987 Regulations) is or is not residing with.

the claimant. And sub-paragraph (2)(a)(iii) is a kind of overlapping benefit provision to the effect that if someone else is in receipt of an invalid care allowance in respect of caring for the claimant the claimant does not get his severe disablement premium.

4. In my view section 22(4) does not empower the Secretary of State to do more than determine by reference to the extent of a person's disability whether he is or is not to be treated as a severely disabled person. As I have said, section 22(3) (in contrast to section 22(1) under which conditions relative to premiums payable to other descriptions of persons are imposed) contemplates indeed requires that, in case of a severely disabled person, the applicable amount shall include an amount in respect of his being a severely disabled person. That requirement would be defeated if the Secretary of State could legitimately impose a condition which deprived a person who was e.g. in receipt of an attendance allowance (who surely must be a severely disabled person) of the premium because he did not e.g. fulfil a residence condition; likewise, if a person in receipt of a severe disablement allowance under section 36 of the 1975 Act (entitlement to which depends on an assessment of at least 80% disablement) were to be deprived of his severe disability premium because a person living in the same household was in receipt of unemployment benefit. In both cases an undoubtedly severely disabled person does not get what section 22(3) says he should have. In my view section 22(4) does not empower the Secretary of State to withhold the premium from a severely disabled person by requiring that person to satisfy extraneous conditions.

5. It is interesting to note that in relation to other benefits, e.g. mobility allowance under section 37A of the Social Security Act 1975, there are similar provisions to those in section 22 of the 1986 Act in relation to a person who suffers from "physical disablement such that he is either unable to walk or virtually unable to do so". There, section 37A(1) entitles such a person to a mobility allowance and sub-section (2) empowers the Secretary of State to "prescribe the circumstances in which a person is or is not to be treated ... as suffering from such physical disablement ...". But the significant difference between section 37A of the 1975 Act and section 22 of the 1986 Act is that sub-section (1) of the former contains the words "... a person who satisfies prescribed conditions as to residence or presence in Great Britain shall be entitled ...". So the Secretary of State is expressly empowered to prescribe conditions as to other matters thus making it plain that he could not have imposed conditions as to those other matters pursuant to his power to prescribe "the circumstances in which a person is or is not to be treated ... as suffering from such physical disablement ...". It seems to me that if it had been intended that the Secretary of State should, in section 22 of the 1986 Act, have power to impose conditions relating to matters other than the extent of disability there would have been a similar or indeed identical formulation to that used in section 37A of the 1975 Act. In my view a power to

specify circumstances in which persons are to be treated as being or as not being severely disabled is significantly different from a power to prescribe conditions to be satisfied by a severely disabled person before he gets his premium. And it is to be noted, in relation to mobility allowance, that the conditions which may be prescribed pursuant to section 37A(1) of the 1975 Act are carefully limited as to their subject matter. I find it difficult to believe that it was intended to give the Secretary of State a completely free hand when exercising the power given to him in section 22(4) of the 1986 Act.

6. Regulation 17 of and Schedule 2 to the 1987 Regulations provide for premiums of different amounts to be paid to different sorts of persons e.g. lone parents, pensioners and non severely disabled persons if they satisfy various conditions. Mr Prosser submitted that those provisions were all prescribed pursuant to the powers in section 22 of the Act. Certainly there seems to be nothing relevant in the extensive regulation-making powers in section 20; the power in question cannot be in section 22(1) because, if that provision enabled the Secretary of State to impose conditions generally, the many other specific regulation - making powers in section 20 would not have been necessary. It is not entirely clear to me what powers there are to prescribe the conditions on which for example lone parent and pensioner premiums are to be paid. Mr Prosser said they were in section 22(1). Whether that is so or not, it is the case as I have said that special provision has been made, in section 22(3) and (4) in relation to severely disabled persons; they shall have a premium simply by reason of their being severely disabled. There would have been no need to make special provision for such persons unless it had been intended that they should have their premium subject only to determining the necessary degree of disability. What has been done for lone parents and pensioners and non severely disabled persons could presumably have been done under section 22(1).

7. If I had any doubt as to the scope of the power in question I would have resolved it by choosing the more restrictive of the possible construction in accordance with what Lord Donaldson, M.R. said in McKiernon v Secretary of State for Social Security (26 October 1989, at page 10 of the transcript). However, for the reasons to which I have referred, I am satisfied that section 22(4) of the 1986 Act does not empower the Secretary of State to impose conditions in effect removing entitlement to a severe disability premium from a severely disabled person because a non-dependant resides with him or because someone else is in receipt of an invalid care allowance in respect of caring for him. Accordingly, paragraph 13(2)(a)(ii) and (iii) which purport to impose such conditions are invalid as being outside the power contained in section 22(4) of the 1986 Act. I should perhaps say that I have considered whether there is a stronger case for the validity of paragraph 13(2)(a)(iii) because in a sense that provision may be said to have something to do with the extent of a person's disability - his need to be cared for. But I think that the condition required to be satisfied by paragraph 13(2)(a)(iii) is not to be read in that way because

there is no entitlement to an invalid care allowance unless the person cared for is in receipt of attendance allowance: section 37(2) of the Social Security Act 1975. Such a person is quite plainly a severely disabled person and it seems to follow therefore that paragraph 13(2)(a)(iii) is to do with "overlapping" benefits and not with the extent of disablement.

8. This appeal succeeds. The claimant is entitled to her severe disablement premium notwithstanding that she does not satisfy the conditions in question.

(Signed) R A Sanders
Commissioner

Date: 5 December 1990