

Bulletin 194

[SHORT]

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSA/469/05

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

Oral Hearing

Appellant:

Respondent: Secretary of State

Tribunal: Glasgow

Tribunal Case No:

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the appeal tribunal given at Glasgow on 15 April 2005 is not erroneous upon a point of law. The appeal fails. I dismiss it.

2. This appeal came before me for an oral hearing on 30 November 2005. The claimant was represented by Mr Dailly, Solicitor, of the Govan Law Centre, Glasgow. The Secretary of State was represented by Mr Brodie, Advocate, instructed by Mr Brown, Solicitor, of the Office of the Solicitor to the Advocate General.

3. The claimant has appealed to the Commissioner against the decision of the tribunal which upheld decisions of the Secretary of State with effect that the tribunal found that the claimant is entitled to attendance allowance but that benefit is not payable to her from 22 July 2002 and that the sum of £2,940.20 is recoverable from the claimant and her attorney as overpaid attendance allowance. In making their decision, the tribunal followed the decision of Mr Deputy Commissioner Burns QC in CSA/164/04.

4. Before me the parties accepted the following findings in fact made by the tribunal:

“5. The facts did not appear to us to be in any dispute. For the sake of completeness we find them to be as follows:

- a. The claimant is aged 94. She has been entitled to the lower rate of AA from 21 August 1985 and to the higher rate of that benefit since 1 March 2001.
- b. Her daughter acts as her attorney under an enduring Power of Attorney.
- c. The claimant has resided in a nursing home since 2 November 2000.
- d. That nursing home is privately owned and run. It is not owned or managed by a local authority under any statutory provision.
- e. The claimant has received free personal care and nursing care allowance from Highland Council from 1 July 2002. These amount to £210 per week, £145 in respect of personal care and £65 in respect of nursing care.
- f. Prior to 1 July 2002 the claimant was wholly self funding in the nursing home accommodation where she lived. She remains self funding in respect of her board and lodging from that date. The cost of her board and lodging are met on her behalf by her attorney.
- g. The attorney informed the section of the Dept for Work and Pensions (DWP) dealing with the claimant's AA of the claimant's award of a free personal care allowance from Highland Council on 11 August 2003. There was no disclosure of the claimant's award of the free personal care allowance from Highland Council to the DWP prior to the above date, either by the claimant herself, her attorney or anyone else.
- h. On the assumption that AA was not lawfully payable from 29 July 2002 onwards (which we have decided to be the case in this decision) an overpayment of £2,940.20 of AA has been incurred because of the failure by the claimant and/or her attorney to disclose her award of a free personal care allowance from Highland Council to the Dept under 11 August 2003.”

5. Regulation 7(1)(b) of the Social Security (Attendance Allowance) Regulations 1991 which provide:

“7(1) ...Subject to regulation 8, a person shall not be paid any amount in respect of an attendance allowance for any period where throughout that period he is a person for whom accommodation is provided –

- (a) In pursuance of –
 - (i) Part III of the National Assistance Act 1948 ..., or
 - (ii) Part IV of the Social Work (Scotland) Act 1968 or section 7 of the Mental Health (Scotland) Act 1984; or
- (b) In circumstances where the cost of accommodation is borne wholly or partly out of public or local funds in pursuance of those enactments or of any other enactment relating to persons under disability.”

6. The question before me was restricted to whether the claimant's circumstances fell within the provisions of that regulation. The answer to that question is dependent on what was encompassed by the word 'accommodation' and the phrase 'cost of accommodation' in the regulation 7(1)(b).

7. As noted in finding in fact 5e the claimant has received personal care and nursing care allowances from Highland Council from 1 July 2002. These allowances are paid under the provisions of the Community Care and Health (Scotland) 2002. It was accepted by the parties to the appeal that this is an enactment relating to persons under disability. Mr Commissioner Burns QC in CSA/164/04 reached the conclusion that:

“23. I conclude therefore that the phrase “the cost of accommodation” in regulation 7(1)(b) of the 1991 Regulations is properly to be interpreted as including personal care as that phrase is used in the 2002 Act.”

8. Mr Dailly's submission to me was that in following CSA/164/04 the tribunal erred in law because that case had been wrongly decided. It was Mr Dailly's submission that, having regard to section 2(28) of the Regulation of Care (Scotland) 2001, which defines personal care as meaning:

“Care which relates to the day-to-day physical tasks and needs of the person cared for (as for example, but without prejudice to that generality, to eating and washing) and to mental processes relating to those tasks and needs (as for example, but without prejudice to that generality, to remembering to eat and wash);”

such personal care allowance was not encompassed within the 'cost of accommodation' referred to in regulation 7(1)(b) of the Attendance Allowance regulations referred to above.

9. It was his submission that the ordinary meaning of accommodation was “a physical place provided for a particular human activity, usually but not always for lodging, residing or staying”. It was said that this ordinary meaning was derived by Mr Dailly from an opinion of counsel which set out his view as to what encompasses accommodation. It was his submission that the allowance made from public funds in respect of personal care under section 2(28) was not the cost of accommodation but was a cost which was ancillary to that accommodation. The payment, it was submitted, was dependent upon accommodation having been provided but was not the cost of that accommodation.

10. Mr Brodie in response submitted that CSA/164/04 had been correctly decided. In making submissions as to what was encompassed within the phrase 'cost of accommodation' for the purposes of regulation 7(1)(b) he effectively went over the same ground as he had in his submission to Mr Deputy Commissioner Burns QC in CSA/164/04 as recorded at paragraphs 15 to 20 therein.

11. Mr Brodie however expanded the submission he made in paragraph 19 of CSA/164/04. He specifically drew my attention to regulations 7(5)(a), (f) and (g). It was his

submission that, if the word 'accommodation' and the phrase 'cost of accommodation' did not have the wider meaning advocated by him, then paragraph 5 of regulation 7 and the sub-paragraph specifically referred to would have no meaning or content. He also made it clear that in relation to the submission he made to Mr Deputy Commissioner Burns QC, in paragraph 19 of CSA/164/04, it was not being suggested that for the purposes of regulation 7(1)(b) accommodation was as defined in section 21(5) of the National Assistance Act 1948. It was simply a guide as to what was encompassed by 'accommodation' and the 'cost of accommodation'. I am grateful for that clarification and consider that he is right in that regard.

12. I am persuaded by Mr Brodie's submission that 'the cost of accommodation' is the aggregate cost of the bricks and mortar of the building and the ancillary services provided, including those encompassed by personal care. I reach that conclusion as I fully accept the argument that regulation 7(5) would have no content or meaning if the phrase 'cost of accommodation' was as contended by Mr Dailly. The exceptions made in regulation 7(5), particularly the nursing care element provided for in the 2002 Act referred to sub-paragraph 1(g) would not have been necessary if accommodation was to be defined in the narrow sense. I am also persuaded by the reasoning of Mr Deputy Commissioner Burns QC in CSA/164/04.

13. One matter which had exercised me was that whilst the payability of attendance allowance was, if I accepted Mr Brodie's submission, affected by a personal care allowance under the 2002 Act of the Scottish Parliament, where as in the present case, the claimant resided in a private nursing home, the payability of attendance allowance remains unaffected if a personal care allowance is paid to a claimant who resides in his own home. Mr Dailly's position was that this was unjustified as the claimant in this case who resides in a private nursing home is would be treated differently to someone who resided within their own home. Mr Brodie indicated that there was a policy justification for the difference in respect that someone in their own home has to buy in the care as required and accommodation was not provided for them. In the event I do not consider that it has a bearing on the resolution of the issue before me, namely what encompasses 'accommodation' and the 'cost of accommodation'. The payment of the personal care allowances in relation to qualifying persons under the legislation whether they resided in their own home or elsewhere was an effect of devolution and the discretion given to the Scottish Executive in relation to how to spend the public funds it has at its disposal. That the United Kingdom government has not amended the attendance allowance regulations in respect of payability in relation to those who receive a personal care allowance and remain in their own homes whilst, in respect of those who reside in a private nursing home such as the claimant, attendance allowance ceases to be payable by the operation of regulation 7(1)(b) is a matter of policy for it. It does not impinge on the interpretation of the regulations.

14. The appeal fails.

(Signed)
D J MAY QC
Commissioner
Date: 1 December 2005