

THE APPLICATION OF ARTICLE 5 OF REGULATION (EC) NO 883/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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INTRODUCTION

- 1 This memo gives guidance on a decision of the Upper Tribunal¹ and the application of Article 5 of Regulation (EC) No 883/2004².

1 AJ v SSWP CG/1346/2018; 2 Article 5 of Regulation (EC) No 883/2004

BACKGROUND

- 2 In this case, the claimant wished to make a claim to Carer's Allowance, as she was caring for her mother (the severely disabled person). In order to make a claim to Carer's Allowance, the severely disabled person had to be in receipt of a qualifying benefit (see DMG 60033). In this case the claimant's mother was not in receipt of any of these benefits, but was in receipt of a Polish benefit called dodatek pielęgnacyjny (medical care supplement). The claimant argued that this benefit was the Polish equivalent of Disability Living Allowance, and that Article 5 of Regulation (EC) No 883/2004 provided for the acceptance of equivalent benefits. The First Tier Tribunal dismissed the claimant's appeal.
- 3 The claimant was granted permission to appeal to the Upper Tribunal. In submissions the Secretary of State conceded that, on the facts of this case, the medical care supplement received by the severely disabled person should be treated as equivalent to Disability Living Allowance due to Article 5 of Regulation (EC) No 883/2004.

THE APPLICATION OF ARTICLE 5 OF REGULATION (EC) NO 883/2004

4 Article 5 of Regulation (EC) No 883/2004 states:

Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

- (a) *where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;*
- (b) *where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.*

5 The leading case on the application of Article 5 is the Court of Justice of the European Union case of Knauer¹.

The Court of Justice of the European Union held that:

- 5.1 “equivalent benefits” did not mean the same as “benefits of the same kind” as referenced in Article 53 of Regulation (EC) No 883/2004 (see paragraph 28 of the judgement);
- 5.2 two benefits were not equivalent merely because they were both within the scope of 883/2004 (see paragraph 32 of the judgement);
- 5.3 the concept of equivalent benefits meant old-age benefits which were “comparable” (see paragraph 34 of the judgement); **and**
- 5.4 when determining comparability, account had to be taken of the aim pursued by the benefits and by the legislation which established them (see paragraph 34 of the judgement).

In that case, the benefits were comparable because the aim of both was to ensure that the recipients maintained a standard of living commensurate which they enjoyed prior to retirement (see paragraphs 35 - 36 of the judgement). The Court of Justice of the European Union added that there was no objective justification for different treatment (see paragraph 37 of the judgement).

¹ C-453/14 Vorarlberger Gebietskrankenkasse and Alfred Knauer v Landeshauptmann von Vorarlberg and Rudolf Mathis

6 Where decision makers receive an application for a benefit (or a benefit component, for example an additional amount for the severely disabled in State Pension Credit) which is reliant on the claimant or disabled person being in receipt of a qualifying benefit, they should not automatically rule out the claim if the Northern Ireland qualifying benefit is not in payment. If the

claimant or disabled person is in receipt of a benefit or other income from another Member State it may be, dependent on the type of benefit or income, that Article 5 of Regulation (EC) No 883/2004 applies. It should be noted that Article 5 of Regulation (EC) No 883/2004 applies to all benefits that fall within the scope of Regulation (EC) No 883/2004, not just cash sickness benefits. This includes special non-contributory benefits.

- 7 In the case above, there were two payment conditions for the Polish medical care supplement:
1. the claimant was incapable of work and independent living **or**
 2. the claimant has reached the age of 75.

The Secretary of State's concession in the case of AJ v SSWP (CG/1346/2018) was based on the fact that the severely disabled person was in receipt of medical care supplement due to the first condition, and therefore the award of it (in relation to the independent living clause) was more akin to Disability Living Allowance. If the claimant had been in receipt due to the second condition, the position of the Secretary of State is that it would not have been akin to Disability Living Allowance.

- 8 Where a claimant claims that either they or the severely disabled person is in receipt of an equivalent qualifying benefit from another member state then the case should be forwarded to Decision Making Services, for consideration of whether the benefit does fall within Article 5 of Regulation (EC) No 883/2004 or not.

ANNOTATIONS

Please annotate the number of this memo (DMG Memo Vol 2/77, 4/146, 8/95, 10/74, & 13/120) against the following DMG paragraphs: 23046, 44076, 60033, 78030, 78105.

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