SDA – S36(4)(d) – requiring claimant ... before pensionable age to be paid SDA after pensionable age was in breach of 79/7/EEC — woman entitled if satisfies conditions before aged 65

JGM/8/LS

Commissioner's File: CS/98/1987

Region: Wales & South Western

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR SEVERE DISABLEMENT ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Evelyn Thomas (Mrs)

Appeal Tribunal: Newport

Case No: 32/13

[ORAL HEARING]

My decision is that by reason of the provisions of Council Directive (EEC) 79/7 (to which I shall refer as the "social security directive") the claimant is not precluded by section 36(4)(d) of the Social Security Act 1975 from having title to severe disablement allowance from 23 December 1984 or any subsequent date and that the disablement questions referred to in section 108(1)(b) of that Act be referred for determination accordingly.

2. The claimant is a woman born on 8 July 1923 who thus attained pensionable age on 8 July 1983. She was employed in the civil service for many years down to 16 November 1984 when she finally became incapable of work and it is not in dispute that she had been incapable of work ever since. She was undoubtedly disabled before then and was frequently absent from work, and I detect in the case papers some suggestions that she might have been actually incapable of work from some earlier date. I asked questions about this at the hearing which I held, and I concluded that it could not possibly be successfully contended that she had for the necessary continuous period of 196 days been incapable of work (or of normal household duties) to have qualified for non-contributory invalidity pension before its abolition with effect from 29 November 1984. She made a claim, which has been accepted as a claim for severe disablement allowance on 26 May 1986. But, as a civil servant, she was covered by the "estains option" down to 4 May 1986 and the real issue is whether she can be awarded severe disablement allowance from 6 May 1985. I add that at that date the claimant's husband was in receipt of an increase of invalidity benefit for the claimant, and that the effect of the Social Security (Overlapping Benefits) Regulations 1979 [SI 1979 No. 597] (the Overlapping Benefits Regulations) is that she and her husband between them cannot receive more than the higher of severe disablement allowance and increase of disablement benefit for her. In fact severe disablement allowance was at a rate in excess of the increase for a wife down to November 1985 but has thereafter run at the same rate. The resulting amount payable if the claimant ultimately establishes title to severe disablement allowance may thus be relatively small by comparison with the principle in issue on this appeal.

3. Section 36 of the Social Security Act 1975, as substituted for an earlier section 36, was introduced with effect from 29 November 1984 in relation to claimants then over 50 among others a new benefit called "severe disablement allowance". In relation to the claimant the conditions for an award of the allowance were that she should be incapable of work and "disabled" in terms of the section (broadly 80 per cent disabled) and have been so incapable and so disabled for 196 consecutive days before that day. It is provided by section 36(4)(d) that a person shall not be entitled to a severe disablement allowance if:

"he or she has attained pensionable age and was not entitled to a severe disablement allowance immediately before he or she attained it .... "

"Pensionable age" is defined in section 27(1) of the Act as, in the case of a man the age of 65 and in the case of a woman the age of 60.

4. The adjudication officer decided that severe disablement allowance was not payable because the claimant was over pensionable age and had not been entitled to the allowance immediately before she attained that age. He founded his conclusion on the fact that she had not claimed and been awarded the allowance before attaining that age, a ground which is suspect in the light of the decision of the House of Lords in Insurance Officer v McCaffrey [1984] 1 WLR 1353. But it is manifest that she was not so entitled; she did not then satisfy the medical conditions and indeed the allowance was not then in existence. The adjudication officer's decision was upheld by the appeal tribunal on sounder grounds and the claimant now appeals to the Commissioner. She was represented at the oral hearing before me by Mr J. D. R. Watkins a Solicitor of the firm of Hallinan Blackburn Gittings & Co of Cardiff and the adjudication officer was represented by Mr Richard Plender counsel instructed by the Solicitor to the Department of Health and Social Security. The sole issue was whether the apparently fundamental obstacle to the claim contained in section 36(4)(d) could be overcome by invoking the provisions of the social security directive on the principle of equality between the sexes, and for that reason the Equal Opportunities Commission sought leave, which I granted pursuant to regulation 17(5)(h) of the Social Security Commissioners Procedure Regulations 1987 [SI 1987 No. 214], to be present and be heard at the hearing. They were represented by Miss Judith Beale instructed by Hallinan Blackburn Gittings & Co above mentioned.

5. The social security directive requires the principle of equal treatment for men and women in matters of social security to be applied to statutory schemes providing protection against among other things invalidity. But by regulation 7 Article 7(1)(a) it operates without prejudice to the right of Member States to exclude from its scope -

> "(a) the determination of pensionable age for the purposes of granting old age and retirement pensions and the possible consequences thereof for other benefits." (my underlining)

The provision of section 36(4)(d) by relating title to pensionable age plainly discriminates between men and women. And the discrimination must contravene the social security directive unless it is excepted therefrom by the words underlined above. It has been obligatory for the United Kingdom to comply with the directive since 23 December 1985 (see the rectified test of the decision of the European Court of Justice (ECJ) in case 384/85 Clarke v Chief Adjudication Officer [1987] 3 CMLR 277 (Clarke's case) rectified as shown in the corrected Commissioner's decision on file CS/212/1984 (to be reported as R(S) 2/88). Although the directive leaves it to Member States the choice of means to the Member States has nevertheless a direct effect inasmuch as a Member State that permits offending laws to subsist cannot rely on their own failure to comply with the directive and cannot rely on its discretion as to the manner of implementation to deny effect to it. The practical effect of decisions of the European Court (ECJ) on the matter (including Clarke's case, case 71/85 Netherland v Federatie Nederlandse Vakweweging 1987 3 CMLR 767 and case 286/85 McDermott and Cotter v Attorney General 1987 2 CMLR 607) where the law offends against the directive by putting members of one sex at a disadvantage in any particular vis-a-vis a member of the advantaged sex is entitled to have the same rules applied as are applied to the advantaged sex which rules remain the only valid point of reference. It follows that if in relation to severe disablement allowance a woman is disadvantaged by being excluded at the age of 60 as compared with a man who is excluded only at the age of 65, and if that disadvantage contravenes the directive the woman is entitled to have the rules applicable to men applied to her. In this case that would mean that section 36(4)(d) did not adversely affect her so long as she becomes entitled to the allowance before the age of 65.

6. Section 36(4)(d) unquestionably discriminates against women. But the question is whether it is a discrimination authorised as being one of the possible consequences for another benefit (severe disablement allowance) of determining different pensionable ages for the two sexes. The ECJ has indicated the need for a link between differential pension ages and the possible consequence for other benefits of that differential and it is necessary to explore the nature of that link. It was suggested by Miss Beale (a suggestion opposed by Mr Plender) that I might refer the question to the ECJ Article 177 of the Treaty of Rome. I have a number of reasons for thinking this inappropriate at the present stage of the proceedings. It seems to me that as a matter of convenience the question whether the claimant satisfies the medical conditions for an award should be resolved first. Further the ECJ would not decide whether section 36(4) infringed the social security directive, it would seek to define the necessary link and might well do so in terms that left an area open to further argument whether the section infringed or not. Accordingly I have decided to endeavour to decide the point myself.

7. Although the ECJ has given several decisions on the social security directive they have not so far as I am aware given any decision on Article 7(1)(a). But there are parallel equal treatment directives relating to employment and access to vocational training (Directives 75/117/EEC and 76/207/EEC) (to which I shall refer as the employment directives) and although these do not contain any exception corresponding to that in Article 7(1)(a) of the social security directive the ECJ has considered the impact of Article 7(1)(a) in cases arising under those directives. In case 19/81 Burton v British Railways Board [1982] 1 QB 1080 the Court (at page 1112) after pointing that the determination of a minimum pensionable age for social security purposes which was not the same for men and for women did not (because of Article 7(1)(a)) amount to discrimination prohibited by Community law rules that an option given to workers tied to the state retirement scheme which applied to workers within five years of that differential pensionable age was not discrimination prohibited by community law. In case 262/84 Beets-Proper v Van Lanshot Bankiers 1987 2 CMLR 616 referred (at page 632) to Article 7(1)(a) as applying only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and as having acknowledged that benefits linked to a national scheme which lays down a different pensionable age for men and women may lie outside the ambit of the aforementioned obligation (viz. the obligation to implement the directive). I mention lastly that there are in the reports of decisions of the ECJ repeated references to the proposition that exceptions from the principle of equal treatment are to be construed strictly (see the Beets-Proper case at page 632 and the Clarke case [1987] 1 CMLR 277 per the Advocate-General at page 283-4.

8. With this guidance I approach the question whether the differentiation between men and women in section 36(4) resulting from the limitation of title to those entitled before attaining pensionable age is excepted from the obligation to implement the directive by being a possible consequence of that differential pensionable ages for other benefits. Miss Beale referred me to a passage from the opinion of the Advocate-General in the Beets-Proper case 1987 2 CMLR 616 at pages 624-5, where he said:

> "Even if different ages may be adopted for private pension schemes it does not follow that different ages may be adopted for compulsory retirement or cessation of work, even if those ages deliberately are made to coincide with the age at which the worker becomes entitled to a pension."

And later in the immediately following paragraph of his opinion the Advocate-General alluded to the possibility (on the legality of which he expressed no opinion) of other benefits than pension being "geared" to the same age differential.

9. In this case severe disablement allowance has been geared to the age differential in pensionable ages of men and women. I have reached the conclusion however that it is not sufficient to escape the directive simply to gear a different benefit to the differential

pensionable ages if the resulting differentiation between sexes in that benefit cannot be shown to have some objective link with pensionable age. If it were it would make it all too easy to evade the provisions of the directive. I am conscious of the way in which the Advocate General in Drake case 150/85 Drake v Chief Adjudication Officer 1987 1 QB 166 at page 171 refuted the argument that invalid care allowance, being paid to the carer and not to the invalid was not an invalidity benefit. I have reached the conclusion that something more is needed than the mere reference to pensionable age with its inherent element of discrimination. There must be some objective link with the differentiation in pensionable ages. For instance severe disablement allowance itself involves more than one age differentiation. A person who become incapable of work before the age of 20 need satisfy for so long as he remains incapable, far less rigorous medical conditions for an award than a person who does not become incapable until later. A second "age bar" occurs at pensionable age. The first age bar is not geared to pensionable age (e.g. to years before pensionable age) and if it had been I should have doubted whether it would be excluded from the principle of equal treatment as a "possible consequence" of the differentiation in pensionable ages.

10. I was referred to the decision of a Tribunal of Commissioners on file CU/63/1987. In that case a male claimant sought to establish that the provision under which a person who has attained the age of 60 is liable to have his unemployment benefit restricted if he is in receipt of an occupational pension was discriminatory against men. He put forward the point that there was no similar rule in relation to women over the age of 55. If there had been, women would have been contending that it was discriminatory and there would have been an interesting question whether this was a possible consequence of the differentiation in pensionable ages. There was however no direct discrimination. The provision applies to men and women alike. But it was indirectly discriminatory because in fact it applied to so many more men than women and it did so for the very reason that pensionable age in the case of women was 60. This was manifestly a consequence of the differentiation in pensionable ages. And so it was held. I do not find that decision of much help to me, though Mr Plender referred me to what the Tribunal had said about the strict construction of the exception in regulation 7(1)(a). They emphasised the word "possible" as being itself a wide word. I have no doubt that in that case the indirect discrimination which they found was a manifest consequence of the differentiation in pensionable ages and that that conclusion was bound to be reached even on the narrowest interpretation of Article 7(1)(a).

11. I have reached the conclusion that it is not possible to evade the requirements of the social security directive by the simple device of referring to pensionable age (as in regulation 6(e) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981) to an age geared to pensionable age. This is not by itself a sufficient link to make it a consequence of the differentiation. By contrast there is obviously a sufficient link if a woman who has attained pensionable age and is actually in receipt of retirement pension is precluded by the Overlapping Benefits Regulations from receiving also a severe disablement allowance when a man of the same age would not be so precluded for the simple reason that, not having attained pensionable age, he was not in receipt of any pension.

12. A more difficult question arises when there is a provision that the right to a benefit comes to an end at pensionable age as happened with mobility allowance when it was first introduced by section 22 of the Social Security Pensions Act 1975 (introducing into the Social Security Act 1975 the new section 37A), subsection (4)(a) being material on the present point. Again the rate of some benefits may change at pensionable age as happens under section 14(2) of the 1975 Act in relation to sickness invalidity and unemploment benefits) and can disappear altogether five years later. I should be disposed to think that these provisions fell to be associated wih the fact that the beneficiary having reached pensionable age fell to be treated as sufficiently provided for by whatever provision that he had made for pension and could not expect to look beyond that; and that accordingly these too were possible consequences for other benefits of the differential consequences which would affect men and women at different ages should properly be regarded as among the

possible consequences for other benefits of the differential pensionable ages.

13. But severe disablement allowance is not quite like that. It is not payable after pensionable age if there was no title immediately before pensionable age. In this respect it is in parallel with the age of 20 in section 36(1). Just as a person who has been incapable since before the age of 20 and has had no chance in life at all can secure title to having to be 80 per cent disabled; so a person who secures title to the allowance relatively early in life and before the weaknesses of old age set in, qualifies for the allowance after pensionable age. Viewed this way the differentiation between men and women does not at first sight appear to be a consequence of the differentiation in pensionable ages. It is rather the consequences of a differential view being taken of the setting in of infirmity in the two sexes.

14. Mr Plender addressed to me forceful arguments to the effect that this was not so. I trust that he will forgive me if I do not take them in his order. He submitted that the provision entitling a person to retain the allowance after pensionable age if title had been secured before that age was purely a provision designed to preserve accrued rights. This does not alter its effect, whatever its purpose. Moreover in Clarke's case it was the ıdable intention of the Government to preserve existing rights which actually have the effect of perpetuating the discrimination between men and women which the ECJ held to be objectionable.

15. Then Mr Plender divided up the non-contributory benefits in the Social Security Act 1975 into two groups viz. (1) those which provided for meeting expenses (mobility allowance, attendance allowance and guardians' allowance) and those which compensated for loss of earnings, viz. severe disablement allowance, mobility allowance and category C and D retirement pensions. The former he said did, while the latter did not have a cut off at pensionable age. I find this a little difficult to follow. It is true of course that severe disablement allowance and invalid care allowance have a similar cut off at pensionable age in a case where the claimant was not entitled before that age. But category C and D retirement pension are pensions for the over eighties. Moreover mobility allowance (which falls into the other category) as enacted in section 22 of the Social Security Pensions Act 1975 had a straight cut off at pensionable age; which has now been altered in deference perhaps to right of equal treatment to 75 all round with a cut off at 65 all round where the claimant was not previously entitled. Moreover invalid care allowance, which was in Mr Plender's category of compensation for loss of earnings, was held in Drake's case to fall within the social security directive because in substance it provided a benefit for the invalid, which switches it into the other category and incidentally attaches the pensionable age cut off to the carer and not to the invalid.

16. Then Mr Plender referred me to the Social Security (Credits) Regulations 1978 [SI 1978 No. 556]. He pointed out that under regulation 9(1) a person receiving severe disablement allowance was entitled to be credited with contribution which under regulation 9(9) would be available only or mainly for securing title to retirement pension. Regulation 9(9) is very complex but I am prepared to assume that in general it has the effect that Mr Plender claimed. But under regulation 9(1) the credits are not linked to severe disablement allowance but to incapacity for work. And I fail to see the importance of this point.

17. Next Mr Plender pointed out to me that the rate of severe disablement allowance and of non-contributory invalidity pension which it replaced has always been the same as the rate of category C retirement pension. It has also unusually if not universally been at the same rate as a variety of other benefits, and I regret to say I that I do not follow why this makes the differentiation of ages between men and women for severe disablement allowance a consequence of the differentiation for pensionable age. I do not find Mr Plender's points either individually or collectively sufficient to make me alter the provisional view I expressed at the end of paragraph 14. In my judgment the intention behind section 36(3)(d) was to permit those whose incapacity set it before the infirmities of begin to assume

significance to continue to in receipt of the allowance, and that those whose incapacity does not set until an age when the infirmities of age begin to assume significance shall never become entitled to it. For this purpose pensionable age has been selected as the critical age for a purpose unconnected with title to pension itself. And this is not in my judgment a consequence for severe disablement allowance of the differential pensionable ages. I concluded therefore that if the claimant satisfies the medical and other conditions (including the 196 day waiting period) before she is 65 she can establish title to severe disablement allowance.

18. This is not the end of the matter the question whether she is severely disabled and has been so disabled for the relevant period of 196 days must be referred to the medical authorities and I direct the adjudication officer to do so. In any event it appears that as the claimant's husband is in receipt of an increase of invalidity benefit for her (now at the same rate) the Overlapping Benefits Regulations will rule out payment to both of them. The claimant told me at the hearing that she had been awarded mobility allowance from, she thought, August 1987. Regulation 10 of the Social Security (Severe Disablement Allowance) Regulations 1984 [SI 1984 No. 1303] provides that the evidence required that on any day a person suffers or suffered from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts or amounted to 80 per cent shall consist of a number of alternatives, one being that he or she is or was entitled to a mobility allowance. Where this is proved by an official record the adjudication officer is empowered to give the decision. This does not offer a short cut as the claimant needs to establish that she was 80 per cent disabled much earlier. Moreover the power conferred on the adjudication officer (pursuant to section 108(2) of the Social Security Act 1975) is a power to determine a medical question, and I do not consider that that power passes on an ordinary appeal to the social security appeal tribunal or the Commissioner. In any case I am puzzled by regulation 10, which is I understand made under paragraph 2 of Schedule 13 to the Social Security Act 1975 relating to procedure regulations. Section 35(7)(c) provides that regulations may prescribe the circumstances in which a person is or is not to be treated as incapable of work or as receiving full-time education, but not the circumstances in which a person is or is not to be treated as 80 per cent disabled. It is somewhat surprising to find that a power studiously omitted from section 36(7) is taken as conferred by a side wind under the guise of a procedure regulation. I should if the question arose here, require to be satisfied that the provision is valid.

19. The claimant's appeal succeeds.

(Signed) J G Monroe
Commissioner

Date: 30 March 1988