

CS 170/1978

PF

SOCIAL SECURITY ACTS 1975 TO 1977
CLAIM FOR NON-CONTRIBUTORY INVALIDITY BENEFIT

DECISION OF A TRIBUNAL OF NATIONAL INSURANCE COMMISSIONERS

Name:

Local Tribunal: Worthing

Case No. 1/4

[ORAL HEARING]

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1. This is the insurance officer's appeal from a decision of the Worthing local tribunal given on 9 January 1978. The appeal fails. The tribunal, one member dissenting, reversed a local insurance officer's decision rejecting a claim for non-contributory invalidity pension. The tribunal held that the claimant, who is a married woman living with her husband, was entitled to such pension from and including 17 November 1977. We heard the appeal on 30 August 1978 when Mr J P Canlin of the solicitor's office of the Department of Health and Social Security represented the insurance officer and Mr Nicholas Warren of the Citizens' Rights Office represented the claimant.

2. Entitlement to non-contributory invalidity pension (hereinafter called "NC benefit") is derived from section 36 of the Social Security Act 1975. Through the operation of a commencement Order NC benefit first became payable to a married woman living with her husband on 17 November 1977, which is the starting date of the local tribunal's award. So far as relevant to this appeal section 36 provides as follows:

"36.-(1) Subject to the provisions of this section, a person shall be entitled to a non-contributory invalidity pension for any day on which he is incapable of work, if he has been so incapable for a period of not less than 196 consecutive days ending immediately before that day.

(2) A person shall not be entitled to such a pension if he is under the age of 16 or receiving full-time education; and a woman shall not be so entitled if -

(a) she is married and either -

(i) she is residing with her husband, or

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(ii) ... or

(b) ...

except where she is incapable of performing normal household duties".

(3)

(4) ...

(5) ...

(6) ...

(7) Regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as incapable of work, as incapable of performing normal household duties or as receiving full-time education".

3. The Secretary of State for Social Services has made only limited use of his power to make regulations under section 36(7). Such use as he has made is contained in regulations 4, 13 and 13A of the Social Security (Non-Contributory Invalidity Pension) Regulations 1975 [SI 1975 No 1058]. Regulation 4 provides in effect that for the purposes of NC benefit a day shall not be treated as a day of incapacity for work unless it would be so treated for the purposes of contributory benefit. This has the result that incapacity for work for the purposes of section 36(1) depends on proof that the claimant is incapable of work which he can reasonably be expected to do and for which an employer would pay.

4. Regulations 13 and 13A were inserted into and became part of SI 1975 No 1058 by force of regulation 2 of the Social Security (Non-Contributory Invalidity Pension) Regulations 1977 [SI 1977 No 1312]. The latter instrument was made on 29 July 1977, and thus closely preceded the date (17 November 1977) on which NC benefit first became payable to married women. Regulation 13A, so far as relevant to this appeal, provides as follows:-

"Circumstances in which a woman is or is not to be treated as incapable of performing normal household duties

13A.- (1) A woman shall not be treated as incapable of performing normal household duties unless she is so incapable by reason of some specific disease or bodily or mental disablement.

(2) Where as a result of such a disease or disablement a woman-

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- (a) is unable to perform to any substantial extent, or cannot reasonably be expected to perform to any substantial extent, normal household duties; or
- (b) in the absence of substantial assistance from or supervision by another person, is unable to perform to any substantial extent, or cannot reasonably be expected to perform to any substantial extent, such duties,

she may be treated as incapable of performing such duties.

(3) Where a woman is living as a member of a household in circumstances in which, were she capable of performing normal household duties, she might ordinarily be expected to be responsible for performing such duties in that household-

- (a) if in the circumstances existing in that household as they relate to the performance of normal household duties therein she would fall to be regarded as incapable of performing such duties, she may be so regarded notwithstanding that she would not be so regarded in substantially different household circumstances; and
- (b) if in the circumstances existing in that household as they relate to the performance of normal household duties therein she would not fall to be regarded as incapable of performing normal household duties, she may be treated as not so incapable notwithstanding that she would be or fall to be treated as incapable of performing such duties in substantially different household circumstances."

5. Mr Canlin accepted that the claimant has been continuously incapable of work in terms of section 36(1) since 17 November 1977. He also accepted that she was so incapable for 196 consecutive days immediately preceding that date. In making this concession it was not clear whether he had considered regulation 13(1)(a) of SI 1975 No 1058 (as amended by SI 1977 No 1312) which in effect provides that for the purposes of determining entitlement to NC benefit in the case of a woman living with her husband, a day shall not be treated as a day of incapacity for work unless on that day such claimant is both incapable of work and incapable of performing normal household duties. Thus, the claimant has to establish under section 36(2) that she has been continuously incapable of normal household duties since

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17 November 1977, and was so incapable for 196 days immediately preceding that date. The effective question in the appeal is whether as above she is and was incapable of performing normal household duties, it being conceded that if that is established, she is and was incapable of work.

6. The claimant is aged 54 and sustained an extensive coronary thrombosis in 1973. She developed angina of effort in 1976, as a result of which she is incapable of sustained exertion and her ability to perform household duties is thus severely restricted. According to the evidence of the doctor who looked after her until December 1977 (his evidence was not before the local tribunal) any exertion, however small, may bring on angina. On the other hand there is some evidence which does indicate that there are various light household duties which she can perform without difficulty. The local tribunal's decision in the claimant's favour was based on a conclusion that the evidence brought her within the terms of regulation 13A(2)(a). They found that "the claimant has proved that she was and is incapable of performing normal household duties to a substantial extent, viz. she cannot go shopping, do heavy household work or household work which entails sustained exertion". Mr Canlin accepted this finding, as do we, although he challenged the conclusion which the tribunal drew from it.

7. Mr Canlin's argument on regulation 13A(2)(a) was as follows. He accepted that by reason of her physical condition the claimant is unable to perform normal household duties to a substantial extent. He submitted however that the evidence leads to the conclusion that the amount which she can do is also substantial. He went on to argue that a woman can only take advantage of regulation 13A(2)(a) if the amount she is able to do is less than can properly be described as substantial. The way he put it was that a person who is able to perform to a substantial extent normal household duties cannot, for the purposes of the regulation, be held to be unable to do so. We reject this argument. We are prepared to assume, without deciding, that the amount the claimant can do by way of household duties is substantial. We accept (see decision CSS 2/78, paragraph 6) that there is no logical difficulty in concluding that a person is at one and the same time both able and unable to perform household duties to a substantial extent. Furthermore, we appreciate that Mr Canlin's argument derives support from paragraph 16 of CS 3/78 (to be reported as Decision R(S) 5/78). However, it was not argued in that case that the real question was the claimant's degree of inability rather than the degree of ability, and it is that argument which as it relates to regulation 13A(2)(a) we now all accept as correct. The essential point to note in our judgment, is that regulation 13A(2)(a) is concerned not with what a woman is able to do but with what, because of disease or disablement, she is unable to do. Once it is found that what she is unable to do is substantial - and Mr Canlin accepts that that is the claimant's position - then in our judgment she brings herself fairly and squarely within the terms of the regulation; and it is

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no longer material to consider what she is able to do, or whether that also is substantial.

8. Even if we had concluded that the claimant could not bring herself within regulation 13A(2)(a) we would nevertheless have held that she is entitled to succeed under section 36(2) operating independently. Mr Canlin accepted that regulation 13A does not exhaustively define the circumstances in which a married woman living with her husband may be treated for the purposes of section 36(2) as incapable of performing normal household duties. In order to satisfy the condition imposed by the subsection she does not have to bring herself within the regulation. All that the regulation does is to define particular circumstances in which a woman may be treated as satisfying the condition.

9. Mr Canlin submitted that in order to satisfy section 36(2) operating independently a woman must establish that she is totally incapable, or only minimally capable, of performing household duties. In support of this he pointed out that under section 36(1) a person must be incapable of work in order to qualify for NC benefit. He submitted that a woman who has a limited capacity for household duties cannot be held to be incapable of work if she can perform them to an extent sufficient to earn remuneration from an employer (see Tribunal Decision R(S) 11/51, paragraph 6). Therefore, he said, section 36(2) would be otiose unless it contemplated virtually total incapacity for housework. We cannot accept this.

10. In our judgment the explanation of the additional condition for married women imposed by section 36(2) is to be found in paragraphs 9 and 10 of the report by the National Insurance Advisory Committee ("NIAC") to the Secretary of State on the draft of the Social Security (Non-Contributory Pension) Amendment Regulations 1977 Cmnd. 6900. These paragraphs, parts of which we quote below, lead us to three conclusions. First, that section 36(2) reflects the legislature's concern that married women who rely on their husband's income for support and occupy themselves with making a home for their family should not be disadvantaged by the fact that they do not qualify for contributory benefits in the event of sickness or disablement. Our second conclusion is that the question whether a married woman is incapable of work for the purpose of NC benefit has to be determined separately from and without regard to her capacity for household duties. This view is consistent with the terms of regulation 13(1)(a) (supra), and was clearly the view held by the draftsman of that provision. The provision envisages that incapacity for work (section 36(1)) and incapacity for household duties (section 36(2)) are separate conceptions each of which must be independently proved. It thus follows that paragraph 6 of Tribunal Decision R(S) 11/51 has no bearing on this case. Our third conclusion is that section 36(2) invites, and is intended to invite, a broad approach by the statutory authorities to the question whether a woman is incapable of household duties.

11. At paragraph 9 of their report NIAC say:-

"Such women [ie those who rely on their husband's income for support and occupy themselves with making a home for their family] regard caring for their home and family as their major occupations in the same way that other people of working age regard their paid employment. In considering whether society should provide her with some income because she is handicapped for work, it is not unreasonable to ask of an impaired married woman who is not in work, not only whether she is incapable of some other work for which an employer would pay her, but also whether she is incapable of her normal work (her housework). The two-part test (incapacity for paid work and incapacity for household duties) is quite clearly akin to the two-job test (incapacity to do own job and incapacity to do any job for which an employer would pay) applied to other invalidity pension claimants".

At paragraph 10 of their report NIAC say:-

"The Act does not proceed to define "normal household duties" but provision is made for regulations to prescribe the circumstances in which a person is or is not to be treated as incapable of performing normal household duties. It might have been expected therefore that the draft regulations now under consideration would have attempted to provide a detailed definition, but they do not do so. The Department have explained that from their long experience of the existing incapacity benefits - sickness, invalidity and injury benefits, all of which are paid on the basis of "incapacity for work" - it has been found that leaving to the statutory authorities the interpretation of "incapacity" works well, enabling consistency to be achieved through the development of case law, while also providing a degree of flexibility to enable justice to be done in varying circumstances. Their experience is that a wide variety of circumstances can be relevant to the question of incapacity for work and they consider that an equally wide variety of circumstances will apply to the question of incapacity for normal household duties. It was for this reason that no attempt was made in drafting the regulations to define more closely the concept of incapacity for normal household duties; the Department have advised us that they are satisfied that to seek to make detailed provisions in regulations would inevitably lead to excessive rigidity and probably to many anomalies. It could of course also reduce the scope for claimants and their representatives to influence the development of generally acceptable broad standards."

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12. In the light of the above we reject Mr Canlin's submission that in order to bring herself within the exception in section 36(2) - operating independently and unaided by regulations - a woman must establish that there are virtually no household duties she can perform. That seems to us as unacceptable as the converse view, namely that she can be held to be so incapable if there are any duties she cannot perform. Incapacity in our judgment depends on her establishing that by reason of disablement she is effectively prevented from running her household in the manner to be expected of a housewife in her circumstances, and to maintain it to the standard appropriate to such circumstances.

13. Applying the above to the evidence before us, we are satisfied that the claimant is, and has since 17 November 1977 been, incapable of performing normal household duties in terms of section 36(2) unaided by regulation 13A, and that she was so incapable for the requisite period prior to that date.

14. Having regard to the view we take as to the effect and scope of section 36(2) operating independently of regulation 13A, it may be asked what purpose that regulation serves. While it is not for us to answer that question, it may be relevant to point out that what the regulation does is to define in paragraphs (2) and (3)(a) certain circumstances in which a married woman may be treated as incapable of performing household duties. It follows that these provisions are intended either to widen the scope of section 36(2) or, alternatively, to make clear what might otherwise be doubtful, namely that section 36(2) does not exclude a married woman from entitlement if she satisfies the conditions they define. Paragraphs 16 and 18 of the above-mentioned NIAC report indicate that paragraphs (2) and (3)(a) are intended to ensure one or other of the above purposes. In particular, at paragraph 16, the report says:- "... regulation 13A(2) has been inserted to ensure that the claimant does not have to be totally incapable of all household duties. It requires her only to be unable to perform the duties 'to any substantial extent' and it also allows the claimant to be treated as so incapable if she 'cannot reasonably be expected' to perform the duties to any substantial extent". Regulation 13A(2) was as it seems to us made ex majore cautela, but this does not in our judgment justify a conclusion that section 36(2), operating independently of it, has the effect contended for by Mr Canlin.

15. For technical reasons with which it is unnecessary to burden this decision we limit our award of NC benefit to the period from 17 November 1977 to 15 February 1978, but our decision will continue to apply in principle after the latter date.

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16. Our decision is that non-contributory invalidity pension is payable for the inclusive period 17 November 1977 to 15 February 1978.

(Signed) R J A Temple
Chief Commissioner

(Signed) Hilary Magnus
Commissioner

(Signed) J N B Penny
Commissioner

Date: 8 September 1978

Commissioners' File: C.S. 170/1978

C.I.O. File: I.O. 1253/NV/78

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