

AGM
Dependency Increase - Claimant
entitled to this for wife in receipt of occupational
pension who is not
also engaged in employment.

JGM/AM

Commissioner's File: CP/07/1987

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Region: London South

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: _____

Appeal Tribunal: _____

Case No: _____

ORAL HEARING]

1. My decision is that the claimant is not prevented by regulation 8 of the Social Security Benefit (Dependency) Regulations 1977 as amended from being awarded an increase of category A retirement pension for his wife.
2. The claimant attained pensionable age and retired on 26 July 1986. He claimed a category A retirement pension including an increase thereof for wife born on 28 January 1934, and such pension was awarded to him from the next following payment day after his retirement. But the increase for his wife was refused on account of her occupational pension by reference to regulation 8 of the Social Security Benefit (Dependency) Regulations 1977 [SI 1977 No 343] (the Dependency Regulations) inserted into those regulations by the Social Security Benefit (Dependency) Amendment Regulations 1985 [SI 1985 No 1190]. An appeal from this refusal was rejected by the social security appeal tribunal, and the claimant now appeals to the Commissioner. He presented his appeal before me with the assistance of Mr Arthur Tibbitts a past president of the Civil Service Pensioners' Alliance and the adjudication officer was represented by Mr J P Canlin of the Solicitor's office of the Department of Health and Social Security.
3. I find it necessary in order to explain the point in this case to consider the history of the relevant provisions since the enactment of the Social Security Act 1975 (the 1975 Act). Section 45 of that Act, which applies to a category A or C retirement pension and to an invalidity pension, provided in subsections (2) and (3) as originally enacted, so far as material, as follows:
"(2) Subject to the following provisions, the weekly rate of a pension to which this section applies, when payable to a man, shall be increased by the amount respectively specified in relation to the relevant pension in Section 4, Part IV, column (4) -
(a) for any period during which the pensioner is residing with his wife; or
(b) for any period during which the pensioner is contributing to the maintenance of his wife at a weekly rate not less than the amount,

and his wife is not engaged in any one or more employments from which her weekly earnings exceed that amount.

- (3) Where the pensioner is residing with his wife, and the earnings of his wife for the week ending last before any week for which he is entitled to benefit pursuant to this section exceeded £20, the weekly rate of benefit under this section shall for the last-mentioned week be reduced -

.....

There follow a provision for the reduction of the increase by reference to the amount of the earnings. and sundry definitions. The figure of £20 above mentioned has been regularly increased. I shall refer to a wife to whom paragraph (a) of subsection (2) applies as a "resident wife" and a wife to whom paragraph (b) applies as a "maintained wife".

It will be noticed at once that there is a distinction between the treatment of a resident wife and a maintained wife. The difference is somewhat reduced by subsection (3). One is tempted to wonder why the legislature should have gone to such lengths to distinguish marginally between the two cases. But I am not permitted to ignore the distinction on the ground that is anomalous or capricious. I mention the point only because both sides addressed to me arguments based on the apparent anomalies to which the provisions as they now stand give rise. I have simply to give effect to the words of the enactment where they are clear. Comparable but not identical provisions were made in section 46 of the 1975 Act for an increase for a female having the case of children, in section 47 for an increase of invalidity pension for a husband or dependant relative and in section 66 for an increase of industrial disablement benefit for a wife (extended in 1980 to spouses of either sex). In the last-mentioned case in particular no distinction was drawn between the resident wife and the maintained wife, both being treated in the manner in which the resident wife is treated under section 45.

5. The Social Security (No 2) Act 1980 first introduced limitations on title to non-means tested benefits by reference to occupational pensions. The limitations at this stage were confined to those over 60 claiming unemployment benefit. For this purpose the Act defined the phrase "payments by way of occupational pension" as meaning in relation to a person:

"..... periodical payments which in connection with the coming to an end an employment of his [or hers] fall to be made to him [or her] and to be so made out of money provided wholly or partly by the employer or under arrangements made by the employer or out of money provided under an enactment or instrument having the force of law in any part of the United Kingdom or elsewhere and other such payments as are prescribed."

6. The next relevant amendments were made by sections 12 and 14 of the Health and Social Security Act 1984. Section 12 introduced a provision for increase of category A retirement pensions for husbands by inserting into the 1975 Act a new section 45A without applying the section 45 distinction between a resident wife and a maintained wife to husbands but instead equating both with the maintained wife. Section 14 introduced a new section 47B and a new section 66A. The new section 47B so far as material reads as follows:-

"(1) Except as may be prescribed -

(a) in section 41 and sections 44 to 47 above any reference to payments by way of occupational pension; and

(b) in sections 44, 45, 45A and 47 any reference to a period in which a person is not engaged in any employment includes a reference to a period in respect of which a person is not entitled to any payment by way of occupational pension.

(2).....

The new section 66A makes a parallel provision in relation to section 66 in so far as it introduces a provision corresponding to section 45A (1)(a), but as section 66 (which makes no distinction between a resident spouse and a maintained spouse) contains no reference to a person not being engaged in employment it makes no provision corresponding to section 47B (1)(b).

7. At the same time an amendment was made to the Social Security Benefit (Computation of Earnings) Regulations 1978 [SI 1978 No.1698] by the Social Security Benefit (Computation of Earnings) Amendment Regulations 1984 [SI 1984 No. 1697] amending the definition of "earnings" for purposes of section 41, 44 to 47, 64 and 66 of the 1975 Act so as to include payments by way of occupational pension within the meaning of the Social Security (No 2) Act 1980, thereby bringing the definition set out in paragraph 4 above into the interpretation of the phrase for present purposes.

8. Finally section 13 of the Social Security Act 1985 (the 1985 Act) among other things repealed subsection (3) of section 45 and the corresponding subsection of section 66 and introduced the following new subsection (2A) into section 45 and paralalled new subsections into sections 45A, 46, 47 and 66. The new subsection (2A) of section 45 reads as follows:

"Regulations may provide that for any period during which the pensioner is residing with his wife and his wife is engaged in any one or more employments from which she has earnings -

(a) the increase of benefit under this section shall be subject to a reduction in respect of the wife's earnings; or

(b) there shall be no increase of benefit under this section".

9. The section also introduced the distinction between resident husband and the maintained husband with section 45(a). The power conferred by the foregoing provision and other parallel provisions was exercised in the Social Security Benefit (Dependency) Regulations 1985 above referred to. This introduced into the Dependency Regulations a new regulation 8. Paragraph (1) of this new regulation indicates that it applies to (among other provisions) section 45(2) of the 1975 Act, under which the present increase is claimed. Paragraph (2) provides as follows:

"Where paragraph (1) applies there shall be no increase of benefit if, in the week before the week ending last before any week in which the beneficiary is entitled to benefit under any provision specified in paragraph (1), the adult dependant had earnings which exceed the amount specified in sub-paragraph (1)(a) of Part I of Schedule 4 to the [1975] Act.

10. In the present case the claimant's wife resides with the claimant and had retired prematurely from the civil service on account of ill-health and she was not engaged in any employment, but she was in receipt of a pension under the Principal Civil Service Pension Scheme, which the claimant confirmed would not have been payable had her employment not come to an end. The amount of the pension was less than that to which she would have been entitled had she continued until normal retiring age, but it was of such magnitude that if it fell to be taken into account as earnings under the regulation an increase of category A retirement pension for her would be lost. The adjudication officer decided that the payments by way of occupational pension constituted earnings within the meaning of regulation 8(2) and that accordingly no increase was payable for the claimant's wife. His decision was confirmed on appeal by the appeal tribunal and the claimant now appeals to the Commissioner.

11. The main contention of the claimant was that it was altogether anomalous that his wife's pension paid long before she reached normal retirement age by reason of her ill-health should be treated as an occupational pension. He pointed out that when she reaches retirement age she would be entitled to a pension on the claimant's contributions irrespective of whether she had an occupational pension, and, as I understood him, he suggested that this was illogical, and that accordingly I ought to hold that his wife's pension payments were not payments by way of occupational pension.

12. I can follow that there is some anomaly in subjecting a benefit which is essentially non-means-tested to a highly selective means test, which takes no account of other resources that a person struck down by early ill-health may have. But if the regulations so provide there is no way in which I can decline to apply them on the basis of some suggested anomaly. It was not suggested that the pension was not, in terms of the definition cited in paragraph 4 above, paid out of such moneys as are mentioned in the definition. It seemed to me to be suggested that it was not payable in connection with the termination of the wife's employment but in connection with the onset of her ill-health. In my judgment as the pension would not have been paid if the employment had not come to an end and as (notwithstanding that it is perhaps not impossible that she should recover and be re-instated) the events that have happened properly constituted the termination of the wife's employment, the pension is an occupational pension within the definition.

13. There is however a more formidable argument that can be put on behalf of the claimant. If one accepts the interpretation of "payments by way of occupational pension" that I have adopted, one can see at once that immediately before the coming into force of the relevant sections of the 1985 Act the claimant would have had no title to an increase of pension for his wife because in terms of section 45(3), now repealed, the earnings of the claimant's wife (including payments by way of occupational pension) would have exceeded the

statutory figure. But section 45(3) has been repealed and replaced by section 45(2A) which interpolates an additional condition for the making of regulations restricting the right to an increase. It applies only in relation to any period during which among other things the wife is engaged in any one or more employments from which she has earnings (defined to include payments by way of occupational pension in section 47B(1)(a) to include payments by way of occupational pension; and the claimant's wife is not actually engaged in any employment. Regulation 8(3) was made under the powers in section 45(2A) among other sections; Mr. Canlin was not able to refer me to any further enabling condition, relevant to section 45. And unless the enabling power authorises the extension of the restrictions in regulation 8(2) to cases where the wife is not engaged in employment, regulation 8(2) is without effect in relation to a wife not so engaged, though in the light of the decision in Dunkley v Evans [1981] ICLR 1522 I do not think this would vitiate its effect in relation to wives who were engaged in employment.

14. Does section 45(3) authorise the making of regulations taking away the right to an increase for a resident wife, if that wife has earnings in the form of payments by way of occupational pension without being engaged in any employment? Before I consider Mr. Canlin's submissions on the point I ought I think to refer to what I have called the parallel amendments made by section 13 of the 1985 Act in the other sections providing for an increase of benefit, viz section 45A relating to increase of retirement pension for a husband, section 46 relating to increase for a person having charge of children, section 47 providing for an increase of invalidity pension for a husband or other dependant relative section 66 relating to an increase of disablement pension for a spouse. For the restriction on increases to operate the husband or spouse concerned specifically must be engaged in employment if a resident husband or spouse in section 45A and 66. In the other cases including those of a non-resident husband or spouse the restriction can be made to operate if the husband or spouse concerned has earnings, which by section 47B(1)(a) or section 66A(1) include payments by way of occupational pension. This leads me to think that it was intended that there should be some practical difference between the cases where there is a requirement that the person concerned shall be engaged in employment and those where there is none. The difference is that in cases where there is such a requirement the increase is lost only if the person concerned, as well as having an occupational pension is in employment, in which case the earnings from the employment plus the amount of the payments by way of occupational pension will be taken into account, whereas if the person is not in employment the entitlement to an occupational pension do not adversely affect the claimant. It is of course quite common to find that a person has an occupational pension (e.g. from the armed services) and also has employment.

15. Mr. Canlin suggested to me that this distinction is illogical. I do not find it any more illogical than a number of distinctions to which I have already alluded that unquestionably exist, and in any case I cannot disregard the plain meaning of the words on the ground of some supposed illogicality in the result. I can of course have regard to such illogicality as an aid to the interpretation of the words. Mr. Canlin invited me to have such regard in the application to section

45(2A) of the "deeming" provisions of section 47B. He pointed out that as under section 47B(1)(a) references to earnings include references to payment by way of occupational pension, it followed that in section 45(2) the requirement that the wife should be engaged in employment from which she has earnings included any payments by way of occupational pension; and that this included reference to payments by way of occupational pension added nothing to the reference to earnings unless a person in receipt of payments by way of occupational pension fell to be treated for that reason alone to be engaged in employment.

16. This argument, if accepted, would lead to the conclusion that the reference to being engaged in one or more employments (that seem to have been deliberately inserted in some but not all places in the 1975 Act by section 13 of the 1985 Act) was entirely otiose, and that the matter could have been left, as in some cases it has been, as a requirement that the person concerned should have earnings. The distinction is most sharply indicated in the changes made by section 13(5) of the 1985 Act in section 66 of the 1975 Act. Here the distinction between the resident spouse and the maintained spouse has been introduced for the first time, and in relation to the resident spouse the spouse has to be engaged in employment from which he or she has earnings, whereas the maintained spouse merely has to have earnings. I have come to the conclusion that I cannot adopt an interpretation, contrary to the plain words of the provision which would have the effect of treating the reference to being engaged in employment as if it were not there. I appreciate that this means that in relation to section 45(2A) the deeming provision of section 47B(1)(a) adds nothing. But there is no need for a deeming provision to have effect every time there is a potential for applying it (see Craies on Statute Law (7th Edition) page 216), particularly where, as here, the deeming section was enacted at a time when the section to which it is being applied it was not in existence.

17. I ought also to mention section 47B(1)(b), which provides for purposes of section 45 among others that references to a period during which a person is not engaged in employment shall include references to a period during which he is not entitled to any payment by way of occupational pension. For this to operate there must be a "reference" to such a period. It does not simply provide that a person should not be treated as not in employment unless he is also not entitled to any payment by way of occupational pension. There is a clear reference in section 45(2) to a period during which a person is not engaged in any employment and I have no doubt that section 47B(1)(b) applies to it. But there is no such reference in section 45(2A). In this connection it is significant that section 66A (which does for section 66 what section 47B does for section 45) contains no provision corresponding to section 47B(1)(b) for the excellent reason that section 66 contains no reference to a period during which a person is not engaged in any employment but only to a person's being so engaged. I do not consider that section 47B(1)(b) assists Mr. Canlin.

18. I conclude therefore that as the claimant's wife as at the date of her husband's retirement residing with him and not engaged in any

employment regulation 8 of the Dependency Regulations is ineffective to deprive her husband of the right to any increase of retirement pension for her so long as she remained so resident and was not engaged in any employment. It follows that unless there is some other obstacle to the payment of the increase for her the claimant is entitled thereto at least for the time being.

19. The claimant's appeal is allowed

J G Monroe
Commissioner

3 June 1987