No indication yet that claimant is to appeal.

MJG/SH/38

Commissioner's File: CP/931/1989

Region: North Eastern

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 19 January 1989, as that decision is erroneous in law and is set aside. I give the decision which the social security tribunal should have given, namely that the claimant is not entitled to Retirement Pension (Category A) from 22 December 1984 to 10 August 1985 inclusive. That is because the claim for retirement pension was not made until 11 August 1986 and section 165A of the Social Security Act 1975 provides that no person shall be entitled to retirement pension in respect of any period more than 12 months before the date of claim: Social Security Act 1975, section 101 (as amended).

2. This is an appeal to the Commissioner by the adjudication officer against the unanimous decision of a social security appeal tribunal dated 6 December 1988, leave to appeal to the Commissioner having been granted by the tribunal chairman. The tribunal had allowed the claimant's appeal against the decision of the local adjudication officer issued on 21 November 1986, to the same effect as my decision in paragraph 1 above.

3. The facts are briefly as follows. The claimant is a married woman living with her husband in the United States of America. She attained pensionable age of 60 years on 17 May 1975. On 8 December 1980 she made a claim for U.K. retirement pension (Category A) based on her own contributions. The claim was in fact constituted by a letter of enquiry dated 8 December 1980 by her husband on behalf of himself and of the claimant. By a certificate dated 30 May 1989 the Secretary of State has accepted that letter "as being a claim for benefit made in sufficient manner in the circumstances of this particular case". I confirm that in substance that letter can be regarded as a claim.

4. The original correspondence is not now available but the claimant's summary of the matter in a letter of 15 February 1988, as follows, has been accepted as correct,

> "The Department's reply to my husband's letter dated 27 January 1981 (your ref: OGD1/180/139890) specifically informed me that I was not entitled to any pension in my own right due to the 'Half Test' but that I should apply again as a dependant wife when my husband approached pensionable age."

5. The reference to the "Half Test" is a reference to the "Married Woman's Half Test", a

rule formerly contained in section 28(2) of the Social Security Act 1975, which required a married woman attaining pensionable age before 6 April 1979 to satisfy an extra contribution condition to receive a pension based on her own insurance, namely that she had to have paid or been credited with full rate contributions for at least half the number of weeks between the date of her marriage and her attaining pensionable age at 60 years.

6. That test was abolished with effect from 22 December 1984 by section 29(2) of and Schedule 6 to the Social Security Act 1985. That was done in order to comply with Article 4(1) of European Economic Community Council Directive 79/7/EEC of 19 December 1978, (the Directive is set out in Official Journal 1979, No. L6, p.24). The Directive is concerned with the progressive implementation of the principle of equal treatment for men and women in matters of social security and it required Member States to bring into force the laws necessary for compliance by at the latest 22 December 1984.

7. The subsequent history is related in the claimant's letter of 15 February 1988 as follows,

> "My husband reached pensionable age on November 22, 1986. In August 1986 we received forms from the DHSS relating to our pension applications and my husband and I both completed these forms and mailed them to the DHSS on August 12, 1986. [Those forms have been treated also as a claim by the claimant for retirement pension in her own right based on her own contributions]. Subsequent correspondence revealed to me that the 'Half Test' had been abolished and that I was in fact entitled to a pension in my own right from December 22, 1974. However the DHSS, citing a rule that no pension payment can be backdated more than 12 months and ignoring the fact that I did in fact first apply in December 1980 (through my husband's letter), determined that my pension should commence on August 12, 1985; i.e. 12 months before my August 1986 application as a dependent wife. Thus I lost more than 7 months pension payments through no fault of mine."

8. The 12 months rule referred to is contained in section 165A of the Social Security Act 1975 which, as in force at the date of the 1986 claim, read as follows,

> "165A. (1) Except in such cases as may be prescribed, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied -
>
> (a) he makes a claim for it -
>
> (i) in the prescribed manner; and
>
> (ii) subject to subsection (2) below, within the prescribed time; or
>
> (b) by virtue of a provision of Chapter VI of Part II of this Act or of Regulations made under such provision he is treated as making a claim for it [not relevant to the circumstances of this case].
>
> (2) Regulations shall provide for extending, subject to any prescribed conditions, the time within which a claim may be made in cases where it is not made within the prescribed time but good cause is shown for the delay.
>
> (3) Notwithstanding any regulations made under this section, no person shall be entitled -

(a)-(b) [not relevant]

(c) to any other benefit (except disablement benefit or industrial death benefit) in respect of any period more than 12 months before the date on which the claim is made."

9. Regulations do in fact provide for back-dating of a claim where "good cause" is shown for the delay and indeed the claimant has been rightly held to have had "good cause" for the delay in claiming (because eg. publicity as to the abolition of the Half Test did not reach her in the United States of America) but that of course can only take her back to a maximum of 12 months before the date of claim (section 165A(3)(c)).

10. The social security appeal tribunal however held that the 12 months' limit in section 165A was invalid in this case on the ground that it offended the direct effect of the EEC Directive, in that the 12 months' limit as applied in this case perpetuated discrimination against women beyond the last date on which that was, under the Directive, possible namely 22 December 1984, the 'discrimination' against the claimant continuing until 10 August 1985 (i.e. 12 months before the date of her claim on 11 August 1986). In a very careful decision, recorded in exemplary detail, the tribunal applied the ruling of the European Court in the case of Clarke v. Chief Adjudication Officer (which has been made part of the appeal papers in this case and is reported at [1987] 3 Common Market Law Reports 277).

11. Before I deal with the effect of the Clarke case, I should refer to the fact that a similar problem came before another Commissioner whose decision thereon is now reported as R(P) 4/88. The learned Commissioner held that the 12 months' rule in section 165A did not contravene the direct effect of EEC Directive 79/7 because, as he put it in paragraph 4 of his decision,

> ".. there is in my view no discrimination arising at least directly from the operation of section 165A of the 1975 Act. That is a provision dealing with the requirement to make a claim in the prescribed manner and time as a pre-condition of entitlement to benefit and allowing back-dating in certain limited cases. It is not section 165A(3) which has perpetuated the discrimination in this case. In a sense it was the claimant herself because she delayed making her claim until [a date more than 12 months after 24 December 1984]."

12. However the decision in R(P) 4/88 was not it seems cited to the social security appeal tribunal in this case and they did not refer to it. Possibly it was not then available. On the other hand, it appears that the decision of the European Court in the Clarke case was not considered or cited to the learned Commissioner who decided R(P) 4/88 - at least he did not refer to the Clarke case.

13. What in essence I have to decide in this case therefore is whether the Clarke case affects the ruling in R(P) 4/88. I hold that it does not. The Clarke case was concerned with a very different set of circumstances, namely the fact that transitional provisions contained in regulation 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984 (S.I. 1984 No.1303) gave an entitlement to a claimant after 22 December 1984 to the new severe disablement allowance (which normally requires at least 80% disablement) if he or she had been entitled, on certain dates before 22 December 1984, to non-contributory invalidity pension. However in certain cases of married etc. women, title to non-contributory invalidity pension had depended on the woman being able to show that she was "incapable of performing normal household duties" (Social Security Act 1975, section 36(2), a test which was not applied to male claimants. That test was clearly discriminatory and the European

Court in the Clarke case held that the transitional provision in regulation 20(1) of the 1984 Regulations, (S.I.1984 No.1304) perpetuated the discrimination beyond 22 December 1984 and thus violated the EEC Directive.

14. However, in my view, in the present case there was in no legislative form any perpetuation of the discrimination comprised in the Married Women's Half Test beyond 22 December 1984. Section 165A of the Social Security Act 1975 did not have that effect. That section contains a time limit of general application and it is established EEC law that time limits of a Member State can validly limit the rights given by a claimant under an EEC Directive (see eg. Alliance Nationale Des Mutualites Chretiennes and Institut Nationale D'Assurance Maladie Invalidite v. Rzepa [1975] 1 Common Market Law Reports 277 (European Court). Indeed as the learned Commissioner pointed out in R(P) 4/88, (paragraph 4), "..had [the claimant] known more about the matter she would presumably have claimed earlier and got the benefit of the abolition of the Half-Test as from the earliest possible date". I appreciate that the claimant's answer to that is that she had "good cause" for not knowing about the matter, particularly as the Department had advised her in 1980 that it was no use for her to claim until her husband reached retirement age in 1986, but "good cause" cannot be extended beyond the 12 months limit (section 165A(3) of the 1975 Act). I therefore reaffirm the decision in R(P) 4/88 in the light of the Clarke case.

15. I refer now however to one further matter which I raised in a direction da 26 April 1989 as follows,

> "At the hearing, I shall wish to hear legal argument on (inter alia) the question raised by the claimant as to why a fresh claim in 1984/5 by her for retirement pension was considered necessary when she had already made such a claim in 1980. It may be relevant to consider whether the 1980 claim was ever formally adjudicated on (cf. R(M)4/86, a decision of a Tribunal of Commissioners)."

16. The hearing took place before me on 8 June 1989 at which the claimant was not present nor represented. The adjudication officer was represented by Ms H.Wheatley of the Office of the Solicitor to the Department of Health and Social Security. I am indebted to Ms Wheatley for her objective and detailed arguments at that hearing.

17. In so far as the position can now be ascertained it would appear that the claimant's husband's letter of enquiry of 8 December 1980 (now treated as a claim - see paragraph 3 above) was never formally adjudicated on. The Department merely replied that the claim could not at that time be maintained. The question is therefore whether that claim remained so to speak 'open-ended' and was therefore still in being when the Married Women's Half Test was abolished on 22 December 1984. In a decision in a different conte a Tribunal of Commissioners in R(M) 4/86 said (at paragraph 14),

> "The normal result of disallowance of a claim is that the claim ceases to have any effect whatsoever and the suggestion that a disallowed claim, although it clearly could never lead to an award of an allowance based on it, could nevertheless continue to have an effect, is one that we could not accept unless driven to do so."

18. It is not entirely clear when the word "disallowance" was used by the Tribunal there they meant actually disallowed by an adverse adjudication officer's decision. However, I have come to the conclusion that the position is here that, whether or not the 1980 claim was formally disallowed, it could not be said to have subsisted right through to 22 December 1984 and must be taken to have lapsed or impliedly to have been withdrawn. In any event, even if I were wrong on this point, there is the further difficulty that paragraph 4(1) of the Social Security (Claims and Payments) Regulations 1979 [S.I. 1979 No. 628 - now replaced by regulation 15(1) of the Social Security (Claims and Payments) Regulations 1987 - S.I. 1987, No. 1968] provided that "a claim for a retirement pension of any category may be made at any time not more than four months before the date on which the claimant will, subject to the fulfilment of the necessary conditions, become entitled to such a pension" (my underlining). If the claim in 1980 were regarded as 'open-ended' and

thus continuing, it still could not fulfil that requirement in that it was initially made more than four months before the earliest date namely 22 December 1984 on which the claimant became entitled to a pension in her own right. The 1980 claim could not in any circumstances be regarded as being made anew from day to day. so as notionally to be made again on 22 December 1984 (compare paragraph 5 of R(P) 4/88).

(Signed) M.J. Goodman

Commissioner

Date: 17 July 1989