

RJAT/KMG

SOCIAL SECURITY ACTS 1975 TO 1977

CLAIM FOR NON-CONTRIBUTORY INVALIDITY PENSION

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Name: Annette Mitchell (Mrs)

Local Tribunal: Manchester 210

Case No.: 76/5

[ORAL HEARING]

Decision C.S. 3/1978

1. This is an appeal by the insurance officer from a decision of a local tribunal given on 13 December 1977. The decision was that the claimant, a married woman residing with her husband, was entitled to non-contributory invalidity pension. I heard the appeal on 10 April 1978, when Mrs M.A. Morgan of the Solicitor's Office, Department of Health and Social Security represented the insurance officer and Mr D. Gordon, a solicitor of the Supreme Court, represented the claimant.

2. It is convenient to deal with the appeal and matters arising under separate headings.

Statutory provisions relevant to the appeal

3. Section 36 of the Social Security Act 1975 provides:-

"(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

(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".

4. Regulation 13A of the Social Security (Non-Contributory Invalidity Pension) Regulations, 1975 [SI 1975 No 1058] inserted by amendment (regulation 2 of the Social Security (Non-Contributory Invalidity Pension) Amendment Regulations 1977 [SI 1977 No 1312]) is 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-

(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."

Scope of the appeal

5. There is no dispute that the claimant is incapable of work within the meaning of section 36(1) of the Social Security Act 1975. The only question for decision on the appeal is whether she establishes that she is also incapable of performing normal household duties as prescribed by the regulations.

The evidence of disablement and function

6. (1) The claimant and her husband gave evidence, his evidence corroborating hers in relation to the amount and nature of the household tasks which she was able to do, and those instances in which he gave her assistance, or himself did.

(2) The claimant undoubtedly suffers from bodily disablement. Her doctor's evidence is that she has a

right hemiplegia which makes her right arm useless with no function and her hand can barely hold a pencil across the palm. There is little or no flexion movement of the fingers and elbow and she has 50% shoulder movement and the whole limb is in flexion spasm. She has impaired agility in the right lower limb because of severe talipes equinovarus with osteoarthritis mid tarsal. She has a partial spastic gait, limps, and has a claw foot; she wears a surgical shoe, and can walk unaided without a stick.

(3) The claimant has full function of her left upper limb. Her doctor describes the right upper limb as a virtual total loss of function. She has some minor loss of balance and loss of agility due to her foot deformity, but is fit in every other respect. The claimant in her evidence put emphasis on her loss of balance as preventing her doing household tasks and as affecting her capacity to shop.

(4) The claimant's functions applying to the right upper limb only, have been graded by her doctor on Form HA 45 as follows:

Lifting and carrying (as in preparing and cooking a meal))	Little
)	
Reaching out and up (as reaching shelves and dusting))	or no
)	effective
Manipulative ability (as turning taps and peeling vegetables))	function
)	
Sustained exertion (cleaning windows or oven, ironing))	
)	
Standing including the function of balance (ironing or queuing))	
)	
Kneeling (eg to clean floors))	Slight
)	
Walking to shops in winter)	impairment
)	
Climbing stairs)	
)	
Bending (to reach oven or low cupboards))	
)	
Walking within the home (room to room))	No
)	
Planning, (organising shopping or daily routine))	impairment
)	
Communication - (dealing with tradesmen and shopping))	
)	

The claimant's evidence

7. The claimant gave instances of matters affecting daily life in her bungalow which she was unable to do. So far as household tasks are concerned she is very slow, and her balance is such that she cannot lift boxes or cartons; she cannot open cans, slice bread or peel vegetables. She cannot wash clothes or take down curtains, or use her washing machine, or a wringer, or operate a machine in a launderette. She cannot iron, or set up an ironing board, or make a bed. She cannot clean kitchen utensils, or dust or clean the tops of doors, or windows. Such kneeling as she can do is painful, and with a degree of instability. She describes her walking in winter as a substantial impairment causing frequent falls, and her poor balance makes it impossible for her to pull a trolley for shopping purposes. A neighbour, who assists, states that the claimant is unable to lift pans off the stove, or take things out of the oven, and keep her home clean and hygienic. Having no effective use of her right arm her capacity to open milk bottles with her left hand is limited, in that she stabs at the metal foil cap with scissors. She cannot, as I have noted make a bed, but I think she could strip the clothes from it.

8. The claimant's bungalow is a property about 46 years old. It comprises a living room, kitchen, a large hall, a bathroom/WC, and two bedrooms. It has main water, electricity and gas. Cooking is done on a gas cooker not of modern type, and the sink is next to the cooker. The claimant can light the gas with a spark-gun. She is able to draw water and fill a kettle and can make tea. Her cooking utensils are aluminium, and she can use a frying pan. She can prepare a breakfast of cornflakes, stewed fruit and milk. She can rinse, but not scour her utensils. Getting on a bus to visit the shops is difficult for her, and in good weather she can carry up to about 2lbs of shopping. She is capable of selecting meat or frozen vegetables, and putting them on the cooker, but in the process of one-handed opening of packages with scissors some of the vegetables fall to the floor. She manages light dusting up to her level, and uses her vacuum cleaner, but she cannot empty the dust bag when it is full and unless the furniture is moved for her she can only clean round it. She can clean the sink and bath, but not to that degree of cleanliness which satisfies her sense of hygiene. In the absence of her husband at his business premises she spends her mornings dusting or looking round the shops. Her husband arrives home for the midday meal about 1 pm, bringing cooked food or

opening a tin, and himself getting the meal ready. The claimant spends her afternoons either with her husband at his shop, or reading at home or in the garden with her toy poodle.

Normal household duties

9. "Normal household duties" is not defined either in the Act or in the regulations, but various household activities are listed in the claim form and supplemented by the medical report in connection with the grading of functions. Since households vary in their composition, facilities and environment the normal household duties of one household may well include duties which do not arise for another, although basic household duties are in large measure common to both.
10. The submission on behalf of the insurance officer was that light household duties were now the claimant's normal household duties, and because she was able to perform them to a substantial extent she failed to qualify for this benefit.
11. This approach to normal household duties, that is to say, the sphere of household duties limited by the degree of the claimant's incapacity would lead to what I think is an unacceptable conclusion. The greater the incapacity the less can be done; a claimant, whose incapacity was almost total and whose only household duty, for which she had a slight impairment of function, was for instance, dusting from a wheelchair, would fail, on the ground that she performed her normal household duty to a substantial extent. Such a result seems to me to be incongruous and wrong.
12. In my opinion the "normal household duties" for consideration for a claimant living in a private household are not those in the limited sphere of activity circumscribed by the claimant's inability to do more, but are the normal household duties appropriate to her own circumstances, all of which, if she were capable, she would be expected to do. I express no view on the position of claimants living in hotels, hostels, nursing homes and similar establishments.
13. I am fortified in this view by the terms of regulation 13A(3) providing for cases where, as here, 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. The emphasis is that the incapacity test is attached to the claimant's own household, in relation to the duties therein which a capable housewife would perform.

14. In summary, in my view, regulation 13A requires a subjective test, in that it is the claimant's own incapacity for normal household duties which is to be considered, judged, however, by reference to the objective standard of the duties which a capable housewife would perform were she in the claimant's situation, in that particular household and in that environment.

Substantial extent

15. Both representatives referred me to dictionary definitions of the word "substantial". The statutory provisions do not define it. It is in my opinion an ordinary English word not used in the regulations in an unusual sense. It should therefore be given its ordinary meaning, weighty, ample, or considerable. The word has many meanings in different contexts. Guidance on the approach may perhaps be found in the speech of Viscount Simon L.C. in Palser v Grinling [1948] A.C. 291. The phrase for consideration in that Rent Act case was "a substantial portion of the whole rent". At page 317 of the report His Lordship said "'Substantial' in this connexion is not the same as 'not unsubstantial', i.e., just enough to avoid the 'de minimis' principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. ... Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case..." In Cozens v Brutus H.L. [1973] A.C. 854 Lord Reid at p 861 spoke to like effect. "It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved."

16. I saw and heard the claimant. My impression is that she bitterly resents the fact that she is disabled. That, however, is no reason why I should take her evidence at less than its face value, and I accept her evidence as being that of a candid witness, who did not exaggerate her difficulties and incapacity for the normal duties of her household which would fall to her lot were she capable. The claimant can aptly be described as a

one-armed person with some liability to lose her balance. The question I have to decide is whether she establishes that her incapacity to perform normal household duties, it being plain that she can perform some duties to a limited extent, is such that the amount she can perform is less than can properly be described as "substantial". Mr Gordon submitted that the case was clearly made out, but I have not found it free from difficulty. The question admits only of the answers 'yes' or 'no'. Having considered the evidence as a whole my answer to the question, albeit with hesitation, is yes.

17. My decision is that non-contributory invalidity pension is payable from and including 17 November 1977 and the insurance officer's appeal is disallowed.

18. The record of the proceedings of the local tribunal states that the chairman "indicated at the start of the claimant's appeal that he and his colleagues felt unanimously on the face of it that the appeal should clearly be allowed, after which the insurance officer repeated her [written] submission". I appreciate that the procedure was a matter for the discretion of the chairman, and that an early indication of a provisional view, subject to hearing argument which might change that view, is both permissible and time saving. It is, however, a dangerous course to adopt if it gives or is likely to give the impression that the adjudicating body has reached a clear conclusion without first having heard argument to support the submissions of a party against whom the decision is given, and great care should be taken in the use of expressions by which such a provisional or tentative view is conveyed to those appearing before the tribunal.

19. I would add that a claimant who attends a local tribunal hearing gives the statutory authorities an opportunity to explore the claimant's capacity, as well as incapacity, for household duties, the evidence hitherto being confined to that given in the prescribed forms. The completion of forms cannot provide for the infinite variety of household circumstances, and in my opinion the evidence of claimants and any witness attending should be taken by local tribunals when the opportunity to do so presents itself. The record of such evidence, and the facts found are, in the event of an appeal, of the greatest value to the Commissioner.

(Signed) R J A Temple
Chief Commissioner

Date: 20 April 1978

Commissioner's File: C.S. 105/1978
C.I.O. File: I.O. 1012/NV/78
Regional File: MER (Unregistered Papers)