

SOCIAL SECURITY ACTS 1975 TO 1984
CLAIM FOR NON-CONTRIBUTORY INVALIDITY BENEFIT
INTERIM DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My interim decision is that non-contributory invalidity pension is not payable to the claimant for the inclusive period from 18 April 1983 to 28 November 1984; and that severe disablement allowance is not payable to the claimant for the inclusive period from 29 November to 21 December 1984. Before I decide whether severe disablement allowance is payable to the claimant for any period subsequent to 21 December 1984 I am referring the questions set put in the reference accompanying this interim decision to the Court of Justice of the European Communities.
2. The claimant is a married woman living with her husband who was born on 10 February 1937. She suffers from a disease called Meniere's disease, which causes spells of vertigo and gives rise to an intolerance of noise. On account of this she ceased working for the Kent County Council on 12 January 1983, and her employment with them was formally terminated after she had been on the sick list for thirteen weeks.
3. It appears that she claimed sickness benefit from the time that she ceased working, but these claims do not appear to have come to anything, probably because the contribution conditions were not satisfied. On 17 April 1983 the claimant made a claim for non-contributory invalidity pension (the pension) under section 36 of the Social Security Act 1975 with effect from the following day 18 April 1983. In connection with this claim her doctor completed a form HA 45 on 17 August 1983 in which he expressed the opinion that the claimant was incapable of work, and that she would remain as restricted in her ability to perform her normal household duties in her own home as she then was and should refrain from work for two years, that is until 17 August 1985. The effect of this that under regulation 11(7) of the Social Security (Claims and Payments) Regulations 1979 [SI 1979 No 628] then in force her claim fell to be treated as a claim for a period ending on 17 August 1985.
4. A new section 36 was inserted into the Social Security Act 1975 in place of that under which the claimant claimed the pension, by section 11 of the Health and Social Security Act 1984 (the 1984 Act). This section was, in accordance with powers conferred by paragraph 16 of the last mentioned Act, brought into force on a later day (28 November 1985) in relation to persons who, like the claimant, were born before 29 November 1949 and had not attained the age of fifty than that on which it was brought into force in relation to others (29 November 1984); see Article 3 of the Health and Social Security Act 1984 (Commencement No 1) Order 1984 [SI 1984 No 1302]. But by virtue of the closing words of paragraph 16 of

Schedule 4 to the 1984 Act no person could be entitled to the pension on or after the earlier of such days (29 November 1984). There were however certain transitional provisions under which a person of the claimant's age might become entitled to severe disablement allowance before 28 November 1985 and the Secretary of State for Social Services has decided that the claim before me may be treated in addition as a claim for severe disablement allowance. Accordingly I have before me a claim for the pension for the period to 28 November 1984 and for severe disablement allowance from then until 17 August 1985. The claimant would be well advised, in case her claim for severe disablement allowance succeeds to any extent to submit a further claim for that allowance from 18 August 1985 promptly after she receives this decision.

5. Section 36 of the Social Security Act 1975 so far as material provided at the time of the claim as follows:

- "(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)
 - (b).....; orexcept where she is incapable of performing normal household duties.
- (3) to (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.
- (8) and (9)....."

6. It is clear from subsection (1) above quoted that the claimant could not in any event qualify for the pension until she had been incapable of work for 196 days. She remained capable of work until 13 January 1983, and the pension could not on any view start until 196 days from then. However as she is a married woman living with her husband she had also to be incapable of performing normal household duties under subsection (2). This subsection contains no requirement that incapacity for normal household duties should have continued for 196 days. But regulations made under subsection (7) have (among other things) the effect of applying the 196 days rule to incapacity for normal household duties, in that it was provided by regulation 13(1)(a) of the Social Security (Non-contributory Invalidity Benefit) Regulations 1975 [SI 1975 No 1058] as amended by SI 1977 No 1312 at the date of the claim that for the purposes of determining whether a woman in whose case (like the claimant's) paragraph (a) or (b) of section 36(2) applied was entitled to the pension for any day, and for that purpose only

"she shall not under the provisions of the Act or of regulations made under it be treated as being or having been incapable of work on any day unless on that day she is or was incapable both of work and of performing normal household duties."

This provision, as was held in Decision R(S) 9/79, had the effect of extending the requirement of 196 consecutive days of incapacity to incapacity for performing normal household duties. It follows that I can hold the claimant to have become entitled to the

pension before it was abolished with effect from 29 November 1984 if before that date she had become incapable of performing normal household duties on a day preceded by 196 consecutive days of such incapacity (the 196 day test). It is accepted that from the 197th day after 13 January 1983 she had satisfied the corresponding condition of incapacity for work.

7. Regulation 13A(2) of the regulations last mentioned as substituted by [SI 1978 No 1340] provided at the date of the claim as follows:

"A woman shall be treated as incapable of performing normal household duties if, [A] without substantial assistance from or supervision by another person, she cannot or cannot reasonably be expected to perform such duties to any substantial extent, but [B] she shall not be treated as so incapable if, without such assistance or supervision, she can or can reasonably be expected to perform such duties to any substantial extent."
(The [A] and [B] have been inserted by me for ease of reference)

This provision was so substituted in the regulations within a matter of days of the publication of Decision R(S) 7/78, the preamble to the regulations stating that by reason of urgency it was inexpedient to refer any proposals to the National Insurance Advisory Committee. It must be concluded that it was not the intention of the new regulation to leave the position exactly as it stood before the new regulation was introduced.

8. But it is not easy to say precisely what effect the new regulation has. It is divided into two contrasting parts indicated by the [A] and [B] above. But the two parts are not mutually exclusive and if the regulation is interpreted literally a person can (in at least two distinct ways) fall into both halves. First of all both halves use the conjunction "or" where to produce complete antithesis one should use "and". For instance a person who can perform normal household duties to any substantial extent but cannot reasonably be expected to do so, is on a literal interpretation to be treated as incapable of performing normal household duties under [A] and as simultaneously incapable of performing them under [B]. Secondly, if "substantial" is given its normal meaning of "weighty, ample, considerable" (see Decision R(S) 5/78) then a person can be simultaneously capable of performing normal household duties to a substantial extent while incapable of performing other household duties to a substantial extent, those of which she is capable being different from those of which she is incapable. In a number of decisions Commissioners have sought to make some sort of consistent meaning to the whole provision.

9. The first of the difficulties above mentioned was resolved by the decision, of the then Chief Commissioner, R(S) 6/79 at paragraph 10, the effect of which he repeated in R(S) 7/79 at paragraph 3. The effect of his conclusion in these two cases, which so far as I am aware has never been questioned, is that a person who either cannot perform the duties to any substantial extent or who cannot reasonably be expected to perform the duties to any substantial extent (in each case without substantial assistance from or supervision by another person) is to be treated as incapable of performing normal household duties. But this statement of the solution begs the question that arises on consideration of the second difficulty.

10. Is it right to say that a person cannot, or cannot reasonably be expected to, perform those duties to any substantial extent if her performance falls substantially short of the complete range of duties? Or is it only right to say this if she cannot perform any of those duties at all except to an insubstantial extent? In Decision R(S) 7/78 a tribunal of Commissioners on the then wording of the Act and regulations answered the first of the questions above in the affirmative.

11. It was the publication of this decision however that led to the prompt introduction of the new regulation 13A(2), which must be taken to have intended some change. And in Decision R(S) 7/79 the Chief Commissioner seemed to answer the second question in the affirmative on the new wording. He held that a woman who he adjudged to be capable of

some dusting, cleaning sewing and mending individual articles of clothing as required, and exercising an overall supervision as well as laying the table for meals was on that account to be treated as capable of performing normal household duties. This conclusion was modified somewhat by Decisions R(S) 5/81 and R(S) 11/81 the effect of which was that it was permissible to disregard the ability to perform part only of a particular household duty or that which was useless without the performance of some other duty (e.g. deciding what the household would have for dinner without being able to do anything towards preparing it). And it was suggested that one way of testing the matter was to consider what would be the state of the household if the claimant were required to run it unaided.

12. These were the reported decisions in relation to claimants whose condition did not greatly vary from day to day that were available to the insurance officer and the local tribunal at the time that they had to consider the claim. They had available to them also Decision R(S) 9/79 in which it was pointed out that whereas a person whose incapacity was intermittent might be able to establish continuous incapacity for work on the footing that a person who could perform his duties on some days of the week only would be virtually unemployable, such a person would not be able to establish continuous incapacity for normal household duties, and so could never satisfy the 196 day test.

13. On these authorities the insurance officer and the local tribunal on appeal from the insurance officer decided that the claimant was not incapable of performing normal household duties. The claimant now appeals to the Commissioner. I held an oral hearing of the appeal on 17 December 1984 at which the claimant was represented by Mr J G Moher of the Transport and General Workers Union, and I heard evidence from the claimant and her husband. I did not however proceed to give a decision on the appeal because of two matters that still called for consideration. First the Court of Appeal had in the case of Stevens v Johnson (23 November 1984) given a decision allowing a claimant's appeal from a decision of the Commissioner refusing to award the pension to a claimant, and the text of their decision was not then available and in any event the parties had had no opportunity of considering whether in the light of the decision they wished to adduce any other evidence. Secondly the date by which it would become mandatory for Member States of the European Economic Community to have implemented the provisions of Council Directive 79/7/EEC (Directive 79/7) was fast approaching. This directive introduced into social security "the principle of equal treatment", meaning that there should be no discrimination on grounds of sex whether directly or indirectly by reference to particular marital or family status. By Article 8(1) member States were required to bring into force laws regulations and administrative provisions necessary to comply with the Directive within six years of its notification.

14. It is clear that section 36(2) of the Social Security Act 1975, as it stood at the date of the claim, infringed this principle of equal treatment. And the new section 36, providing for severe disablement allowance was clearly introduced in order to bring to an end such infringement in compliance with Article 8. As it abolished the pension with effect from 29 November 1984 it did so before the expiration of six years from the notification of the Directive which in relation to the United Kingdom at least was notified by an instrument dated 22 December 1978. That is the date taken by the Commission of the European Communities as the date on which the directive came into force. This appears from the answer to a question in the European Parliament reported in the Official Journal of the European Communities of 26 August 1985 (OJ C 214/2) and it is also the date from which section 11 of the Social Security Act 1985, also intended to comply with the Directive, is declared to have effect. I hold that the United Kingdom was required to comply with the directive by that date.

15. The new section 36 provides for the new benefit severe disablement allowance, and in relation to it makes no distinction between men and women. But the Social Security (Severe Disablement Allowance) (Regulations 1984 [SI 1984 No 1303] contain certain transitional provisions. In particular regulation 20 of those regulations provides that any person who immediately before both 10 September 1984 and 29 November 1984 was entitled to a non-

contributory invalidity pension should be entitled, for 29 November 1984 and for certain subsequent days (possibly indefinitely) thereafter, to severe disablement allowance whether or not they satisfy the medical conditions therefore and whether or not 29 November 1984 was appointed for the commencement of severe disablement allowance for persons of his or her age. For reasons that will appear I have concluded that the claimant was not entitled to the pension before either of the days above mentioned so that she cannot take advantage directly of regulation 20. But if she had been a man, or a woman to whom section 36(2) (a) or (b) did not apply, she would as being and having being incapable of work have been entitled to the pension immediately before both those dates and thus would have been entitled to severe disablement allowance from 29 November 1984. It can be argued therefore that this provision has perpetuated the discrimination against married women that has since 22 December 1984 been prescribed by Directive 79/7. The oral hearing was accordingly resumed on 25 September 1984 when the claimant was again represented by Mr. Moher and the adjudication officer was represented by Miss A Windsor of the Solicitor's Office of the Department of Health and Social Security. I heard argument and a little evidence (not from the claimant) on the effect of the Stevens decision and there was consideration of a draft reference to the European Court of Justice of questions directed towards enabling me to decide whether the claimant, if not previously entitled to severe disablement allowance by virtue of the Directive from 22 December 1984. Such reference would be necessary only if I determined the question of entitlement before 29 November 1984 adversely to the claimant. For reasons I shall come I am deciding that question adversely to her and accordingly I am referring to the European Court of Justice the question set out in the reference to that Court accompanying this decision and deferring the consideration of the question whether the claimant is entitled to severe disablement allowance from 22 December 1984 until those questions have been considered by that Court.

16. I must now turn to my reasons for considering that the claimant did not satisfy the medical conditions for an award of the pension before 29 November 1984. To satisfy the conditions she has to show on at least one day before that date she was incapable of performing normal household duties and had been so incapable for 196 consecutive days immediately preceding that date. The claimant's condition of Meniere's disease tended to engender intermittent incapacity. The principle obstacle to the claimant's success is her difficulty in establishing continuous incapacity for 196+ days. The disease caused her dizzy spells and an intolerance of noise. In consequence she was unable to use a vacuum cleaner, or herself to start the spin-drier, or to shop where there is a tannoy system in use as at many supermarkets or work at heights. These are things that she is continuously unable to do. And if it could be said that without doing these things (and anything else to which the same applies) she was incapable of performing normal household duties within the meaning of regulation 13A(2), she would have satisfied the 196 day test. But I should not on the authority of the decisions hitherto considered have held that the claimant was by reason only of the matters last mentioned incapable of normal household duties within that regulation. I have therefore to go on to consider the matters of which the claimant was intermittently incapable and I have to do so taking into account the above-mentioned decision of the Court of Appeal in Stevens v Johnson, where, as in the present case, the claimant was subject to intermittent periods of complete incapacity separated by periods of relative well-being.

17. The claimant in the case in question suffered from bouts of migraine and attacks of grand mal epilepsy. During attacks of either of these she was completely incapable of performing any household duties. When not suffering from attacks of either she was "very well indeed", better I dare say than this claimant ever is. But the onset of attacks particularly those of grand mal epilepsy was unforeseeable. According to that claimant's doctor there was a continuous risk of sudden and complete disability. This, in the judgment of the Court of Appeal, made it at all times unreasonable to expect her to undertake a number of household duties without assistance or supervision because of the dangers entailed. For instance the dealing with boiling water hot dishes and sharp knives involved in cooking and the bathing of her children and the taking her children out were instanced as

matters that she could never be expected to do without assistance or supervision. In consequence these matters were sufficient to render her incapable of performing normal household duties within regulation 13A(2), and at all times either she was unable to perform normal household duties or she could not reasonably be expected to perform them. In my judgment it was on this ground that the Court of Appeal decided in favour of that claimant.

18. The Court was plainly puzzled by regulation 13A(2). They considered but rejected the suggestion that part [B] of the provision should be treated as a proviso cutting down part [A]; and they reached in substance the same conclusion as the former Chief Commissioner reached in Decisions R(S) 6/79 and 7/79 (see paragraph 8 above) that the effect of the provision was that it sufficed that a person should either be actually incapable of performing normal household duties without substantial assistance or supervision from another person or that she could not reasonably be expected to perform them without such assistance or supervision.

19. On the question of the effect of the words "to any substantial extent" I find it more difficult to express a firm opinion as to the Court's conclusion. Dillon LJ rejected the possibility that that a person could simultaneously be able to perform household duties to a substantial extent and unable to perform household duties to a substantial extent - even though it possible for a glass of water to be simulataneously half full and half empty. I take their true conclusion to be summed up by Cumming Bruce LJ who said:

"As I construe that regulation the effect is that both questions raised by the regulation have to be answered and when they have both been answered, assuming that the answer to the first question is affirmative and the answer to the second question is affirmative, the balancing act must then be carried out in order to decide whether, regarding the situation of the applicant as a whole and in the round, it is sensible to hold that she cannot perform normal household duties because she cannot reasonably be expected to carry them out to a substantial extent, having regard to the substantial extent to which she can carry out some of those duties."

I do not understand those words as giving to the regulation the same effect as the Act and regulations were given by the Tribunal of Commissioners that gave Decision R(S) 7/78 before regulation 13A was introduced to reverse their decision. Indeed that would mean holding that regulation 13A had no effect whatever. I take the words above quoted to mean that the adjudicating authorities have to look at the situation of each claimant "as a whole and in the round" and decide whether the duties that she can perform and reasonably be expected to perform without assistance or supervision are more or less significant than those that she cannot perform or cannot reasonably be expected to perform without such assistance or supervision. If they are less significant the condition is satisfied.

20. In reaching their conclusions in the Stevens case the Court concluded in effect that the matters of cooking, bathing young children and taking them out, which she was continuously either unable to do or could not reasonably be expected to do, outweighed the things that she could be reasonably expected to do in between attacks. They took into account the fact that she had young children. It is clear that they were right to do so because regulation 13A(3) clearly indicates that a woman's capacity for normal household duties has to be assessed by reference to what is normal in her own household and not by reference to some imaginary average household. In the case of the present claimant, who has two non-dependant children, a married daughter and a son, I have to weigh up the various duties without reference to any duties in respect of young children.

21. I turn therefore to the evidence in this case. I have mentioned certain matters that the claimant can never do, such as operating the Hoover, turning on the spin-drier, and she cannot shop in supermarkets where there is a tannoy system, working at heights as with cleaning windows. She gave evidence at the first hearing that I held and I read out to her part of my note of her evidence at the second hearing but neither she nor Mr Moher sought to have anything added to it. My note is as follows:

"I try to go shopping. Tannoy systems can't cope.

Dizzy looking at shelves.

Walk to local shops. More expensive.

I write lists.

I can prepare meals. I can sit. I have to watch when cooking.

I have to be very careful. I take an element of risk. I sometimes have to do it.

I have a drop front oven and can move joint out onto the door.

But movement brings it on.

Can't stand the spinner. My daughter starts it and I go into another room.

Can't use Hoover. Have to sweep, Can use Ewbank.

Can't clean windows. Can't get up on anything.

Daren't turn a mattress. Bending over bed not good.

She gave an account of two falls that she had had, one in the greenhouse when she fell without warning, breaking some of the glass but fortunately not hurting herself seriously; and once in a bedroom when she fell and upset a lamp. Both these occasions were before the first hearing and I did not receive any account of any repetition between then and the second hearing.

22. In completing her claim form the claimant indicated that she was able to do most of the work relating to the preparation of meals and a little of the work relating to the household washing except that she could not do the drying at all; and that she could do most of the household cleaning except for the vacuum cleaner and the windows. Her doctor completing the form HA 45 considered that she had full function in relation to all the matters listed in the form but qualified it by saying first that all these could be affected by giddiness, secondly that tolerance of noise was an important condition, thirdly that she could not use a Hoover, washing machine or spin-drier; and fourthly that she could largely perform all other household duties.

23. I heard evidence from the claimant's husband at both hearings. He told me about the drugs that were being used to control his wife's condition and that they had side effects (which I do not doubt). He told me that he often came home to find that his wife had been unable to do anything to prepare a meal for him. In general he gave me the same impression as he seems to have given the doctor, that he rates his wife's capacity a good deal lower than his wife herself does. The doctor has gone to the length of suggesting that the husband's attitude reduces the confidence of his wife in her own abilities.

24. I accept that there are bad days when the claimant is incapable of performing almost all household duties. But that is not sufficient to enable the claimant to succeed. She cannot in my judgment succeed unless she can establish that down to 1984 even on her good days she cannot reasonably be expected to perform her normal duties to a substantial extent. It may well be that her condition is deteriorating. Her husband says that the condition was first identified in 1978, but she did not have to give up work until 1983. I am not persuaded that the claimant could not reasonably be expected to perform most of her normal household duties on her good days, or that such days were down to 1984 so infrequent that she ever had a sequence of 196 bad days. I understood from her evidence that she had

to go elsewhere while the spin drier was started by her daughter, and presumably to remain there until it had finished and if it did not switch itself off her daughter switched it off. It may be that the same applies to the washing machine. But I cannot regard the switching of the machine on and off as substantial assistance from another person. It seems to me that she could on good days manage the washing with minimal assistance from another person, even assuming that it was impracticable to have an extension lead to another room where the claimant herself could switch on and off. She can do most of the work in the preparation of meals; and she could do much of the household cleaning on her good days. I hold therefore that she did not at any time down to the abolition of non-contributory invalidity pension satisfy the rigorous medical conditions for its award to her. Her appeal therefore fails except to the extent, if any, to which she may establish title to severe disablement allowance by virtue of the Directive 79/7.

(Signed) J.G. Monroe
Commissioner

Date: 25th November 1985