

♀ entitled to SDA on basis of Johnson: passport ^{MUM} ¹⁹⁸⁵
NICIP to which she would have been entitled if it had not been for
discriminatory household duties test.

DGR/SH/16

Commissioner's File: CS/217/1990

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR SEVERE DISABLEMENT ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

★ 44/92

1. My decision is that the decision of the social security appeal tribunal given on 11 July 1990 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide that the claimant is entitled to severe disablement allowance, but only as from 20 June 1985.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 11 July 1990.

3. The tribunal, on a reference to them by the adjudication officer, decided that the claimant was not entitled to severe disablement allowance. She did not make her claim until 20 June 1986, by which time section 165A of the Social Security Act 1975 (see Schedule) had come into operation, effectively neutralising the Court of Appeal's decision in McCaffrey. The tribunal accepted that, had the claim been made before the coming into operation of section 165A on 2 September 1985, she would have established title to non-contributory invalidity benefit "before both 10 September 1984 and 29 November 1984", and under regulation 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984 [S.I.1984 No.1303] (see Schedule) have automatically acquired an entitlement to severe disablement allowance. For, by reason of the decision of the European Court of Justice in case 384/85 Clarke v. Adjudication Officer [1987] 3 C.N.L.R 277 (see also R(S) 2/88) the effect of EEC Council Directive 79/7 was to give to women equal access with men to non-contributory invalidity pension, and hence severe disablement benefit, by releasing them from the "household duties test". However, the lodging of the claim to non-contributory invalidity pension after the coming into operation of section 165A - and section 165A was made retrospective by section 165B - was fatal to the claimant's case. Section 165A required, as a condition

of entitlement, that a claim to the relevant benefit be actually made, and the pre-requisite of entitlement to severe disablement benefit, under regulation 20(1), was entitlement "immediately before both 10 September 1984 and 29 November 1984" to "a non-contributory invalidity pension". If there was no entitlement to non-contributory invalidity pension, because there had been no claim, there could be no right under regulation 20(1) to severe disablement allowance.

4. However, after the tribunal reached their decision, a judgment of the European Court of Justice in case C-31/90 Johnson v Chief Adjudication Officer was handed down on 11 July 1991, which decided, inter alia, that:-

- (i) section 165A of the Social Security Act 1975 in conjunction with regulation 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984 maintained the discrimination arising out of the additional "household duties test" required of a woman if she was to receive non-contributory invalidity pension (see paragraph 31 of the judgment);
- (ii) certain national legislation, such as section 165(A) combined with regulation 20(1), the latter of which rendered entitlement to a benefit dependent on a previous claim for a different benefit containing a discriminatory provision, was incompatible with Article 4(1) of Directive 79/7/EEC (see paragraph 33 of the judgment); and
- (iii) in reliance upon Article 4 of the Directive the offending national legislation could be set aside (see paragraph 36 of the judgment).

5. I am satisfied, for the reasons admirably set out by the adjudication officer now concerned in his submissions to the Commissioner dated 21 January 1991, that the claimant came within the personal scope of Directive 79/7, and therefore might rely on it for any assistance which it might provide in support of her claim. Now, the effect of the judgment of the European Court of Justice in the Johnson case was, subject, of course, to the retention of the "92 months rule", to negate section 165A in relation to the establishment of title to non-contributory invalidity pension, and through it, under regulation 20(1), title to severe disablement allowance. The tribunal found - and I agree with them - that the claimant satisfied all the conditions (after disregarding the discriminatory "household duties test", rendered unlawful by the European Court) for an award of non-contributory invalidity benefit as from 5 December 1978. As the effect of the decision of the European Court of Justice in the Johnson case was to render an actual claim for non-contributory invalidity pension unnecessary, clearly the claimant was entitled to that benefit before the statutory dates contained in regulation 20(1), and as a result she was automatically entitled to severe disablement allowance. The only limitation on her

claim dated 20 June 1986 was that she had to establish "good cause" for its lateness. However, I am satisfied that the delay in her claim was fully justified. Of course, she cannot obtain benefit for more than 12 months immediately preceding the date of claim - this was the situation even before the coming into operation of section 165A - so that the claimant is not entitled to benefit prior to 20 June 1985.

6. It follows from what has been said above that the tribunal erred in point of law in rejecting the claim outright. Accordingly, I must set aside their decision. However, it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently substitute my own decision.

7. My decision is, for the reasons previously stated, as set out in paragraph 1.

Schedule

Section 165A of the Social Security Act 1975

" 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 in the prescribed manner and within the prescribed time; or
- (b) by virtue of regulations made under section 51 of the Social Security Act 1986 he is treated as making a claim for it

(2) Where under subsection (1) above a person is required to make a claim or to be treated as making a claim for a benefit in order to be entitled to it -

- (a) if the benefit is a widow's payment, she shall not be entitled to it in respect of a death occurring more than 12 months before the date on which the claim is made or treated as made; and
- (b) if the benefit is any other benefit, except disablement benefit or reduced earnings allowance, the person shall not be entitled to it in respect of any period more than 12 months before that date.....

Regulation 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984 [S.I.1984 No.1303]

"20.-(1) Any person who, immediately before both 10th September 1984 and 29 November 1984 was entitled to a non-contributory invalidity pension shall be entitled for 29 November 1984 and for any subsequent days which

together with 29th November 1984 fall within a single period of interruption of employment, to a severe disablement allowance whether or not-

- (a) he is disabled for the purposes of section 36 of the Act, or
- (b) 29th November 1984 is appointed for the purposes of section 11 of the 1984 Act in relation to persons of his age,

if he satisfies the other requirements for entitlement to such an allowance.

(Signed) D.G. Rice
Commissioner

(Date) 10 June 1992

CP. AG

SOCIAL SECURITY ACTS 1975 TO 1990

THE SOCIAL SECURITY COMMISSIONERS PROCEDURE REGULATIONS 1987
REGULATIONS 24(1)

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER - CORRECTION

Page 2 paragraph 5 line 8
 delete "92 months rule"
 insert "12 months rule"

(Signed) D.G. Rice
 Commissioner

(Date) 26 June 1992

Commissioner's File: CS/217/1990