

JGM/FB

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR NON-CONTRIBUTORY INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

ORAL HEARING

Decision C.S. 6/81

1. My decision is that non-contributory invalidity pension is not payable to the claimant for the inclusive period from 17 November 1977 to 1 September 1978 because no day in that period was preceded by 196 consecutive days on which she can (having regard to regulation 4(2) of the Social Security (Non-Contributory Invalidity Pension Regulation 1975 [S.I. 1975 No 1058]) be treated as having been incapable of work; but that such pension is payable to her for the inclusive period from 2 September 1978 to 23 May 1981.

2. This appeal was heard by me together with an appeal raising similar questions in the Case on Commissioner's file C.S. 602/80. I give the reasons for my decision on each of the two appeals in the annexed statement of reasons. I draw attention to the need for a fresh claim if the pension is to be awarded beyond the end of the period of the present award (see paragraph 20 of the reasons).

(Signed) J G Monroe
Commissioner

Date: 13 March 1981

Commissioner's File: C.S. 556/1980
C I O File: I.O. 1395/NV/79
Region: HNCIP Unit NFCO

- (A) Appeal on Commissioner's file C.S. 556/80
- (B) Appeal on Commissioner's file C.S. 602/80

REASONS FOR COMMISSIONER'S DECISIONS ON THE ABOVE APPEALS

1. The claimants' appeals in the above two cases were heard by me together on 4 February 1981. The claimant in the first of the above-mentioned appeals (Claimant A) was represented by Miss Jennifer Waine of counsel instructed by Messrs Walter Thompson & Partners Solicitors and the other claimant (Claimant B) was represented by Mrs J Stevens of the Soldiers' Sailors' and Airmen's Families Association. The insurance officer was represented on each of the appeals by Mrs G S Kerrigan of the solicitor's office of the Department of Health and Social Security. I am most grateful for the assistance which I derived from their submissions.

2. Under section 36(1) of the Social Security Act 1975 it is a condition of entitlement to non-contributory invalidity pension for any day that the claimant should on that day be incapable of work and have been so incapable for not less than 196 consecutive days (ie 28 weeks) ending immediately before that day. In the case of persons who (like both the claimants before me are married women residing with their husbands there are under section 36(2) additional conditions relating to incapacity for normal household duties. In this case it is not in dispute that at all material times both claimants (apart from the effect of regulation 4(2) of the Social Security (Non-Contributory Invalidity Pension) Regulations 1975 /S.I. 1975 No 1058/ (to which I shall refer as "the 1975 Regulations")) satisfy and satisfied the conditions in section 36(1) and 36(2). Both have claimed the pension from 17 November 1977 the earliest date from which it could be awarded to a married woman residing with her husband and both claims are open-ended.

3. It is provided further by section 36(3) of the Act that a person shall not be entitled to such a pension unless he satisfies prescribed conditions as to residence and presence in Great Britain; and by section 36(7) that regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of the section as incapable of work. The 1975 Regulations, as originally enacted, included the following, among other, provisions:-

- (A) (regulation 3(1)) "Subject to the following provisions of this regulation, the prescribed conditions for the purposes of section 36(3) of the Act as to presence in Great Britain in relation to any person in respect of any day shall be -
 - (a) that he is present in Great Britain;
 - (b) that he has been present in Great Britain for a period of, or periods amounting in the aggregate to, not less than 26 weeks in the 12 months immediately preceding that day; and

(c)

(B) (regulation 4(2)) "In determining for the purposes of section 36(1) of the Act whether a person has been incapable of work for 196 consecutive days, a day shall not be treated as a day on which that person was incapable of work if on that day he was absent from Great Britain"

Regulation 4(2) has since been amended by regulations with effect from 5 January 1979 (see paragraph 19 below).

4. It is not immediately obvious that one effect of regulation 4(2) is to impose in the guise of a prescription of circumstances in which a person is not to be treated as incapable of work, an additional condition as to presence in Great Britain which in effect requires a claimant to have been present for 28 out of 28 of the preceding weeks. It would have been clearer if it had been expressed as a condition as to residence, and in fact many people at all levels have been misled. Indeed, as I suspect, in relation to the main subject matter of the present appeals the draftsman of the regulations misled himself.

5. Both claimants on this appeal were in the first instance refused the pension on account of their having been absent from Great Britain and thus not satisfying the 196 day rule. Both claimants are the wives of serving members of the forces and both were at 17 November 1977 with their husbands then serving in West Germany. It seems clear that it was the intention of the draftsman of the 1975 Regulations to make an exception in favour of members of the forces and their families by regulation 3(2), both as originally drafted and as substituted with effect from 4 April 1977 by regulation 16 of the Social Security (Child Benefit Consequential) Regulations 1977 [S.I. 1977 No 342]. This, as so substituted reads, so far as material, as follows:-

"For the purposes of paragraph 1(a) or (b) notwithstanding that on any day a person is absent from Great Britain he shall be treated as though he were present in Great Britain if his absence is by reason only of the fact that on that day -

- (a) he is abroad in his capacity as -
 - (i) as serving member of the forces, or
 - (ii); or
- (b); or
- (c) he is living with a person mentioned in sub-paragraph (a)(i) and is the spouse, son, daughter, of that person".

6. The claimants rely on this provision as the wives of serving members of the forces. The words underlined above show an apparent intention that they should operate only for purposes of

regulation 3(1)(a) and (b) and not for the purposes of regulation 4(2). However it takes a good deal of ingenuity to think up circumstances in which the exceptions in regulation 3(2) could ever be of effect in face of regulation 4(2) unless I can ignore the words "For the purposes of paragraphs 1(a) or (b)" underlined above; and unless I can ignore them I must reach the conclusion that the draftsman has failed to achieve his presumed intention. I was referred at the hearing to a decision of a local tribunal at Southampton (from which the insurance officer did not appeal) who took a robust view of the matter and held that a claimant similarly placed was deemed for all purposes not to be absent from Great Britain. I was referred also to the decision on Commissioner's file C.S. 313/79 where the Commissioner, with much reluctance and after considering the authorities on statutory interpretation, concluded that he could not so hold. He referred to Halsbury's Laws of England (3rd edition) volume 36, page 389, which contains the following:-

"Where the main object and intention of a statute are clear, it should not be reduced to a nullity by a literal following of language, which may be due to want of skill or knowledge on the part of a draftsman, unless such language is intractable".

Like the author of decision on file C.S. 313/79 I find the words underlined intractable and I do not feel able to interpret the regulations in such a way as to give effect to what I conceive to have been their intention. Accordingly unless the claimants can succeed on one of the further grounds put forward to me, their appeals must fail.

7. I would add that the Commissioner's decision on file C.S. 313/79 recorded the claimant's and her association's invitation to the Secretary of State for Social Services to alter the law as it had been found to be (which can be done by regulations). That decision was dated 20 May 1980 and I am somewhat concerned that Mrs Kerrigan could not give any indication that any consideration was being given to the matter. When in September 1978 a Tribunal of Commissioners gave a decision on this benefit (R(S) 7/78) that was regarded as interpreting the law in a manner different from that which the Department of Health and Social Security had supposed an amending regulation was enacted within a week. I suggest that in the interests of serving members of the forces and their families in general, the matter be now looked at as a matter of urgency.

8. I come now to the alternative grounds put forward in support of the appeals. The first such ground was the so-called principle of extraterritoriality. It was suggested that members of the forces and their families in quarters abroad should be treated as on British soil. Arguments of this sort have been unsuccessfully put forward in national insurance or social security cases in relation to a person in a British embassy abroad (see Decision R(I) 44/61) and in relation to British ships at sea (see Decision C.P. 93/49(KL) and R(P) 8/61). Moreover if members of the forces and their families in quarters abroad were deemed to be in Britain there would be no need for regulation 3(2) (or the corresponding provisions in relation to other benefits) at all. I reject the argument based on extraterritoriality.

9. Next reliance was placed on Council Regulation (EEC) No 1408/71 (to which I shall refer as "Regulation 1408/71") inasmuch as West Germany is a Member State of the European Economic Community. Miss Waine who presented the argument on this point relied on Articles 10, 19 to 22, and 39. I will take these in turn. Article 10 reads so far as material as follows:-

"..... invalidity, old age or survivors' cash benefits, acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated."

Paragraph 14 of what is, since the admission of Greece as a Member State, Point J of Annex V to the Regulation, has the effect that in relation to British benefit Article 10 applies to a person staying in a Member State as if he were residing there. Both claimants as the wives of persons who are unquestionably workers in terms of Regulation 1408/71 are, if for no other reason, persons to whom that Regulation applies in terms of Article 2 thereof and they are entitled to the benefit of Article 10. That Article however has the effect of waiving "residence clauses" (such as section 82(5)(a) of the Social Security Act 1975) but has no effect on the acquisition of the right to benefit as by enabling the claimants to satisfy the 196 day rule; see Case 32/77 Giuliani v Landesversicherungsanstalt Schwaben [1977] ECR 1857 at paragraph 6 (page 1865). It follows that Article 10 is of no assistance to the claimants.

10. As for Articles 19 to 22, these are in a part of the regulation concerned with sickness benefit. Sickness benefit is recognised by Article 4(1) as being a branch of social security different from invalidity benefit and Regulation 1408/71 deals separately and differently with the two kinds of benefit. I do not consider that Articles 19 to 22 affect the present claims at all.

11. Article 39 also relied on by Miss Waine is one of three Articles 37 to 39 comprising section 1 of Chapter 2 of title III of the Regulation. This section was headed in the Regulation as originally published "Workers subject only to legislations under which the amount of invalidity benefit is independent of the duration of insurance periods." This heading was subsequently altered and then expressed to be reinserted by Council Regulation (EEC) No 2864/72. In the course of reinsertion the word "legislation" has become substituted for "legislations", though the plural is retained in at least the German and French texts. Mrs Kerrigan relied on the plural as showing that Article 39 was never intended to apply to persons who, like the claimants, have never been subject to more than one legislation. Article 37 opens with a reference to a worker who has been successively subject to the legislations of two or more Member States. She argued that regulation 39 (which does not contain any express reference to such workers) applied only to persons to whom Article 37 applied, pointing to the heading to section 1 and to the fact that Article 37 itself provides that workers to whom it applies shall be entitled to benefit in accordance with Article 39. I accept Mrs Kerrigan's argument in this respect. Accordingly I reject the submission that the claimants are assisted by Article 39. This disposes of Regulation 1408/71.

12. . Lastly reliance was placed on the reciprocal Convention between the United Kingdom and the Federal Republic of Germany scheduled to the Family Allowances, National Insurance and Industrial Injuries (German) Order 1961 [SI 1961 No 1202]. It could be argued that this Convention does not apply to the claimants in the present circumstances as being excluded by Article 6 of Regulation 1408/71, and this could depend on what is decided by the European Court of Justice in Case 99/80 Galinsky v Insurance Officer now before the European Court of Justice. I deal with the point on the assumption that the Convention is not excluded especially as Mrs Kerrigan submitted that in the circumstances of this case it was not.

13. The Convention is expressed in Article 51 to remain in force for one year from the date of its entry into force (1 August 1961) and thereafter from year to year unless "denounced in writing" three months before the end of any such yearly period. Article 1 contains definitions including the definitions of various benefits, among them "invalidity pension", which did not exist by that name in the United Kingdom in the year 1961. It is clear from the definition that only a contributory benefit can be included as an "invalidity pension" and that provisions of the convention expressed to relate to invalidity pension do not apply to non-contributory invalidity pension.

14. There are however provisions that relate to benefit generally including in particular Article 3(2), which provides as follows:-

"Subject to the provisions of paragraphs (3) and (4) of this Article and of Articles 13, 17 and 27 of the Convention, a person who is in, or resident in, the territory of one Party shall be treated as if he were, respectively in, or resident in, the territory of the other Party for the purpose of entitlement to claim, or to receive payment of, any benefit under the legislation of the latter party."

This, if it applies to non-contributory invalidity pension, would seem to save the claimants from the effect of regulation 4(2) of the 1975 Regulations. Mrs Kerrigan however submitted that it did not apply to non-contributory invalidity pension. She drew my attention to Article 2(1) which provides that the Convention shall in relation to the United Kingdom apply to a number of specified Acts of Parliament including in particular the National Insurance Act 1946 and the Family Allowances Act 1945; and to Article 2(2) which, subject to paragraphs (3), (4) and (5), of the Article, extends the application of the Convention to any legislation which amends, supplements or consolidates the legislation mentioned in paragraph (1). She submitted however that non-contributory invalidity pension was excluded by paragraph (4) of Article 2, which provides as follows:-

"The Convention shall apply to any legislation which relates to a branch of social security not covered by the legislation specified in paragraph (1) of this Article only if the two Parties make an agreement to that effect."

No relevant agreement has been made, so that if non-contributory invalidity pension is a branch of social security not covered by the

legislation specified in paragraph (1), (of which only the National Insurance Act 1946 is possibly relevant) the Convention does not relate to it.

15. What constitutes a different branch of social security? Regulation 1407/71 sets out in Article 4(1) a list of branches of social security to which it applies identified by reference to the different circumstances covered (e.g. maternity and, sickness, invalidity, and unemployment). It goes on in Article 4(2) to state that the Regulation applies to schemes of social security whether contributory or non-contributory. There is a considerable temptation in the circumstances of the present appeals to conclude from this that in the Convention social security is divided into different branches according to the contingency covered, and that contributory and non-contributory benefits covering the same contingency are not different branches of social security. But Regulation 1408/71 was not in existence in 1961; and the regulation which it replaced then in existence (known as Regulation 3) indicated similarly (in its Article 2) the types of social security to which it applied and made no reference (according to the unofficial English translation thereof published in connection with the 1961 negotiations for British entry into the European Communities) to "branches" of social security. I think therefore that I have to deduce from the context of the Convention what particular subdivisions of social security were indicated by the term "branches". I have reached the conclusion that for the reasons set out in the next paragraph non-contributory benefits (normally based on concepts of residence and physical presence in a particular state) and contributory benefits (based on the fact of insurance in a particular state) constitute different branches of social security in terms of the Convention even where the contingency covered is the same.

16. At the time of the Convention the only British benefits that were non-contributory were family allowances and guardian's allowance, the latter of which was contributory only in so far as one of the parents of the child in respect of whom the allowance was paid had to have been an insured person. If the wide provisions of Article 3(2) of the Convention applied to non-contributory benefits based on residence or physical presence in Britain then persons could in general satisfy the residence conditions for such benefits by residence or presence in West Germany. I find it impossible to believe that such an extension of non-contributory benefits was intended. I note that Article 3(3) excludes family allowances from the operation of Article 3(2) and that there was such a link between the family allowances law (now child benefit law) and guardian's allowance law as effectively to exclude guardian's allowance from the benefit of Article 3(2). If it were to be suggested that the newer non-contributory benefits in general could be satisfied with the help of Article 3(2) I think it likely that the Convention would have either been modified by agreement or "denounced" in accordance with Article 31.

17. I conclude therefore that neither claimant is assisted by the Convention any more than by the principles of extra-territoriality or Regulation 1408/71. It follows that they cannot start their entitlement to non-contributory invalidity pension until after they

returned from West Germany to and remained in Great Britain or (by virtue of paragraph 2(1) of Schedule 1 to the Social Security (Northern Ireland Reciprocal Arrangements) Regulations 1976 [SI 1976 No 1003]) Northern Ireland for the requisite period.

18. Claimant A returned on 18 February 1978, which day I hold to be the first of the 196 days of presence in Great Britain or Northern Ireland required by regulation 4(2) of the 1975 Regulations. She completed her 196 days on 1 September 1978 and the pension became payable to her from 2 September.

19. Claimant B returned only on 9 July 1980 and later moved to Northern Ireland. By that time regulation 4(2) of the 1975 Regulations had been amended by the Social Security (Non-Contributory Invalidity Pension) Amendment (No 2) Regulations 1978 [SI 1978 No 1845] with effect from 5 January 1979. The effect of this amendment is that a claimant who has been incapable of work (and, where necessary, normal household duties) for 196 days can satisfy regulation 4(2), as amended, by presence in Great Britain (or Northern Ireland) for 168 out of those 196 days. In this case it means that the pension became payable to Claimant B from the 168th day following 9 July 1980 ie from 24 December 1980.

20. In my decision in each case I have in part allowed and in part disallowed the claim. I understand from paragraph 17 of Decision CS 8/80 (to be reported as R(S) 5/80) that I am empowered to do this provided that my decision exhausts the claim. For the reasons given in Decision CS 12/80 at paragraph 18 I consider that my decisions being given on open-ended claims and not being decisions within Section 79(3) of the Social Security Act 1975 and regulations made under it, do dispose of the claims, so that fresh claims will be necessary if the pension is to be awarded after the end of the period of my awards. Although I conceive that, as the decisions are not within section 79(3) of the Act, I am strictly not affected by the restrictions on the period of an award under that section and regulations under it, I think it right to adhere to the principles of those restrictions, that is to say I ought only to give a decision or decisions for periods after the date of claim of not more than thirteen weeks. Adhering to that principle I could thus now make a number of awards for periods of 13 weeks or less down to the date of my decision and for up to 13 weeks thereafter. I consider however that the law permits me to do in a single step that which I can do in two or more separate steps (cf Re Collard's Will Trusts [1961] Ch. 293) and that I can properly give a decision awarding benefit covering a period up to the date of my decision and not more than 13 weeks thereafter. I give my decisions accordingly.

(Signed) J G Monroe
Commissioner