

CS 662/1979

JM/BW

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR NON-CONTRIBUTORY INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.S. 3/81

1. This is a claimant's appeal against so much of a decision of the local tribunal dated 4 April 1979 as confirmed a decision of the local insurance officer dated 22 September 1978. My decision is as follows:

- (1) The claimant is not entitled to non-contributory invalidity pension from 1 April 1978 to 3 August 1978 (both dates included) because she was not for a period of not less than 196 consecutive days immediately prior to any day on or between those dates incapable of work.
- (2) The claim for non-contributory invalidity pension from 13 September 1978 is disallowed because the claimant has not proved that she was incapable of performing normal household duties by reason of some specific disease or bodily or mental disablement.

2. The claimant is a married woman aged 49. At the material time she was living in a house with her husband, two sons and a 14 year old daughter. A valvotomy was performed upon her in 1966, with good results. In 1978, however, she was suffering from mitral stenosis and recurrent bronchitis - and there is no doubt that by reason of these complaints her range of physical activity had become considerably reduced. She was in paid employment as a temporary cleaner but had, on account of her deteriorating physical condition, to give up such work in January 1978. (The exact date in January seems to be somewhat in doubt. At two places in the papers, however, the claimant has hazarded 20 January - and this date now seems to be accepted by all parties.) It is also accepted that ever since the claimant gave up paid work she has been incapable of work within the meaning of section 36(1) of the Social Security Act 1975.

3. On 23 May 1978 the claimant made a claim for non-contributory invalidity pension. On form BF 450 she stated that she was claiming this as from 1 April 1978. Under paragraph 21 on that form she stated that she could, by herself and without much difficulty, plan, prepare and cook a main meal for herself and her family. She further stated

Decision C.S. 3/81

that she was normally able, although only with substantial difficulty, to collect the shopping and to keep her home clean and tidy from week to week. Lastly, she stated that she was normally unable to do the normal weekly washing and ironing for herself and her family. Under paragraph 22 she wrote: "I can do the washing in the machine. Not the ironing; don't go upstairs to put it away."

4. The claimant's doctor duly completed form HA 45. He stated thereon that the claimant's own description of her limitations (ie on form BF 450) was broadly consistent with his own assessment thereof. His general description of the claimant's mental and physical condition reads as follows: "Her general condition is fairly good, but she becomes exhausted v. easily, and has found that working outside the home becomes v. difficult." At a later place in his report he wrote: "Much of her impairment is in duration. She can do many normal household tasks, but not for long." He completed the table of activities which features in paragraph 4 of form HA 45 to this effect:

No impairment:

Walking within the home (moving from room to room or to outside toilet).

Manipulative ability (eg turning taps, peeling vegetables).

Planning (eg organising shopping or arranging daily routine).

Communication (eg dealing with tradesmen, shopping).

Slight impairment:

Lifting and carrying (eg as in preparing and cooking a meal).

Reaching out and up (eg as in reaching shelves and dusting).

Bending (eg to reach oven or low cupboards).

Kneeling (eg to clean floors).

Climbing stairs.

Substantial impairment:

Standing - including the function of balance (eg while ironing or queueing).

Walking outside the home (eg to go to the shops).

Sustained exertion (eg cleaning windows or oven, ironing).

(No entry was made in the column headed "Little or no effective function".)
This form HA 45 was completed in respect of an examination conducted on 26 July 1978. The doctor answered "Until further notice" to each of the questions "How long is the claimant likely to remain at least as restricted in her ability to perform the normal household duties in her own home as she is now?" and "For how long should the claimant refrain from (paid) work?".

5. The insurance officer then pursued the question of the lateness of the claim (of the first two sentences of paragraph 3 above). In view of the finding which is reflected in paragraph 1(1) above, I do not propose to go into the merits of the "good cause" aspect of this case. Suffice it to say that the insurance officer was not satisfied that the claimant had demonstrated good cause for her delay; and on 22 September 1978 he decided that the claimant was disqualified for receiving non-contributory invalidity pension from 1 April to 15 May 1978 (both dates included) by reason of the lateness of her claim. At the same time he disallowed the remainder of the claim (ie from 16 May 1978) on the ground that the claimant had not proved that she was incapable of performing normal household duties by reason of some specific disease or bodily or mental disablement. From these decisions the claimant appealed to the local tribunal.

6. Between the date when the insurance officer made these decisions and the date when he prepared his submission to the local tribunal two significant matters occurred:

- (a) There came to the notice of the insurance officer a decision of a Tribunal of Commissioners (then numbered C.S. 5/78 but now reported as R(S) 7/78).
- (b) Parliament, in direct and swift response to that decision, amended the relevant regulations so as to impose, with effect from 13 September 1978, a much more stringent test (ie than that emerging from the said decision) upon claimants seeking to establish that they were incapable of performing normal household duties.

(What I hereafter call the "old" regulation was regulation 13A(2) of the Social Security (Non-Contributory Invalidity Pension) Regulations 1975 [S.I. 1975 No. 1058] as amended by the Social Security (Non-Contributory Invalidity Pension) Amendment Regulations 1977 [S.I. 1977 No. 1312]. What I hereafter call the "new" regulation is the said regulation 13A(2) as substituted by the Social Security (Non-Contributory Invalidity Pension) Amendment Regulations 1978 [S.I. 1978 No. 1340].)

7. The effect of the Tribunal of Commissioners' decision is set out in paragraph 12 of the submission of the local insurance officer. The effect of the "new" regulation is set out in paragraph 14 of the local insurance officer and in paragraphs 7 to 10 of the submission (to the Commissioner) of the insurance officer now concerned. For present purposes it is sufficient to say this:

- (a) Under the "old" regulation, as interpreted by the Tribunal of Commissioners, a claimant could establish that she was incapable of performing normal household duties if she could demonstrate that what she was unable to do (by reason of disease or disablement) was substantial. This she might demonstrate notwithstanding that there was also a substantial part of normal household duties which she was able to do. (See paragraph 7 of Decision R(S) 7/78.)

Decision C.S. 3/81

- (b) Under the "new" regulation a claimant must fail if what she is able to do, by way of household duties, is substantial. (See, eg, paragraph 10 of Decision R(S) 6/79, a copy of which is in the case papers.)

8. In consequence of (a) of paragraph 6 above, the insurance officer accepted that the claimant's physical condition was such as to enable her to satisfy the test as applicable down to 12 September 1978. He made the point, however, that, since the claimant had been in paid work until 20 January 1978, the earliest date upon which she could have satisfied the 196 consecutive days rule (section 36(1) of the Social Security Act 1975) was 4 August 1978. In consequence of (b) of paragraph 6 above, the insurance officer submitted that as from 13 September 1978 the claimant ceased to be entitled to the pension.

9. The claimant's appeal first came before the local tribunal on 27 November 1978. The claimant appeared and gave evidence. She agreed that she could prepare a meal and could dust to eye level. She could clean floors either by kneeling or by using a long mop, although she had "to take her time". She could use the vacuum cleaner but could not move furniture. She had an automatic washing-machine into which she could put the clothes, but she required help in the lifting out of the wet wash. Ironing shirts and large items was difficult. Everything took a long time.

10. The claimant also told the local tribunal that her health had deteriorated since the medical examination of 26 July 1978 (cf paragraph 4 above). The hearing was, accordingly, adjourned so as to enable her to obtain a further report from her doctor. Such report was furnished by a letter dated 11 December 1978. This did not carry the matter any further. Her doctor did, however, write therein: "[The claimant's] impairment is only partial, but the signs are that it is progressive".

11. The local tribunal sat again on 4 April 1979. It had before it the letter referred to in paragraph 10 above. The claimant repeated that her condition was getting worse. She said that rheumatism had developed in her knuckles. The insurance officer made oral submissions along the lines of his written submission (cf paragraph 8 above).

12. In the event the local tribunal:

- (a) allowed the appeal to the extent of awarding non-contributory invalidity pension from 4 August to 12 September 1978; but
- (b) confirmed the disallowance of the claim in so far as it related (i) to the period 1 April to 3 August 1978 and (ii) to 13 September 1978 and thereafter.

The disallowance in respect of (i) was founded upon the 196 days rule (section 36(1) of the Social Security Act 1975). The local tribunal did not, accordingly, find it necessary to go into the issues arising by reason of the lateness of the claim (cf paragraph 5 above).

13. The claimant now appeals to the Commissioner. It is not entirely clear from her grounds of appeal whether she is contesting the disallowance in respect of the period 1 April to 3 August 1978.

De bene esse, however, I have brought that period within the scope of this decision. I can see no basis for interfering with the manner in which the local insurance officer and the local tribunal applied the 196 days rule. Accordingly, if the claimant does intend me to consider this period as falling within her appeal, this limb of her appeal must fail. This is reflected in sub-paragraph 1 of paragraph 1 above.

14. So far as 13 September 1978 and thereafter are concerned, the claimant's grounds do not really carry the matter much further than it was at the date of the local tribunal hearings - save that she reiterates the progressive nature of her disabilities. There is no medical evidence before me other than the original form HA 45 and the doctor's letter of 11 December 1978.

15. In these circumstances I have no alternative but to confirm the local tribunal's decision in respect of that part of the claim which relates to 13 September 1978 and thereafter. Much as I sympathise with the claimant, the "new" regulation makes it impossible for her to succeed upon this claim in respect of any date after 12 September 1978. From paragraphs 3, 4 and 9 above can be seen the extent to which the claimant was, at the relevant time, able to perform normal household duties. (I repeat that there is no medical evidence as to the position as it may have developed since then.) That extent cannot be regarded as being less than "substantial" - one of the ordinary meanings of which is "considerable" (see, eg, paragraph 15 of Decision R(S) 5/78).

16. Understandably enough the claimant is at a loss to comprehend why, if her claim was allowed in respect of the period 4 August to 12 September 1978, it has been disallowed from 13 September 1978. Her perplexity is the greater because her disabilities are increasing. I have tried, in paragraphs 6 and 7 above, to explain why this has come about. The short answer is that Parliament saw fit to change the rules - to the disadvantage of claimants. This is a matter over which the statutory authorities have no control. Their duty is to apply the law as it is enacted by Parliament - and they have no power to go beyond that.

17. Very fairly, the insurance officer now concerned concluded his submission thus:

"Mainly for the information of the claimant I would point out that if her appeal fails it will nevertheless be open to her to make a further claim if her condition becomes worse and her performance of household duties becomes more limited than is shown by the present evidence."

This was written before the Decision of a Tribunal of Commissioners C.S. 8/80 (to be reported as R(S) 5/80) and unreported Decisions C.S. 9/80 and C.S. 13/80 had been decided. In so far as these decisions touch upon jurisdiction and procedure they are directly

Decision C.S. 3/81

concerned only with sickness benefit and contributory invalidity benefit. I myself, however, can see no reason why the principles propounded therein should not apply with equal effect to non-contributory invalidity benefit. Decision C.S. 8/80 is intimately concerned with the construction of regulation 11(1) of the Social Security (Claims and Payments) Regulations 1975 [S.I. 1975 No 560] as amended by the Social Security (Claims and Payments) Amendment (No. 2) Regulations 1977 [S.I. 1977 No 1444] (In consequence of repeal and re-enactment the equivalent regulation is now regulation 11(1) of the Social Security (Claims and Payments) Regulations 1979 [S.I. 1979 No 628].) Since 20 July 1975, when the Social Security (Non-Contributory Invalidity Pension) Regulations 1975 [S.I. 1975 No 1058] came into operation, regulation 11(1) has applied to claims for non-contributory invalidity pension as well as to claims for sickness, invalidity and injury benefit.

18. It follows from the foregoing that -

- (a) the claimant was not obliged to await the outcome of this appeal before making a fresh claim; and
- (b) she would have been entitled to have had such fresh claim judged in isolation and upon its own merits.

(Cf paragraphs 23 to 28 of unreported Decision C.S. 13/80.) I should make it clear, however, that -

- (i) the insurance officer now concerned cannot be criticised for taking the view, in the light of the law as it was then widely understood and applied, that the claimant ought to await the outcome of this appeal before making a fresh claim; and
- (ii) a fortiori the claimant cannot be criticised for accepting and acting upon that view.

19. In practical terms, the upshot of all this is that if the claimant should, within a short time after receiving notice of this decision, make a fresh claim which is "back-dated" to a date not more than 12 months before the date of such claim, I should be very surprised were anyone to disqualify her on the ground of lateness in respect of any period covered by her claim. (There is, of course, an absolute statutory bar against awarding benefit in respect of any period which is more than 12 months before the date of the claim - section 82(2) of the Social Security Act 1975.) The claimant ought, accordingly, to assess - if possible, with the assistance of her doctor - the date upon which she first satisfied the "new" test; add thereto 195 days; and claim as from the date immediately following upon the period thus computed. (If, of course, this last date is more than 12 months before the date of the fresh claim, the scope of the fresh claim will have to be restricted accordingly.)

20. That part of my decision which is set out in subparagraph (2) of paragraph 1 above is cast in a form which was expressly approved in Decision C.S. 8/80. (See, too, unreported Decisions C.S. 9/80 and C.S. 13/80.) I am acutely aware of the fact that in attempting to interpret and apply Decisions C.S. 8/80 and C.S. 9/80 I have reached certain conclusions of law which are at variance with conclusions reached and speculations canvassed in the recent unreported Decision C.S. 12/80. It may well be that time will vindicate Decision C.S. 12/80. If that should happen I should not wish the claimant in this appeal to be prejudiced thereby. It may assist her, accordingly, if I make it clear that, had I felt it necessary to put a terminal date upon the disallowance of the claim from 13 September 1978, I should have specified 4 April 1979 - ie the date of the local tribunal's decision. As I have stressed already, there is not before me any medical evidence which bears upon the claimant's condition after that date. I have decided this appeal upon the evidence as it stood when the matter was before the local tribunal. I make no finding whatever as to the claimant's condition at any time after the local tribunal hearing - and am not to be taken as having done so.

21. For the reasons set out above, I have no alternative but to disallow the claimant's appeal.

(Signed) J Mitchell
Commissioner

Date: 16 February 1981

Commissioner's File: C.S. 662/1979
C.I.O. File: I.O. 1509/NV/79
Region: HNCIP Unit NFCO