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SOCIAL SECURITY ACTS 1975 TO 1977

CLAIM TO INVALIDITY BENEFIT

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Name: Margaret James (Mrs.)

LOCAL TRIBUNAL: Edinburgh and Lothians

Case No: 13/1

[ORAL HEARING]

1. My decision is that non-contributory invalidity pension is not payable from and including 13 September 1978 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 in terms of section 36(2) of the Social Security Act 1975 and relative regulations as amended.

2. This is an appeal by the insurance officer from a unanimous decision of the local tribunal on 22 February 1979 allowing an appeal by the claimant against a refusal of non-contributory invalidity pension in respect of the period from 13 September 1978. Following an earlier appeal to the Commissioner, the claimant was found entitled to non-contributory invalidity pension in respect of the period from 17 November 1977 to 12 September 1978 by decision C.S.S.72/78 dated 20 September 1978 given in light of a decision of a Tribunal of Commissioners (R(3) 7/78). The Commissioner's decision did not deal with the period post-12 September 1978 because of the new considerations arising from an amendment of the law with effect from 13 September 1978 made by the Social Security (Non-Contributory Invalidity Pension) Amendment Regulations 1978.

3. Those amending regulations altered the provisions of regulation 13A of the Social Security (Non-Contributory Invalidity Pension) Regulations 1975, as previously amended, which prescribed circumstances in which a person might be treated as incapable of performing normal household duties. Regulation 13A(2) as now amended provides: "A woman shall be treated as incapable of performing normal household duties if, 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 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."

4. In light of the foregoing amended regulation the local insurance officer in the present case disallowed non-contributory invalidity pension to the claimant in respect of the period from 13 September 1978, taking the view that she did not now satisfy the amended statutory test. The claimant appealed to the local tribunal who found as a fact that the claimant was at one and the same time both able and unable to perform her duties to a substantial extent. They further

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found that the factual element of the claimant's capability was unchanged from that pertaining when the Commissioner decided the appeal in respect of the period to 12 September 1978. The local tribunal found that the claimant came within both halves of the provisions of amended regulation 13A(2), being incapable as defined in the first half and not incapable as defined in the second half. They considered that if the word "but" occurring between the two halves fell to be read as meaning "except that" then the first part of the provision was unnecessary. Alternatively if the word "but" meant "on the other hand" a claimant like the present claimant could be simultaneously entitled and not entitled to benefit which they regarded as nonsense. Being in these circumstances unable to give rational meaning to the amended regulation the local tribunal proceeded to apply section 36(2) of the Social Security Act 1975 independently. Having done so they found the claimant incapable within the meaning of that subsection and so entitled to non-contributory invalidity pension.

5. I sympathise with the difficulties of the local tribunal in this case and I consider that it was proper in the circumstances in which they found themselves for that tribunal to proceed in the way they did. Nevertheless I am unable to accept their conclusion on the amended regulation. I think that the explanation for the inelegant double-barrelled provisions of amended regulation 13A(2) lies in the legislature's decision to eliminate the construction of the previous statutory provisions which was adopted by the Tribunal of Commissioners in R(S) 7/78. As was stated by the Chief Commissioner in recent numbered decision C.S. 3/79 in paragraph 9 "The effect of the substituted regulation in operation after 13 September 1978 is to provide for a set of circumstances in which a woman shall be treated as incapable of performing normal household duties and another set of circumstances in which she shall not be so treated, and to this extent in my opinion it excludes any independent operation of section 36(2) of the Act." Apart from serving that purpose the first half of the substituted provision would, I think, as the local tribunal suggest, have been unnecessary. In my opinion the amended regulation remains unsatisfactory for various reasons. It is undoubtedly confusing to have such alternative sets of circumstances prescribed for treating and not treating persons as incapable when the real intention now is to make the critical issue the assessment of the extent to which the person can (or can reasonably be expected to) perform normal household duties. I agree with the conclusion of the Chief Commissioner in paragraph 10 of the same decision when he says:- "The normal household duties must be considered to ascertain those which she can perform. These duties, whether or not perfectly performed, become the test of her capacity to perform normal household duties to any substantial extent". I have, unfortunately, some doubts regarding the questions which the Chief Commissioner formulates in the same paragraph and in particular regarding the formulation and restricted scope of application suggested for the second question dealing with what a claimant can reasonably be expected to do. As at present advised I consider that the alternative of what a person can reasonably be expected to perform is simply an alternative test of capacity which may be invoked in any case in which there is clear evidence bearing upon it which is inconsistent with the evidence of actual capacity or which provides a clear conclusion where evidence on actual capacity is unsatisfactory or doubtful.

6. A further provision of the regulations which requires to be noticed when a judgment is being made upon the question of a claimant's capacity or otherwise for performing normal household duties is that contained in regulation 13A(3) which

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provides: "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."

Those provisions indicate that, as one might expect, in a case such as the present a claimant's capacity or otherwise is to be judged in light of her own household circumstances. This is of some importance in the present case where the duties arising in a household consisting of the claimant and her husband are not as onerous as they would have been had the household for instance included a family of six children.

7. The claimant is aged 57 and suffers from rheumatic heart disease. She has replacement aortic and mitral heart valves and is on long-term medication. She also suffers from hoarseness following a tracheotomy in 1972. She has no mental impairment. Physically she becomes tired easily and breathless on moderate to severe exertion. Her own assessment is that she can look after her husband and herself "but in my own time", can plan, prepare and cook a main meal, can do the normal weekly washing and ironing and keep the home clean and tidy but only with substantial difficulty, and cannot manage the weekly shopping. Her doctor in grading various functions assessed her as having no impairment for four, slight impairment for four, and substantial impairment for a further four. The main disability is in respect of sustained exertion.

8. An oral hearing was sought and granted in this case and at the hearing the claimant and her husband carefully explained to me the pattern of their life and the restrictions which the claimant's disability imposes upon her capacity for household duties. I have considered that evidence which I accepted as honest and reliable. I do not propose to repeat the details because it is plain that the claimant's capacity has remained substantially unchanged throughout the period of assessment and in light of her own evidence as to what she is able to do albeit with difficulty which accords with the views of her doctor and her husband I do not think that it is possible despite the submissions of her representative to come to any conclusion other than that the claimant is, although substantially handicapped, nevertheless able to perform normal household duties to a substantial extent. In reaching that conclusion I of course leave out of

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account the considerable assistance with shopping and weekly cleaning and the like which is rendered by the claimant's husband. There is no evidence in the present case to suggest that the claimant could reasonably be expected to perform normal household duties otherwise than she in fact does. In saying that I do not minimise the difficulties under which the claimant labours in performing the duties which she can perform. In the circumstances, however, the alternative test under regulation 13A(2) does not arise in this case.

9. My decision therefore is that the claimant cannot be treated as incapable of normal household duties from 13 September 1978 and non-contributory invalidity pension is therefore not payable from that date.

10. Technically the payments made in implement of the decision of the local tribunal fall to be regarded as overpayments but there is no question of the claimant being required to make repayment of any such benefit received. It is a matter for regret that changes in the law and in the interpretation of the law should have caused the variety of decisions upon entitlement to non-contributory invalidity pension to which the claimant has unfortunately been subjected.

11. The appeal of the insurance officer must be allowed.

(Signed) J. G. Mitchell
Commissioner
Date: 27 July 1979

Commissioner's File: C.S.S.70/79
C.I.O. File: I.O.1354/NV/79
Central Office File: North Fylde Central Office