

VGHH/19/LM

Commissioner's File: CG/036/1988

Region: North Eastern

SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR INVALID CARE ALLOWANCE
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Joyce Beard (Mrs)

Appeal Tribunal: Bradford

Case No: 79/1

[ORAL HEARING]

1. My decision is
 - (1) The decision of the social security appeal tribunal dated 1 October 1987 is erroneous in law
 - (2) It is expedient that I should make fresh and further findings of fact and give the appropriate decision in the light of them
 - (3) My decision is that the claimant is entitled to invalid care allowance (ICA) from 28 July 1986.
 2. I held an oral hearing of this case, which was listed and heard on the same day as the appeal in CG/29/1987 (Cooze). A copy of my decision in that case accompanies my decision in the present case.
 3. The hearing of this case originated as an application for leave to appeal out of time by the claimant against the above-mentioned decision of a social security appeal tribunal. The claimant was represented by Mr Mark Rowland of counsel, instructed by the Child Poverty Action Group as agents for Bradford Law Centre. She was not present. The adjudication officer and the Secretary of State were represented by Mr R. Plender of counsel, instructed by the Solicitor's Office of the Departments of Health and Social Security. I granted an extension of time in which to apply for leave out of time, being satisfied that there were special reasons for this, and also granted leave to appeal. With the consent of the parties, given at the hearing, I am treating the application as an appeal and am determining any question arising on the application as though it were a question arising on the appeal: see regulation 5(3) of the Social Security Commissioners Procedure Regulations 1987.
- Nature of this appeal
4. The present appeal is against the decision of a social security appeal tribunal affirming an adjudication officer's decision that section 37(5) of the Social Security Act 1975 precludes the claimant from obtaining ICA.
 5. The sole question in this appeal is whether by reason of Directive 79/7/EEC of the Council of European Communities ("Directive 79/7") the claimant is entitled to ICA notwithstanding section 37(5) of the Social Security Act 1975. The answer to this question turns on whether Article 7(1)(a) of Directive 79/7 excludes section 37(5) from the scope of Direction 79/7.

The relevant law

6. This is the same as that referred to in paragraphs 16 and 17 of decision CG/29/1987 (Cooze).

The adjudication officer's decision

7. The following decision of an adjudication officer was issued on 11 September 1986 .

"The claimant is not entitled to invalid care allowance because she has attained pensionable age and was not entitled and cannot be treated as having been entitled to invalid care allowance immediately before attaining that age. (Social Security Act 1975 sec 37(5) and the Social Security (Invalid Care Allowance) Regulations reg 10).

The claimant appealed against this decision.

The social security appeal tribunal's decision

8. The appeal was heard on 1 October 1987. The claimant was present and gave evidence. The chairman's note state:

"Adjudication Officer.

Disallowed. Claimant attained 60, 4.4.86. Claim 7.7.86. Claimant attained pensionable age before claim made therefore disallowed EEC directive does not affect.

Claimant.

Agrees age and date of claim. Worked part time AHA. Was allowed to continue in work until 65, but retired to look after her mother.

I received attendance allowance at higher rate - July 1986.

Became aware of FLA allowance - Marshall case.

Sex discrimination against Miss Beard

79/7 1978. EEC directive Act 4 quoted.

Benefits Officer's decision illegal in view of directive which should have been brought into force within 6 years - Act 8.

Agrees Adjudication Officer has followed present Regulations."

The tribunal's decision was:

"The decision is confirmed."

Their recorded findings of fact were:

"Claimant's date of birth 4.4.26. Was entitled to continue work after the age of 60 but retired in order to look after her mother for whom higher rate attendance allowance was awarded.

Claimed invalid care allowance on 7.7.86.

Claimants representative refers to EEC Council directive 79/7 of Dec 1978. In particular to articles 4 and 8, extracts from which are attached."

Their recorded reasons for this decision were:

"Claimant agrees that the AO has followed the present Regulations applicable in the UK and that because she attained pensionable age before she claimed disallowance her claim cannot succeed unless the Regulations are altered in accordance with the above EEC directive.

The Tribunal has no authority or discretion in this case and any amendment to rules must be done by higher authority."

Was the tribunal's decision erroneous in law?

9. Yes, it was. For the reasons set out in my decision in CG/29/1987 (Cooze) Article 7(1)(a) of Directive 79/7 does not exclude section 37(5) of the Social Security Act 1975 from the scope of Directive 79/7. That Directive had direct effect and the tribunal were in error in thinking that it did not.

The facts

10. The claimant attained the age of 60 on 4 April 1986. She worked after attaining that age but gave up her employment to look after her mother. Had she not done so she would have been able to continue in her employment until she reached the age of 65. Her mother was awarded attendance allowance from 1 July 1986 and claimed ICA from 7 July 1986. [These two dates, no doubt by clerical error, are erroneously stated in Mr Rowland's submission to be 1 July 1988 and 7 July 1988]. It is not in dispute that the claimant worked until 25 July. Her claim, as Mr Rowland has pointed out, is from Monday 28 July 1986. None of these facts is in dispute.

11. It is common ground that under the law of the United Kingdom (or, more accurately, that of Great Britain), the claimant would be entitled to ICA were it not for section 37(5) of the Social Security Act which provides that "a person who has attained pensionable age shall not be entitled to an allowance under this section unless he was not entitled (or is treated by regulations as having been so entitled) immediately before attaining that age". Pensionable age is 65 for a man and 60 for a woman. Since attendance allowance did not become payable to the claimant's mother until 1 July 1988, by which time the claimant had attained the age of 60 years, and entitlement to ICA only began in respect of this claimant as from the date when attendance allowance became payable (see section 37(1)(c) read with section 37(2) of the Social Security Act 1975), section 37(5) operates to disentitle the claimant to ICA unless it is overridden by the provisions of Directive 79/7.

The decision that should have been given

12. Mr Plender's argument that Directive 79/7 does not apply in respect of section 37(5) is that same as that advanced in his argument in CG/29/1987 (Cooze) and I reject it for the reasons set out in my decision in that case and accept the submission of Mr Rowland that this claimant's appeal should be allowed. Because Directive 79/7, as explained in that decision, is directly applicable, the claimant is entitled to ICA on the same terms as men and continue to be eligible for ICA up to the age of 65. Since she had not reached

age 65 when attendance allowance became payable to her mother, ICA is payable to her from 28 July 1986, from which it has been claimed. My decision to this effect is set out in paragraph 1.

(Signed) V G H Hallett
Commissioner

Date: 6 April 1989