NON-CONTRIBUTORY INVALIDITY PENSION

Prospective claim—circumstances in which the claim must be treated as terminated.

The claimant appealed to the Commissioner against disallowance of an open-ended prospective claim for non-contributory invalidity pension. By decision dated 19.2.80 the Commissioner decided benefit was not payable from 13.9.78. Subsequent claims were made for the period beginning 13.9.78 and a question arose as to the effect of the Commissioner's decision of 19.2.80 and the correct approach to the disposal of the subsequent claims.

Held that:

1. the disallowance of an open-ended claim is effective to the date of the decision and disposes of the claim (paragraphs 10 and 13);

2. if further claims for the same benefit are submitted for an overlapping period after final disposal of an original open-ended claim they will, so far as overlapping, be precluded from adjudication by the rule of *res judicata* (paragraphs 11 and 13).

In paragraphs 8 and 11 the Commissioners indicate the special circumstances in which the running of an original claim can be terminated.

Decisions R(S) 5/80, R(I) 3/65 and R(I) 9/63 considered.

1. Our decision is (1) that consideration of the merits of claims in the alternative for non-contributory invalidity pension submitted by the claimant in respect of the period from 13 September 1978 to 19 February 1980 (both dates included) is precluded by the principle of *res judicata* and that these claims must be and are hereby dismissed; and (2) that non-contributory invalidity pension is not payable to the claimant from 20 February 1980 to 9 October 1981 (both dates included) upon the ground that the claimant has not established that she was incapable of performing normal household duties within the meaning of section 36(2) and (7) of the Social Security Act 1975 and relative regulations.

2. This appeal to the Commissioner by the claimant from the decision of a local tribunal was dealt with by a Tribunal of Commissioners because of the complex issues involved and because it throws into relief certain recent differences of view between Commissioners which have emerged in the application of the principles laid down in R(S) 5/80 (the decision of a Tribunal of Commissioners) to circumstances different from those dealt with in that reported decision. An oral hearing was held before us. The claimant was unable to attend and was unrepresented. The insurance officer was represented by Mr. James of the Solicitor's Office of the Department of Health and Social Security, who addressed us with his customary clarity and skill. We are indebted to him for his assistance.

3. The claimant is a married woman now aged 46 who lives with her husband and 3 grown up sons. She suffers from rheumatoid arthritis, coronary artery disease and an anxiety state. In July 1980 she had a benign growth removed from the stomach and a hysterectomy operation. She first claimed non-contributory invalidity pension on 11 October 1977. That benefit became payable to a married woman living with her husband with effect from 17 November 1977. Before a claimant in this category can be found entitled to the benefit she must show that she is incapable both of work and of performing normal household duties by reason of some specific disease or bodily or mental disablement and that she has been so incapable for a period of not less than 196 consecutive days ending

immediately before the first benefit day. See section 36 of the Social Security Act 1975. The circumstances in which a claimant is to be treated as incapable of performing normal household duties for the purposes of section 36(2) are prescribed in the Social Security (Non-contributory Invalidity Pension) Regulations 1975 made under section 36(7) of the Social Security Act 1975. The claimant's original claim, made with effect from 17 November 1977 was disallowed by the local insurance officer and, on appeal, by a local tribunal, but in light of the decision of a Tribunal of Commissioners upon the interpretation of the relevant statutory provisions (C.S. 5/78 dated 8 September 1978) the claimant's appeal to the Commissioner was upheld and non-contributory invalidity pension was awarded to the claimant from 17 November 1977 to 12 September 1978 by decision on Commissioner's file C.S.S. 137/78 dated 3 January 1979. That decision did not deal with the question of the claimant's entitlement as from 13 September 1978 because of an amendment to regulation 13A(2) of the Social Security (Non-contributory Invalidity Pension) Regulations which took effect from that date. The question of the claimant's entitlement to the benefit as from 13 September 1978 was remitted to the insurance officer and reconsidered in light of the altered law applicable from that date. Benefit was disallowed by the insurance officer and, on appeal, by a local tribunal. The claimant appealed to the Commissioner who by decision dated 19 February 1980 (decision on Commissioner's file C.S.S. 185/79) decided that non-contributory invalidity pension was not payable to the claimant from 13 September 1978 upon the ground that the claimant was unable to satisfy the amended statutory test. That decision was given in light of a medical report upon the claimant dated 27 April 1979 made on form HA45 in which the doctor advised that the claimant should refrain from (paid) work and was likely to remain at least as restricted as she then was in her ability to perform normal household duties "until further notice". The doctor's advice in an earlier report given at the time of the claimant's original claim was in the same terms.

4. On 17 September 1980 the claimant lodged a fresh claim for non-contributory invalidity pension which is the subject of the present appeal. She stated that she claimed benefit from 5 March 1980. A further doctor's report dated 10 October 1980 advised that the claimant should refrain from paid work and was likely to remain as restricted in her ability to perform normal household duties as she then was for the period of one year, i.e. to 9 October 1981. The local insurance officer disqualified the claimant for receiving the benefit from 5 March 1980 to 9 September 1980 upon the ground that her claim was not made within the time limit set out in regulations and good cause for the delay had not been established. He disallowed benefit from 10 September 1980 on the ground that the claimant had not established that she was incapable of performing normal household duties. The local tribunal refused an appeal by the claimant against that decision although they erroneously described the disallowance from 10 September 1980 as a disqualification. The claimant again appealed to the Commissioner. In making her appeals to the local tribunal and to the Commissioner the claimant contended that benefit should be awarded to her not from 5 March 1980 but from September 1978. It emerged that she had submitted doctors' statements on forms MED 3 at regular intervals covering the continuous period from 27 January 1978 to 14 November 1980. On 27 May 1981 a directive was issued on behalf of the Secretary of State for Social Services accepting under regulation 9(1) of the Social Security (Claims and Payments) Regulations 1979 that these medical statements might from 13 September 1978 be treated as claims in the alternative for non-contributory invalidity pension. In these circumstances it is obvious that questions arise as to the effect of the Commissioner's decision dated 19

February 1980 disallowing benefit from 13 September 1978 and as to the correct approach to the disposal of the claimant's subsequent claims to benefit.

5. On behalf of the insurance officer it was submitted by Mr. James under reference to decision R(S) 5/80 and section 79(3) of the Social Security Act 1975 that in the case of short term claims such as claims based upon incapacity including non-contributory invalidity pension prospective claims, i.e. claims in respect of a day or days subsequent to the date of claim, are only permitted where expressly provided for, and that the only regulation expressly permitting prospective claims for benefits in respect of incapacity is regulation 11 of the Social Security (Claims and Payments) Regulations 1979. We agree. Contrary to what was held by the Commissioner in paragraph 17 of unreported decision C.S. 2/82 we do not regard the provision of Schedule 1 of those regulations dealing with the prescribed period for making claims as itself expressly "permitting, in prescribed circumstances" a prospective claim within the meaning of section 79(3).

6. Regulation 11 of the Claims and Payments Regulations, so far as material for present purposes, provides:—

"11.—(1) Subject to the following paragraphs, where a medical certificate has been issued in respect of the person named therein ("the claimant")—

(a) a claim for sickness, invalidity or injury benefit or non-contributory invalidity pension based on the medical certificate shall, unless in any case the Secretary of State otherwise directs, be treated as if made by the claimant for the period specified in that certificate;

(b) on any such claim the benefit may be awarded for the whole or part of that period after the date of the claim but not exceeding 13 weeks or such shorter period as the Secretary of State may in a particular case direct;

.....

(6) For the purposes of paragraphs (1) to (5) a medical certificate means—

(a) a doctor's statement issued in the form prescribed in Part II of Schedule 1 to the Social Security (Medical Evidence) Regulations 1976, or having effect as so issued, which advises the claimant to refrain from work for the period specified in it;

.....

(7) Where a claim for non-contributory invalidity pension is made by a woman who claims by virtue of the exception to section 36(2) (incapable of performing normal household duties) that claim shall, unless in any case the Secretary of State otherwise directs, be treated as if made by her for—

(*a*) the period specified by a registered medical practitioner not being the claimant, on a form approved by the Secretary of State, as being that during which it is to be expected that the claimant is likely to continue to remain as restricted in her ability to perform the normal household duties in her own home or, if shorter, during which she should refrain from work; or

(*b*) where applicable, the period of any award of—

(i) attendance allowance payable at the higher rate specified in paragraph 1 of Part III of Schedule 4 to the Act, or

(ii) an increase of disablement pension where constant attendance is needed payable at the higher rate specified in paragraph 7 of Part V of Schedule 4 to the Act, or

(iii) an increase of allowance where constant attendance is needed in cases of exceptionally severe disablement payable by virtue of regulations made under section 159(3)(b) (payments for pre-1948 cases), or

(iv) increase of allowance where constant attendance is needed in cases of exceptionally severe disablement payable under any scheme made under section 5 of the Industrial Injuries and Diseases (Old Cases) Act 1975, or

(v) constant attendance allowance payable at the higher rate specified for exceptional cases of very severe disablement under any Personal Injuries Scheme or Service Pensions Instrument defined in regulation 2(1) of the Social Security (Overlapping Benefits) Regulations 1975; or

(c) .....

in any case beginning on the first day for which non-contributory invalidity pension is claimed.

(8) The reference in paragraph (1)(b) to "that period" shall be construed, in relation to a claim to which paragraph (7) applies, as a reference to the period applicable under the latter paragraph, and paragraphs (1)(c) and (2) shall be construed accordingly."

7. It was submitted by Mr. James on behalf of the insurance officer (1) that only if a medical certificate was issued for a period could there be a claim coming under regulation 11; (2) a "medical certificate" within the meaning of regulation 11(1) as defined in regulation 11(6)(a) means a doctor's statement in the form prescribed in the Medical Evidence Regulations or one "having effect as so issued". This covered a medical report in the form employed in housewife's non-contributory invalidity pension cases; (3) a claim for such pension even if supported by a medical report containing a prognosis in the "until further notice" form comes within regulation 11 and the relative claim, being for an indefinite period continues until withdrawn or a terminal date is fixed or the claim is finally disallowed or the claimant dies. We agree with the first of these submissions to the extent that regulation 11(1) envisages that a claim can only be dealt with under it if a medical certificate within the meaning of that regulation has been issued. We are attracted by Mr. James' argument as to the significance that should be attached to the words "or having effect as so issued" in regulation 11(6)(a) because it provides a possible bridge over what would otherwise be a hiatus between the doctor's report on an approved form as mentioned in regulation 11(7)(a) and a medical certificate as specified in regulation 11(1). But it will be noted that the doctor's statement referred to in regulation 11(6)(a) is one advising the claimant to *refrain from work* for the period specified in it whereas the doctor's report under regulation 11(7)(a) will only have effect for that period if it is shorter

than the period for which the claimant is likely to continue to remain as restricted in her ability to perform normal household duties. Furthermore Mr. James' suggested interpretation of the words from regulation 11(6)(a) does not provide any corresponding bridge for the variety of cases dealt with under regulation 11(7)(b) where the period is the period of an award of a different benefit. The fact is that in this and a number of other respects regulation 11 is not expressed in a way entirely appropriate to the assimilation of claims for non-contributory invalidity pension under section 36(2) of the Social Security Act 1975. In this respect (with one qualification) we agree with the observations of the Commissioner in unreported decision C.S. 15/81 in paragraphs 8(1) and (2), and (10)(1). Having regard to Mr. James' second submission upon the words in regulation 11(6)(a) the Commissioner's observation in paragraph 8(1) of C.S. 15/81 that regulation 11(6) prescribes what is a "medical certificate" for the purposes of regulation 11(1) in terms which make it "unequivocally clear" that a form HA 45 report is not a "medical certificate" overstates the position.

8. We accept the proposition that a claim for non-contributory invalidity pension comes under the provisions of regulation 11 even if the relative doctor's report is in the "until further notice" form. A claim supported by a medical report in such terms is in our opinion a claim for an indefinite period. We appreciate that such a period may be contrasted with the specification of a definite period and that in the context of medical statements on forms MED 3 paragraph 13 of Part I of Schedule 1 to the Social Security (Medical Evidence) Regulations 1976 refers to the use of the words "until further notice" as an alternative to specifying a period. We do not however consider this a sufficient argument to cause us to restrict the application of regulation 11 to such claims for non-contributory invalidity pension as contain the specification of a definite period as distinct from an indefinite period. It is inherent in the nature of non-contributory invalidity pension claims that many will relate to claimants whose incapacity is permanent or at least likely to be of indefinite duration where a prognosis by the doctor in the "until further notice" form is appropriate. While we consider the wording of regulation 11 to be less than satisfactory in this connection there is, it seems to us, nothing in that wording to compel us to restrict its application to the exclusion of such cases. In this respect therefore we disagree with the opinion expressed by the Commissioner in unreported decision C.S. 12/80 paragraph 17. We also agree with Mr. James that such a claim for an indefinite period continues until it is withdrawn or a terminal date is fixed or the claim is disposed of by a final disallowance or the death of the claimant occurs. In this respect we do not regard the events stated by the Commissioner in paragraph 9(4) of unreported decision C.S. 15/81 as exhaustive of the possibilities and we consider this matter further in paragraph 11 below.

9. Mr. James next submitted that when a claim based on incapacity for an indefinite period, i.e. an open-ended claim, has been made, a disallowance from the date of claim is effective to the date of the disallowance decision and disposes of the claim. There is no express statutory basis for this proposition but it is in accordance with the generally understood effect of such a decision. It is to be justified on the basis that where such an open-ended claim has been made the claimant should be treated as continuing his claim until final determination of it. It will therefore persist during appeal procedure until a final decision is made whereupon the claim for the whole period is disposed of. If this were not so there would be potential prejudice to a claimant who did not lodge further claims during any protracted appeal procedure since he might find that subsequent claims were affected by the 12 month limitation in section

82(2)(c) of the Social Security Act 1975. Reference may also be made by way of analogy to the decision in R(I) 3/65 paragraph 15, a decision upon the effect of a disallowance of a claim for special hardship allowance. We consider that the effect of a decision disallowing benefit upon an "open-ended" incapacity claim from the date of claim as generally hitherto recognised should now be reaffirmed.

10. R(S) 5/80 laid down the principle that the power to disallow prospective claims is to be found only in section 99 of the Social Security Act 1975 and that the disallowance must dispose of the whole claim. If a prospective open-ended claim is to be disallowed it must (assuming it remains open-ended) be disallowed down to the date of the disallowance decision. The adjudicating authority, whether insurance officer, local tribunal or Commissioner cannot therefore deal with a claim of this character which remains open-ended by imposing a disallowance down to a specified date which is earlier than the date of decision. In this connection we agree with the view expressed by the Commissioner in unreported decision C.S. 9/80 paragraph 7 and disagree with the conclusion reached by the Commissioner in paragraph 18 of unreported decision C.S. 12/80. In the latter case the Commissioner refers to paragraph 15 of decision R(I) 3/65 but in that case the disallowances were not made for a specified period ending before the date of decision and the reference does not appear to support the Commissioner.

11. A problem arises in relation to any further claims for the same benefit which may be submitted for an overlapping period. If such a claim is submitted after final disposal of an original open-ended claim it will, so far as overlapping, be precluded from adjudication on the merits by the rule of *res judicata.* See R(I) 9/63 paragraphs 24 and 25. In that situation the original decision can be reconsidered only if there are grounds for review. If submitted during a period when the original claim is under appeal a new claim cannot in our opinion be regarded as automatically terminating the running of the old claim although such termination can in our view be regarded as effected in certain circumstances. Thus if the new claim is supported by a medical report which identifies the occurrence of a material change in the claimant's condition and so places a terminal date upon the duration of the claimant's condition as assessed in connection with the original claim, a terminus to the running of that claim can be accepted as established. Again, if there has been no adjudication under the original claim upon the period covered by the new claim, the termination of the running of the original claim could be regarded as effected by the withdrawal, express or implied, of that period of claim from the original claim. Furthermore it appears to us that the allowance of a new claim by an award, which is unchallenged, made before the original claim is finally disposed of, should be regarded as terminating the running of that claim. The insurance officer has a statutory duty to deal with any such new claim and may be required to do so before the date of final decision on the original open-ended claim. To minimise the risk of the possible emergence of conflicting decisions relating to overlapping periods it is obviously essential that details of any such subsequent claims and any adjudication upon them should always be disclosed by the insurance officer to the Commissioner when an appeal is pending on an earlier open-ended claim.

12. There are occasions particularly in the case of appeals to the Commissioner where there is a lack of up-to-date medical evidence on an open-ended claim. Frequently the claimant has lodged no new claim but maintains that there has been a recent deterioration in her condition. In such cases it is open to the Commissioner before finally disposing of the appeal to call for further medical evidence if such evidence could lead to an

award of benefit for the most recent period before him. Alternatively we consider that it would be open to the Commissioner before finally disposing of the appeal, even if the earlier part of the period of claim fell to be disallowed, to give an interim decision covering that part of the period of claim and to remit the balance of the period of claim to the local tribunal or the insurance officer for further investigation, without transgressing the rules set forth above. These alternatives would obviate the difficulty in such cases that in the absence of a further claim having been made a disallowance decision could only be reviewed subsequently upon production of "fresh evidence" in terms of section 104(1)(a) of the Social Security Act 1975.

13. Our conclusions upon the foregoing matters may be summarised as follows:—

(1) Prospective claims for short-term benefits are only permitted where expressly provided for by regulation and the only regulation expressly so providing is regulation 11 of the Social Security (Claims and Payments) Regulations 1979.

(2) Claims for non-contributory invalidity pension are made under regulation 11 whether for a definite or an indefinite period.

(3) (a) The disallowance of an open-ended claim is effective to the date of the decision and disposes of the claim.

(b) If such a disallowance is appealed, the claim must be treated as persisting during the appeal procedure to the date of final disposal unless earlier terminated in one or other of the ways referred to in paragraphs 8 and 11 above.

(c) If the final disposal is a disallowance it must exhaust the claim period and the decision will be *res judicata* for that period, i.e. subject only to review, it will preclude subsequent further adjudication upon the merits in relation to that period.

14. We turn now to the circumstances of the present appeal. it follows from what has been stated above that the claimant's original claim which was open-ended was extended to cover the period from 13 September 1978 up to the date of final disposal of the appeal by decision dated 19 February 1980. The final disallowance of the claim for that period by the Commissioner's decision of that date operates to preclude, on the principle of *res judicata,* any further adjudication on the *merits* of any new claims relative to that period. In so far as in pursuance of the direction of the Secretary of State the claimant is to be regarded as having made claims in the alternative for non-contributory invalidity pension for the same period these claims must, of course, be disposed of but the appropriate manner of disposal is in our view that they must be dismissed upon the ground that consideration of them upon their merits is precluded by the decision of the Commissioner dated 19 February 1980.

15. So far as the period from 20 February 1980 onwards is concerned, accepting that the claimant has made claims in the alternative for non-contributory invalidity pension from that date up to and beyond the date of her second formal claim on 17 September 1980 and as we are prepared to deal with the questions thereupon arising as questions for our disposal under section 102(1) of the Social Security Act 1975, there is in our opinion no longer any question of the claimant being required to establish good cause for the delay in submitting her second formal claim. The period before us on appeal is accordingly the period from 20 February 1980 up to 9 October 1981, the terminal date being established by reference to the terms of the doctor's report dated 10 October 1980 and the provisions of

regulation 11(1) and (7) of the Social Security (Claims and Payments) Regulations 1979.

16. The claimant's medical problems have already been summarised. She is described in the medical report dated 10 October 1980 as a tense lady with poor musculature and rather poor grip but with full reach and able to tiptoe and squat. She is assessed as having normal or substantial function for all but 4 of the activities listed on report form HA 45. Of the remaining activities the claimant is assessed as having, (1) substantial function in lifting as in preparing and cooking a meal, and slight to substantial function in lifting as in doing washing and getting shopping, (2) substantial function for carrying as in preparing and cooking a meal, and slight to substantial function for carrying as in doing washing and getting shopping, (3) only slight function in connection with walking outside the home, and (4) only slight function for sustained action as in cleaning windows or an oven or ironing. Commenting on the claimant's own assessment of her abilities as entered on her claim form dated 17 September 1980 the doctor observed that she helps her husband when they go shopping by car, that she prepares meals and could wash up, that given time she could do most of washing and ironing. So far as cleaning was concerned the doctor agreed with the claimant's own assessment that she was able to dust and tidy, use a vacuum cleaner or carpet sweeper and polish.

17. It is clear that the claimant is unable to attend to shopping without substantial assistance from her husband. So far as the remainder of normal household duties are concerned it is in our opinion clear that despite the disabilities arising from the claimant's medical conditions she retains a measure of ability, without substantial assistance or supervision, to perform normal houseold duties to an extent which must be regarded as "substantial" and this is in accordance with what could reasonably be expected in the circumstances. The claimant cannot therefore be treated as incapable of performing normal household duties for the purposes of section 36(2) of the Social Security Act 1975. In her grounds of appeal to the Commissioner the claimant makes reference to having to attend hospital for further tests, and in observations dated 27 July 1981 the claimant states that she is attending hospital for her stomach and bowels and that she is beginning to get worse with arthritis in the hands and legs. No further medical evidence has been submitted by the claimant but even if there were sufficient evidence to establish a material change in the extent of the claimant's capacity for normal household duties at some date in or shortly prior to July 1981, the claimant would not be able to succeed in establishing entitlement to benefit in the period up to 9 October 1981 by reason of the operation of the 196 day condition affecting this benefit, referred to in paragraph 3 above. It is unnecessary for us in this appeal to decide in terms that no such material change has occurred, and to avoid any risk of prejudice to a subsequent claim we prefer not to do so.

18. The appeal of the claimant is refused.

(Signed) I. O. Griffiths
Chief Commissioner

(Signed) Douglas Reith
Commissioner

(Signed) J. G. Mitchell
Commissioner