

## CHAPTER 7

## Increase of benefit for adults

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## CHAPTER 7

## Increase of benefit for adults

## Part 1: Increase of unemployment benefit, sickness benefit and retirement pension

*Sections 44(1)(a)(i) and 45(2)(a) of the SS Act 1975, and see also reg. 3 of the SS Benefit (Persons Residing Together) Regs. 1977 (hereinafter referred to as “the Act” and “the Regs.”).*

**1 Beneficiary held to be residing with his wife**

- i A man who had been receiving in-patient treatment as a voluntary patient in a mental hospital for 15 months, and who had been home for short visits on a number of occasions, was held to be “residing with” his wife. It was not a case where there appeared to be no prospect of the absence coming to an end and that, in the circumstances, it was premature to say that after a lapse of no more than 15 months or thereabouts the husband’s absence from home was other than temporary. Compare R(S) 15/51, *infra* 7.1.3 ii and R(S) 14/55, *infra* 7.1.1 iv. R(S) 31/52
- ii A man and his wife were residing until he was called up for national service in Her Majesty’s Forces and it was held that he had not ceased to reside with her during his period of service. R(U) 6/54
- iii A man had been an in-patient of a mental hospital for over three years when he was then discharged absolutely to his home, but had to be readmitted to the hospital after only nine days at home. The prospect of his discharge within six months of readmission was very slight. Prior to his discharge he had not been regarded as residing with his wife, but it was held by a tribunal of Commissioners that the inference to be drawn from the fact was that on being discharged from the mental hospital and going home a new period of residence with his wife began. The unexpected recurrence of his mental malady which made it necessary for him to return to hospital was an event which did not affect the fact that at the moment when he did return home he was residing with his wife. See also R(P) 7/53, *infra* 7.1.2 iii. R(S) 25/54 (T)
- iv The claimant’s wife had been a voluntary patient in a mental hospital for some three years, during the whole of which period he had been in receipt of an increase of sickness benefit in respect of her. She had been home on visits on no less than 43 occasions but there was no prospect of her being discharged within the next six months. References were made to R(S) 31/52, *supra* 7.1.1 i, R(S) 15/51, *infra* 7.1.3 ii and R(S) 7/55, *infra* 7.1.2 iv, but the case to which those decisions related were distinguished on the ground that in each of them the periods of absence of the claimant and his wife from one another far exceeded the periods of their living together; whereas in the instant case the claimant’s wife had visited her home so frequently and for such substantial periods that it would not be right to say that her absence from home had been anything other than temporary. It was accordingly held that she and the claimant had continued to reside together. See also and compare R(U) 15/54 and R(S) 6/52. R(S) 14/55
- v A retirement pensioner and his wife were living in prescribed accommodation provided under the National Assistance Act 1948 and, because married quarters were not available for them, they had to sleep in separate dormitories in the same building. There were short period when one or other of them had to go to hospital, but otherwise they spent their time together in the dining and sitting rooms. They were held to be residing together. R(P) 15/56

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R(S) 8/60 vi A man who suffered from pulmonary tuberculosis was an in-patient in hospital. His wife had been in a mental hospital for 23 years and there was no prospect of her being discharged. It was held that there was no evidence, other than the mere absence in hospital, that the claimant and his wife had ceased to reside together and accordingly, applying (what was then) reg. 4A of the NI (General) Benefit Regs. 1948, as amended (see now reg. 2 of the Regs.), they were “residing together” at the material time.

**2 Temporary absence**

R(P) 7/53 i In the case of a RP the established test for deciding whether absence has ceased to be temporarily is that it has lasted for more than a year and there is no reasonable prospect of its coming to an end. If a man left home, and if it was ascertained after more than a year had elapsed that there was still no prospect of his return, he would not be said to be temporarily absent. That is not, however, a hard and fast rule for there may be cases where it could be said long before the year was up that the absence was not going to be temporary, but unless there are special features the test ought to be adhered to and not whittled away.

R(S) 7/55 ii A man had been a voluntary patient in a mental hospital for over two years. He had been allowed home to visit his wife at weekends for some time, but the hospital authorities stated that there was no likelihood of his being discharged within the ensuing 6 months. It was held that his absence from his wife had ceased to be temporary. Compare R(S) 31/52, 7.1.1 i *above* and R(S) 15/51, 7.1.3 ii *below*.

R(U) 14/58 ii A man who left home to seek work in another part of the country, although it was his intention to return to local employment when possible, was held to be only temporarily absent from his wife.

**3 Beneficiary held not to be residing with his wife**

CS 6/48 i It was held in the case of a man whose wife had been an in-patient in a hospital for 15 years that she could not be said to be residing with him. See also CS 70/49.

R(S) 15/51 ii A man had been an in-patient in a mental hospital for some eight years but had been allowed to go home for three days each month. The hospital authorities stated that his discharge within the next six months was unlikely unless his relative made a specific request for his discharge. It was held that he was not residing with his wife. See paras. 8 and 9. See also R(S) 6/52 and R(S) 26/52.

R(P) 5/54 iii A woman who was in receipt of RP was admitted to a mental hospital. Two years later the hospital authorities were prepared to discharge her but she did not return home, the reason being either that she had what was described as a “rooted objection” to leaving the hospital, or because her husband felt unable to arrange to look after her on account of her physical condition. There was no satisfactory evidence on which it could be inferred that she was likely to return home and it was held that she was no longer residing with her husband.

R(S) 2/57 iv A voluntary patient in a mental hospital had been an in-patient for nearly six years and it was not expected that he would be discharged in the near future. He had been allowed to return home approximately every other weekend and for a longer period in the summer, and at Christmas, during the previous 2½ years, but it was held that he had ceased to reside with his wife. See and compare R(S) 14/55, 7.1.1 iv *above*.

R(U) 11/62 v A claimant was an in-patient in hospital for some nine months, after which he (T) rejoined his wife and two children for about a month. He left them and never returned to live with his wife and it was held by a tribunal of Commissioners that, after a separation of twelve months, he had ceased to reside with his wife.

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**4 What constitutes a wife**

i In 1981 a man claimed an increase of sickness benefit in respect of the woman, a widow, with whom he had been living in Scotland as man and wife. That association had been going on since 1967. At that time the claimant was already married to another woman, but that marriage was dissolved in 1969. As a result of her association with the claimant, the widow had lost her right to WB. The question in issue was whether the claimant and the widow had established the existence of a marriage by cohabitation with habit and repute. The evidence was that neighbours, relatives and employers knew that they were not married. The Commissioner held that, since the provisions of the Marriage (Scotland) Act 1939, the only form of irregular marriage in Scotland was one which was established by proof of cohabitation with habit and repute (para. 4). To establish such a marriage under the law of Scotland the parties must have cohabited openly and constantly as if they were husband and wife for such a length of time that in the society or neighbourhood of which they were members the general belief that they were married persons resulted (para. 4). When both parties were still alive, a fairly heavy onus fell on persons who were living together maintaining that they had contracted an irregular marriage by habit and repute (para. 5). In the present case the parties had been free to enter into a regular marriage since May 1969. There appeared to have been no real reason why the parties, if they had wished to be married, should not have taken steps to enter into a regular marriage. It had to be remembered that cohabitation with habit and repute did not itself constitute marriage, such cohabitation had to raise the presumption that there had been tacit consent to the marriage and he held that for SS purposes the claimant and the widow were not married (para. 6). R(S) 4/85

ii An increase of sickness benefit was claimed in respect of the woman with whom the claimant had been living for 22 years but to whom he was not legally married. The claim was disallowed on the ground that she was neither the claimant's wife nor had care of a child of the claimant. The Commissioner held that in s. 44 of the SS Act 1975 the term "wife" must be given its ordinary primary meaning of "woman joined to a man by marriage" having gone through a form of legal marriage to a man. It cannot be extended to take in "a common law wife". R(S) 6/89

**5 Validity of foreign divorce**

See Chapter 19 - International subjects.

## Part 2: Increase of unemployment benefit, sickness benefit and retirement pension

*Sections 44(1)(a)(ii), 44(1)(b) and 45(2)(b) of the Act and see also regulations 3-4 of the Regulations.*

### 1 What constitutes 'contributing'

- CP 96/50 i A retirement pension payable to a wife on her husband's insurance should be regarded as a contribution by him towards her maintenance.
- R(S) 1/51 ii A claimant in England said that he contributed 'as much as he could afford' to the maintenance of his wife in Ireland. It was pointed out that the statutory test was whether in fact a person contributes the statutory amount and is not simply whether he contributes as much as he can afford.
- R(U) 25/58 iii It is not legitimate to regard a payment of arrears as increasing the sum paid by way of maintenance in any particular week, for it is simply a late payment of what ought to have been paid before. It does not increase the amount actually paid by the claimant towards the maintenance of his wife. A man and his wife had lived separate and apart for many years and there was in existence a court order for payment by the man of certain weekly sums. During a period of about 40 weeks before the date of his claim for an increase of benefit for his wife he had paid an additional amount to her in respect of arrears. It was held he had not been contributing at a weekly rate of the statutory amount and that to hold otherwise would be to give undue benefit to the husband who accumulated arrears and then paid them off over a long period, as compared with the husband who paid fully and punctually.
- R(S) 1/59 iv A claimant who was separated from his wife regularly contributed to her maintenance an amount which entitled him to an increase of sickness benefit in respect of her. The required amount for entitlement to the increase was raised, but the claimant did not become aware of that fact until some time later and when he did become aware of it he increased his contribution to his wife's maintenance retrospectively. It was held that when not incapable of work he was contributing to her maintenance at a weekly rate of not less than 'the amount of the increase' and that an increase of sickness benefit was payable to him.
- R(U) 22/62 (T) v A claimant for an increase of unemployment benefit in respect of his wife had not lived with her for a year although they were not permanently living apart. He had not contributed the weekly amount of the increase he claimed for the cost of providing for his wife and it was held by a Tribunal of Commissioners that, *inter alia*, he was not entitled to an increase of unemployment benefit for his wife because he was not contributing to the cost of providing for her, nor when last in employment had he so contributed.
- R(U) 3/66 vi A man who had lived apart from his wife for some years and who had been making voluntary contributions for her maintenance conveyed the former matrimonial home to his wife, who, in consideration thereof, agreed to accept reduced cash maintenance payments. It was held that, in the circumstances of the case, the conveyance of the house by the claimant to his wife fell to be taken into account when the weekly rate at which he was contributing to her maintenance was being calculated. See paragraphs 7-9 and see also 7.3.5 iii *above*.

## 2 Wife held to be engaged in a gainful occupation

*N.B. 'Earnings' means earnings derived from a gainful occupation. See regulation 1(2) of the Social Security (Benefit) (Computation of Earnings) Regulations 1974.*

- i A man whose occupation was that of a retail seedsman was ill for a protracted period, during which his wife attended to the business. It was held that by carrying on her husband's retail business for over a year she was gainfully occupied and in receipt of earnings in excess of what was then the statutory maximum amount. C.S. 509/50
- ii It was held that a woman who looked after 4 boarders in her house was gainfully occupied and in receipt of earnings in excess of what was then the permitted amount save for a period of a week when 2 of the boarders were away for 4 days. R(S) 3/51
- iii The wife of a professional man was paid a small weekly amount for business services performed by her at her home on his behalf. She rendered certain services in connection with his profession - such as answering the telephone, etc - and it was held that she was engaged in a gainful occupation from which her weekly earnings exceeded the permitted amount. The fact that the man was under no obligation to pay his wife for her services or that she was under no obligation to render her services was said to be nothing to the point. Compare C.S. 133/49, *infra* 7.2.3 i. R(S) 17/52
- iv A claimant for an increase of sickness benefit whose wife was in regular employment alleged that 2 weeks' holiday pay which she received at the commencement of her holiday was in respect of past work and that she was not, for the two weeks of holiday, engaged in a gainful occupation from which her weekly earnings exceeded the permitted amount. It was held that the holiday pay was properly attributable to the 2 weeks for which it was paid and that the claimant was not entitled to an increase of benefit in respect of his wife for those 2 weeks. See paragraphs 6-7. R(S) 2/55
- v A man who had a wholesale grocery and provision business was seriously ill for some 9 months and his wife then took over the running of the business. She received no wages, but it was nevertheless held that an increase of sickness benefit was not payable to the claimant in respect of his wife since, from the date on which she started running the business, she had become gainfully occupied and the major part of the profits of the business constituted her earnings. Compare C.S.I. 133/49, *infra* 7.2.3 i. R(S) 11/56
- vi A man in receipt of sickness benefit claimed an increase of benefit for his wife when she was absent from work because of her own sickness. She was in receipt of sick pay from her employer which, it was contended, did not constitute earnings disentitling the claimant to the increase for his wife. It was held that, since the wife's sick pay was derived from her occupation, it was earnings and that an increase of sickness benefit was not payable in respect of her. R(S) 8/58
- vii A man in receipt of sickness benefit claimed an increase for his wife, who was a working partner in a grocery business from which she received interest on her share of the capital plus half the net profit which remained after deduction of her interest and the salary of the other partner. It was held that the interest on her share of the capital invested, which the tax authorities allowed her to treat as earned income, was earnings for national insurance purposes and that no deduction from her share of the profits could be made for the cost of travelling between her home and her business or for the cost of employing domestic help in her home. The increase was not payable to the claimant on the ground that his wife was engaged in a gainful occupation from which her earnings exceeded the permitted amount. See also R(S) 1/62. R(S) 3/61
- viii A man in receipt of a retirement pension made a claim for an increase of pension for his wife from a period during which she was absent from work by reason of sickness. She was in receipt of payments from her employers under a scheme of payment for such absences. The employers stated in a leaflet issued to employees that they reserved the right to withdraw or amend the scheme at any time or to decline to determine payments (T) R(P) 7/61

in any particular case. The claimant contended that during the relevant period his wife was not in a gainful occupation and that the payments made by the employers were *ex gratia* payments and not her earnings. It was held that the claimant's wife was engaged in a gainful occupation; that the payments she received were earnings, and that whether the payments were voluntary or *ex gratia* did not provide a decisive test as to whether they were remuneration or profit derived from a gainful occupation.

### **3 Wife held not to be engaged in a gainful occupation**

- C.S. 133/49 i A wife who took over her husband's shop for about 2 months while he was ill was held not to be gainfully occupied but merely discharging her normal wifely duty in a temporary emergency. See *supra* 7.2.2 iii.
- R(S) 8/56 ii A claimant for an increase of sickness benefit was the licence of a village inn. Before his illness his wife had helped in the evenings and served any customer who came in before 8 p.m., but 90 per cent of the trade was done later than 8 p.m. During the claimant's illness his wife looked after the bar without assistance until 8 p.m., but a barman then arrived and it was accepted that the claimant's wife took a very subordinate part in the running of the business. It was held that she was not gainfully occupied and that the increase was payable to the claimant for her. Compare C.S. 509/50, *supra* 7.2.2 i.

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### Part 3: Increase of unemployment benefit, sickness benefit and maternity benefit

*Section 44(2)-(3) of the Act.*

#### **1 Meaning of ‘incapable of self-support’**

*Section 168(1) of and Schedule 20 to the Act.*

i It was said that the question whether a person is incapable of self-support involves the following subordinate questions: (1) Is the claimant suffering from an infirmity? If so, (2) What work would the claimant have been qualified to do but for this infirmity? (3) Would the usual remuneration for his work be enough to support the person concerned? (4) Would the person now be able to do this work under the conditions upon which it is usually obtainable? (5) Would the person concerned now be able to do this work sufficiently well to earn enough by it to support himself or herself? It was added that ‘self-support’ means ‘self-support at a reasonable standard of living’. See also C.G. 3/48 and as for the meaning of ‘incapacity’ see C.G. 5/48. C.G. 4/48

ii The finding of a medical board as to the nature of a person’s infirmity and/or as to whether an infirmity was the same infirmity as that by reason of which a person was previously incapable of self-support was binding on a local tribunal (though not on the Commissioner) by force of regulation 2(2)(b) of the National Insurance (Widow’s Benefit and Retirement Pensions) regulations 1948. But the board’s finding on the question whether the person is incapable of self-support was *not* binding on the tribunal and, accordingly, when in the case of a claimant for a widow’s pension a medical board found that there was some infirmity due to ‘(1) old fracture R. navicular, foot; (2) injury to spine’, but that it was not such as to render her incapable of self-support, and the local tribunal considered themselves to be bound by that finding to hold that the claimant was incapable of self-support, it was held that the tribunal was mistaken in so deciding and that the evidence as a whole showed that the claimant was incapable of self-support. But compare R(G) 8/53 when a medical board had found that a claimant had ‘No disability. No infirmity.’ See now regulation 16 of the Social Security (Widow’s Benefit and Retirement Pensions) Regulations 1975. R(G) 12/53

iii A widow was in receipt of a widow’s pension on the ground that she was incapable of self-support by reason of chronic bronchitis. Reports by visiting officers, a medical board and her own doctor showed that her condition varied from time to time, but it was held that she was entitled to a widow’s pension by reason of being incapable of self-support since the periods during which she was capable of work were comparatively short and infrequent. It was pointed out that the question is not whether a claimant is incapable of work but whether he or she is incapable of self-support; that is to say whether, owing to infirmity, he or she is unable to earn enough by his or her own exertions to secure a reasonable standard of living. R(G) 3/56

**2 Incapable of self-support**

- R(G) 16/52 i A woman whose husband committed suicide became entitled to a widow's allowance but under the legislation then in force was only entitled to a widow's basic pension unless she was by reason of infirmity incapable of self-support. Against her doctor's advice she worked for 5 months as a clerk at a time when she was grossly unfit following her husband's suicide and it was held that, on the evidence, she was incapable of self-support since she was unfit to work as she had done.

**3 Not incapable of self-support**

- R(G) 4/51 i A woman aged 45 who suffered from fibrositis, sciatica and nervous debility but kept house for 2 grown-up children and did all the housework, was held not to be incapable of self-support.

**4 What is a 'prolonged period'**

- C.S. 343/49 i A period of 5 weeks during which a man had pneumonia was held not to have been a 'prolonged period' for the purpose of determining whether a person was incapable of self-support. 'At least the period must have lasted, or be expected to last, for some months before in the normal use of language it can be spoken of as a prolonged period. Words in the statute, not otherwise defined, have to be interpreted according to the normal use of the English language.'
- C.S. 288/50 ii It was pointed out that when the question whether a person would be incapable of self-support for a prolonged period first arises it relates to the future, but when the question falls to be decided after the period is over, and there is no evidence of any prospects of recovery at the time when the question arose, a tribunal judging the question after the event is entitled to assume that medical opinion would have made a reasonably accurate forecast of the probable duration of the incapacity for self-support. It was held that the claimant's son, who was incapable of work from 22nd October to

4th February, had not been incapable of self-support for a prolonged period. Although the exact probable duration of a period of incapacity for self-support must necessarily be uncertain in a great number of cases, a period of which it could not be said that it was likely to last for 6 months could not normally be spoken of as a 'prolonged period'. See also R(S) 2/56 in which it was said that in judging whether a period is a prolonged period the past should be taken into account as well as the future.

## **5 Wholly or mainly maintaining another person**

### *Regulation 5 of the Regulations*

i A man who has not been wholly or mainly maintaining his wife cannot be precluded for all time from saying in respect of any period that it is 'a period during which' he is wholly or mainly maintaining his wife within the meaning of the relevant statutory provision. A change of circumstances arises if for any reason he decides to contribute such a sum of money to her maintenance as would in fact wholly or mainly maintain her and he acts on that decision. Thus a man who had not maintained his wife for a longer period, but then began making weekly payments under a court order, was held to have been wholly or mainly maintaining his wife from the date on which he made the first payment. C.U. 303/50

ii A woman whose husband was in the Forces claimed an increase of sickness benefit in respect of her mother, who lived with her. The claimant received a marriage allowance in respect of her husband and an allotment of his pay from the Air Ministry. She also had earnings from her own employment. It was held that the marriage allowance and the allotment should be allocated to her, or to her and her child only, which enabled her to show that she was mainly maintaining her mother. R(S) 7/58

iii When a claimant who had lived apart from his wife for some years conveyed the former matrimonial home to her it was held that the conveyance of the house fell to be taken into account when the weekly rate at which he was contributing to her maintenance was being calculated. See paragraphs 8-9 and see also R(U) 2/65 and *supra* 7.2.1 vi. R(U) 3/66

**6 Not wholly or mainly maintaining another person**

- C.S. 58/49 (T) i Where a beneficiary has wholly or mainly maintained his wife or other dependant for a period during which he was not incapable of work, that period must be regarded as continuing until it is manifest that it has come to an end. Where the beneficiary has clearly repudiated his obligation to maintain the dependant, or there is a definite agreement that a third party should assume the liability to do so, it would be right to hold that the period has ceased to be one 'during which the beneficiary is wholly or mainly maintaining the dependant' even though only a few months, or even weeks, have elapsed since he ceased in fact to do so. Where there is no evidence of repudiation or transfer of the obligation, but the beneficiary is in fact unable to maintain the dependant by reason of incapacity, the answer to the question depends upon how long he had been prevented by incapacity from wholly or mainly maintaining the dependant; and whether it is probably he will be able to resume maintenance within a reasonable time. Thus in the case of a man who, owing to incapacity, had been unable to maintain a dependant for a period of years and was likely to continue indefinitely to be unable to do so, it was held by a Tribunal of Commissioners that the period during which he had or mainly maintained the dependant had come to an end. See also R(S) 22/52.
- R(S) 6/52 ii A man who had been in a mental hospital for some years without prospect of discharge was in receipt of an increase of sickness benefit for his wife until the wife, having sold her husband's house in which she had resided, took work as a resident housekeeper, but after receiving the proceeds of the sale of the house she gave up work and went into lodgings, living on capital. It was held that the man was not wholly or mainly maintaining his wife while she was working as a resident housekeeper but that he was doing so from and after the date upon which she received the proceeds of the sale of the house.
- R(S) 26/52 iii The claimant's wife had been in hospital for some years although, depending upon the state of her health, she was occasionally allowed to go home for a few days. It was held that the claimant was not wholly or maintaining his wife because, even if he had wholly or mainly maintained her during her visit to her home, the condition could not be regarded as satisfied since maintenance must be continuous and she was not normally dependent upon the claimant for her maintenance, but must be regarded as having been for some years wholly or mainly maintained by the hospital authorities. See also R(S) 15/51, *supra* 7.1.3 ii.

**7 Effect of payment into court**

- C.U. 80/48 i The existence of a court order for maintenance is not in itself a sufficient ground for allowing a claim for an increase of benefit. A man who had made only one payment towards his wife's maintenance since they separated 4 months previously, and in whose favour there was in existence a court order for weekly payments, was held not to be wholly or mainly maintaining his wife.

ii 'Maintaining' does not mean actually making sure that the money is applied to the purpose of the maintenance of the person to whom it is paid, but merely means taking all practicable steps to provide and hand over the money for those purposes. Thus it was held that a man who, under a court order, paid a weekly sum to his wife for her maintenance was entitled to an increase of benefit for her although the money was being held by the clerk to the court while the wife was receiving free in-patient treatment in a mental hospital. But see and compare R(U) 37/52 and paragraph 3 of that decision. C.S. 638/49

iii Where a person fails to pay the amounts ordered by a court to be paid by way of maintenance it is not legitimate to regard the payment of arrears as increasing the sum so paid in any particular week since it is simply a late payment that ought to have been paid before and does not increase the amount actually paid towards the maintenance of the person concerned. Thus where a man who was separated from his wife had a court order to pay a weekly sum, and during a period of about 40 weeks paid an additional amount off the arrears which he had accrued, it was held that he had not been contributing to the maintenance of his wife at the required weekly rate. 'To hold otherwise would be to give an undue benefit to the husband who accumulated arrears and paid them off over a long period as compared with the husband who paid fully and punctually.' See also *supra* 7.2.1 iii. R(U) 25/58

## 8 What is a 'prescribed relative'

*See section 168(1) of and Schedule 20 to the Act of 1975 and see also regulation 9 of and Schedule 1 to the Social Security (Dependency) Regulations 1977.*

- i A housekeeper was held not to be a prescribed relative. See also C.S. 11/48 C.S. 2/48
- ii 'A relative by adoption' is not confined to relatives by legal adoption. C.S. 7/48
- iii A sister-in-law was held not to be a prescribed relative. C.S. 33/48

## 9 'Some female person having care of a child'

i It was held that the claimant was not entitled to an increase of his weekly rate of sickness benefit in respect of a housekeeper living with him as his wife and having care of their child. She also looked after 2 lodgers and was held to be gainfully occupied. See also C.S. 43/50. C.S. 55/49

ii 'Care' does not mean 'exclusive care' and the 'female person' may be a person who is not resident with the claimant and his child. A comparison of the number of hours during which a claimant, a female person and a child are normally in the house together is not the test. The female person might perform duties for a child, for which a child needs assistance, in comparatively few hours, but as the child grows older the needs would decrease. But a female person may be said to have 'the care of a child' if to a substantial extent she performs those duties for a child with which a child needs assistance because he or she is a child, or exercises that supervision over the child which is one of the needs of childhood. See paragraph 8-12. C.S. 726/49

iii A man was held not to be entitled to an increase of sickness benefit in respect of his housekeeper on the ground that she had the care of his son who was at a boarding-school for 9 months of the year, including the period covered by the claim. During the period, which the claimant admitted was during the school term, the claimant's housekeeper did not have care of his child. R(S) 17/54

iv The claimant's mother-in-law lived with him and his wife. The latter was in full-time employment and left home each day at 8.45 a.m. and did not return until 5.30 p.m., except for a midday meal, each day. It was held that the mother-in-law was a female person who had care of the claimant's child. R(S) 20/54

R(S) 11/55 v A man over pensionable age who had not retired from regular employment was awarded sickness benefit with an increase in respect of his child, but was held not to be entitled to an increase in respect of his housekeeper, who had the care of his child. But see now section 46(2) of the Act.

**10 Sex discrimination**

R(S) 11/79 i A husband and wife exchanged the conventional roles, the wife becoming the bread-winner and the husband remaining at home attending to domestic duties. The wife claimed an increase of sickness benefit in respect of her husband and daughter. She conceded that her husband was not capable of self-support (see sections 41(6) and 44(3)(a) of the Social Security Act 1975) but contented that the sex discrimination inherent in that Act and the regulations made thereunder must have been negated by the Sex Discrimination Act 1975. It was held that even if, which was doubtful, the provision of social security benefits fell within any of the theatres of discrimination against which the latter Act is directed section 51 of that Act operates to prevent the discrimination from being unlawful.

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## Part 4: Increase of disablement benefit

*Other than under section 60 of the Act.*

### 1 Unemployability supplement held to be payable

*Sections 58-59 of the Act*

i A surface colliery worker had been in receipt of workmen's compensation for 3 years before the National Insurance (Industrial Injuries) Act 1946 came into force on the ground of partial incapacity due to pneumoconiosis. He had done no work since then and had been in receipt of unemployment benefit for over 2 years. It was held that the evidence established that, as the result of pneumoconiosis, he could be treated as being incapable of work and likely to remain permanently so incapable and that an unemployability supplement under (what was then) section 13 of the Act of 1946 was payable to him. See also C.I. 44/49. C.I. 4/48

ii The question whether a man is incapable of work is not entirely a medical question, but is one to be decided by the statutory authorities in the light of all the available evidence, including reports of medical boards. A medical report reported that a 51-year-old man who had been employed for many years in the coal-mining industry, and who suffered from pneumoconiosis, was not incapable of very light employment. He had, however, done practically no work for the previous 7 years and his own doctor and the previous medical board considered that he was unfit for any employment. It was held on the evidence as a whole that the claimant had been and was likely to remain permanently incapable of work and that an unemployability supplement was payable to him. R(I) 58/52

iii A 60-year-old man, who was in receipt of a war pension as a result of wounds he received in the first World War, in 1950, 1951 and 1953 met with 3 separate industrial accidents in the course of his employment in the coal-mining industry, and had also been in receipt of a 30 per cent, *disablement pension* on account of pneumoconiosis since 1955. It was held that, because unemployability supplement is an increase of disablement pension, the claimant could not rely directly upon the industrial accidents in 1950, 1951 and 1953 (for which he had received disablement gratuities), but he had, nevertheless, established that pneumoconiosis had turned him from a man who was capable of work into a man who was, regard being had to his age, education, experience, state of health and other personal factors, likely to be permanently incapable of work, so that an unemployability supplement was payable to him. See R(I) 26/52, the principles discussed in which were held to be applicable to the questions relating to special hardship allowance applying also to question arising in connection with unemployability supplement. See also and compare C.I. 99/49 and R(I) 34/54, *infra* 7.4.2 i-ii. R(I) 10/61

**2 Unemployment supplement held not to be payable**

- C.I. 99/49 i A person is incapable work if, regard being had to his age, education experience, state of health and other personal factors, there is no work or type of work which he can reasonably be expected to do. The fact that there is no such work locally, or that, owing to the state of the labour market, the claimant has only a remote prospect of obtaining it, or that there is none in connection with the occupation in which he had previously been employed, does not prove that he is incapable of work for the purpose of his entitlement to an unemployability supplement because the incapacity must be the result of the relevant loss of faculty and is not concerned with inability to obtain work from other causes. Accordingly when a medical board expressed the opinion that a coal-miner who had fractured his ankle some years previously was capable of light work not involving excessive walking or standing, and that he could have undertaken light work long ago, it was held that he did not satisfy the conditions for payment of an unemployability supplement.
- R(I) 34/54 ii A man was certified to be suffering from pneumoconiosis and was suspended from employment in the coal-mining industry, but more recent medical evidence showed that the pneumoconiosis had not progressed appreciably although unrelated causes of disability, viz. diabetes, tachycardia and hypertrophy of the left ventricle, had supervened. Those fresh cause of disability were unrelated to pneumoconiosis and it was held that the claimant's incapacity was not the result of that disease and that he was not entitled to a payment by way of unemployability supplement. See also R(I) 43/54.
- R(I) 37/60 (T) iii A lorry driver was injured during the course of his employment before the National Insurance (Industrial Injuries) Act 1946 came into force and he claimed both damages at common law from a third party and workmen's compensation from his employer. He did not, however, pursue his claim under the Workmen's Compensation Act because, under section 30 of the Workmen's Compensation Act 1925, he was not entitled to recover both damages and compensation. Nevertheless for a time his employer made weekly loans to him, which were subsequently repaid when the common law claim was settled. It was common ground that the weekly payments made by the employer did not constitute payments of workmen's compensation. It was held by a Tribunal of Commissioners that the claimant had not at any time been entitled to weekly payments by way of compensation under the Workmen's Compensation Acts within the meaning of regulation 32 of the National Insurance (Industrial Injuries) (Benefits) Regulations 1948 (see now regulations 45 of the Social Security (Industrial Injuries) (Benefit) Regulations 1975). It was held further that 'entitled' as used in the regulation meant 'entitled to receive payments' and that the claimant had clearly never elected to recover compensation and had, in fact, eventually recovered damages. The claim for unemployability supplement was, accordingly, disallowed.

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### 3 Hospital treatment allowance

i A claimant travelled daily from his home to a rehabilitation centre where he received remedial treatment. There was insufficient beds at the centre to accommodate him, but the centre had no facilities for out-patients and he was treated in all respects as an ordinary in-patient except that he went home to sleep. It was held that the phrase 'as an in-patient' refers to a person's status as an in-patient and not to the nature of the treatment he is receiving. 'In-patient' was defined as a patient who occupies a bed in a hospital as distinguished from an out-patient who comes daily or from time to time to be treated or to receive attention. It was held that, in the circumstances, a hospital treatment allowance was not payable to the claimant. R(I) 27/59

ii When a claimant under what was at the material time in section 16 of the National Insurance (Industrial Injuries) Act 1965 (see now S. 62 of the Act) is being adjudicated it is necessary first to ascertain from the evidence what was the condition of the claimant for which he was being treated while in hospital; then turn to the particular decision of the medical authorities by virtue of which disablement benefit is being paid during the period of treatment and determine, in the light of that decision and of the findings of fact on which it is based, whether the treatment was for the relevant injury or loss of faculty. If, but only, if the condition for which the claimant was receiving treatment was the condition, or one of the conditions, which was taken into account as relevant (whether fully or partially) to the assessment of the extent of the claimant's disablement, the claim under section will succeed. Hospital treatment allowance was claimed for a period during which the claimant was in hospital receiving treatment for varicose veins. The medical authority, who had made an assessment of disablement of 12 percent for life, he found that the varicose veins did not result from the relevant accident and, in making their assessment, had disregarded any loss of faculty resulting from varicose veins. It was held that the extent of the claimant's disablement during the period he was in hospital could not be treated as assessed at 100 per cent since the treatment received was not for the relevant injury or loss of faculty. See para. 9. R(I) 1/67



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## Part 5: Computation of Earnings

### 1 Earnings not immediately ascertainable

i The SS Benefit (Computation of Earnings) Regs. 1978. A man claimed an increase of invalidity benefit in respect of his wife. The wife was in employed earner's employment with earnings which were not immediately ascertainable - i.e. a weekly wage plus, if payable, a monthly productivity bonus and an annual profit sharing bonus. It was held that: R(S)1/82

1. returns made by employers to the Inland Revenue in respect of their employees are not 'returns or statement of earnings for income tax purposes' within the meaning of reg. 5 (para. 13(4));
2. there was no evidence that a statement or return would be made of the wife's earnings within the meaning of that reg. (i.e. by or on behalf of the wife) para. 14);
3. the amount of increase of invalidity pension should be determined by the calculation or estimation of earnings in accordance with regs. 2(3), 3 and 4 of those Regs. and not in accordance with regs. 5 and 6 (para. 1(1)).

Commissioner's decision CP 1/79, para. 13 considered and followed. See also R(S) 3/83.

ii A man claimed an increase of invalidity pension in respect of his wife. The wife had earnings on which she paid tax under the P.A.Y.E. system, but the amount of her earnings were not immediately ascertainable. This was the view of the insurance officer and he decided that the wife's earnings fell to be calculated under reg. 5 of the SS Benefit (Computation of Earnings) Regs 1978. The Secretary of State for Social Services thereupon directed under reg. 6(1) that the increase was to be suspended but under reg. 6(2) interim payments should be made pending the insurance officer's determination of the wife's earnings. At the end of the tax year he decided that no increase was payable in respect of the wife and under reg. 6(3)(b) he required repayment of the interim payments. The Commissioner held: R(S) 3/83

1. that, as no return would be made under the P.A.Y.E. system in relation to the wife's earnings the amount of those earnings fell to be determined under regs. 2(3), 3 and 4 of the above Regs, not under reg. 5; but
2. that, as the insurance officer's decision had not been reversed at the time when the Secretary of State gave his direction, he was entitled to give that direction; and accordingly
3. that the excess of interim payments could be recovered under reg. 6(3) and indeed they are bound to be so recovered), notwithstanding that, for the reasons stated in (1) above, calculation of the wife's earnings under Supplement 29[1/96] reg. 5 was at law appropriate.

R(S) 1/82 followed. See also R(U) 4/84, 19.1.1 viii, 19.2.21 *v below*.

### 2 Notional earnings

i The Commissioner had before him a case where the claimant was receiving an adult dependency increase to his IB. That increase was awarded on the basis that the claimant's spouse was not working. In 1999 the DM was notified that the claimant's spouse was working in a launderette. She normally worked for 24 hours per week for which she earned £25 per week. The employer stated that he could not afford to pay the national minimum hourly rate. R(IB) 7/03

## 7.5.2

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The DM decided to apply 4(2) of the SS (Computation of Earnings) Regs 1996. This reg. sets out that, where a person provides a service to another person and, in return that person makes no payment of earnings or pays less than is paid for comparable employment in the area, that person can be treated as possessing "such earnings as is reasonable for that employment". The DM decided that the spouse should be treated as possessing earnings of £3.60 per hour (being the national minimum hourly rate). The result of this was that the claimant was not entitled to an adult dependency increase with effect from April 1999.

The Commissioner asked himself what primary power reg. 4(2) was made under. He concluded that it was S. 3(2) of the SS Contributions and Benefits Act 1992. This states that, for the purpose of certain benefits, the amount of a person's earnings shall be "calculated or estimated in such manner and on such basis as may be prescribed".

The Commissioner concluded that these words were insufficient to allow regs to be made treating a person as possessing earnings that they did not in fact possess. Hence reg. 4(2) of the Computation of Earnings Regs was *ultra vires* and so could not lawfully be applied.

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Part 6: Increase of RP under s. 45A(1)(a) of the  
SS Act 1975

**1 Entitlement to increase for dependant husband**

i A married woman claimed RP and an increase for her husband on her own contributions. The Commissioner held that her claim for such increase must fail because she had not been entitled at the relevant time to an increase of any of the benefits specified in s. 45A(1)(a) of the SS Act 1975. Also held that s. 45A did not breach the equal treatment Directive of the EEC. A further synopsis is at 19.2.10 iii *below*. R(P)3/88

ii. In a case similar to 7.6.1.i, the Commissioner referred the matter for a ruling of the ECJ. The ECJ (case 420/92) decided that where a Member State has provided for increases in long-term old age benefits in respect of a dependant spouse to be granted only to men, Article 7(1)(d) of Directive 79/7/EEC does not prevent that State from abolishing that discrimination solely with regard to women who fulfil certain conditions. In the light of the ECJ's ruling, the Commissioner held that the inequality of treatment arising from s. 45A(1)(a) of the SS Act 1975 does not breach Directive 79/7/EEC. See also 19.4.10 ii *below*. R(P)2/96

## Part 7: Increase of invalidity benefit

### 1 Effect of domicile on polygamous marriage

R(S) 2/92 i A man claimed an increase of his invalidity benefit for his first wife whom he had married under Islamic law in Pakistan, contending he only had one wife under English law. He came to England after the marriage but returned to Pakistan there marrying his second wife. He returned to England with his first wife and was joined later by his second wife. He subsequently visited Pakistan for nine months. It was held that:

1. the crucial issue was whether the claimant's domicile was in Pakistan at the time of each marriage;
2. in common law domicile is the equivalent of a person's permanent home. There is a presumption in favour of the continuance of an existing domicile and the burden of proving a change lies on the party alleging it;
3. at the time of his second marriage the claimant had not decided to make his permanent home in the UK, was still domiciled in Pakistan and so entered into a marriage recognized in this country;
4. he was polygamously married to two wives and was not therefore entitled to an increase of invalidity benefit.

### 2 Effect of trade dispute on entitlement

R(S) 6/94 i The claimant had received an increase of invalidity benefit for his wife continuously since 19 April 1982 and was thus entitled to the transitional protection applying to the tapered earnings rule. His wife was involved in one day strikes on four separate days. It was held that:

1. the increase of benefit is a daily benefit;
2. there is no title to an increase for an adult dependant who is involved in a trade dispute and either has been disqualified or would have been disqualified for UB if otherwise entitled. It does not matter that the claimant's wife would not have been entitled to UB in any event because of her lack of contributions;
3. there is no entitlement to an increase of benefit for the wife on the days of the strike. The claimant thus lost the transitional protection for a tapered increase for his wife from the day following the first day on which the claimant's wife was on strike.

### 3 Wife receiving RP

R(S) 5/94 i The claimant was receiving invalidity benefit and an increase of invalidity benefit in respect of his wife who claimed RP at age 60, payable from 3 March 1986. The AO deducted the whole of the RP (basic, additional and graduated) from the increase of invalidity benefit otherwise payable. The Commissioner held that although the graduated RP was not deductible from the increase of invalidity benefit, the basic and additional pensions had to be deducted (para. 9 and 10).

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The decisions listed below are not included in chapter 7

**A** *Decisions relating to the calculation and distribution of what was termed 'the family' or the 'household fund'*

C.S.I. 50/49	R(I) 19/51	R(I) 2/59
C.S. 52/50	R(I) 30/52	R(I) 20/60
C.S. 111/50	R(U) 37/52	R(I) 8/65
C.S. 151/50	R(I) 46/52	
C.I. 266/50	R(I) 75/52	
C.U. 544/50	R(I) 1/57	

**B** *Decisions relating to the ability or inability of a spouse to obtain financial assistance*

C.S. 4/48	R(S) 30/52	R(S) 11/54
C.S. 10/50	R(S) 11/53	R(S) 4/58
C.S. 22/50	R(S) 13/53	R(S) 5/58
R(S) 18/51	R(S) 17/53	R(S) 3/60

**C** *Decisions which relate to amounts which are no longer realistic and decisions which for other reasons are no longer relevant*

C.S. 11/48	C.S. 547/49	R(S) 12/51	R(G) 4/91
C.S. 25/48	C.S. 788/49	R(S) 22/52	
C.S. 30/48	C.I. 14/50	R(I) 50/52	
C.U. 102/48	C.G. 128/50	R(S) 6/53	
C.S. 7/49	C.S. 254/50	R(I) 68/53	
C.G. 30/49	C.U. 257/50	R(G) 9/54	
C.S. 41/49	R(G) 2/51	R(S) 10/55	
C.I. 129/49	R(G) 3/51	R(U) 1/90	

