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Study of the Figure of the Non - Professional Caregiver. Special Reference to the Right to Permanent Disability. Legal Problems that Arise and Possible Solutions

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Abstract: *Law 39/2006, of December 14, 2006, gave new recognition to the hitherto "invisible" figure of the non-professional caregiver, referring to the person in the family or environment of the dependent person, who provides non-professional care at home.The non-professional caregiver is the person who is in charge of the care of a family member or close person in a situation of dependency, and does not exercise this activity as a professional activity, as derived from its name, neither on his own account nor on behalf of others, since, as we are going to analyze, he does not meet all the requirements that the law demands for the existence of an employment relationship on behalf of others, such as the alien nature, dependence, remuneration, voluntariness and power of organization of the employer, nor as an employer. In these circumstances, the question that arises in this study is whether the non-professional caregiver can be the beneficiary of a total permanent disability benefit, under the special agreement regulated in Royal Decree 615/2007 and Order TAS/2632/2007. We can affirm that most of the people who are caregivers of dependent persons are women who have performed invisible work over the years, assuming the care of their relatives, without the support of the public administration and within the domestic sphere with no help other than that of the family organization. Hence the importance of the latest legislative reforms that makes these figures visible and gives them some rights.*

Keywords: *Non-professional caregiver, usual profession, permanent disability, dependent person.*

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Introduction

Law 39/2006, of December 14, 2006, gave new recognition to the hitherto "invisible" figure of the non-professional caregiver, referring to the person in the family or environment of the dependent person who provides non-professional care at home.

The regulation recognizes exceptionally the economic benefit for dependent persons to be cared for by non-professional caregivers, as long as there are adequate conditions of coexistence and habitability of the home, and it is established in their Individual Care Program (art. 1 RD 615/2007)[1]. Specifically, the regulation refers to the care of their family environment, recognizing an economic benefit for family care (art. 18 Law 39/2006)[2].

For these purposes, the spouse and relatives by blood, affinity or adoption, up to the third degree of kinship, including a person in their environment who, although not having any degree of kinship, resides in the same municipality of the dependent person and has cared for him/her at least during the previous period of one year, given the absence of public or private services that can provide these care needs, may assume the status of non-professional caregivers of a person in a situation of dependency.

Royal Decree 615/2007, of May 11, 2007, includes non-professional caregivers in the scope of application of the General Social Security Regime through a special agreement, excluding non-professional caregivers who are pensioners for permanent disability[3]. Coverage is therefore aimed at family members or people in the dependent's environment who are dependent on him/her.

After RDL 6/2029, of March 1 of urgent measures to guarantee equal treatment and opportunities between women and men in employment and occupation, there was an important advance in relation to social security

[1] According to the new wording of art. 1 of RD 615/2007, of May 11, which regulates the Social Security of caregivers of dependent persons, given by RD 175/2011, of February 11, those who are designated as such in the Individual Care Program and meet the requirements of art. 12 of RD 727/2007, of June 7, will be considered non-professional caregivers.

[2] Law 39/2006, of December 14, 2006, on the Promotion of Personal Autonomy and Care for Dependent Persons.

[3] RDL 6/2019, of March 1, on urgent measures to guarantee equal treatment and opportunities between women and men in employment and occupation, modified the fourteenth additional provision of the LGSS, approved by RDL 8/2015, of October 30, which was a great step forward since it establishes that "the Social Security and Vocational Training contributions established each year based on the provisions of art. 4 of RD 615/2007, of May 11, will be paid jointly and directly by the Institute for the Elderly and Social Services (IMSERSO) to the General Treasury of the Social Security.

coverage, since through this regulation it was established that, in the special agreements in the social security system for non-professional caregivers of people in a situation of dependency, the contribution to be paid to social security for their condition would be paid by the General State Administration, This was a very important advance because until now it had been paid by the caregiver himself, which meant a tax that was often impossible to cover and therefore made this important and essential figure for the care of dependents invisible once again.

Concept of the non-professional caregiver and the right to permanent disability.

A non-professional caregiver is a person who is responsible for the care of a family member or close relative in a situation of dependence, and does not exercise this activity as a professional activity, as derived from its name, either on his own account or for others, since, as we will analyze, he does not meet all the requirements that the law requires for an employment relationship to exist, such as the employer's dependence, dependence, remuneration, voluntariness and power of organization, nor as an employer.[4]

In the first place, it can be stated that the financial aid derived from the dependency law is directly addressed to the dependent person, the amount received is less than the minimum interprofessional wage, precisely because it does not follow the rules established by the legislation for employed workers, and it is also the Administration that grants the financial aid according to the care needs detected. Therefore, it must be considered that the relationship of the non-professional caregiver of the dependent person, declared as such by the competent administrative authority, has effects at the level of care[5].

Secondly, the dependent does not have the characteristics of an employer, since the work of the caregiver is not under his or her direction and supervision and he or she is not obliged to hire him or her, nor to register him or her and pay Social Security contributions for him or her[6]. Nor must it comply with the occupational health and safety regulations, derived from the labor contract, since there is no contractual relationship between dependent and caregiver, and the legal regime that regulates the figure of the caregiver of the dependent person is found in the Dependency

[4] INSS Criteria, 5/2010. RJ 35/2009.
[5] STSJ of Valencia, Social Chamber, Judgment No. 798/2013 of April 3, p. 5.
[6] According to RDL 20/2012 of July 13, 2012, in force since July 15, 2012, the contribution becomes exclusively payable by the caregiver.

Law and not in the Workers' Statute, since there is no labor relationship as such[7]. Likewise, neither does it derive an unemployment contingency, because of the performance of his or her activity.

In these circumstances the question that arises is whether the non-professional caregiver can be the beneficiary of a total permanent disability benefit, under the special agreement regulated in Royal Decree 615/2007 and Order TAS/2632/2007.

If we follow the literal wording of the regulation[8] , the protective action of the non-professional caregiver includes the contingencies of retirement, permanent disability and death and survival derived from accidents, whatever their nature, or illness, regardless of their nature, but what happens with total permanent disability, because if we are talking about incapacity to exercise their profession, we must start from the concept of habitual profession, for the purpose of recognizing the benefit.

At this point we find a contradiction, because if we are talking about a non-professional caregiver, its "clashes" that the regulation recognizes the protective action through permanent disability, when the contingency derives from an accident at work or occupational disease. The inclusion of the coverage is correct from my point of view because it is inclusive and broad, but we are still dealing with a hybrid figure due to its own denomination as a non-professional caregiver and at the same time protected by professional contingencies, to determine the benefits derived from its activity.

The term "usual occupation" is therefore used to determine whether or not there is a permanent disability benefit in the event of an accident or illness.

In this sense, the law establishes that "for the purpose of determining the degree of disability, the incidence of the reduction of the working capacity in the development of the profession of the interested party or of the professional group, in which he/she was included, before the event causing the permanent disability occurred, will be taken into account" (137.2 LGSS). Again, the doubt, in which professional group is included if we are talking about non-professional caregivers and therefore without a recognized profession for the performance of such activity.

In turn, as can be seen from art. 1.2 of RD 615 /2007, it is compatible to work as a non-professional caregiver with the performance of another type of work, whether self-employed or employed, and in this sense, it is considered unnecessary to sign the special agreement when the caregiver pays

[7] STSJ of Valencia, Social Chamber, judgment no. 798/2013 of April 3, p. 4.
[8] Art. 3 of RD 615/2007, of May 11, 2007, which regulates Social Security for caregivers of dependent persons.

contributions to another regime. Consequently, the legislator's intention is that non-professional caregivers are included in the scope of application of the General Social Security Regime and, specifically, in a situation assimilated to registration, when they sign the special agreement regulated in the reference regulation. And this has been included after the reform introduced in RDL 6/2029, of March 1, on urgent measures to guarantee equal treatment and opportunities between women and men in employment and occupation, "with the contribution to be paid being the responsibility of the General State Administration" (Thirty-first transitory provision of the LGSS).

In short, a non-professional caregiver must be designated as such in the Individual Care Program that certifies the requirements and suitability of the person designated as such, according to the requirements of art. 12 of RD 727/2007, of June 8, on criteria for determining the intensities of service protection and the amount of economic benefits of law 39/2006, of December 14, on the Promotion of personal autonomy and care for people in a situation of dependency.

Concept of usual profession in relation to non-professional caregivers

We must start from the legal concept of usual occupation, for the purposes of the qualification of the situation of disability to the degree of permanent disability as established by law. In this sense, the regulation understands by habitual profession "in the case of an accident, whether or not work-related, the one normally performed by the worker at the time of suffering it, and in the case of illness, common or professional, the one to which the worker devoted his main activity during the twelve months prior to the date on which the temporary disability from which the permanent disability derives began" (art. 11.2 of the Ministerial Order of April 15, 1969, BOE, May 8, 1969, no. 110).

In the same sense, the courts pronounce "for the purposes of the situation of disability, in the degree of total permanent disability, in the cases in which the worker during the period prior to the beginning of the T.I., or to the request for the declaration of such disability has exercised, for a period of more than twelve months, a certain profession, having exercised during a relevant period of his working life a different profession, in attention to which he claims the declaration of total permanent disability".[9]

Therefore, in the case of non-professional caregivers, what profession or activity, if any, is assessed when applying for the IP benefit as

[9] STS, Fourth Chamber, of September 26, 2007, p. 2.

a non-professional caregiver**.** And it is here that many doubts arise as to what happens if the caregiver has previously worked as a non-professional caregiver in another activity, what profession should be assessed, and in the case of having worked only as a non-professional caregiver, what activity should be assessed if we take into account that the very name of this figure indicates the non-existence of a recognized profession that gives professional status to the activity being performed.

In this sense, art. 137.2 of the LGSS, links the degree of permanent disability with the reduction of the working capacity for the development of the profession that the interested party exercised or of the professional group, in which he/she was included, before the event causing the permanent disability occurred. However, the concept of habitual profession is not a pacific concept since it is under permanent review in processes to determine whether there is a right to total permanent disability for the exercise of the habitual profession, when it is a question of specifying which is the habitual profession if there have been successive activities throughout the worker's working life.

In the case of valuing the profession of non-professional caregiver, this does not meet the requirements of dependence, dependence, subjection to a schedule, and in short, does not meet the requirements established by the ET to consider an employment relationship[10].

The concept of regular profession has been completed and clarified by the jurisprudential doctrine, which gradually specifies what we should understand by regular profession, depending on the criteria used in each specific case[11].(GARCÍA QUIÑONES, J.C. (nº 5/2004):602))

Several criteria are used to determine the concept of the usual profession, firstly, that provided for in Art. 22.1. Firstly, that provided for in Art. 22.1 of the Labor Code, based on the professional classification system in the company or sector, as a result of collective bargaining; secondly, the national classification of occupations (CNO-94), approved by RD 917/1994,

[10] In this sense, the TSJ of Valencia, Social Court, 1st Section, in judgment No. 798/2013 of April 3, 2013, ruled that there is no dismissal of a professional caregiver since there is no employment relationship and her regime is under the Dependency Law and not under the Workers' Statute.

[11] In this sense, Professor GARCÍA QUIÑONES, J.C., refers to the concept of "habitual profession" as an "indeterminate legal concept, in continuous revision by the judicial doctrine, and by the Jurisprudence, in parallel with the solution of the pretensions that are submitted to its evaluation. This elaboration is explained by the urgent need to establish guidelines that contribute to delimit the concept of "habitual profession" to a certain level of concreteness, making it a useful and homogeneous reference of interpretation..."

and replaced by RD 475/2007 of April 13, 2007, approving the National Classification of Economic Activities 2009 (CNAE 2009), can be applied, as stated in the ruling of the Social Chamber of the Castilla y León High Court of Justice of January 10, 2007, this criterion is supported by the Social Security regulations (Order TAS/2926/2002, of November 19 (RCL, 2002, 2702) to determine the usual occupation in the case of an occupational accident. (RIVAS VALLEJO, P., (nº 1/ 2007): 3271).

We can introduce a further element that complicates the question and that is in the case of persons who non-professional caregivers are, having previously exercised another job. The question that arises is which profession should be considered as "usual profession", the usual and previous one or the residual and last one. In this regard and to resolve this question, the Supreme Court[12] , understands that the following should be recognized as the usual profession for the purposes of the declaration of permanent disability: a) the first profession when it has not been voluntarily abandoned by the beneficiary except for justified cause); b) periods of interruption of the habitual profession for health reasons through situations of temporary disability or functional mobility within the company will also be taken into account for the temporary calculation, with the maximums established for these figures; c) that the period of the last profession be short, even if it exceeds twelve months; d) that the period of the last profession be short, even if it exceeds twelve months, with the maximums established for these figures; e) that the period of the last profession be short, even if it exceeds twelve months, identifiable with the period of receipt of the contributory unemployment benefit, when it does not exceed the maximum legal duration (art. 210 of the LGSS) and finally that the period of effective dedication to the former profession is significantly longer than the effective dedication to the new profession (without counting the periods of incapacity or unemployment)[13]. (RIVAS VALLEJO, P., (nº 1/

12 STS, Fourth Chamber, of December 9, 2002 (RCUD 1197/2002).

13 In this sense, RIVAS VALLEJO, P., in "La profesión habitual o efectos de la incapacidad permanente, un concepto al margen de la realidad del mercado de trabajo: comentario a la STSJ Castilla y León/Valladolid (AS 2007, 678)" , op. cit, states that "this weighting is based on an evident and manifest imbalance between the various professions exercised throughout the working life, so that it can be understood that the last of them cannot serve to adequately define the professional profile of the worker and deduce from this that his capacity for work has been notably affected by depriving him of the aptitude to carry out that which, despite other occasional incidences, even if it were the last of them, has constituted his fundamental and habitual means of livelihood. Because the earning capacity to which the permanent disability refers compensates precisely for this and not for the loss of a job, for which purpose a benefit of a different temporary nature, that of

2007): 3272).

However, in the case of the non-professional caregiver would not be in these cases either, since the term non-professional caregiver would imply the non-consideration of profession understood in a strict sense, consequently the disability could not be considered for his or her usual profession, because the care of dependent persons is not understood as such. The usual profession would be the previous profession in time and that has nothing to do with the current activity.

The problem lies, above all, in the fact that non-professional caregivers are generally women, who have not worked before or have worked for many years, and even without having been registered.

This situation, therefore, has generated many doubts of interpretation because the regulatory coverage that protects non-professional caregivers does not fit with the legal term of habitual profession. In order to resolve this issue and make the activity of the non-professional caregiver compatible with the possibility of permanent disability classification, the INSS has interpreted that in cases where there is no profession that can be identified as a regular profession exercised prior to the activity performed as a non-professional caregiver, the current activity can be taken into account, the performance of which entitles the person to inclusion in the social security system, even if it is in a situation assimilated to registration because it is not of a purely occupational nature, as we have already mentioned. The contrary interpretation would render meaningless the rule that provides coverage for Social Security protection, in terms of permanent disability and retirement. This fiction of covering a non-work situation in the strict sense gives rise to an equally flexible interpretation to understand the inclusion of the non-professional caregiver's activity as a regular occupation for the purposes of recognizing a possible total permanent disability or partial permanent disability for the same and considering the application of the provisions of Article 11.2 OIN. And in the case of an ordinary special agreement, which is not due to the exercise of any activity, the profession to which the worker devoted his activity mainly during the year immediately prior to his last leave as an active worker must be taken as the usual profession[14].

unemployment, is already provided, since it cannot be ignored that one of the inspiring principles of the regulation of pensions (even if it refers in particular to their economic content), whatever the contingency covered, and in view of their lifelong nature, is to provide a faithful reflection of a more or less complete working life and not of a temporary situation, for which another type of benefit, temporary subsidies, is available".

[14] Criterio del INSS, 5/2010. RJ 223/2009.

This interpretation leads us to think that the term "usual profession" should be revised based on the new times, since given the temporary nature and the lack of work that especially affects young people and women, it is almost impossible to apply when checking whether there are circumstances to declare a permanent disability or not. In this sense, the term "usual profession" should be changed to "prevalent profession", as proposed by Professor Rivas. (RIVAS VALLEJO, P., (nº 1/ 2007): 3270) otherwise this benefit would not apply.

Conclusions

The conclusions we can draw from the situation described above are as follows: first, we can affirm that most caregivers of dependent persons are women who have performed invisible work over the years, assuming the care of their relatives, without the support of the public administration and within the domestic sphere with no help other than that of the family organization.

Secondly, caregivers are usually women who leave their jobs to care for their children. The social role assigned to them implied that they had to dedicate themselves to the care of their relatives.

Thirdly, being a caregiver is not a profession from a legal point of view, and this is established in the very name of the care benefit, referring to non-professional caregivers. This situation entails a clear lack of defense when examining whether to recognize permanent disability, given the legal indeterminacy of the specific situation.

Finally, we must begin by changing the term "usual profession" and updating it so that it can be adapted to the new social and labor realities and give real and total coverage to the figure of the non-professional caregiver so that he/she can be within the framework of the legality in force. To this end, the public administration must also act effectively through the functions assigned to it, thus achieving real and effective coverage of all the parties involved in a situation that the social and democratic rule of law must address.

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