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CI/17220/1996
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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CI/17220/1996

Starred Decision No: 71/00

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 6th December 2000

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

71/00

1. This appeal by the claimant succeeds. In accordance with the provisions of section 14(8)(b) of the Social Security Act 1998 I set aside the decision made by the social security appeal tribunal on 15 May 1996. I refer the matter to a completely differently constituted tribunal for a fresh hearing and decision in accordance with the directions following and below. It is with some reluctance that I refer such an old case for another hearing, but there are factual issues on which the parties appear not to have had an opportunity to make submissions or comments and which I cannot determine on the basis of the evidence before me. The claimant should consider requesting the tribunal to hold an oral hearing and in default of such request consideration should in any event be given as to whether an oral hearing should be held. The parties should regard themselves as being on notice to send to the clerk to the tribunal as soon as is practicable any further relevant written medical or other evidence.

2. The claimant was born on 16 December 1920. From 1935 he worked as a coal miner, working underground, and from 1940 to 1951 was a coal face worker. He developed inflammation and irritation of the nose, mouth and throat and from 1951 to 1985 worked above ground (as I understand it) as a winding engine man. Subject to any findings of fact made by the tribunal, it appears that the claimant took voluntary redundancy on 22 June 1985. Since that date he has had no employment and done no paid work. He reached the age of 65 on 16 December 1985.

3. On a form signed on 30 September 1992 and received on 5 October 1992 the claimant made a claim for industrial disablement benefit in respect of prescribed disease D4 (at that time described as "inflammation or ulceration of the mucous membrane of the upper respiratory passages or mouth produced by dust, liquid or vapour"). On 9 August 1993 the adjudicating medical authority decided that the claimant was not suffering from that prescribed disease but the claimant's appeal against that decision was allowed by the medical appeal tribunal sitting on 27 February 1995. On the claim form there is a question "from what date do you claim your disablement began?". The date 1945 has been written in and crossed out and replaced by the date of 5 July 1948. The claimant did not tick the box at Part 17 of the form indicating that he wanted to claim reduced earnings allowance. In the record of its decisions the tribunal stated its finding that the claimant was suffering from prescribed disease D4 and had been so suffering since 1 January 1948, from which date there had been a loss of faculty which it described as "impaired nasal function resulting in the disablement from the relevant accident". It has not been suggested that there was a relevant accident and I have no doubt that the reference to an

accident is a clerical error. The tribunal assessed the extent of the disablement resulting from a loss of faculty as 7% for the period 5 July 1948 for life. Had the tribunal also indicated that the loss of faculty had commenced on 5 July 1948 the last five years worth of appeals and hearings might have been unnecessary. In the reasons for its decision the tribunal indicated that the assessment was 8% from 5 July 1948 for life. This also appears to be a clerical error. As the assessment was less than 14%, no disablement benefit was awarded.

4. Reduced earnings allowance was introduced on 1 October 1986 to replace Special Hardship Allowance. Prior to 24 March 1996 regulation 19(1) of and Schedule 4 to the Social Security (Claims and Payments) Regulations 1987 provided that a claim for reduced earnings allowance was required to be made within three months of any date on which it was claimed that entitlement to the allowance existed. Regulation 19(2) provided for that period to be extended to cover the whole period during which the claimant had continuous good cause for not having made the claim at the prescribed time. There was no limitation on this good cause period until the regulations were amended with effect from 24 March 1996.

5. On 28 March 1995 the claimant made a claim for reduced earnings allowance. The claim form asks "from which date do you wish to claim reduced earnings allowance? (see note 6)". Note 6 stated:-

"6. Normally the earliest date from which you can claim Reduced Earnings Allowance is the date you first lost earnings because of your accident or disease. But Reduced Earnings Allowance cannot be paid earlier than 91 days (not including Sundays) after the date of your accident or the date you first suffered from your disease."

As I have indicated, this advice was incorrect. However, acting on the advice the claimant stated that he wished to claim reduced allowance from 28 December 1994 and added "I am unable to claim further back as I overlooked the tick box on my original claim form [of] 30 September 1992. That is my only excuse".

6. It seems to me that in fact this was a claim for indefinite backdating although at no stage has this point been considered or discussed. I direct the tribunal to treat the claim for reduced earnings allowance as including a claim for backdating to 1 October 1986 and to decide whether there was continuous good cause for not having made the claim at an earlier stage. Special hardship allowance was payable only as

an increase of disablement benefit. The claimant in this case cannot be entitled to special hardship allowance because prior to its replacement by reduced earnings allowance no disablement benefit had been awarded. Further, the claimant can only be entitled to backdate his claim for reduced earnings allowance beyond three months for a period in respect of which he shows both good cause for delay in claiming that allowance, and also good cause for the delay in claiming disablement benefit (see e.g. paragraph 6 of CI/502/1993).

7. On 17 May 1995 the adjudicating medical authority, Dr. Wingate-Gray advised that the claimant's symptoms were not severe enough to prevent him doing "the job" and that although the prescribed disease had been developed on 1 January 1948, the claimant had "worked perfectly well in the job until being made redundant on 21 June 1985". There was obviously some confusion here, and the new tribunal will only be able to rely on this advice to a limited extent. This is because it is clear that in 1951 the claimant changed the type of work that he was doing, but Dr. Wingate-Gray seems to have made no distinction between working underground at the coal face and working above ground operating the winding engine. The adjudication officer refused to award reduced earnings allowance, partly on the basis that the claimant was not incapable of following his regular occupation but also because the claimant did not satisfy the conditions of entitlement in relation to the commencement of the disease.

8. The principal conditions of entitlement to reduced earnings allowance are set out in Part IV of Schedule 7 to the Social Security Contributions and Benefits Act 1992. The conditions of entitlement to retirement allowance (which might turn out to be relevant in this case) are set out in Part V to that Schedule. Amongst other conditions, an employed earner is only entitled to reduced earnings allowance if he is entitled to a disablement pension or would be so entitled if that pension were payable where disablement is assessed at not less than 1%. Section 108(1) of the Social Security Contributions and Benefits Act 1992 provides that industrial injuries benefits (which include disablement pension) shall be payable in respect of any prescribed disease:-

"which is a disease or injury due to the nature of that employment and which developed after 4 July 1948."

The view adopted by the adjudication officer (and subsequently by the tribunal) was that because the medical appeal tribunal had found that the date of onset was 1 January 1948, it could not be said that the disease had developed after 4 July 1948.

9. On 12 June 1995 the claimant appealed to the social security appeal tribunal against the refusal of reduced

earnings allowance, on the basis of the wages differential between doing regular face work underground and doing work on the surface, such differential becoming more pronounced after the introduction of production bonuses. The tribunal sat on 28 March 1996 to consider the matter but adjourned because of lack of time and the matter was finally considered by the tribunal on 15 May 1996. The tribunal took the view that it was bound by the date of onset identified by the medical appeal tribunal and it also found that the claimant had not proved that he was permanently incapable of working as an underground face worker due to prescribed disease D4. On 5 September 1996 the claimant applied for leave to appeal to the Social Security Commissioner against the decision of the tribunal and leave was granted by Mrs Commissioner Heggs on 10 April 1997.

10. It is regrettable that it has taken over three years since the grant of leave for this appeal to be decided. However, there have been lengthy and complex legal submissions, including a very detailed and helpful 15 page closely typed submission prepared by Mr Heath from the Office of the Solicitor to the Department of Social Security. Reference may be had to that submission (pages 36 to 50 of the bundle of papers before me) for details of the legal history and analysis of the relevant legal provisions. It is no discourtesy to Mr Heath that I have tried to keep the reasons for my decision as straightforward as possible. Although the adjudication officer initially opposed this appeal to the Commissioner, the Secretary of State (who has taken over the conduct of the appeal) appears now to support the appeal on the basis that I explain below and that had been previously put to the Secretary of State's representative.

11. Regulation 5 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 provides that if on a claim for a relevant benefit in respect of a prescribed disease a person is found to be or to have been suffering from the disease, the disease shall for the purposes of such a claim "be treated as having developed on a date (hereafter in these regulations referred to as 'the date of onset') determined in accordance with the provisions of the next two following regulations". The next relevant provision is in regulation 6(2)(b) which provides that where the claim for the purposes of which the date of onset is to be determined is a claim for disablement benefit (except in respect of occupational deafness):-

"The date of onset shall be the day on which the claimant first suffered from the relevant loss of faculty on or after 5 July 1948 ..."

12. To me, the obvious way of reading this provision is that the date of onset is the 5 July 1948 or any later date on which the claimant first suffers from the relevant loss of faculty if the claimant is not suffering from the relevant loss of faculty on 5 July 1948. In other words, if a claimant begins to suffer from the relevant loss of faculty before 5 July 1948, this provision deems the date of onset to be 5 July 1948. In the present case, this interpretation avoids a potentially unfair result and is also in keeping with the notion in regulation 5 of the disease being treated as having developed on the date of onset. In the present case, the date of onset is 5 July 1948. The disease is treated as having developed on that date. This is also the date on which, for the purposes of section 108(1) of the Social Security Contributions and Benefits Act 1992 the disease developed. Accordingly, since it developed after 4 July 1948, industrial injuries benefit is payable in an appropriate case. The adjudication officer and the tribunal, without spelling it out, assumed in effect that regulation 6(2)(b) meant that the claimant had to have first suffered from the disease on a date later than 4 July 1948. That was the principal error of law by the tribunal.

13. Although the medical appeal tribunal identified the date of onset as 1 January 1948, if the claimant was still suffering from the prescribed disease on 5 July 1948, the social security appeal tribunal should have identified that date as the date on which the disease developed, for the purposes of considering a claim to reduced earnings allowance. I direct the new tribunal so to do. It is then a question for the new tribunal to determine, on the evidence before it, whether there was continuous good cause for the delay in making the claim, and from what date, and then to consider the other conditions of entitlement. In view of the age of the claimant when he completed the form, and the length of time between last working and completing the form, these matters will need careful consideration and before the matter is listed for hearing it should be referred to a district chairman or legally qualified panel member dealing with interlocutory matters so that proper listing directions and arrangements may be made.

(Signed) H Levenson
Commissioner

(Date) 2 October 2000