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Commissioner's File: CI/247 89

SOCIAL SECURITY ACTS 1975 TO 1978

DECISION OF TRIBUNAL OF COMMISSIONERS

Name:

Social Security Appeal Tribunal: South Shields

Case No: 146 : 02581

ORAL HEARING

1. We find no error in law in the decision of the South Shields social security appeal tribunal dated 17 April 1989. This appeal accordingly is disallowed.

2. This is one of eight cases which were heard together by this Tribunal and which raised questions about the competence and effect of regulation 13(1)(c)(i) of the Social Security (Industrial Injuries etc) Miscellaneous Provisions Regulations 1986 (S.I. 1986 No. 1561). The case on Commissioners' file CI/156/88 was the leading case and the reasons for our decision herein are essentially fully set out therein. The material part of our decision in that case therefore forms an Appendix to this decision.

3. Nonetheless we think it right to consider the particular facts of this case and relate them to our decision in the leading case.

4. Our appointment and the appearances before us are set out in paragraphs 2 and 3 of the leading case.

5. On 16 November 1987 this claimant sought disablement benefit in respect of prescribed disease A11 (vibration white finger) (hereinafter referred to as "PD A11"). It was accepted that he had worked in an occupation prescribed in relation to PD A11 and, in due course, an adjudicating medical authority held him to suffer from that disease and assessed the relevant loss of faculty. That assessment was of 5% from 1 April 1985 for life. On 22 August 1988 an adjudication officer refused the claim because, although he accepted that the date of onset was prior to 1 April 1985, he held that the claim could not be treated as having been made earlier than 1 October 1986 in that the claimant had not proved that he had been incapable of making an earlier claim.

6. The appeal tribunal accepted the summary of facts and the claimant's written statement as constituting the facts in the case. From that it is clear that when the claimant first developed symptoms about 1935. He developed Dupuytren's contractures about 1940 and thereafter related the former to the latter. His doctor had told him that there was nothing that could be done. He had told his doctor about the numbness, blanching and curling of his fingers. He knew nothing about vibration white finger until he met a colleaugue from working days, In November 1987. He immediately sought the appropriate form for a claim.

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7. The tribunal held that that situation so far as this claimant was concerned fell within the meaning of the word "incapable" as contained in the Miscellaneous Provisions Regulations. It is stronger than the leading case on its facts. We hold that the appeal tribunal were well entitled to find that the circumstances before narrated amounted to the claimant being "incapable" of making his claim earlier than August 1987 and fully explained their reasons for that conclusion.

8. The appeal fails.

(signed) J G Mitchell
Commissioner

(signed) M H Johnson
Commissioner

(signed) W M Walker
Commissioner

Date: 29 August 1989

APPENDIX

2. This is an appeal by the adjudication officer in a case concerning a claim to disablement benefit made on 4 December 1986 and in respect of which the disablement resulting from the relevant loss of faculty was assessed at 3 per cent. Prior to 1 October 1986 such an assessment, in respect of a prescribed disease and assuming all other qualifications to be satisfied, would have attracted the award of a disablement gratuity. But with effect from that date the law was changed resulting in the abolition of such gratuities in respect of claims made thereafter. Provision was, at the same time, made for such claims, in limited circumstances, yet to be received and treated as if they had been made on 30 September 1986. The scope of that exemption was raised in this case. So, too, were certain questions about the competence of the provisions dealing with these matters. Because of the importance of the issues involved the Chief Commissioner, on 20 June 1989, appointed a Tribunal of Commissioners to determine this appeal. He had earlier directed that there be an oral hearing. On 6 July 1989 he appointed us also to determine seven other pending appeals which raised the same questions, but in varying circumstances, and directed oral hearings in them as well. The leading decision is that in this case.

3. At the oral hearing the adjudication officer, whose appeal it was in each of the eight cases, was represented by Mr Naeem Butt, Barrister, of the Office of the Solicitor to the Departments of Health and Social Security. This claimant was represented by Mr Mark Rowland, of Counsel, instructed by Messrs Rowley Ashworth, Solicitors, of Exeter. The other seven claimants were represented by Mr Michael Purdon, of Messrs Terence Carney, Solicitors, Hebburn Tyne & Wear. We are grateful for the care with which they deployed their several arguments before us. We think it convenient to deal with all their submissions on the relevant law in this decision.

4. On 4 December 1986 this claimant sought disablement benefit in respect of the prescribed disease A11 (vibration white finger) (hereinafter referred to as "PD A11"). It was accepted that the claimant had worked in an occupation prescribed in relation to PD A11 and, in due course, an adjudicating medical authority held the claimant to suffer from that disease and assessed the relevant loss of faculty. On 16 November 1987 an adjudication officer issued a decision rejecting the claim because it had been made after 1 October 1986 and could not be treated as having been made earlier by satisfaction of the exemption, provided for by regulation 13 of the Social Security (Industrial Injuries and Diseases) Miscellaneous Provisions Regulations 1986 (SI 1986 No. 1561) (hereinafter referred to as the "Miscellaneous Provisions Regulations"). The claimant appealed.

5. The facts were not in dispute and although they were deployed to some extent before the tribunal and they made findings thereon sufficient for their purposes, it is desirable that we record the facts in rather greater detail. The claimant ceased to be employed in a prescribed occupation on 30 April 1980. He was then aware of some problem with his fingers but was, correctly, then advised that no compensation - in the sense of benefit - could be sought. Having regard to the adjudicating medical authority's subsequent assessment of the date of onset of the disease, it is, we think, fair to assume that at that time the claimant was suffering from the symptoms of vibration white finger. That condition only became a prescribed disease with

effect/

effect from 1 April 1985. Then and thereafter the claimant was not in a relevant employment and was unaware of the prescription until towards the end of November 1986 when a friend so informed him. For some time the claimant had been housebound by arthritis. He completed and signed the appropriate claim form on 2 December 1986.

6. The tribunal allowed the appeal, holding the claimant entitled to claim disablement benefit from 30 September 1986, that being the date put before them by the adjudication officer then concerned as the earliest date which could be accepted as the revised date of claim, in the event that tribunal came to be in favour of the claimant. The tribunal gave the following reasons for their decision:-

> "The case hinged upon whether or not [the claimant] satisfied regulation 13, Industrial Injuries and Diseases (Miscellaneous Provisions) 1986 [sic]. It was regrettable that the submission was prepared on the law applicable before the regulation came into force. [The claimant] now had to show that he was incapable of claiming before December 1986. The tribunal could not accept that Parliament had intended the word 'incapable' to mean physical incapacity since this would effectively disqualify practically all claimants. The tribunal applied the legal meaning of capacity as awareness. [The claimant] could not be capable because he did not know."

Against that decision the adjudication officer appealed.

7. Turning to the relevant law: disablement benefit exists by virtue of section 50(1) and (2)(b), whereby it is made payable to an employed earner who has suffered a personal injury by accident (which in practical terms includes prescribed diseases by virtue of Section 76) arising out of and in the course of his employment, resulting in a loss of physical or mental faculty - about none of which was or is there any dispute in this case - "in accordance with sections 57 to 63". Section 57(1), as in force prior to 1 October 1986 entitled such a claimant to disablement benefit if as a result of the relevant accident the loss of physical - there was no question of mental in this case - faculty was such that the assessed extent of the resulting disablement amounted to not less than 1%. Subsection (5) provided that where the extent of the disablement was assessed at less than 20% disablement benefit took the form of a disablement gratuity in accordance with regulations. Paragraph 3(1) of Schedule 3 to the Social Security Act 1986 increased the minimum level of disablement in section 57(1) from 1 to 14%. Paragraph 3(3) provided with reference to section 57(5):-

> "(3) Subsection (5) of that section shall cease to have effect except in relation to cases where the claim for benefit was made before this paragraph comes into force."

That paragraph came into force, on 1 October 1986 - by the Social Security Act 1986 (Commencement No. 1) Order 1986 (SI 1986 No. 1609).

8. Vibration white finger first became a prescribed disease by virtue of the Social Security (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 1985 (SI 1985 No. 159). The relevant regulations

for the purposes of these cases are now those contained in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI 1985 No. 967) whereby that disease appears in Part I of Schedule 1 as "A11" and in respect of which the relevant date set out in Schedule 4 for the purposes of regulation 43 is 1 April 1985. In practical terms, for present purposes, that is the earliest date in respect of which a disablement benefit could be claimed in respect of that condition. In the case of this claimant a date of 1 January 1976 was recorded by the adjudicating medical authority as the date of onset of the disease.

9. Turning, next, to the question of time limits we should first note that Section 165A of the Social Security Act 1975 contains the general statutory provision that no person is entitled to any benefit unless, apart from other specific conditions, he makes a claim for it in the prescribed manner and within the prescribed time. Regulation 14(1) and Schedule 1, paragraph 8, of the Social Security (Claims and Payments) Regulations 1979 (SI 1979/628), as amended, provided that a claim for disablement benefit required to be made in respect of any day on which the claimant was entitled to benefit on that day or within the period of three months immediately following it. Although something was suggested about these provisions, at least so far as concerned the other seven cases, it is clear from paragraph 5 of Schedule 2 to the Claims and Payments Regulation that, in respect of a disablement gratuity, which alone was in issue in all these cases, there is not to be a disentitlement by reason only of the claim not being made within the prescribed time. We need, therefore, say no more about that time limit.

10. The important time provision for the cases before us, is the exemption for delayed claims set out in regulation 13 of the Social Security (Industrial Injuries and Diseases) Miscellaneous Provisions Regulations 1986 (SI 1986 No. 3889). That provides that where, as here, the date of onset of a prescribed condition or disease was before 1 October 1986 and ".. the claimant delays making a claim for disablement benefit until after that date" and the degree of disablement is assessed at less than 14% then the claim is to be determined "as though it had been made on 30 September 1986" if the claimant - 13(1)(c) -

> "... proves that throughout a period commencing on a date before 1 October 1986 and ending with the date of claim -
>
> (i) he was incapable of making an earlier claim or,
>
> (ii) he had good cause for delaying making such a claim because of advice provided by the Department of Health and Social Security,".

11. Finally, for this stage, the Interpretation Act 1978, by section 16 provides that upon repeal of a statutory provision then, unless the contrary intention appears, that does not - section 16(1)(c) -

> "affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;".

12. The grounds of the adjudication officer's appeal were, first, that this claimant could not have delayed making his claim, in the sense of

regulation/

regulation 13(1)(a) of the Miscellaneous Provisions Regulations since it was after the date in question that he made his claim and he was until then ignorant about any right to make a claim. He was thus not in a position to delay making a claim. Secondly, under reference to paragraph (1)(c), it was contended that the claimant had to prove that he had been incapable of making an earlier claim and that "incapable" bore a restricted meaning.

13. Mr Butt conceded that all eight claimants had acquired rights to disablement benefit in the sense of Section 16(1)(c) of the Interpretation Act. That was because, in this case, the claimant had submitted his claim within the the three months allowed for the purpose, from 30 September 1986 and the other seven claimants because, since any benefit would be in the form of a gratuity, they were relieved from the time limit by paragraph 5 of Schedule 2 to the Claims and Payments Regulations which made clear that there was not to be a disentitlement to such benefit in the form of a gratuity merely because the claim was not made within the prescribed time. Mr Rowland made submissions to the same effect in an attractive argument and referred us to authorities dealing with what he contended were comparable situations in other areas of the law. For our part we would be reluctant to affirm that there was a right either acquired or accrued in any of the claimants prior to 1 October 1986 without having heard full argument to the contrary. On this matter there was no contradictor. Had the matter depended upon that issue then further examination and argument would have been necessary. But since we have come to a clear conclusion upon the question of "contrary intention" it is sufficient for present purposes that we assume that there was such a right acquired or accrued.

14. The first real issue in the case, then, was as to whether, assuming that there was an accrued or acquired right there appeared from the amending legislation and regulations that there was an intention contrary to the non-affecting of that right. Mr Butt analysed the changes made to section 57 of the 1975 Act by paragraph 3 of Schedule 3 to the 1986 Act and sought to show that there was a contrary intention. We think that Mr Rowland was correct in saying that if a contrary intention is to be found it must be in the legislation and not in statutory instruments. We therefore restrict our consideration to that. We also think that Mr Rowland was correct in saying that most of the changes were essentially neutral. The purpose of the amendments as a whole was to raise the threshold of assessment which would trigger entitlement to benefit. That having been done, there would arise cases which fell below the higher threshold. The new subsection (1A) appears designed to allow an individual having such a lower assessment yet to receive some benefit from it should he suffer a subsequent relevant accident and disablement, by allowing aggregation of the two assessments. Then the new subsection (1B) appears to provide for something of a simplification, for calculating purposes, by arranging for assessments to be rounded up or down to ensure that when they are taken into account they are in multiples of ten.

15. New subsection (1C) next clarifies that in the case of an aggregate percentage rounding is to have effect in relation to the aggregate and not to the individual percentages forming the aggregate. That having been done paragraph 3(3) then provides for the cessation of gratuities.

Otherwise/

Otherwise the aggregate provision could lead to a double benefit. Sub-paragraph (4) amends section 57(6) in light of the new provisions. Thus far, indeed, all does appear neutral. But then if closer regard is had to the precise terms of paragraph 3(3), it states that section 57(5), of the 1975 Act, is to cease to have effect "except in relation to cases where the claim for benefit was made before this paragraph comes into force". The past tense, which we have emphasised, is, to our minds, of prime significance. It is not only a past tense but it is specifically related to time prior to the paragraph coming into force - that is prior to 1 October 1986. If Parliament had intended sub-section (5) of section 57 of the 1975 Act to continue in force so far as claims made after the paragraph came into force the provision would have required to be couched in different terms. The tense would have had to be different and the time limit would have been inappropriate. For these reasons we are clear that the language of paragraph 3(3) of Schedule 3 to the 1968 Act evinces a clear intention to cut off any rights that might have been acquired or accrued in regard to a disablement gratuity otherwise conferred under section 57(5) of the 1975 Act. Thus we are satisfied that the contrary intention is sufficiently and clearly contained within the amending statute. The contrary intention must be found within the amending legislation and although we do not base it upon the consideration, we feel entitled to find support for our conclusion about contrary intention from the way in which the relevant subordinate legislation appears to have been designed upon and, where necessary, to provide for that very situation. We deal with that in paragraph 22.

16. Mr Butt then turned to the transitional provisions dealing with disablement gratuity. The relevant regulation is 13 of the Miscellaneous Provisions Regulations. The opening words of paragraph (1) were satisfied since the date of onset prescribed was before 1 October 1986. Sub-paragraph (a) was also satisfied at least so far as the claim was certainly not made until after the last mentioned date. However Mr Butt submitted that the verb "delays" pre-supposed some knowledge of a claimant's rights and of the benefit to be claimed together with knowledge that the disease or condition was prescribed. The same verb appears in sub-paragraph (c)(ii). Mr Butt sought support for his interpretation from the language of regulation 14 which deals with claims made before 1 October 1986. There the language was simply "where a claim for disablement benefit is made before ...". That showed, said Mr Butt, that what was intended in regulation 13 was not simply a late claim but, as the side note itself stated a delayed claim and the contrast implied knowledge and intent. Mr Rowland pointed to a difficulty in that interpretation since sub-paragraph (c)(i) requires that in order to take advantage of the escape provisions of regulation 13 a claimant must not only have delayed making his claim until after 1 October 1986 but under that particular provision prove that throughout a period commencing on a date before 1 October 1986 and ending with the actual date of claim he was incapable of making an earlier claim. It was, suggested Mr Rowland, difficult to envisage how somebody could at one and the same time both have the knowledge necessary to form an intent to delay a claim and yet be then also incapable of making it. Mr Rowland went on to point to the language used in regulation 14 of the Social Security (Claims and Payments) Regulations 1979, as amended, which deals with the time for claiming benefits. Therein the language is

simply/

simply descriptive of a claim being made late - after the time prescribed for making it - but in the escape provision at paragraph (3)(b) it appears that if, amongst other things, the claimant proves that -

"Throughout the period between the earlier date /that is a date earlier than the date of claim when he was entitled to the benefit in question/ and the date on which the claim was made there was good cause for delay in making such a claim;" (Our emphasis).

That, submitted Mr Rowland, showed that the word "delay" was used by the draughtsman as simply descriptive of a past situation where a claim had not been made timeously without any question of relevant knowledge or intent being involved. We think that Mr Rowland's submissions are correct. We therefore hold that regulation 13 of the Miscellaneous Provisions Regulations was simply designed, within the context of the amendments involved to the disablement benefit scheme, to provide for claims which were late in the sense of being made after 1 October 1986 in respect of benefits where the date of onset of the prescribed disease had occurred earlier. These are claims which necessarily will be claims that had been delayed in much the same sense as one might speak of mail delayed in the post simply as an historic description of what had happened. No inference of wilfulness on the part of the postal authority would arise. Nor, in our view, does it arise here.

17. Mr Butt's next contention was that in holding the claim to succeed under regulation 13(1)(c)(i) the appeal tribunal had gone too far. Incapability of making an earlier claim, he submitted, could not logically be interpreted as simply meaning being unaware of any or all of the relevant facts and law. In short, mere ignorance of having a good claim to assert did not amount to incapability of making that claim. There had, Mr Butt submitted, to be circumstances beyond the individual's control. Thus, as the adjudication officer had submitted, mental or physical incapability would suffice. There might be other situations in which such circumstances could establish incapability. But to hold, as the tribunal did, that mere ignorance of a good claim was enough could lead to an absurd result since on the one hand it would virtually amount to substituting "inability" for the clearly different concept of "incapable". Moreover it would mean that a claimant only had to say that he was unaware for him to succeed since it would be difficult to disprove that he was of that state of mind. Had that relatively simple test been enough then the draughtsman would have said so. Under reference to the definition in the Shorter Oxford Dictionary, where the word is defined as being the opposite of capable and so meaning, amongst other things "not open to", "insensible to", "not having the capacity, power or fitness for" - he submitted that there was involved thereby in incapability some active power of the mind awanting so as to exclude the relevant faculty or ability. Faced with the question as to whether that would include or exclude intellect and its implication of knowledge he ultimately submitted that his approach would exclude that capacity. For these reasons therefore, Mr Butt submitted, the tribunal's decision contained an error of law.

18. In response Mr Rowland submitted that regulation 13 was intended to be a mitigation of the consequences of the earlier assumed removal of an

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acquired right. With a copious reference to authorities he submitted that in that situation the provision fell to be construed liberally and that, under reference to provisions in the realm of industrial relations law, where a late claim to a tribunal may be accepted if, depending upon the legislation at the time, it was made out that it was not practicable, or not reasonably practicable, to have made it timeously, he sought to equate incapability to the sort of approach laid down by the courts in regard to those phrases. But the thrust of his argument, as we understood it, was that the scope of the word was not limited to mere physical or mental disability or incapability. It was something narrower than good cause and, whatever its precise scope, it covered the facts in this case. We were not, however, persuaded that it was of much assistance to look at different words in a different body of the law.

19. Mr Purdon, who adopted Mr Rowland's submissions, but made independent contentions as to the meaning of "incapable", submitted, in that regard, that the word was an ordinary one and so should be given its plain ordinary meaning. There was nothing in the context to call for a special meaning. He referred us to the well known observations of Fry L J in Pemsel v the Commissioners of Income Tax [1888] 22QB 296 at page 309 where he said -

> "There are some rules of construction to which it is convenient to refer. The words of a statute are to be taken in their primary, and not in their secondary, signification. If, therefore, the words are popular ones they should be taken in a popular sense ..."

He also referred us to the words of Upjohn L J, giving the judgement of the Court of Appeal in Stephens v Cuckfield Rural District Council [1960] 2QB 373 at page 332 where he said -

> "Authorities or rather similar words in other Acts passed for entirely different purposes .. do not assist us"

And again -

> "But when Parliament uses ordinary words .... which are in common and general use in the English language, it seems inappropriate to try to define them further by judicial interpretation and to lay down as a rule of construction the meaning of such words unless the context requires that some special or particular meaning should be placed upon such words."

His Lordship then quoted Somervel L J in Bath v British Transport Commission [1954] 1 WLR 1013 at page 1015 -

> "... If they are, as these words are, perfectly familiar, all one can do is to say whether or not one regards them as apt to cover or describe the circumstances in question in any particular case."

And then under reference to the particular words there under consideration, "open land", Upjohn L J said, in the Stephens case -

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"We do not think it right to lay down as a rule of construction a definition which necessarily includes in the phrase "open land" or unbuilt on land ... Equally we would refuse to lay down another definition which necessarily excluded from that phrase a spacious park ...

Whether land satisfies the description of "open land" must be treated as a question to be answered by consideration of all the relevant circumstances of the case."

We are satisfied that these words indicate the proper approach to the problem in this case and confirm our view that looking at different words in a different statutory scheme is not likely to be appropriate.

20. "Incapable" is undoubtedly an ordinary word in the English language. What it connotes, or does not connote can be appreciated intellectually having regard to particular circumstances facing an individual without it being possible to lay down an all embracing definition or even one which would precisely describe the situation under consideration. In this case the scheme of the legislation, as we have earlier observed, involved, as part of a reorganisation of disablement benefit, the removal of what might be conveniently be described as the lowest rate, the gratuity, but allowing for the possibility of a later aggregation in the event of a later assessment following upon a further relevant accident or onset of a prescribed disease. But the other amendments seem to us to indicate that there was an appreciation that there might be late or delayed claims in respect of the gratuity made even after 1 October 1986. That alone, as it seems to us, makes sense of the provisions in regulation 13(1)(a) and (b) of the Miscellaneous Provisions Regulations and the final part of that paragraph which requires such claims to be treated as made on 30 September 1986. But the important qualifying provision, for this case, arises, of course, under paragraph 1(c)(i). The tribunal expressed the view that "incapable" covered the claimant's situation, one of justifiable ignorance that he had a viable claim, and that that state had been made out by his evidence of having left the industry at a time when PD A11 was not prescribed, having been advised that he had no claim in that regard and then, by reason of remoteness from the industry, having had no reason to make any further enquiry until told of the possiblity of making a claim in November 1986. We are satisfied that those same circumstances clearly indicated a lack, and a justifiable lack, of appropriate knowledge, for making a claim namely, in this case and in essence, the coincidence of two matters, first that he was suffering from a condition and, second, that it had become a prescribed disease. In our view, whatever the word "incapable" may mean to lexicographers, the tribunal were well entitled to come to the conclusion that it covered the claimant's situation, although our reasoning is necessarily rather fuller than was theirs.

21. We derive some support for the view that we have formed as to the scope of the meaning of "incapable" in the context of this case from some words of Buckley J. In an adoption case where a consent was

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required of persons then in a "totalitarian land", according to the rubric of the report, and the wording in the relevant legislation was "cannot be found or is incapable of giving his consent" his Lordship said this -

> "Moreover ..... I think that it can truly be said that they are incapable of giving their consent, for how can a man consent to a proposal of which he is unaware?"

(In re R (Adoption) (1967) 1 WLR 34 at page 40).

22. As noted, Mr Butt contended that giving such a wide meaning to the word "incapable" could lead to absurd results. We think his fear is misplaced. It is, in light of this decision, not enough for a claimant simply to say that he did not know. He has to prove facts, as did the claimant in this case, such as to warrant an inference of justifiable ignorance in the sense above discussed, before there would be circumstances which, for the purpose of this legislation, could be covered by the concept of being "incapable".

23. But then regulation 13 of the Miscellaneous Provisions Regulations requires that this claim be determined "as though it had been made on 30 September 1986". That seems to us neatly to mesh with the words of paragraph 3(3) of Schedule 3 to the Social Security Act 1986 and, for the matter of that sub-paragraph (4) which applies to claims which were made, in effect, before 1 October 1986. This claim, by virtue of the final words of regulation 13(1) is deemed to have been made on 30 September 1986. It was thus made before paragraph 3 of the Schedule came into force and falls to be determined accordingly. Hence what we said earlier about the regulations being constructed in such a way as to support, although not of themselves to imply, the contrary implication discussed in paragraph 15 above.