

MJG/SH/32/MD

Commissioner's File: CI/72/1987

Region: North Western

SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR ACCIDENT DECLARATION
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Eric Alfred Fletcher

Appeal Tribunal: Manchester

Case No: 176/06

[ORAL HEARING]

1. My decision is as follows:

- (a) On or about 1 March 1982, the claimant suffered personal injury by accident arising out of and in the course of his employment, being employed earner's employment: Social Security Act 1975, sections 50(1) and 107;
- (b) The claimant's claim to disablement benefit on form BI 100A dated 17 December 1984 shall be dealt with by the adjudication officer accordingly and I direct him to make any necessary reference to an adjudicating medical authority: Social Security Act 1975, sections 57 and 101 (as amended)

The claimant's appeal against the decision of the social security appeal tribunal dated 11 November 1985 is therefore allowed.

2. This is an appeal to the Commissioner by the claimant, a man born on 2 November 1935, against the unanimous decision of a social security appeal tribunal dated 9 October 1986. That decision dismissed the claimant's appeal from the decision of the local adjudication officer issued on 22 March 1985 (in relation to a claim dated 17 December 1984 on form BI 100A for disablement benefit), refusing a declaration of an industrial accident. In answer to the question on form BI 100A, "What was the date of the accident for which you are claiming disablement benefit", the claimant had deleted the word "accident" and substituted the word "condition". He answered, "The condition became known officially March 1982 by X-ray)". In answer to the question on the form, "In what way are you disabled as a result of the accident?", the claimant had again deleted the word "accident" and substituted the word "condition". He gave the answer, "No longer able to blow my oboe in the [world famous] orchestra as a result of laryngoceles (hernia of the throat)."

3. The appeal was the subject of two oral hearings before me. The first was on 18 November 1987, following which I issued a direction for medical evidence (see below) and

the second on 22 September 1988. At neither hearing was the claimant present. There is however a considerable volume of documentary evidence (see below). At both hearings the claimant was represented by Mr S Martin of the Musicians Union and the adjudication officer was represented by Mr I Sundborg of the Office of the Chief Adjudication Officer. I am indebted to Mr Martin and to Mr Sundborg for their assistance to me at the hearings.

4. The social security appeal tribunal which dealt with this case took considerable trouble with it and their record of decision on Form AT3 is a model in the detail and precision with which the findings of fact and reasons for decision are stated. The tribunal did not however have the benefit of a further medical opinion by a consultant which was obtained as a result of my direction. The tribunal's decision being recorded before 6 April 1987, it is susceptible of 'review' on fact as well as law by the Commissioner (see Social Security Act 1976, Schedule 5, paragraph 7 and the exemption thereto in the Commencement Order, S.I.1986 No.1958, Art.2(2)).

5. The tribunal made the following findings of fact,

"The appellant claimed Disablement Benefit in a claim dated 17.12.1984. He was then aged 49. The appellant had been previously employed as a professional oboist with [a world famous] Orchestra, which had been his professional occupation for 25 years. The appellant's evidence, which the tribunal accepts, is that he has been an oboist for 30 years. The tribunal accepts the appellant's evidence that as a professional oboist he played the oboe five to six hours each day for five to six days a week and that in addition he practised at home almost every day. The tribunal accepts the appellant's evidence that in October 1984 he felt unable to play professionally as an oboist and that he was from that time off work sick. As a result the appellant then attended the clinic of Professor S, an [Ear, Nose and Throat] Consultant at X Hospital in November 1984. The tribunal accepts the appellant's evidence that Professor S advised him to give up oboe playing as the laryngoceles condition would otherwise become worse, and that as a result the appellant gave up his employment with the .. Orchestra. The evidence indicates that these laryngoceles 'started' some time in 1980 and the tribunal accepts that the evidence does so establish. In March 1982 the appellant was referred to Mr N, FRCS, who is an [Ear, Nose and Throat] Consultant at X Hospital. The appellant at that time complained of feeling a sharp pain in his throat mainly on the right side with some discomfort on swallowing. X-rays were then taken and showed bilateral laryngoceles. Infection of the right laryngocele was diagnosed by Mr N who prescribed Amoxil to improve the appellant's symptoms, which it did, resulting in his resuming his profession as an oboist. In October 1984 the appellant returned to Mr N's clinic and complained of discomfort in the left side of his throat after playing the oboe for more than 30 minutes. X-rays were repeated but showed no change in size of the laryngoceles. No attacks of acute infection in the laryngoceles were subsequently noted by Mr N. On 10 June 1986 Mr N examined the appellant and found that his symptoms had remained unchanged."

The chronology thus set out will be of assistance to the adjudication officer and to the adjudicating medical authority in dealing with the relevant dates for disablement benefit etc.

6. The tribunal confirmed the local adjudication officer's decision that what had occurred was not an "accident" within the meaning of section 50(1) and 107 of the Social Security Act 1975 but was the result rather of a "process" which unless it could be brought within the prescribed diseases provisions of section 76 of the 1975 Act and the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 [SI 1985 No.967], was not on that view within the industrial injuries scheme in the social security legislation and any claim to disablement benefit etc must necessarily fail. There is no prescribed disease in the above cited Act or Regulations which can apply to the present facts.

7. The tribunal considered the evidence before it and stated,

"On the question of fact the tribunal concludes that the evidence does not point to a definite pathological change taking place at a particular time or times. In the tribunal's view it has not been shown that incidents caused the original progress of the laryngoceles. The tribunal concludes, indeed, that on the probabilities raised by the evidence the laryngoceles developed gradually. The tribunal accepts Mr Martin's submission [on behalf of the claimant] that Mr N's report, where he says 'the laryngoceles started sometime in 1980' is not incompatible with a view that there was an incident or series of incidents. However, the tribunal disagrees with Mr Martin's submission that the evidence as a whole supports an inference that the cause of the laryngoceles lies in such an incident or series of incidents. In the tribunal's view the evidence does not, on the balance of probabilities, support such a view."

8. The tribunal's references to Mr N's report, which they themselves commissioned, was to his report dated 10 June 1986. He was asked by a medical officer of the Department of Health and Social Security, in requesting a report, to answer the following questions,

- "1. Was there a moment when the condition (laryngocele) is considered to have come into existence?
2. Was there a moment when the condition (if already in existence) worsened.
3. In relation to both (1) and (2) above, the probable cause of the condition.
4. The connection between the condition and [the claimant's] profession as an oboist."

9. To those questions Mr M gave the following answers,

- "1. I think the laryngoceles started sometime in 1980 but probably did not become noticeable until about 1982 when he first presented with his symptom.
2. The condition started to worsen between 1982 and 1984 but has remained unchanged since that time.
3. The cause of this condition is dilatation of the laryngeal sinuses, causing them to fill with air and producing an air cavity, which in his case are external laryngoceles i.e. outside the larynx.
4. It is believed that this condition is produced by increased pressure within the larynx, forcing this dilatation to occur, and it is common in players of wind instruments. In [the claimant's] case it is probably due to his oboe playing".

I should add that it has not at any stage been contended otherwise than that in fact the claimant's oboe playing caused the laryngoceles and I see no reason to dissent from that.

10. Following the first hearing before me on 18 November 1987 I issued a direction in the following terms,

"Following the oral hearing today, I request the Adjudication Officer to obtain, through a Senior Medical Officer of the Department of Health and Social Security, a written report from an independent medical consultant on the question whether the laryngoceles in both sides of the claimant's neck (for which he sought medical treatment in 1982) were:-

- (a) the result of the claimant's playing the oboe as a professional musician in

the Orchestra for a period of some 30 years.

- (b) if so, was the onset of the laryngoceles on balance of probability caused by a specific incident or series of incidents between eg. 1980 and 1982, such as sustained playing of the oboe in a given orchestral piece on a particular occasion or occasions or was the onset of the laryngoceles on the balance of probability the result of a gradual process, with no specific moment of time when the laryngoceles developed or significantly worsened."

11. In response to that a report was obtained by a senior medical officer of the Department from Mr D, FRCS, a consultant ear, nose and throat surgeon. His report is dated 15 April 1988 and reads as follows,

"The history of [the claimant's] complaint is well documented in the reports that you have enclosed.

Clinical examination:

Nose, throat, pharynx, larynx - no abnormalities detected.

Neck: soft swellings on both sides of the neck which increase on valsalva manoeuvre, the left swelling being slightly larger than the right. Clinically consistent with laryngoceles.

In answer to your questions:

In the human larynx between the false and true cords is a small narrow space called laryngeal sinus. In some individuals increase in pharyngeal pressure against resistance can reach such a peak as to open up the space. Wind instrument players are known to be prone to it. [The claimant] was trained as an oboist and has been a professional since 1960 and has worked for the Orchestra since 1963 as an oboist. Certain musical works are more exacting and require prolonged effort, an example he gave me was that of Mahler and Bruckner works. It would appear therefore that over a period between 1980 and 1982 a series of incidents occurred when the elevation of increased pharyngeal pressure led to the causation of laryngoceles on both sides. These laryngoceles have to be of a certain size before symptoms are produced and in [the claimant's] case it happened in 1982 but the process must have been going on for a few years prior to it. It is impossible to give an exact time of its occurrence. Sometimes infections of the laryngoceles can occur which can lead to their obliteration and hence a possible spontaneous cure. Operative treatment in his case is not recommended." (my underlining).

12. Accompanying Mr D's report was an explanatory report from Dr S, MA, MRCS, LRCP, DRCOG, LDSRCS, a Senior Medical Officer of the Department, explaining the physiology etc. of laryngoceles. He also expresses certain opinions on the question of whether or not there was an "accident" involved in what had occurred. I should record that at the outset of the second hearing Mr Martin expressed strong objection to Dr S's report being furnished to the Commissioner at all and, particular, that he should give an opinion on the question of accident. I should reiterate what I said at the hearing, namely that I consider the practice by which explanatory factual reports are furnished for the Commissioners by Senior Medical Officers of the Department to be a beneficial one. However, as in this case a report on the question of 'accident v. process' was obtained on my direction from an independent consultant Mr D. I would not think it proper to take into account the opinions proffered on the question by Dr S. To that extent, but no further, I accept Mr Martin's objection.

13. The question therefore is whether or not the claimant has, by reason of the laryngoceles, at some time suffered "personal injury.... by accident arising out of and in

the course of his employment, being employed earner's employment", within the classic words of section 50(1) of the Social Security Act 1975. It became apparent at the second hearing before me that the laryngoceles that the claimant had in both sides of his neck were not properly to be described as a "disease" but rather as an "injury" (see the distinction between these terms in section 76 of the Social Security Act 1975). Indeed Dr S at the second hearing agreed with my surmise that the claimant was not to be described as a diseased man but as a healthy man who had suffered an injury.

14. The question then is whether that personal injury, described by the claimant as "hernia of the throat", had occurred by "accident" or by a process not constituting an accident. Case law on this question is of course voluminous and goes back to the Workmen's Compensation Act 1897 (and subsequent Acts). In Jones v. Secretary of State for Social Services [1972] A.C. 944 at page 1009F Lord Diplock defined "accident" as "... something external which has some physiological or psychological effect upon that part of the sufferer's anatomy which sustains trauma, or some bodily activity of the sufferer which would be perceptible to an observer ...". In Roberts v. Dorothea Slate Quarries Co Ltd [1948] 2 All ER 201 at page 205H, Lord Porter said,

"... two types of cases have not always been sufficiently differentiated. In the one type there is found a single accident followed by a resultant injury, as in Brintons Ltd v. Turvey [1905] A.C. 230, or a series of specific and ascertainable accidents followed by an injury which may be the consequence of any or all of them, as in Burrell (Charles) and Sons Ltd v. Selvage (1921) 14 BWCC 158. In either case, it is immaterial that the time at which the accident occurred cannot be located. In the other type, there is a continuous process going on substantially from day to day, though not necessarily from minute to minute, or even from hour to hour, which gradually and over a period of years produces incapacity. In the first of these types, the resulting incapacity is held to be injury by accident. In the second it is not."

15. Examples of the former category, i.e. accident, in reported Commissioners decisions are R(I) 77/51 (repeated operation of stiff lever in steam railway locomotive held to be series of accidents resulting in umbilical hernia); R(I) 24/54 (frequent burns and pricks to hands of a tinner were a series of accidents resulting in the formation of traumatic epidermal cysts); and R(I) 43/55 (repeated explosive noises from a machine leading to psycho-neurotic disorder in the claimant held to be accidents). Cases of processes, not accidents, are eg. R(I) 42/51 (gradual straining of chest muscles over some months) and R(I) 11/74 (use of heavy electrical boring machine jarring hands and arms of a miner causing ulnar nerve compression), upheld by the Divisional Court in R v. Industrial Injuries Commissioner, ex p. Starr - see Appendix to R(I) 11/74.

16. In the Starr case, the Divisional Court observed (at p.123H) that the question of whether or not there was an accident or a process is not a question of law but a question of fact. I have so treated it in this case. I have looked at the two consultant's reports, that of Mr N obtained for the local tribunal and that of Mr D obtained for the Commissioner (see above). I have also considered the evidence, including the evidence given by the claimant himself to the local tribunal. I arrive at the conclusion that what occurred in this case was a series of accidents when the claimant was playing the oboe, very possibly on some occasions for some length of time in a particular musical work. Those accidents caused the muscle weakening that produced the laryngoceles. Thus the claimant complained of a sharp pain in his throat which became worse on playing the oboe and was also associated with right ear ache (Mr N's report of 10 June 1986). I also conclude that by March 1982, the month the claimant himself gave for the worsening of the condition, the claimant on or about 1 March 1982 suffered an accident or accidents which would have occurred on a distinct occasion or occasions and was not merely part of a "continuous process going on substantially from day to day" (see the citation from Lord Porter in the Roberts case above).

17. In particular I note that Mr D's report (see para. 11 above) states,

"It would appear therefore that over a period between 1980 and 1982 a series of incidents occurred when the elevation of increased pharyngeal pressure led to the causation of laryngoceles on both sides."

That is undoubtedly an affirmative answer to my question as to whether or not there had been "a specific incident or series of incidents between eg. 1980 and 1982, such as sustained playing of the oboe in a given orchestral piece on a particular occasion or occasions". The subsequent statement by Mr D, "the process must have been going on for a few years prior to it" does not in my view subtract from his earlier statement that there was a series of incidents but is merely a description of what had occurred in the time prior to 1980/1982. The word "process" is not there used as a term of art.

18. I have not overlooked the fact that on 28 February 1985 the claimant himself made a written statement to the Department in which he said there has been no incident or series of incidents of particular stress which could have brought on his condition. which had been coming on over the years. He added, "... I cannot remember [when] the condition was first felt as it was a gradual process". However, the claimant at that time was making the statement without the benefit of the medical reports having been obtained from the consultants and possibly without knowledge of the distinction made by the industrial injuries legislation between "accident" and "process". Ultimately the statutory adjudicating authorities, including in this case the Commissioner, must make the decision on all the evidence available. My decision on the facts in this difficult case is that the claimant's laryngoceles were an injury sustained by industrial accident and he is therefore presumably entitled to any relevant industrial injuries benefits.

(Signed) M.J. Goodman
Commissioner

Date: 17 October 1988