

CI 176/1981

MTG/JCB

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR INDUSTRIAL INJURY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision No. CI 5/82

1. My decision is as follows:

- (i) The claimant's request for an oral hearing of his application for leave to appeal from the unanimous decision of the national insurance local tribunal was validly granted, there being power for a Commissioner to hold such a hearing.
- (ii) Having read the case papers and considered the evidence given at the oral hearing of the application, I conclude that it does not appear that there is any valid ground for holding that the decision of the local tribunal is or may be erroneous. Leave to appeal is accordingly refused.

Social Security Act 1975, sections 101, 114 and 115 and Schedule 13; Social Security Act 1980, section 15; Social Security (Determination of Claims and Questions) Regulations 1975 (S.I. 1975 No 558, as amended by S.I. 1980 No 1622) regulations 3, 12A and 13.

2. On 4 February 1981 a national insurance local tribunal unanimously dismissed the claimant's appeal from the decision of the insurance officer that the claimant's accident on 18 September 1979 did not arise out of and in the course of the claimant's employment, with the result that injury benefit was not payable for the inclusive period from 19 September 1979 to 28 October 1979. That 'accident' occurred when the claimant was working as a bus conductor and a man, who was connected to the claimant's family and with whom the claimant had already had bad feeling, boarded the claimant's bus and struck the claimant blows with his fists, inflicting on the claimant personal injuries which caused him to be off work for about 6 weeks. The local tribunal dismissed the appeal on the ground that,

"There was personal injury to the claimant whilst at work, but it was caused by an altercation with a member of his

family, ie the husband of his wife's sister and it was in furtherance of a family dispute."

3. Under section 15 of the Social Security Act 1980 the claimant had first to ask the chairman of the local tribunal for leave to appeal to the Commissioner. The local tribunal chairman refused leave on 18 March 1981 and on 9 April 1981 the claimant's trade union made application to the Commissioner for leave to appeal (using a form properly applicable to an actual appeal, i.e. form LT44). On that form, the union stated, "We respectfully request an oral hearing of this appeal".

4. That request was treated by the Commissioner as a request for an oral hearing of the application for leave to appeal and on 28 August 1981 the Commissioner granted the request for the oral hearing of the application, making certain special directions as to documentary and other evidence. The oral hearing was fixed for 24 November 1981 and at that hearing the claimant appeared in person (not represented by his trade union who had by this time withdrawn from the proceedings), and the insurance officer was represented by Mr J P Canlin of the Office of the Solicitor of the Department of Health and Social Security.

5. At the outset, Mr Canlin made a submission to the effect that there was no power for the Commissioner to hold an oral hearing of an application for leave to appeal from the decision of a national insurance local tribunal. However, Mr Canlin agreed to a suggestion by me that on the occasion of this particular 'hearing' I should, without prejudice to my decision on Mr Canlin's submission, ask certain questions (concerning the documentary and other evidence) of the claimant. Before I examine the statutory provisions concerning this particular point, I should perhaps observe that in all other types of case where application has to be made to a Commissioner for leave to appeal, the regulations in question make it clear that an oral hearing can be held. So far as concerns leave to appeal from the decision of a Medical Appeal Tribunal, the Attendance Allowance Board (or its delegate), or a Supplementary Benefit Appeal Tribunal, regulations empower the Commissioner to grant or refuse a hearing of an application for leave. The relevant regulations are, respectively, regulation 29(1) of the above-cited Determination of Claims and Questions Regulations; regulation 11(1) of the Social Security (Attendance Allowance) (No 2) Regulations 1975 (S.I. 1975 No 598) and Rule 10(1) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 (S.I. 1980 No 1605).

6. The absence of any specific provision as to oral hearings in the case of applications for leave to appeal from the decision of a national insurance local tribunal was one of the reasons adduced by Mr Canlin for suggesting that in such a case there was no power for a Commissioner to hold an oral hearing. Mr Canlin pointed out that regulation 13(1) of the Determination of Claims and Questions Regulations does provide for the grant or refusal by a Commissioner of a request for an oral hearing of the actual appeal from the decision of a national insurance local tribunal, but makes no provision for an oral hearing of an application for leave to appeal. The provisions as to leave to appeal from the decision of a national insurance local tribunal are contained in the new regulation 12A of the Determination of Claims and Questions Regulations which was inserted by regulation 5 of S.I. 1980 No 1622, as from 24 November 1980. Regulation 12A makes

no provision for the holding of an oral hearing by a Commissioner of an application for leave to appeal, but simply provides that the application for leave to appeal to the Commissioner should be made in writing. There is no provision of the Social Security Act 1975 which assists on this particular point, and section 15 of the Social Security Act 1980, which introduced the leave to appeal procedure, contains no provision on the point.

7. In my judgment, the absence of specific legislative provision as to an oral hearing in this type of case is not conclusive. The nature of a Commissioner's function in deciding whether or not to grant leave to appeal from the decision of a national insurance local tribunal is judicial and not administrative. Consequently the rules of natural justice, which apply to all judicial proceedings unless expressly excluded by legislation, would empower the Commissioner to hold an oral hearing, if he considered it apposite in order to exercise his judicial function. There would be no right for an applicant (for leave to appeal) to demand an oral hearing before a Commissioner. In exercising his discretion in deciding whether or not to accede to a request for an oral hearing, the Commissioner should in my view take into consideration the same matters as he is enjoined to take into consideration by the regulations cited in paragraph 5 above, namely the record of the case and the reasons put forward in the request for the oral hearing. The nature of an application for leave to appeal and the need for a comparatively 'summary' determination of such applications (no reasons having to be given - Tribunals and Inquiries (Social Security Commissioners) Order 1980, S.I. 1980 No 1637) means that the number of cases in which a Commissioner will consider it necessary to grant a request for an oral hearing of an application for leave must of necessity be very few in number. However, the present case is in my view one where, because of evidential and representational difficulties, an oral hearing of the application for leave was desirable.

8. If statutory authorisation is sought for the power of the Commissioner to hold an oral hearing of an application for leave to appeal from the decision of a national insurance local tribunal, then in my judgment it can be found in regulation 3 of the Determination of Claims and Questions Regulations, which provides,

"Procedure at hearings and in connection with determination;
and right to representation.

3(1) Subject to the provisions of the Act and of these Regulations -

- (a) the procedure in connection with the consideration and determination of any claim or question to which these regulations relate shall be such as the Secretary of State, the competent tribunal or the person holding the inquiry, as the case may be, shall determine; (my underlining)
- (b) any person who by virtue of the provisions of these regulations has the right to be heard at a hearing or an enquiry may be represented by another person whether having professional qualifications

or not and, for the purposes of the proceedings at any such hearing, any such representative shall have the rights and powers to which the person whom he represents is entitled under the Act and these regulations".

By regulation 2(1) of the Regulations, the expression "competent tribunal" includes a Commissioner, and the word "hearing" is defined as meaning "oral hearing".

9. In my judgment, regulation 3(1)(a) confers a power on the Commissioner, in the process of his determining the "procedure in connection with the consideration and determination of any claim or question" to hold an oral hearing of the application for leave to appeal, whether the hearing is directed by the Commissioner of his own motion or as the result of a grant by him of a request for a hearing by an applicant for leave. I do not accept Mr Canlin's submission that the context of regulation 3 indicates that it is concerned solely with cases where a hearing is positively provided for by some other statutory provision and merely regulates the procedure at that hearing. The wording of regulation 3(1)(a) is too wide for that, referring as it does to "procedure in connection with the consideration and determination of any claim or question". For that matter, there is nowhere in the Social Security Act 1975 or in regulations a positive provision that a national insurance local tribunal can or shall hold an oral hearing, but it is their invariable practice so to do. Regulations 10 and 11 of the Determination of Claims and Questions Regulations make detailed provision as to such hearings, without requiring that such a hearing shall take place and on the assumption that the local tribunal has power to hold such a hearing.

10. So far as this claimant's application for leave to appeal is concerned, I have already indicated that under the 1980 Order (para 7 above) the Commissioner is not obliged to give reasons for grant or refusal of leave. However, as the claimant did appear at an oral hearing before me and the evidential problems are considerable, I propose to say shortly that, having considered all the evidence and the representations made to me by the claimant and by Mr Canlin, I conclude that the local tribunal (before whom the claimant appeared, represented by an official of his trade union) committed no error of law or fact in their decision. On the contrary the local tribunal took pains to make a detailed and comprehensive record of the claimant's evidence. They also gave detailed findings of fact and grounds for decision, which are exemplary in form, as well as being, in my view, correct in law.

11. The additional documentation that has been put before the Commissioner, concerning the lending of a sum of money to the claimant by his employers until he obtained an award from the Criminal Injuries Compensation Board, does not advance the matter any further, since it is clear that the claimant's employers were not in any sense seeking, by so doing, to 'pre-empt' or express any opinion on the question of whether the claimant's accident on his bus arose out of and in the course of his employment, (Social Security Act 1975, section 50).

12. In my judgment the only arguable point that could be made on behalf of the claimant was whether the local tribunal had properly considered section 55 of the Social Security Act 1975, the material parts of which read,

"55(1) An accident shall be treated for the purposes of this Chapter, where it would not apart from this section be so treated, as arising out of an employed earner's employment if -

- (a) the accident arises in the course of the employment; and
- (b) the accident "is caused by another person's misconduct ... or by steps taking in consequence of any such misconduct; and
- (c) the employed earner did not directly or indirectly induce or contribute to the happening of the accident by his conduct outside the employment or by any act not incidental to the employment".

However, paragraph 6 of the local tribunal's findings of fact stated,

"6. The onus of proof is upon the claimant to show that the accident arose out of his employment. We find he has failed to do that. There was clearly 'bad blood' between the claimant and [the man who was his family connection] which caused or contributed towards the happening of the accident by conduct outside the employment of the claimant".

13. Although there is no express reference to section 55 of the 1975 Act in that particular finding of fact, it is clear that the local tribunal had section 55 fully in mind, that section having been cited in the submission of the local insurance officer and the local tribunal having in their finding of fact repeated some of the words of section 55(1)(c). Moreover, I consider on the evidence before me that the local tribunal made a correct finding of fact on this point, with the result that the claimant cannot invoke the aid of section 55 to bring his 'accident' on the bus within the definition of an 'industrial' accident. If he cannot invoke section 55, he clearly fails on the facts of this case to show in the ordinary sense that the accident arose out of the employment as there is evidence to rebut the presumption (in section 50(3) of the 1975 Act) that it did so. The claimant has not in my view displaced the inference raised by that evidence that the accident, though it was "in the course of" his employment, was not one "arising out of" the employment (1975 Act, section 50(1)).

(Signed) M J Goodman
Commissioner

Date: 25 May 1982

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