C1 184/1981

T/MP

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR INDUSTRIAL DISABLEMENT BENEFIT

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

C1 4/82

1. Our decision is that prescribed disease No 48 known as 'occupational deafness' is prescribed in relation to the claimant because he has been employed in employed earner's employment in 'an occupation involving ... assistance in the use of pneumatic percussive tools on metal ..... for at least an average of one hour per working day' for a period or periods amounting in the aggregate to not less than twenty years within paragraph 48(c) of Part I of Schedule 1 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1975 [S.I. 1975 No 1537] as amended (now 1980) [S.I. 1980 No 377], and furthermore he satisfies regulation 40(2) of the aforesaid Regulations. The appeal of the claimant against the decision of the local tribunal is therefore allowed.

2. This is an appeal by the claimant against the unanimous decision of the local tribunal confirming the insurance officer's decision shown in box 1 of form LT2. The Chief Commissioner directed that the appeal should be heard by a Tribunal of Commissioners. An oral hearing of the appeal took place on 16 March 1982. The claimant appeared and was represented by Mr M Pelling of Counsel instructed by Messrs Pattinson and Brewer, solicitors. The insurance officer was represented by Mr R G S Aitken of the Solicitor's Office of the Department of Health and Social Security.

3. On 18 September 1979 the claimant, now aged 53, made a claim to disablement benefit on the ground that he was suffering from the prescribed disease known as occupational deafness (PD48). In order to succeed the claimant has to satisfy regulation 2(d) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1975 as amended (now 1980) which provides as follows:-

> '(d) occupational deafness is prescribed in relation to all persons who have been employed

(i) in employed earner's employment at any time on or after 5 July 1948; and

(ii) for a period or periods (whether before or after 5 July 1948) amounting in the aggregate to not less than twenty years,

in one or more of the occupations set out in the second column of paragraph 48 of Part I of Schedule I to these regulations'

4. The occupations set out in paragraph 48 are as from 3 September 1979 any occupation involving

(a) The use, or supervision of or assistance in the use, of pneumatic percussive tools, or the use of high-speed grinding tools, in the cleaning, dressing or finishing of cast metal or of ingots, billets or blooms; or

(b) the use, or supervision of or assistance in the use, of pneumatic percussive tools on metal in the ship building or ship repairing industries; or

(c) the use, or supervision of or assistance in the use, of pneumatic percussive tools on metal, or for drilling rock in quarries or underground, or in coal mining, for at least an average of one hour per working day; or

(d) work wholly or mainly in the immediate vicinity of drop-forging plant (including plant for drop-stamping or drop-hammering) or forging press plant engaged in the shaping of hot metal; or

(e) work wholly or mainly in rooms or sheds where there are machines engaged in weaving man-made or natural (including mineral) fibres, or in the bulking up of fibres in textile manufacture; or

(f) the use of machines which cut, shape or clean metal nails; or

(g) the use of plasma spray guns for the deposition of metal'

5. Regulation 40(2) of the 1975 Regulations (now regulation 40(2) of the 1980 Regulations) provides with effect from 3 September 1979 that disablement benefit shall not be paid in respect of a claim for occupational deafness which is made later than twelve months after the claimant has ceased to be employed in an occupation prescribed in relation to the disease, unless the claim is made within the period of twelve months beginning on 3 September 1979 and all the circumstances specified in any one of paragraphs (3) (4) and (5) of the Regulations obtain. In the present case the claimant has been in the same employment since 1969, and accordingly if he can satisfy regulation 2(d) he will likewise satisfy regulation 40(2).

6. The claimant has worked for British Rail Engineering Ltd since 1958. As regards the period from 14 April 1958 to 14 September 1958 he was employed as a rivet heater, and as such used pneumatic percussive tools on cast metal for at least an average of one hour per working day within paragraph 48(c). Moreover, as regards the more substantial period from 15 September 1958 to 14 November 1969 the claimant likewise brings himself within the above statutory provision. He was during these years employed as a fitter's mate, and his specific work was descaling. It is clear on the evidence that in the course of that employment the claimant used pneumatic percussive tools on cast metal for two to three hours a day on at least four days a week.

7. However, it is the subsequent period of the claimant's employment up to the date of his claim which has occasioned us the real difficulty in this case. The claimant gave evidence before us as to the precise function he performed, and he was supported by two witnesses, Mr Pownall and Mr Porritt. The combined evidence was not as clear as we could have hoped, but its effect can conveniently be summarised as follows.

8. The claimant has during the relevant period been employed as a carriage lifter and crane driver. His job has been to position bogies wherever the riveters want them in order to enable them to work thereon. For the most part the claimant's practice has been to place each bogie in the desired position and then go on to do work elsewhere. However, sometimes he remains with the bogie so positioned, using his crane to suspend it in the air. He has been in the habit of doing this whenever this was the only way the riveters could with safety work on a particular bogie. It may be - the evidence was uncertain on this point - that the need for this kind of attention is called for only in the case of a particular type of bogie. Apparently until about 1977 the claimant operated an overhead crane, he himself remaining seated throughout in his cab some twenty feet above ground. After 1977 he took over a pendulum crane, operating it from the floor of the shed. However, nothing material to this appeal seems to turn on this particular change.

9. It proved particularly difficult to ascertain from the evidence given by the claimant and his witnesses exactly how much time was taken up in holding bogies in suspense. The evidence was muddled and at times flatly contradictory. However, we are just satisfied, and find as a fact, albeit with some hesitation, that during the period from 1969 to the date of claim the claimant expended at least an average of one hour per working day holding with his crane one or more bogies in suspense, so as to enable riveters with safety to work thereon. We might have reached a different conclusion, had the employers given oral evidence. Their evidence was confined to two letters dated respectively 13 November 1979 and 19 March 1980 and the supervisor's statement of 23 March 1981. Such evidence conflicted with what was stated by the claimant and his witnesses, but the absence of the employer's representatives at the hearing rendered it impossible to cross-examine the latter on what they had stated in writing. In the circumstances we prefer the evidence of the claimant.

10. The claimant seeks to maintain that his employment from 1969 falls within paragraph 48(c). He does not, of course, contend that he uses pneumatic percussive tools on metal; his case is that throughout by the operation of his crane he assists in the use of such tools.

11. We have no doubt that the word 'assistance', appearing in paragraph 48(c) (and for that matter in paragraph 48(a) and (b)), is to be construed narrowly. It qualifies the actual use of the tools, not the process in the course of which the tools are employed. A crane driver, who only positions bogies to enable riveters to work thereon and then goes away, is clearly assisting in the process of getting the bogies repaired, and that process requires the use of pneumatic percussive tools. However, assistance of this nature is not assistance in the actual use of the tools. Any other view would mean that a clerk who comes to record the riveting operations or the person who sweeps up or the man who opens the factory door to enable work to commence could all be said to be assisting in the use of the relevant tools. Of course, their duties are important, doubtless essential even; but they are concerned only with facilitating the process, not with the actual use of the tools. We approve the observations contained in paragraph 15 of unreported Decision C.I. 12/80 where the claimant sought to bring himself within paragraph 48(a) on the ground that his work as a crane operator was a vital link in enabling pneumatic percussive tools to be used in the dressing shop which constituted his place of employment

> 'I have no doubt that the claimant's work was of great assistance to the users of the pneumatic percussive tools. I have no doubt at all that the claimant was making a substantial contribution towards the processes being carried out in the dressing shop. I am further satisfied that the actual users of the pneumatic percussive tools were employed in an occupation prescribed in relation to occupational deafness. The claimant was however not engaged in assistance in the use of pneumatic percussive tools; he was in my judgment clearly engaged in assistance in the processes being carried out in the dressing shop. That being so the words of sub-paragraph (a) are in my judgment not apt to cover the claimant's occupation'.

12. In so far as the learned Commissioner in Decision R(I) 9/81 sought in paragraph 11 to extend the aforementioned narrow construction, we reject it. Nor are the obiter observations in paragraph 18 of the unreported decision of a Tribunal of Commissioners C.I. 2/82 in our view to be read as giving any support to the wider interpretation adopted by the Commissioner in R(I) 9/81 - though if they were we would reject them. Just as in the decision of a Tribunal of Commissioners R(I) 11/81 it was held that the words 'supervision .... of the use of pneumatic percussive tools' must be construed strictly, so too must the words 'assistance in the use of' such tools.

13. However, although, in our judgment, it is clear that where a crane merely moves bogies or metal from one point to another and then goes on to other work, it is merely assisting in the process, and not in the use of pneumatic percussive tools, the position is quite

different when a crane holds a bogie in suspension to enable riveters safely to work thereon. This does constitute assistance in the use of the relevant tools. The dividing line between what is and what is not assistance has in these circumstances been crossed, and the operation falls within the meaning of 'assistance' within paragraph 48.

14. As we are just persuaded that the claimant has during the period from 1969 to the date of claim been assisting in the use of pneumatic percussive tools for at least an average of one hour per working day, we are satisfied that the claimant had at the date of claim been for more than twenty years employed in a prescribed occupation, and accordingly that prescribed disease No 48 is prescribed in relation to him.

15. We allow this appeal.

(Signed) D G Rice
Commissioner

I Edwards-Jones
Commissioner

J B Morcom
Commissioner

Date: 2 June 1982

Commissioners' file: C.I. 184/1981

C I O File: I.O. 5363/I/80

Region: Yorkshire and Humberside