C1 185/1979

RSL/GJH

SOCIAL SECURITY ACTS 1975 TO 1980

APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER - CORRECTION

/ORAL HEARING/

Decision C.I. 5/81

Paragraph 15, line 4: for "Loss" read "loss"

line 11: delete the words "for State".

G T Crook
Secretary

1 May 1981

Commissioner's File: C.I. 185/1979
DHSS File: I. 2271/5072

CI 185/1979

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[ORAL HEARING]

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Introduction

1. This is an appeal made with my leave by the claimant from a decision of a Medical Appeal Tribunal dated 5 July 1978 (referred to below as "the tribunal decision").

2. I have heard the appeal at an oral hearing at which the claimant attended and addressed me. The Secretary of State was represented by Mr Canlin of the Solicitors' Office of the Department of Health and Social Security, and I am indebted to him for his assistance.

The Facts

3. The claimant, a man now aged 51, was injured in an industrial accident on 15 June 1977. He slipped on pellets lying on a hard surface and fell, injuring his pelvis and right hip joint. He had suffered from rheumatoid arthritis since 1962 and in 1967 had had an operation involving total right hip replacement.

Medical Board Decisions

4. On 6 December 1977 a Medical Board gave a decision ("the original decision") provisionally assessing the claimant's disablement at 30% for the period 14 December 1977 to 13 December 1978. They arrived at this percentage by means of a gross assessment of 40% from which they off-set 10% for "pre-existing arthroplasty for hip disease".

5. Subsequently the claimant applied successfully for a review of the original decision. On 3 April 1978 a second Medical Board

gave a decision ("the review decision") finding that the injury to the claimant's right hip was fully relevant and awarding to him a provisional disablement assessment of 60% for the period 14 December 1977 to 13 June 1978.

6. The review decision was given in exercise of the power conferred by section 110(1) of the Social Security Act 1975 which provides that a decision of a medical authority may be reviewed by a Medical Board "if satisfied by fresh evidence that the decision was given in consequence of the non-disclosure or misrepresentation ... of a material fact ...". For the purposes of this provision "fresh evidence" means evidence which the person concerned was unable to produce before the decision under review was given or which, in the circumstances, he could not reasonably have been expected to produce: R v Medical Appeal Tribunal (North Midland Region), Ex parte Hubble (C.A.) [1959]2 Q.B. 408, [1959]3 All E.R. 40; see also the reported Commissioners' Decisions R(I) 27/61 and R(P) 3/73 dealing with earlier but similar statutory provisions.

7. The fresh evidence on which the claimant relied is a report dated 9 March 1978 written by Professor B T O'Connor, who operated on him on 10 January 1978, that is to say after the date of the original decision. The crucial point on which the claimant has sought to rely is that Professor O'Connor stated in his diagnosis that a fracture of the wall of his acetabulum was caused by his fall. He also relied on the fact that because of the fracture he was fitted at the operation with a smaller total hip replacement joint than the one which it replaced. And he maintains that this has left him with certain disadvantages including a shortened right leg. The Medical Board of 3 April 1978 made a note of these contentions.

The Tribunal Decision

8. The Secretary of State referred both the original and the review decisions to a Medical Appeal Tribunal ("the Tribunal") and both were dealt with in the tribunal decision. The Tribunal did not confirm either of the Medical Board decisions, but awarded to the claimant a provisional assessment of 30% for the period 14 December 1977 to 13 June 1979, arriving at that figure after an off-set of 10% for "the disability resulting from the progressive loosening of prosthesis; the rheumatoid arthritis and steroid therapy". Their reasons, stated in full, were as follows:-

> "The Secretary of State has referred to the Tribunal for consideration the decisions of the Initial Medical Board of 6.12.77 and the Review Medical Board of 3.4.78.
>
> We have heard representations from Mr Kelly on behalf of the Secretary of State and also from the claimant. The Medical Members have carried out a clinical examination of this claimant.
>
> The Tribunal has considered the whole of the documentary evidence referred to in both sets of case papers together

with a further letter from the claimant dated 28.6.78 and has also viewed and considered the X-rays which are set out in the schedule.

He acknowledges today that in the last few weeks there has been some general improvement in his condition. On clinical examination we noted that he has diffuse evidence of chronic rheumatoid disease and in particular there is involvement of the hands, wrists, both knees and right hip joint. He has quite reasonable movement in both knees. In view of the recent history of instability in the right hip joint no examination of this joint was carried out, but it was noted that there was a little shortening of the right leg.

The history of this case shows that this claimant since 1962 has suffered from rheumatoid arthritis affecting principally the right wrist and elbow; both knees; and the right hip (in respect of which an arthroplasty was performed in 1967). The Tribunal note that the claimant has received treatment with steroid drugs since 1964 and it is more probable than not that there were metabolic changes in the bones as a result of this treatment at the time of the accident. The type of arthroplasty carried out in 1967 is well known to be a relative success for quite a number of years but after a period of about 10 years there is a tendency for loosening of the acetabular component to take place and this loosening is obviously more liable to take place in the presence of osteo-porosis consequent on the exhibition of steroids and the rheumatoid arthritis. This picture leads the Tribunal to the conclusion that prior to the relevant accident the acetabular component was loosening due to the bone changes. *Despite the fact that this claimant was active prior to the relevant accident, nevertheless, it is the view of the Tribunal in the light of the factors to which we have referred above that a disability was present as a result of the loosening process and the rheumatoid arthritis and steroid treatment and this, in the view of the Tribunal, constitutes a disability from which the claimant suffered before the relevant accident and which in our view he would have suffered during the assessment period even if the relevant accident had never occurred. In these circumstances we regard an offset as justified in this case.*

After careful consideration of the whole of the documentary evidence and in particular the history of this case, it is the view of the Tribunal that the effect of the relevant accident was to accelerate the progress of the loosening process to which we have referred and in our view it is more probable than not that even if the relevant accident had never occurred, this claimant within the course of the next few years would have required further surgery on the right hip.

A final assessment at this stage would be premature.

The Tribunal has dealt first with the reference of the decision of the Initial Medical Board dated 6.12.77 and in substitution for the assessment made by that Board we make a provisional assessment of 30% from 14.12.77 to 13.6.79 after an offset of 10% for the disability resulting from the progressive loosening of prosthesis; the rheumatoid arthritis and steroid therapy.

Turning now to the decision of the Review Board of 3.4.78, the decision of this Tribunal in the preceding paragraph now becomes the assessment to be reviewed and obviously since we made this decision a few moments ago there has been no fresh evidence that the decision of the Tribunal was given in consequence of the non-disclosure or misrepresentation of a material fact.

The decision of the Board of 3.4.78 is set aside and we are not satisfied by fresh evidence that the decision of the Medical Appeal Tribunal of 5.7.78 was given in consequence of the non-disclosure or misrepresentation of a material fact."

The passage between asterisks ("the starred passage") is discussed below in paragraphs 14 to 16.

Errors of Law

9. In my judgment the tribunal decision is erroneous in point of law for three reasons. These are (a) defective procedure, (b) failure to deal with the whole of the claimant's case and (c) failure to comply with the provisions of regulation 2(3) of the Social Security (Industrial Injuries) Benefit Regulations 1975 [S.I. 1975 No 559] ("the Benefit Regulations").

Defective Procedure

10. The Tribunal's proper procedural course was first to determine whether the review decision was a valid decision, and for that purpose to determine whether Professor O'Connor's report, or any other item of evidence, was "fresh evidence". If so then the review decision superseded the original decision which became of no effect. But if not, then the Tribunal would have had to deal with the original decision and not with the review decision. It was not open to them to deal with the original decision as if the review decision had never been made unless they first decided that the latter was not a valid decision. Their reasoning for setting aside the review decision is unacceptable. Whether or not there was fresh evidence justifying that decision depends on the state of the evidence at the time it was made, not on something that happened at the Tribunal's proceedings three months later. The issue does not change between the first instance and appeal proceedings; it necessarily remains the same and no tactic of the Tribunal, however ingenious, can exorcise it.

11. I surmise that the motive of the Tribunal in adopting their irregular procedure was reluctance to spend time on the "fresh evidence" question. This is understandable because, whether or not the review decision was valid, they had to consider Professor O'Conor's report, and any other evidence first presented to the Medical Board of 3 April 1978. If the review decision was invalid then such evidence would have become evidence submitted to the Tribunal additional to that submitted to the Medical Board of 6 December 1977 which, of course, they would have taken into consideration as in fact they did. However, it was not open to them to avoid the issue by the method they chose. No objection could have been taken to their suggesting to the Secretary of State's representative that he should withdraw his contention which raised the issue. And, since in any case the evidence in question had to be considered by the Tribunal, there would have been small point in his persisting in it. Moreover, even if he had not agreed to do so, I do not think that the issue should have taken up much of the Tribunal's time. If they had asked whether the claimant was warned that he was expected to provide medical evidence for the Medical Board of 6 December 1977 at his own expense, they would probably have had the answer to the question whether it was reasonable to expect him to produce such evidence.

12. Mr Canlin conceded that the irregularity of the Tribunal's procedure constituted an error of law justifying the setting aside of the tribunal decision. And I so hold.

The claimant's case

13. The claimant's case was that the disablement assessment in the original decision was inadequate, because the Medical Board of 6 December 1977 failed to take into account that he had fractured his acetabulum in his industrial accident and that this led to a shortening of his right leg because of the size of the new hip joint. He was entitled to know whether or not the Tribunal accepted these contentions, and if not their reasons for rejecting them. Unfortunately, the Tribunal did not even mention the fracture in the reasons for their decision. They based the whole of their decision on the fact that in their view the claimant would have required a replacement hip joint in any event. But this does not deal with the point that the hip joint fitted led to a shortening of the claimant's leg. Nor with the question whether the claimant's disablement resulting from his industrial accident was, if only temporarily, increased by the fracture. In fact, the claimant may be forgiven for supposing that the Tribunal rejected Professor O'Connor's view that the accident caused the fracture, because they assessed his disablement at the same percentage as in the original decision; and the members of the Medical Board who gave that decision subsequently stated that they did not know at the time that the claimant had sustained a fracture. If the Tribunal in fact disagreed with Professor O'Connor, they did not say so; nor, of course, have they given any reasons for doing so.

The Benefit Regulations

14. The starred passage in the Tribunal's reasons has to be examined in the light of regulations 2(2) and (3) of the Benefit Regulations, which read as follows:-

> "2.-(2) When the extent of disablement is being assessed for the purposes of section 57*, any disabilities which, though resulting from the relevant loss of faculty, also result, or without the relevant accident might have been expected to result, from a cause other than the relevant accident (hereafter in this regulation referred to as "the other effective cause") shall only be taken into account subject to and in accordance with the following provisions of this regulation.
>
> (3) Any assessment of the extent of disablement made by reference to any disability to which paragraph (2) applies, in a case where the other effective cause is a congenital defect or is an injury or disease received or contracted before the relevant accident, shall take account of all such disablement except to the extent to which the claimant would have been subject thereto during the period taken into account by the assessment if the relevant accident had not occurred."
>
> (*This refers to section 57 of the Social Security Act 1975.)

15. Three terms appear in those paragraphs which, in an ordinary context, could be regarded as synonymous. These are "loss of faculty", "disability" and "disablement". The statutory provisions, however, use them to signify three distinct concepts. A "Loss of faculty" is a dysfunction of an organ of the body which brings about one or more disabilities; a "disability" is a total or partial inability to do something; and a disablement is the sum total of all the disabilities which the relevant industrial accident has caused to the person concerned. For authority for these definitions see the speeches of Lord Diplock and Lord Simon of Glaisdale in Jones v Secretary of State for State for Social Services, Hudson v Same [1972] A.C. 944 at pp 1010 C and 1019 H; also the supplement to the Commissioner's Decision R(I) 3/69 at pp 200 and 214.

16. In the starred passage in their reasons, the Tribunal confused a loss of faculty (i.e. a cause of disability) with a disability. The evidence was that the claimant had no disabilities prior to his industrial accident, and the Tribunal themselves were referring to this fact when they stated that he was active prior to the accident. The loosening process and other matters mentioned by the Tribunal were not disabilities since they were symptomless; they were causes or potential causes of disabilities which had not, however, given rise to any disability prior to the accident. Mr Canlin agreed that the Tribunal had confused a cause of disability with a disability, but submitted that they did not really make an offset for a cause of disability. They stated that there was a disability

from which, in their view, the claimant would have suffered during the assessment period even if the relevant accident had not occurred. But I cannot accept this submission. The Tribunal have not mentioned any inability which may properly be termed a disability within the meaning of the regulation; such as, for example, inability to walk. They appear to regard the factors mentioned by them, the loosening process and so forth, as themselves constituting the disability. If I have misunderstood them on this point I can only state that, in my view, their reasons show confusion as to what constitutes a disability and it is not clear that they applied regulation 2(3) correctly.

17. I find that misunderstanding of regulation 2(3) is widespread. I believe that many medical men who are members of medical authorities proceed on the basis that it is their duty to apportion between the accident and a pre-existing condition the blame for the handicapping conditions experienced by the person concerned. The law proceeds on a different principle. Regulation 2(3), in my view, introduces into disablement benefit law a well-known principle of the Common Law that an injured person must be accepted as he is. This principle is expressed in Halsbury's "Laws of England (4th ed) vol 12 at p 445 (Title "The Measure of Damages in Tort" paragraph 1144) in the following passage:-

> "In tort, a defendant who commits wrong must take the victim as he finds him. It is no answer to a claim for damages to say that the victim would have suffered no or less injury if he had not had, for example, an eggshell skull."

The industrial injuries insurance fund is not, of course, a wrongdoer as is the defendant to an action for tort, (which is a non-contractual legal wrong) but, in effect, Parliament has decreed that compensation shall be paid out of it to a claimant for disablement benefit on the same principle. The injured person has to be compensated as his injuries merit regardless of some personal attribute which augments his injuries to a degree which another person without that attribute would not have suffered. The brittle bones cases are good examples of the operation of the principle.

18. There was some discussion at the oral hearing of the reference in the Tribunal's reasons to the presence of osteo-porosis consequent on steroid treatment and rheumatoid arthritis. The claimant stated that Professor O'Connor told him that at the operation on 10 January 1978 no osteo-porosis was detected in his hip joint. However, the Professor did not mention this point in his report. Mr Canlin at one stage suggested that I should direct that a further report be requested from the Professor to deal with the point, but it is not for me to direct what evidence should be presented to the Medical Appeal Tribunal who next have to deal with the claimant's case. However, I feel justified in expressing the hope that it will not be suggested that it is the claimant's responsibility to obtain this evidence. It is usually difficult to the point of impossibility for a lay person to obtain medical evidence unless, perhaps, he pays for it.

Conclusion

19. For the reasons which I have explained I find that the tribunal decision is erroneous in point of law. Accordingly, the references of the original decision and the review decision will now have to be re-determined by another Medical Appeal Tribunal whose constitution should, in accordance with the usual practice, be entirely different from that of the Tribunal of 5 July 1978. Since there has been a long delay in this case I suggest for consideration by the Secretary of State's representatives that there also be referred to the same Tribunal the decisions dated respectively 4 October 1979 and 29 April 1980 which have been given by Medical Boards in the intervening period.

(Signed) R S Lazarus
Commissioner

Date: 21 April 1981

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