Meaning of "mining coal" includes above ground as well as below ground for purpose of Prescribed Diseases regs.

MH/1/LM **Commissioner's File:** CI/202/90

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR INDUSTRIAL INJURIES DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: David James Thomas

Appeal Tribunal: Doncaster

Case No: 1548

[ORAL HEARING]

1. My decision is that this appeal must be allowed. In accordance with section 101(5)(a)(i) of the Social Security Act 1975, I exercise the power to give the decision which I consider the tribunal should have given, namely that the claimant was engaged in mining coal within the period of five years immediately before the making of his claim for disablement benefit which was made on 4 November 1988.

2. The claim of the claimant was based upon the fact that at the time of the claim he was suffering from occupational deafness. His claim was not accepted by the adjudication officer on the ground that he had not worked on or after 1 January 1981 in an occupation prescribed in relation to occupational deafness, and accordingly the claim for disablement benefit had been made more than five years after he had ceased such work and was disallowed in accordance with regulation 25(2) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations. The claimant appealed to the Doncaster social security appeal tribunal, who heard his appeal on 9 November 1989.

3. By a majority, the claimant's appeal was dismissed. The tribunal found that, on the basis of the appellant's evidence, it was accepted that he was in a prescribed occupation between 1954 and 1980. This was in fact as a miner working in a coal mine. The tribunal went on to find that from 1980 to 1985 he was working on the surface. His job entailed using jigger picks on concrete for a substantial part of his time. The majority decision referred to a case numbered CI/262/82, in which a Social Security Commissioner had decided that the wording in the regulations "in coal-mining" extended to the use of pneumatic percussive tools in the wider context of the industry as a whole. The wording was changed, according to the majority, in 1988 to "in mining coal". The tribunal held that that meant the use of the tools was restricted to the actual job of mining the coal. On the facts, therefore, the claim was out of time. The dissenting member felt that the words "mining coal" should mean

not only the act of mining the coal but all the other jobs which are necessary parts of the process.

4. The claimant appealed, by leave of the chairman of the tribunal, to a Commissioner. I held an oral hearing at which the claimant was represented by Mr A. Kershaw, a welfare rights officer of the Barnsley Metropolitan Borough Council, and the adjudication officer was represented by Mr D. Conridge, of the Chief Adjudication Officer's Office.

5. Before me, it was common ground that none of the facts were in dispute, and that the only issue arising on the appeal was whether the claimant had been engaged "in mining coal" within the five years preceding his claim on 4 November 1988. I was referred to the authority cited by the majority of the tribunal, namely Commissioner's case CI/362/1982, a decision of Mr Commissioner Morcom, dated 17 May 1983. A copy of that decision is with the case papers. The passage which had to be interpreted in that decision was contained in paragraph 48 of Schedule 1 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980, as follows:-

> "Any occupation involving
>
> ..
>
> (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 1 hour per working day;"

The material part of the Commissioner's decision read:-

> " ... the question before me is one of construction of the statutory provisions, that is of paragraph 48(c). The words are "in coal-mining" and not "in coal mining". Were the words in the statutory provisions merely "in coal mining" I would have been disposed to decide that that was limited to actual drilling of coal. However the legislature has included a hyphen between "coal" and "mining". I think that the addition of the hyphen as a question of construction involves a wider construction than the mere activity of mining coal. Accordingly I find that the claimant satisfies the statutory test."

6. In 1983, regulations were published which made a number of changes in the text of the 1980 Regulations, and in particular the material words quoted in paragraph 5 above were re-worded to read as follows:-

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

(See SI 1094 of 1983, which came into operation on 3 October 1983). Further amendments to the regulations were made by SI 967 of 1985, but this passage remained unaltered. The language of the provision in force for the purposes of the present case, contained in SI 2112 of 1987, was as follows:-

> "(c) the use of pneumatic percussive tools for drilling rock in quarries or underground or in mining coal, or work wholly or mainly in the immediate vicinity of those tools whilst they are being so used; or."

It is submitted on behalf of the adjudication officer that the change of wording introduced in 1983, and repeated in 1985 and in the amending regulations of 1987 was immediately consequent upon the decision of Mr Commissioner Morcom, with the result that the extent of the phrase in question should be limited to drilling work actually carried out on coal underground, or possibly in an open cast mine. A submission on behalf of the adjudication officer was that the wording now involved "in mining coal" had the effect of narrowing the expression, as had been suggested as an alternative interpretation in the passage quoted above from Mr Commissioner Morcom's decision.

7. Nowhere in the decision of Mr Commissioner Morcom referred to, nor in either of the written submissions before the Commissioner in the present appeal by either the claimant or on behalf of the adjudication officer, is there any reference to the interpretation regulation which appears in each of the four sets of regulations in 1980, 1983, 1985 and 1987, as regulation 1 in each case. At the end of the oral hearing, I made a direction that each party should make a further written submission in relation to the history of the definitions, in particular of "coal mine" and "mine" since the 1980 Regulations. Each party confirmed that the definitions of those two expressions had remained unchanged throughout the amendments contained elsewhere in the four sets of regulations. The absence of any reference in the Commissioner's decision leads to the very probable conclusion that neither party before him had referred the Commissioner to these definitions, and accordingly they had played no part in his decision. The absence of any such reference would considerably weaken the effect of that decision bearing upon the present case. It should be noted that the passage quoted above was strictly obiter.

8. Bearing in mind that the words under consideration in the present appeal are "in mining coal", rather than a direct reference to a "coal mine", nevertheless the expressions are sufficiently close for me to have appropriate regard to the interpretation provisions, bearing in mind that an interpretation regulation is normally carefully drafted with the terms of the regulations for which it applies fully in mind. Further, if there is a significant alteration of words in other parts of the regulations, it may be of particular significance to see whether or not the interpretation definitions of the relevant expressions has been changed, or not. In the present case there has been no change in the definition in regulation 1. They are as follows:-

""coal mine" means any mine where one of the objects of the mining operations is the getting of coal (including bituminous coal, cannel coal, anthracite, lignite, and brown coal);"

""mine" includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways and sidings, both below ground and above ground, in and adjacent to and belonging to the mine, but does not include .... [not relevant]."

9. It was the undisputed evidence that the claimant had, within the necessary previous five years before his claim, been working frequently with a pneumatic "jigger" tool, among other things breaking up concrete surfaces within the area of the surface of the coal mine. Taking the two definitions quoted in the previous paragraph together, their meaning on the facts of this case can only be that the claimant was working in a "coal mine", his place of work being part of the "works" "both below ground and above ground" which are within the very comprehensive definition of "mine" in regulation 1(2). One technical matter relating to the interpretation is that the definition of coal mine is introduced by the word "means", and the definition of "mine" is introduced by the word "includes". The standard works upon interpretation indicate that these two words are to be contrasted when considering an interpretation clause. "Means" indicates that only the definition which follows that word is to be taken for the purpose of the legislation concerned, while the use of the word "includes" is a draftsman's way of signifying the definition which follows may not be comprehensive, but at least does include every item mentioned in the definition in that piece of legislation. I conclude that the absence of any change in the interpretation meanings of the two words referred to can only indicate an intention on the part of the draftsman not to alter the extent of what is to be considered for the purposes of these regulations, and the scheme within which they operate to remain unchanged.

10. It follows that in my view the majority of the appeal tribunal in the present case misdirected themselves in law in holding on the agreed facts that the claimant had not been engaged in "mining coal" during the five years preceding his claim. Therefore I allow the appeal, and I exercise the power contained in section 101(5)(a)(i) of the Social Security Act 1975 and give the decision which the appeal tribunal should have given. That is that the claimant is entitled to a declaration that he was engaged in mining coal for the purposes of paragraph 10(c) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1987 within the period of five years preceding his claim for disablement benefit made on 4 November 1988. Following the appropriate procedure, it will now be for the adjudication officer to make the necessary steps in relation to the medical questions involved in the award of this benefit. The precise details of the state of those questions has not been put before me, and I therefore am not in

a position to make further comment about them. The appeal is accordingly allowed.

(Signed) M Heald
Commissioner

Date: 16 April 1991

CPAG

Case Note

CI/202/90 Disablement Benefit

Occupational Deafness - Prescribed Occupation

Claimant made claim for disablement benefit on 4 November 1988 on grounds that he was suffering from occupational deafness. Both the Adjudication Officer and the SSAT held that because he only worked on the surface of the mine between 1980 and 1985 he was not engaged in "mining coal" within five years of his claim in accordance with 25 (C) of the Social Security (Industrial Injuries) (Prescribed diseases) Regulations. The DSS had sought in this case to restrict the meaning of the phrase 'in mining coal' to mean the extraction of coal underground or possibly in an open cast mine following obiter by the Commissioner in CI 262/82, and because the claimants service was not "in mining coal" he was disallowed. This was despite the fact that he was deafened by his use of pneumatic drills on concrete on the pit surface during this time.

HELD: The Commissioner held that the Adjudication Officer and the SSAT had misdirected themselves in Law and that the claimant was engaged "in mining Coal" during 1980-1985 when the phrase in the regulations were read in conjunction with the interpretation section to the regulations. The Commissioner said "Their meaning on the facts of this case can only be that the claimant was working in a "Coal Mine", his place of work being part of the "works" both below ground and above ground which are within the very comprehensive definition of "mine" in Regulation 1 (2).

Andy Kershaw, Barnsley Metropolitan Borough Council
Welfare Rights Officer