MJG/SH/3

Commissioner's File: CI/276/1993

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INDUSTRIAL INJURIES

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Appeal Tribunal: Sutton Doctor - stress

Case No:

1. I allow (to the limited extent indicated below) the claimant's appeal against the decision of the social security appeal tribunal dated 15 October 1992 as that decision is erroneous in law. My decision is that it has not been established that there was either (i) an event which in itself is identifiable as an accident, or (ii) a particular occasion on which personal injury was suffered by the claimant which could constitute an accident. Accordingly a declaration of an industrial accident cannot be made: Social Security Administration Act 1992, sections 23 and 44.

2. This is an appeal to the Commissioner by the claimant, a married woman aged 26 at the relevant time. The appeal is against the unanimous decision of a social security appeal tribunal dated 15 October 1992, which dismissed the claimant's appeal from a decision of the adjudication officer issued on 18 April 1991, in terms similar to those of my decision in paragraph 1 above. Although I have allowed the claimant's appeal against the social security appeal tribunal's decision because of an error of law which occurs in the tribunal's reasons (see below), I nevertheless consider that my ultimate decision on the law and facts applicable to this case should be the same as that of the tribunal. I also give below the reasons for that conclusion.

3. The appeal was the subject of two oral hearings before me, the first on 18 February 1994, the second on 28 June 1994. At the first hearing the claimant's husband was present and on the second occasion the claimant herself and her husband were present. On both occasions they were represented by Mr R Gay of the Free Representation Unit. On the first hearing the adjudication officer was represented by Miss Harold of the Office

of the Solicitor to the Departments of Health and Social Security. On the second occasion the adjudication officer was represented by Miss N Mallick of that Solicitor's Office. I am indebted to all those persons for their considerable assistance to me at the two hearings.

4. At the conclusion of the first hearing I gave a direction in the following terms,

> " 1. At the hearing today I indicated that my ultimate decision would set aside the social security appeal tribunal's decision of 15 October 1992 as being erroneous in law and that I would not remit the case to another social security appeal tribunal but would continue to deal with the appeal itself.
>
> 2. By consent, I adjourn the case for a further hearing before me, ... at that hearing I shall wish to have all relevant medical and other evidence. [The claimant] should, if at all possible, attend that hearing.
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> 3. The draft letter to Professor Edwards [a consultant psychiatrist], submitted by Mr Gay, is acceptable to me and to the adjudication officer. Copies of Professor Edwards reply should be sent to me and to the adjudication officer as far in advance of the new hearing as possible."

5. At this point I should explain why I stated in paragraph 1 of that Direction that I would hold the tribunal's decision to be erroneous in law. That is because I accepted concurring submissions by Miss Harold for the adjudication officer and Mr Gay for the claimant, as well as a written submission also from the adjudication officer dated 27 May 1993, all to the effect that the tribunal erred in law in paragraph 5 of their reasons for decision when they said,

> "However, following the decisions quoted we cannot agree that the incidents could possibly come within the ordinary definition of an accident. There is nothing to suggest that each incident was not within the normal occurrences in an obstetrics and gynaecological posting. It was unfortunate for [the claimant] that she considered herself insufficiently trained or supported to cope as well as she would have liked but this does not bring the incidents into the realms of accidents. We distinguish CI/72/1987. It appears to have been largely decided on the very precise medical evidence contained in the two consultants' reports. In the incidents described by [the claimant] there was nothing comparable to the 'sharp pain in his throat' felt by the oboeist or the sharp pain and severe breathlessness suffered by the non-smoker in R(I) 6/91. [The claimant] subsequently developed the phobias and delusions which were the manifestations of her depressive illness."

6. The incidents referred to were some six separate incidents described by the claimant and recorded in detail in the tribunal's notes of evidence. They were incidents which occurred to the claimant when she was working as a hospital house physician. I deal more particularly with those incidents below.

7. I have set the tribunal's decision aside, only after careful thought and bearing in mind the care which the tribunal clearly took with this case, completing their record of decision (on Form AT3) in commendable detail. The reason, however, that I have set their decision aside is that I accept the concurring submissions of Mr Gay, Miss Harold, and the adjudication officer (in his written submission) that the tribunal appear to ".. have decided that the incidents do not constitute accidents as they were not outside the normal occurrences of the job. In Jones v. Secretary of State for Social Services [1972] A.C. 944 [at 1014B], it was decided that a perfectly ordinary part of a man's work could be called an accident if it had the effect of causing injury. R(I) 11/80 went on to say that if a pathological change for the worse occurs while a person is at work, the change, if caused by the work itself, constitutes injury by accident. I submit, therefore, that the tribunal have erred in law by deciding that an incident cannot be treated as an accident if it was not outside the normal occurrences of the job." (adjudication officer's written submission of 27 May 1993, paragraphs 8-10).

8. Consequently I must set the tribunal's decision aside as being erroneous in law. There then remains the question of what is the correct decision to be given both on the law and the facts as I of course have the power to decide facts, conferred by section 23 of the Social Security Administration Act 1992. The whole question in this case is whether the claimant's very serious psychiatric illness was due wholly or in part to an "accident" (Social Security Act 1975, section 50(1) now re-enacted in section 94(1) of the Social Security (Contributions and Benefits) Act 1992) or whether it was wholly due to factors other than accident eg. a process.

9. There are of course many authorities on the meaning of the word "accident" not only in relation to social security law but also in relation to the word "accident" used in the Workman's Compensation legislation. There are indeed a number of decisions of the House of Lords on this point. I have considered all the authorities that were cited to me by Mr Gay, Miss Harold and Miss Mallick in their most helpful submissions. I have taken them into account in relation to Mr Gay's contention that there were in fact some six separate incidents which can be described as accidents. Those incidents are described in detail in the tribunal chairman's note of evidence (at pages T113 and T114 of the appeal papers) and in the tribunal's findings of fact. They all in fact relate to the claimant's work as a hospital house officer and represent particularly traumatic occasions eg. being asked to do work which she had no training for; being accused by a patient of having caused the death of her baby; being refused time off to go to an interview; having to deliver a dead child

and dissect the child before a post-mortem; and having to deal with a woman who had been raped when she was delivered of the consequent baby. These are of course incidents of the utmost gravity and my decision in no way reflects on the very considerable stresses which the claimant, and indeed all those fulfilling similar medical posts, have to undergo.

10. Following the first hearing before me, a letter was sent by Mr Gay (see my direction above) to Professor Edwards, the relevant portions of which read as follows:-

> "I need to ask you for your opinion of the respective contributions to [the claimant's] outbreak of illness of (i) [the claimant's] character and dispositions (the vulnerable personality' spoken of by Dr. H in his letter dated 16 April 1991), (ii) the conditions which were there all the time while she was working at Hospital (stress, inadequate support, lack of sleep, etc), (iii) particular events, such as the one [the claimant] describes at the end of paragraph 34 of [a statement by her] - I attach two sheets which give details of a number of 'episodes'. I specially need you to try to distinguish between the contributions of (ii) and (iii). Please try to say whether in your opinion [the claimant] would have suffered the same psychological illness given (i) her predisposition and (ii) the standing conditions of her employment even if these episodes had not occurred or although [the claimant] might, if the conditions of her work continued the same until, say, April 1991, have suffered some psychological illness by then, the particular illness she suffered, with its specific symptoms and its duration and incapacitating effect, would not have happened as and when it did but for such episodes."

11. Professor Edwards reply (dated 8 March 1994) reads as follows,

> "The probable causal significance of different factors
>
> (1) Personality
>
> It is always possible to argue that if a person has a mental breakdown they are likely to have been predisposed, or the illness would not have occurred. In this case there is though no persuasive objective, evidence for pre-existent personality abnormality. Thus the 'vulnerability' hypothesis is purely speculative and really rather circular. My feeling is, therefore, that personality should be dismissed from consideration as a potentially contributing factor.
>
> (2) Standing conditions of employment
>
> The totality of a stressful environment can be pictured as an overall entity in its own right. [The

claimant's] employment situation at the material time should be seen in these terms. These conditions should be seen as carrying 50% responsibility for the onset of her illness.

(3) Particular events

Breakdown is often occasioned by interaction between a stressful background environment and particular events. In my view events of a kind which [the claimant] describes in paragraph 34 of her statement are likely to bear a 50% responsibility for her illness. Theoretically she might later have become ill in the presence of the standing condition without the supervening events, but the events happened and should be taken into the reckoning."

12. I naturally give the greatest weight to those conclusions of Professor Edwards and I bear in mind that Miss Mallick on behalf of the adjudication officer did not wish to obtain any other medical report. It is of course true that if the incidents in question were to be described also as accidents then the fact that they only contributed by 50% to the claimant's illness would not prevent her illness being "caused" by accident.

13. But I have to decide whether these incidents had the characteristic of "accidents". In my judgment these incidents cannot be described as "accidents". They are in fact in my view only examples taken out of a continuous process. I appreciate that whether or not any particular incident is an accident is a question of law, not of fact (see CI/365/89 paragraph 6). However the definition of accident in the case law eg. Fenton v. Thorley [1903] A.C. 443, H.L. and Roberts v. Dorothea Slate Quarries Ltd. [1948] 2 All E.R. 201, H.L. shows that there must be some specific event which is not just part and parcel of a continuous process but which has some individual characteristic which enables it to be singled out as a specific event capable of being an accident, i.e. "an untoward event" (per Lord MacNaughten in Fenton v. Thorley). In my judgment the events singled out by the claimant, though serious and no doubt very traumatic for her, are not different in kind from all the rest of the work that she was doing, all of which was, so far as her illness is concerned, a process and not a series of individual accidents.

14. The case of the oboeist (CI/71/1987) and of the person injured by specific incidents of passive smoking (R(I) 6/91) are distinguishable, because the sudden occasions of having to blow excessively hard on the oboe or the sudden occasions of being 'smoked at' were different in quality and kind from the normal work of the claimants in those cases. When the oboeist was not being called upon to play a particularly loud passage there was no risk of him suffering hernia i.e. laryngoceles. When the clerical officer in R(I) 6/91 was not being smoked at on a particular occasion she was presumably under no danger as to lung damage from smoking. Consequently the particular events in both

those cases could be properly described as accidents. But in this case the claimant was under continual and constant stress from the nature of her job and the incidents which she describes are not different in kind or quality from the very considerable stress which she was suffering all the time. In my judgment, therefore, those incidents are not "accidents" and although I have every sympathy with the claimant and the serious mental illness which she suffered I cannot conclude that she comes within the industrial injuries scheme in the social security legislation, confined as it is to prescribed diseases (there is no disease prescribed that is relevant to this particular situation) or "accidents". A point must be reached where it is not possible to dissect a process into individual events and term each of those events an accident. In my judgment in this difficult case that point has been reached. I am unable to hold that the claimant has shown that her undoubtedly serious personal injury by psychiatric illness was caused by "accident".

15. Lastly, I should refer to a matter which occurred at the second hearing before me on 22 June 1994. By a supplementary written submission dated 17 June 1994, Miss Mallick on behalf of the adjudication officer sought to resile from the adjudication officer's previous submissions that the social security appeal tribunal had erred in law in the manner which I have described above (paragraphs 7 & 8). Mr Gay on behalf of the claimant resisted this on the footing that I had already issued a direction after the first hearing in which I had indicated that I intended to set the tribunal's decision aside as being erroneous in law. At the hearing on 26 June 1994, I ruled that Mr Gay's submission on this point must be accepted and that it was too late for Miss Mallick to resile from the adjudication officer's written submission and from the submission of her colleague Miss Harold. The first hearing had concluded the question of whether or not the tribunal's decision was erroneous in law. Indeed I had spent some considerable time at that hearing investigating that question independently. It was only after that investigation that I was prepared to accept the concurring submissions of Miss Harold and Mr Gay that the tribunal had erred in law. The subsequent hearing was therefore confined to considering the effect of Professor Edwards' evidence on the matter, I having indicated that I would decide the case myself. I do not regard this point as covered by such technical expressions as <u>estoppel</u> or <u>res judicata</u> but simply a question of common fairness by which, when once in the course of the hearing the matter has been determined, it should not normally be allowed to be reopened. I do not regard therefore my refusal to allow it to be reopened as in any way derogating from the undoubted duty of a Commissioner to fulfil his own investigative

role and to decide the case according to the facts and the law applicable. That I had already in fact done, so far as the tribunal's alleged error of law was concerned, at the first hearing.

(Signed) M.J. Goodman
Commissioner

(Date) 4 August 1994