Commissioner's File: CI/286/95

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 23 August 1994 on this claim for disablement benefit for occupational deafness was not erroneous in point of law, and the appeal by the adjudication officer therefore fails.

2. I held an oral hearing of this appeal at which Mr S. Sriskandarajah, of the Solicitor's Department, Department of Social Security, appeared on behalf of the adjudication officer. The claimant did not appear and was unrepresented, having written in to say that there was little he felt he could add to the unanimous decision of the tribunal which had considered all the relevant facts and points of law.

3. The claimant is a man now aged 60 who throughout his working life has been engaged in the heavy metal engineering business as a skilled welder and fabricator. His many years of experience have been chiefly with Vickers in various ship building, heavy engineering and reactor projects in the North East of England and Scotland. The fragmentation of manufacturing industries and established patterns of employment that took place in the mid 1980s has meant that like many others, the claimant changed from being in steady employment with an established firm and became self-employed. He had been the head foreman at Vickers in charge of all pipe welding, welder training, production and development, but from 1984 he did self-employed welding, fabrication and consultancy work on his own account until his retirement due to ill health in July 1991.

4. Throughout his life the nature of the claimant's occupation has meant that his work involved either using, or working in close proximity to, powered grinding tools and pneumatic percussive tools working on metal. This noisy work on a daily basis has

affected his hearing, and on 28 January 1994 he made a claim for disablement benefit for occupational deafness which is prescribed disease A10 under s. 108 Social Security Contributions and Benefits Act 1992 and Sch. 1 Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 S.I. No. 967. Under para A10 of that Schedule, there has to be a specified degree of hearing loss before a person can qualify for benefit but the claimant has not yet had any tests to establish this or to determine the degree of his disablement, because his claim was turned down on the ground that as a self-employed person from 1984 to 1991 he was disqualified from getting the benefit at all. He appealed to the tribunal which held on 23 August 1994 that he was not disqualified for this reason and that his claim had been made within the prescribed time, so that his claim needed to be considered further to see whether he met the medical and other conditions. The adjudication officer appeals against the tribunal's decision on the ground that they were wrong in law on the initial point.

5. To understand how the point arises it is necessary to consider the legislation briefly. The scheme of benefits for industrial injuries and diseases now set out in Part V of the Contributions and Benefits Act has been part of our social security system for many years, in recognition of the fact that certain occupations do give rise to greater risks of particular types of injury or disease than normal; and that what is in effect a universal system of insurance is the fairest and most practical way of bearing the cost of a basic level of protection for those individuals for whom the risks turn into reality. In the context of employment patterns as they were in 1948 when the universal scheme was introduced it is not surprising that the scheme covered only those who were exposed to such risks by reason of working for another person or firm as employees, with the overall costs spread equitably among employers. Thus under s. 94 Contributions and Benefits Act, industrial injuries benefit is payable where an employed earner suffers personal injury caused by accident arising out of and in the course of his employed earner's employment. Similarly, by s. 108, injuries benefits are also payable in respect of a person who has been in employed earner's employment and in respect of any prescribed disease which is a disease due to the nature of that employment.

6. By s. 108(2), a disease or injury may be prescribed in relation to any employed earners if the Secretary of State is satisfied that (a) it ought to be treated, having regard to its causes and incidence and any other relevant considerations, as a risk of their occupation and not as a risk common to all persons; and (b) it is such that, in the absence of special circumstances, the attribution of particular cases to the nature of the employment can be established or presumed with reasonable certainty. The provisions made by the Secretary of State in exercise of this power are currently set out in the 1985 regulations already referred to. These contain detailed provisions relating to particular industrial processes and related diseases or other conditions.

7. By reg. 2(a) - (c) it is provided as follows.

> (a) the various diseases set out in the first column of Part I of Sch. 1 are prescribed in relation to all persons who "have been employed on or after 5 July 1948 in employed earner's employment in any occupation set against such

disease or injury in the second column"; but this is subject to (b) and (c) which follow.

(b) deals with the prescribing of pneumoconiosis and I shall have to refer back to one part of it later.

(c) is the one that deals with occupational deafness, which is prescribed "in relation to all persons who have been employed in employed earner's employment

(i) 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 10 years;

in one or more of the occupations set out in the second column of para A10 of Part I of Sch. 1 ... " the remainder of the paragraph being unnecessary to look at for the present purpose.

8. Reg. 4 deals with when there is to be a presumption that a disease is due to the nature of a claimant's employment. By para 4(5) it is provided where a person in relation to whom occupational deafness is prescribed in reg. 2(c) develops occupational deafness the disease shall, unless the contrary is proved, be presumed to be due to the nature of his employed earner's employment. Thus if the claimant is a person who meets the conditions in reg. 2(c), *any* occupational deafness he thereafter develops is to be presumed to be due to the nature of his work as an employee in one or more of the prescribed occupations, although it remains open to the DSS and adjudicating authorities to establish that his disease is due to work other than as an employee, or to different causes altogether.

9. By reg. 6(2)(c) no claim for disablement benefit in respect of occupational deafness is to have a "date of onset" before 3 February 1975 when this disease was first added to the schedule, and the only other provision in the body of the regulations that is relevant is reg. 25(2) which has given rise to the disallowance of the claimant's claim. It provides so far as material that disablement benefit shall not be paid in pursuance of a claim in respect of occupational deafness which is made later than 5 years after the latest date, before the date of the claim, on which the claimant worked in an occupation prescribed in relation to occupational deafness.

10. In Sch. 1, para A10 defines the disease as sensorineural hearing loss of a given level in each ear, due in the case of at least one ear to occupational noise. In relation to this disease a long list of occupations is prescribed, including the use of powered grinding tools on metal in the metal producing industry, the use of pneumatic percussive tools on metal, and work wholly or mainly in the immediate vicinity of such tools while they are being so used. Various other types of work in steel mills, foundries and ships' engine rooms are also included. The tribunal, after hearing the evidence of what the claimant had actually spent his working life doing, recorded findings of fact that he had been using grinding tools on cast metal and pneumatic percussive tools on metal for at least 10 years after 5 July 1948, so that he satisfied the conditions in reg. 2(1)(c); and that the work he

had been doing as a self-employed person within the 5 years before his claim was made on 28 January 1994 had also been in an occupation qualifying under one or more of the paragraphs in the second column of Sch. 1 because of the nature of the work he did.

11. These findings have not been seriously disputed although the adjudication officer's initial submission on the appeal dated 16 December 1994 does invite me to note at para 9, that the claimant's employment with Vickers "has not been confirmed as meeting the prescription requirements of PD A10". In my judgment the tribunal's findings of fact on the nature of the claimant's occupation both while he was an employee and after he became self-employed do amount to a determination that the work he was doing fell within the occupation descriptions in Sch. 1 para A10 second column, both for the relevant 10 year period to qualify him under reg. 2(c) and at the relevant date for determining whether he was within the 5 year period for reg. 25(2); and the tribunal were justified in making those findings on the evidence.

12. The issue in the appeal therefore resolves itself into the single question whether for the purposes of reg. 25(2) it is sufficient, as the tribunal held, that the claimant was working in any capacity in one or more of the occupations described in the second column, or whether as the adjudication officer contends the condition that the claimant must have "worked in an occupation prescribed in relation to occupational deafness" within 5 years before the date of his claim, must be read in the context of this benefit as requiring that he worked within that period *as an employed earner* in such an occupation. It is not in dispute that the claimant was in employed earner's employment continuously until 1984, or that from 1984 until 1991 when he ceased work he was not in such employment, as he was self-employed. As pointed out in the adjudication officer's second submissions dated 16 August 1995, questions whether a person is or was employed in employed earner's employment for the purposes of Part V of the Contributions and Benefits Act are reserved by s. 17(1)(d) Social Security Administration Act 1992 for the Secretary of State; but no question in fact arises between the parties about this as the facts are clear and not in dispute.

13. Mr Sriskandarajah for the adjudication officer contended that having regard to the purpose of the legislation itself under ss. 94 and 108 to provide benefits for industrial injuries and diseases by reference to employed earner's employment only, and the fact that the list of occupations set out in relation to diseases and injuries in Sch. 1 to the prescribed disease regulations is all by reference to persons who have been in employed earner's employment, I should treat the list of occupations as prescribed only in relation to employed earner's employment so that periods of self-employment could not count as work in a prescribed occupation. The result of this would be that when determining whether this claimant had worked in an occupation prescribed in relation to occupational deafness within 5 years of his claim for the purposes of reg. 25(2), the last date he could be counted as having so worked was 31 December 1984 when he ceased to be an employee of Vickers, and his claim was thus out of time. My attention is drawn to another Commissioner's decision in case CI/016/91 in which it is emphasised that the relevant date must be one of actual *work* in a prescribed occupation, but that case does not

assist me on the issue which arises here, namely whether the broad expression "worked in an occupation" has to be restricted in the way the adjudication officer contends.

14. In my judgment that contention is not well founded. Although the adjudication officer's submissions and the wording of reg. 25(2) in its present form refer to an occupation as "prescribed", it is in fact *diseases*, not occupations that are to be prescribed under s. 108(1) of the Contributions and Benefits Act; and by s. 108(2) the prescription of diseases is to be "in relation to any employed earners": that is in relation to *people* satisfying certain criteria. Those criteria as set out in reg. 2 are that the "persons" in relation to whom the diseases identified in Sch. 1 are prescribed are those who "have been employed" in employed earner's employment in any of the relevant occupations at the time or for the period specified in reg. 2.

15. That reg. 2 itself identifies the relevant persons as "persons who have been employed ... in *employed earner's employment* in any occupation" set out in the second column of Sch. 1 strongly indicates that the occupation descriptions themselves may have a wider ambit, for otherwise the restriction to "employed earner's employment" would be otiose. The normal meanings of "work" and "occupation" do of course extend further, as it would be absurd to tell this claimant for example that he had not been in any work or occupation since his employment with Vickers came to an end in 1984. That this normal sense is the way in which those expressions are used in these regulations is in my judgment placed beyond any doubt by reg. 2(b) which as noted above deals with the prescription of pneumoconiosis, in relation to two defined categories of people:

> (i) "all persons who have been employed on or after 5 July 1948 in employed earner's employment in any occupation set out in Part II of Sch. 1; and
>
> (ii) ... all other persons who have been so employed in any occupation involving exposure to dust and who have not worked at any time (whether in employed earner's employment or not) in any occupation in relation to which pneumoconiosis is prescribed ... "

16. The express reference in reg. 2 itself to work at any time (*whether in employed earner's employment or not*) in any occupation in relation to which the disease is prescribed leaves no room for doubt that work in an occupation is apt to include work in another capacity than that of an employee. By the same token, where the expression "worked in an occupation" is used in reg. 25(2) and refers to prescription in relation to occupational deafness, the only meaning that can in my judgment fairly be given to the words used is that the work may be in any capacity in such an occupation, whether or not as an employee.

17. I see no justification for reading in here the additional words for which the adjudication officer contends, to make it read "worked *in employed earner's employment* in an occupation". There would have been nothing to prevent the framers of the legislation from inserting these words expressly, as in regs. 2(a) and (c), if that was what had been intended. Nor is there any absurdity in a person being able to claim more than 5 years after

ceasing to be an employed earner but within 5 years of stopping his actual work in a listed occupation which gives exposure to noise. Before he can get the benefit, the question whether his disease is due to the nature of his former employment as an employee has still to be determined. As noted above there is a presumption in his favour under reg. 4(5) but this may become progressively easier to rebut the longer the intervening period of work in a noisy environment as a self-employed person. I do not therefore find anything inconsistent with the purpose of the legislation in reading it as it is, or anything that gives real support to the adjudication officer's argument that it would make reg. 25(2) "ultra vires" if it is construed to mean what it actually says.

18. In my judgment, the meaning of reg. 25(2) is clear and the tribunal were correct in the way they read it. This appeal is therefore dismissed and the consequence is that the adjudication officer and the medical authorities must now consider whether the claimant meets the remaining conditions for receiving the benefit.

(Signed)

P L Howell
Commissioner
13 October 1995