C1 361/80

T/AG

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR INDUSTRIAL DISABLEMENT BENEFIT

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Decision C.I. 14/81

1. This appeal fails. Our decision is that disablement benefit is not payable to the claimant in respect of prescribed disease No 48 (commonly known as industrial deafness) because the claim for that benefit made on 3 September 1979 was later than 12 months after the claimant had ceased to be employed in an occupation prescribed in relation to occupational deafness and the claimant is not assisted by the transitional provisions relating to claims made on or within 12 months of 3 September 1979: Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1975 /S.I. 1975 No 1537/ (hereinafter called "the 1975 Regulations") amended with effect from 3 September 1979 by the Social Security (Industrial Injuries) (Prescribed Diseases) Amendment (No 4) Regulations 1979 /S.I. 1979 No 992/ (hereinafter called "the 1979 Regulations") now repealed but re-enacted in identical terms with effect from 15 April 1980 by the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980 /S.I. 1980 No 377/ (hereinafter called "the 1980 Regulations").

2. At the oral hearing before us, Mr J P Canlin of the Solicitor's Office of the Department of Health and Social Security appeared for the insurance officer and the claimant appeared in person. Neither of them called oral evidence. The claimant gave evidence and we found him an honest and helpful witness.

3. Regulation 2(d) of the 1980 Regulations provides that 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 20 years in one or more of the occupations set out in the second column of paragraph 48 of Part 1 of Schedule 1 to the regulations. In this case it is not in dispute that the claimant's occupations have been in employed earner's employment.

4. The occupations set out in paragraph 48 (the second column) are:

"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 shipbuilding 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 and 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."

Paragraphs (c), (e), (f) and (g) were newly prescribed under the 1979 Regulations. Under paragraphs (a) and (b) the phrase "or supervision of or assistance in the use, is" was added by the same regulations.

5. Regulation 40(2) of the 1980 Regulations now provides that disablement benefit shall not be paid in respect of a claim for occupational deafness which is made later than 12 months after the claimant has ceased to be employed in an occupation prescribed in relation to occupational deafness unless the claim is made within the period of 12 months beginning on 3 September 1979 and all the circumstances specified in one of the paragraphs (3), (4) (5) of those regulations obtained. Those paragraphs provide as follows:

"(3) The circumstances first mentioned in paragraph (2) are that -

(a) before 3 September 1979 the period or periods for which the claimant was employed in one or more occupations specified in paragraph (7), (being the

occupations prescribed in relation to occupational deafness before 3 September 1979) did not amount in aggregate to 20 years;

(b) before 3 September 1979 the period or periods for which he was employed in one or more occupations now set out in the second column of paragraph 48 of Part 1 of Schedule 1 hereto amounted in aggregate to not less than 20 years; and

(c) at some time in the 12 months immediately preceding 3 September 1979 he was employed in an occupation now set out in the second column of the said paragraph 48.

(4) The circumstances mentioned secondly in paragraph (2) are that -

(a) the claimant was employed in one or more occupations specified in paragraph (7) for a period or periods amounting in aggregate to not less than 20 years and that period or the last of those periods ended before 28th October 1973; and

(b) at some time in the 12 months immediately preceding 3 September 1979 he was employed in an occupation now set out in the second column of the said paragraph 48, not being an occupation specified in paragraph (7).

(5) The circumstances mentioned thirdly in paragraph (2) are that -

(a) before 3 September 1979 a claim was made by or on behalf of the claimant in respect of occupational deafness within 12 months of his ceasing to be employed in an occupation then prescribed in relation to occupational deafness, or, in the case of a person who ceased to be so employed at any time within 12 months preceding 28th October 1974, within 12 months after that date;

(b) at the time of that claim he was a person in relation to whom occupational deafness was, by virtue of regulation 2(d), a prescribed disease; and

(c) that claim was disallowed because the claimant was not suffering from occupational deafness as it was then defined."

6. The claimant, who throughout his previous working life had been a welder, has since 1974 been employed as a welding inspector by the shipbuilding group of a well-known engineering company. His claim for benefit was made on 3 September 1979, which is the day when the 1979 Regulations came into force. A previous claim of his had been rejected. The claimant is one of 12 welding inspectors in the fabrication quality

assurance department of this shipbuilding group. His job involves the inspection, at various stages, of the welding operations carried out in the workshop, which is a building about 150 yards square with separate work-bays. The operations which the claimant is concerned to inspect involve platers, caulkers and welders. There are separate foremen controlling each of these three groups of tradesmen. For example, the foreman caulker has some 30 to 40 caulkers working under him. The claimant himself has no power or authority to control or dictate the use of any particular tool by any caulker, or plater, or welder. If he wishes to criticise the way in which a tool is being used, or to require it to be used in a particular way, this must be done through the foreman of the relevant tradesman. The claimant has no control or authority over any of these foremen. If a foreman does not comply with any of the claimant's suggestions or requirements, the claimant's remedy is to complain to the head of his own department, fabrication quality assurance, who then takes up the matter. The claimant himself does occasionally use two pneumatic percussive tools, in order to demonstrate the results which he wishes the tradesman in question to achieve. The first is a chipping hammer which he uses on occasion (according to his own estimate, perhaps one hour a month or one hour a week). The second is a slagging tool, which he uses on very rare occasions. The use of pneumatic percussive tools is not regarded by the claimant's employers as part of his employment and in so far as the claimant does use them the employers regard such use as outside his duties and jurisdiction and it is not expected of him. The head foreman of the shipbuilding works has stated that on the claimant's becoming a welding inspector in 1974 the trade unions would not allow him to use pneumatic percussive tools.

7. It is not in dispute that at all times since he became a welding inspector in 1974 the claimant has been employed in the shipbuilding or ship repairing industries. The real issue in this case is accordingly whether the claimant has, during the 12 months preceding his claim on 3 September 1979, been employed in "Any occupation involving ..... the use, or supervision of or assistance in the use, of pneumatic percussive tools on metal in the shipbuilding or ship repairing industries. ..": see sub-paragraph (b) of paragraph 48 of the 1980 Regulations. Sub-paragraph (c) cannot assist the claimant, in our view, if he does not satisfy the requirements of sub-paragraph (b) since although it is capable of applying to an employee in the shipbuilding or ship repairing industries it requires "the use, or supervision of or assistance in the use" of the pneumatic percussive tools in question "for at least an average of one hour per working day". It has not been suggested that sub-paragraphs (a), (d), (e), (f) or (g) of paragraph 48 can assist the claimant. If the claimant does not satisfy the prescription in sub-paragraph (b), in respect of his employment in the 12 months preceding his claim on 3 September 1979, the transitional provisions quoted in paragraph 5 above do not help him; for their application is limited to the case of claimants who can prove that they have been employed during such 12 months in an occupation which is prescribed under the 1979 Regulations - or the 1980 Regulations - or who have had a previous claim disallowed because the claimant was not suffering from industrial deafness. There is no suggestion that the previous claim of the claimant was disallowed on that ground.

8. The local tribunal decided, on appeal by the claimant against an adverse decision of the insurance officer, that the claimant was not during the said 12 months involved in any occupation falling within the regulations. The claimant's appeal against this decision is made on two grounds: first, that he supervised the use of pneumatic percussive tools in the shipbuilding industry within the 12 months before the date of his claim and, secondly, that he used those tools himself, though not frequently, within that period. The first contention is supported by reference to Decision C.I. 4/81 (not reported). On the second point, it is submitted that in law <u>any</u> use of the tools within 12 months of the claim, no matter how infrequently, would qualify the claimant, as would supervision of the use of the tools.

9. At the oral hearing, the claimant urged his appeal on the grounds already stated. Mr Canlin, on behalf of the insurance officer, opposed the appeal. He submitted that the frequency and duration of the use by the claimant of pneumatic percussive tools was negligible in relation to the whole of his occupation and that it was not part of his occupation to use such tools. As regards supervision, he submitted that the correct approach was to be found in paragraph 7 of Decision C.I. 7/81 (not reported), namely that there must be direct and personal supervision of the person using the tool for such supervision to fall within the regulations.

10. In our judgment, both of the submissions now made on behalf of the insurance officer are correct. For an occupation of an employed earner to be one "involving .. the use of pneumatic percussive tools" in terms of sub-paragraph (b) (or sub-paragraph (a) or (c)) of paragraph 48 of the 1980 Regulations that use must, first, form part of the work that the claimant was employed to do. If it is not part of his job to use those tools at all and their use is outside his duties and not expected of him, then his occupation is not one "involving" their use. Secondly, whereas in sub-paragraph (b) (and sub-paragraph (a)) the conditions for prescription do not specify any degree of the frequency of use of the said tools, in our view the position is correctly stated in paragraph 8 of Commissioner's Decision R(I) 1/78:

> "The degree must ..... be such that the claimant's occupation might reasonably be described as involving the use of such tools in one or more of the prescribed processes. If such work is indeed so infrequent as to be negligible then it could not properly be said that a person was or is engaged in such an occupation."

The claimant's use of pneumatic percussive tools in the 12 months preceding his claim on 3 September 1979 satisfies neither of these tests and, in our judgment, his occupation as a welding inspector did not involve their use.

11. For an occupation to be one "involving .... supervision .... of the use of pneumatic percussive tools ...." in terms of sub-paragraph (b) (or (a) or (c)) of paragraph 48 of the 1980 Regulations that supervision must be of the <u>use</u> of those tools. The sub-paragraphs must be construed, each as a whole, and consideration given to the juxtaposition of the word "supervision" and "assistance" with "use" which, in our opinion,

indicates that "supervision" must be of the use of the tools. "Occasionally, the actual order of words may be decisive, one word taking its colour from those with which it happens to be in juxtaposition" (Maxwell on Interpretation of Statutes, 12th Ed. at p. 293, citing Stone v Commercial Railway Co. (1839) 9 Sim. 621). "... words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded." (Maxwell (supra) at p. 29, citing Galashiels Gas Co Ltd v O'Donnell [1949] A.C. 275).

12. We have taken notice of the written evidence of the head of the employers' fabrication quality assurance since 1 January 1978, formerly the assistant head, to the effect that the claimant's occupation is not regarded by the employers as involving the use or supervision of pneumatic percussive tools. In our opinion, an employer may be asked such questions: such evidence is admissible in view of the technical nature of the many and varied processes and operations undertaken in manufacture and industry. Such evidence is in the nature of expert evidence, the assistance of which the statutory adjudicating authorities (the insurance officer, local tribunal and the Commissioner) require together with other evidence as to a claimant's duties. Such evidence should not be excluded and we do not regard it as expressing a conclusion of law. The adjudicating authorities may take cognisance of it but are not obliged to accept an employer's evidence any more than an employer's opinion as to whether a claimant is in the course of his employment at the time of an accident. The application of statutory language to particular facts involves a mixed question of fact and law and it is not always easy to segregate fact from law.

In Phipson on Evidence, 12th Ed., page 26, it is stated - "26. Construction of Statutes. Although the construction of a statute or statutory instrument is a matter of law for the judge, the meaning of ordinary words used therein is not a matter of law unless the context shows that the words are used in an unusual sense. In that event the judge will determine that unusual meaning. This exceptional situation apart, it is for the jury to consider as a fact whether in the whole circumstances the words of the statute do or do not apply to the facts proved as a matter of ordinary usage of the English language" Brutus v Cozens [1973] A.C. 854 per Lord Reid at p. 861.

13. We are unable to agree with the view expressed in paragraph 9 of Decision C.I. 4/81 that "supervision" includes the oversight of the work done by the tool as well as the oversight of its use. Inspection of the results of work done by welders and other persons using pneumatic percussive tools in order to see that their work is up to standard, in other words fabrication quality assurance, which was the job of the claimant, is an entirely different task from the supervision of the use of the tools employed to carry out the work. That supervision was entrusted to the foreman welder, foreman plater, or foreman caulker (according to the relevant tradesman carrying out the work in question) and the claimant had no duty or power to interfere or control the tradesman using the tools in any way. His job was to inspect the results. In order to do this he might indicate what results were wanted, but he had no control whatever over the welders, or platers, or caulkers, of their use of pneumatic percussive tools. Such supervision, in our judgment, in the context of the regulations, imports direct and personal superintendence and control of the use of the tools. It does not constitute any function, for example,

of the general manager of the shipbuilding group or other senior executives who might have power to give orders generally as to the work to be done and tools to be used, notwithstanding that an executive might be entitled to give orders to the particular foreman (be he the foreman welder, the foreman plater or the foreman caulker) who was actually supervising (that is to say directly and personally superintending the work in question) because his own superintendence would not be direct and personal. We agree with Decision C.I. 7/81 that the sub-paragraph involves direct and personal supervision by another person of the operator using the tool. An employee waiting for a job, or a particular stage in a job, to be completed by a claimant using a particular pneumatic percussive tool, so that he can carry out his job (e.g. inspecting the results, or carrying out other work that he is employed to do) and who has no control of the way in which the tradesman uses those tools, is not "supervising" their use at all, in terms of the regulations.

14. We have considered Decisions C.S.I. 4/80 and C.S.I. 1/81 (neither of which is reported) which were mentioned in Decision C.I. 4/81. In Decision C.S.I. 4/80 a question arose as to whether the claimant was assisting in the use of pneumatic percussive tools and it was decided that he was not. That decision is not directly in point in this appeal. We agree with the observation in paragraph 9 that if the legislature had intended to cover persons who worked in the vicinity of persons using pneumatic percussive tools, express provision would have been made and sub-paragraph (b) would surely have been framed in a similar manner to occupations in sub-paragraphs (d) and (e). Decision C.S.I. 1/81 depended upon its own facts.

15. We are fortified in the conclusion that we have reached by the Report of the Industrial Injuries Advisory Council on Occupational Deafness (Command) 7266 which was laid before Parliament in July 1978. We are entitled, and ought, to have regard to this report in order to consider the mischief that the present regulations, in their amended form, were intended to remedy: see Black-Clawson International Ltd. v PapierWerke Walhof-Ascheffenburg AG /1975/ A.C. 591. That report shows that the relaxation of the stringency of the 1975 Regulations, by (amongst other matters) the introduction of occupations involving supervision of the use of pneumatic percussive tools, was intended to be limited by clear and close definitions in order to carry a reasonable assurance that numbers coming forward would be within the capacity of the audiological services: see paragraph 36. To extend the meaning of "supervision ... of the use of ... pneumatic percussive tools" so as to include persons who are watching their use but who have no direct and personal responsibility to control such use would, in our judgment, go beyond the strictly limited extension intended by the regulations.

16. We have considerable sympathy for the claimant. It is unattractive that employed earners who have suffered loss of hearing by working in a noisy environment should be disentitled from claiming benefit because their occupation (e.g. welding inspector) does not satisfy the prescription in

the regulations while other employed earners (e.g. welding foremen) who are exposed to the same noise, might satisfy the prescription. But the narrowness of the prescribed occupations was deliberate: see paragraph 16 of the above mentioned report. It was approved by Parliament, before whom the regulations were laid, and we have no power to alter it.

(Signed) J S Watson
Commissioner

(Signed) V G H Hallett
Commissioner

(Signed) D G Rice
Commissioner

Commissioner's File: C.I. 361/80
C I O File: I.O. 5275/I/80
Region: Northern

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