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SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 15 December 1993 is erroneous in point of law and accordingly I set it aside. As I consider it expedient to give the decision the tribunal should have given, I further decide that the claimant did not work on or after March 1978 in an occupation prescribed in relation to occupational deafness. The claim for disablement benefit made more than five years later on 24 April 1991 is disallowed accordingly.

2. This is the adjudication officer's appeal against the decision of the social security appeal tribunal of 15 December 1993 leave having been granted by the tribunal chairman. The appeal was the subject of an oral hearing held before me. The claimant was represented by Miss A Ryde from the Transport and General Workers Union. The adjudication officer was represented by Miss S Churaman from the Solicitor's Office of the Departments of Health and Social Security.

3. On 24 April 1991 the claimant claimed disablement benefit in respect of Prescribed Disease No. A10 - known as occupational deafness. However, on 27 October 1992 the adjudication officer decided that as the claim had been made more than five years after the date when the claimant had ceased to be engaged in an occupation prescribed in relation to occupational deafness, the claimant was disentitled to benefit. In other words, he was debarred by the provisions of regulation 25(2) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, as amended, ("the Regulations") reaffirmed by paragraph 4(3) of Schedule 6 to the Social Security Act 1990.

The claimant had contended that he had worked for John Clines Surfacing from March 1978 to March 1991 as a plant driver and general operative. He submitted that this occupation was prescribed because it involved "the use of chain saws in forestry" as set out in paragraph A10 (i) of Part I of Schedule 1 to the Regulations.

4. The claimant and his representative attended the hearing of the appeal before the tribunal on 15 December 1993. In the event the tribunal allowed the appeal. The findings of fact read:-

" 1. Date of claim 24.4.91.

2. Appellant worked from March 1978 to March 1991 for John Clines Surfacing.

3. Work involved cleaning forest to accommodate roads. Cleaning work was done by using a chain saw to fell trees and cut them thereafter into logs.

4. Average time spent using a chain saw each year would be 39 weeks when saw was used on a daily basis.

5. A typical area cleared of trees would be one of 5 miles x 8 metres."

The reasons for decision read:-

" 1. By virtue of the nature of the work done by the appellant and the regularity with which it was done as per 2(3)(4)(5) above, the Tribunal considered that the appellant used chain saws in forestry. Although working for a Surfacing Company he was in effect their forester employed in forestry.

2. As such, he was entitled to Disablement Benefit for Occupational Deafness by virtue of Regulation 2(c) Prescribed Diseases Regulations 1985 and second column of paragraph A10 of Part I of Schedule 1 thereto."

5. Section 45 of the Social Security Administration Act 1992 ("the Act") provides that the question whether there is a relevant loss of faculty, the extent at which disablement caused by that loss of faculty is to be assessed and the period of the assessment are "disablement questions" and that these questions are to be determined by the medical adjudicating authorities. Miss Churaman submitted that the tribunal had erred in law in deciding that the claimant was entitled to disablement benefit because the issue was not within their jurisdiction. I agree. I must set aside the decision.

6. Part I of Schedule 1 to the Regulations lists the prescribed diseases and the occupations for which they are prescribed. Column 1 of paragraph A10 refers to occupational deafness.

Column 2 lists the prescribed occupations. Sub-paragraph (i) is relevant and refers to any occupation involving "the use of chain saws in forestry".

7. The word "forestry" is not defined. Miss Churaman and Miss Ryde both referred me to the Shorter Oxford Dictionary in which the word is given the following meaning "the science and art of forming and cultivating forests, management of growing timber". Miss Churaman stressed that column 2 of paragraph (a) of Part I of Schedule 1 referred to "any occupation involving". She submitted that paragraph A10(i) fell to be given a narrow interpretation and meant the use of chain saws in the occupation of forestry. The claimant's occupation involved cutting down trees, albeit with chain saws, to clear sites for the construction of roads. His work did not involve promoting the interests of forestry, the development of afforestation, the management of forests or the production and supply of timber. The frequency in which the claimant used a chain saw was irrelevant.

8. Miss Ryde stated that the claimant would cut down trees on land owned by the Forestry Commission and on land privately owned. She submitted that as the word forestry in paragraph A10(i) was not defined it fell to be interpreted in its usual and popular sense. In other words it should be given a wide interpretation. The facts as found by the tribunal were not in dispute. The claimant spent the majority of his time felling trees using a chain saw. As a result she submitted that the claimant's occupation was prescribed under paragraph A10(i).

9. Following the oral hearing of the appeal I directed the adjudication officer to submit in evidence a copy of the report by the Industrial Injuries Advisory Council on the operation of the provisions for occupational deafness. I directed a further written submission in the light of that report and on the effect of Meally v. M'Gowan 39 SLR 662 on the interpretation of "forestry".

10. I have considered the report with care and agree with Miss Churaman's further submission that the report does not assist in the definition of the term "in forestry". Paragraph 35 suggests that some especially noisy processes justify prescription at the earliest opportunity, including inter alia, "the use of chain saws (notably in forestry)".

11. The issue in Meally v. M'Gowan was whether the employment of a workman fell within the meaning of section 1(3) of the Workman's Compensation Act 1990. In that case a workman was killed while engaged in felling and removing timber in the course of his employment. At the time the workman was employed by a wood merchant and saw miller, part of whose business it was to buy growing wood, cut it down, and remove it to his saw mill, where it was converted into flooring or planks. It was argued on behalf of the workman that the word "forestry" in the context of his employment meant planting and cultivation of trees and

management of growing timber. The workman was not the owner of a forest or a cultivator of timber, but merely a buyer of wood. The fact that he had to cut down the wood was merely an accident of his contract. The Court held that the operation being carried out by the workman was not forestry. The operation was cutting down trees which the employer had purchased, putting the wood upon carts, and carting it away - that was not "forestry".

12. As stated in the present case the claimant was employed in the construction industry to build roads. In the course of such construction the claimant was required to clean forests and clear vast expanses of trees using a chain saw to fell the trees and thereafter cut them into logs. Miss Churaman submits that applying Meally v. M'Gowan the cutting down of trees was merely an accident of the claimant's contract. The claimant's occupation did not fall within the definition of "forestry".

13. I accept Miss Churaman's submission and reject the submission of Miss Ryde. In the context of paragraph A10, Part I of Schedule 1 of the Regulations the words "in forestry" in sub-paragraph (i) mean "in the occupation of forestry". I cannot accept that "forestry" was intended to include all occupations connected with forests which required the use of a chain saw however frequently. The claimant's occupation involved the destruction of a forest not the preservation of it. I should add for completeness that Miss Ryde did not contend that the claimant's occupation was prescribed under any other sub-paragraph of paragraph A10.

14. For the reasons stated above the tribunal's decision was erroneous in point of law. As I consider it expedient to give the decision the tribunal should have given, I give the decision set out in paragraph 1 as I am empowered by section 23(7)(a)(i) of the Act.

15. The adjudication officer's appeal is allowed.

(Signed) R.F.M. Heggs
Commissioner
(Date) 24 April 1995