

C 1 384/1980

IOG/JCB

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR INDUSTRIAL DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.I. 7/81

1. This is an insurance officer's appeal from the decision of a local tribunal dated 15 September 1980 allowing the claimant's appeal from the decision of the insurance officer dated 3 June 1980. My decision is that disablement benefit is not payable to the claimant in respect of prescribed disease No 48, (commonly known as occupational deafness) because the claim thereto was made on 8 April 1980 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 which assist claimants making claim within 12 months of 3 September 1979: the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1975 [S.I. 1975 No 1537] (hereinafter "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(Prescribed Diseases) Amendment (No 4) Regulations 1979 [S.I. 1979 No 992] (hereinafter "the 1979 Regulations") now repealed but re-enacted with effect from 15 April 1980 by the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980 [S.I. 1980 No 377] (hereinafter "the 1980 Regulations"). Accordingly the insurance officer's appeal is allowed.

2. On 19 February 1981 I held an oral hearing. Mr J P Canlin of the solicitor's office of the Department of Health and Social Security appeared for the insurance officer. He called no oral evidence. The claimant was represented by Mr R Glancy of Counsel instructed by Messrs Lawford and Company Solicitors. Mr Glancy called the claimant to give evidence. Insofar as it is necessary for me to make any finding as to the claimant's reliability as a witness, let me say that he was a thoroughly fair and reliable 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

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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, of" 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. It is common ground in this case that sub-paragraphs (a), (c), (d), (e), (f) and (g) of paragraph 48 have no application to this appeal. The question in this appeal is whether the claimant has been employed in any occupation involving "(b) ... supervision of ... pneumatic percussive tools on metal in the shipbuilding or ship repairing industries".

7. The claimant who is now 50 years of age is a steel shops manager employed by a well known shipbuilding and ship repairing company based on the North East coast. He has been so employed by the company for the majority or probably the entirety of his working life. From April 1946 to February 1968 he was a boilermaster and from February 1968 to August 1974 he was the ancillary trades supervisor. I am satisfied that in both those occupations he was either using or supervising the use of pneumatic percussive tools on metal in the shipbuilding or ship repairing industries. On 1 August 1974 the claimant was promoted to the position of steel shops manager. He has continued in that occupation up to the date of his application in this case and up to the present. He is responsible for some 200 plus men and has the general supervision of 7 steel shops. His general occupation involves the exercise of managerial skills and he is much concerned with staff relations, work allocation and the production of steel work in the various shops. He tells me, and I readily accept it, that he spends the majority of his working days in and about the various shops for which he is responsible. He is therefore exposed to the same noisy environment as that to which he was exposed whilst a boilermaster and the ancillary trades supervisor save possibly that the intensity of the noise is perhaps not as great as it originally was. He says that as he moves about the shop he would, if he saw any craftsman doing something which was incorrect, interfere and give that person a direct order to carry out the work in a proper manner. I have no doubt that from time to time he may well so interfere but I am satisfied that in the vast majority of cases he would interfere only by going through what he described as the chain of command, ie he would bring the matter to the attention of the appropriate foreman for him to take what remedial action was necessary. In a letter received by the Department on or about 30 May 1980 his employers state "he (ie the claimant) has not in fact 'used, or supervised or assisted in the use of the relevant tools'". In a letter dated 21 May 1980 his employers state: "... we confirm that since taking up his present position of Steel Shops Manager on 1 August 1974 Mr Abell has not 'used or supervised or assisted in the use of the relevant tools'". On the evidence before me I am not satisfied that the claimant supervised any individual workman in "the use of the prescribed tools".

8. Before me it was contended that the words of paragraph 48(b) were apt to cover the claimant's case because he was exercising some general supervision over the use of pneumatic percussive tools on metal

in the shipbuilding or ship repairing industries. Mr Canlin submitted that the degree of supervision exercised by the claimant was not sufficient to fall within paragraph 48(b). He submitted that in order to fall within the definition of supervision there had to be by the claimant supervision of an operative actually using the tool. He went on to argue that there had to be a close nexus between the act of supervision and the act of use. He argued therefore that the word supervision in paragraph 48(b) meant direct and personal supervision by the claimant of the person actually using the designated tool. Those in essence were the rival contentions and I have to decide which of those I accept.

9. The dictionary definition of 'supervise' is "to oversee, have the oversight of, superintend the execution of the performance of a thing or the movement or work of a person". I think it of interest to set out how the word "supervision of the use of" the designated tools formed part of the appropriate regulations. The National Insurance (Industrial Injuries)(Prescribed Diseases) Amendment Regulations 1974 [S.I. 1974 No 1414] extended with effect from 28 October 1974 insurance under the National Insurance (Industrial Injuries) Act 1965 subject to certain conditions to occupational deafness in the case of persons insurably employed in specific operations involving the use of tools in the shipbuilding industry. In due course the 1974 Regulations were repealed and consolidated into the 1975 Regulations. These regulations were extended by the 1979 Regulations to introduce the words "supervision of or assistance in the use" in to the 1979 Regulations and those words now appear in the consolidating 1980 Regulations. A tribunal decision (Decision R(I) 15/75) decided that occupational deafness was prescribed only in relation to a person actually using the defined tools. The majority in that case held that the words of the then regulation were apt only to cover the user of the defined tools. The reasoning of the majority was in fact accepted by and applied in the Court of Appeal in Northern Ireland in the case of The Queen (at the prosecution of Samuel Horner) v The Chief National Insurance Commissioner on 6 April 1979.

10. Subsequent to the Decision R(I) 15/75 the Industrial Injuries Advisory Council in accordance with section 141 of the Social Security Act 1975 produced a report on the operation of the provisions for occupational deafness and on other processes with severe noise levels. This report is Command Document 7266. In paragraph 36 the committee writes:

"The occupations prescribed for occupational deafness limited cover to the actual operator of the tool;... We do, however, consider that the cover in relation to pneumatic percussive tools has proved too restrictive. In some of the processes, in addition to the actual user of the tool, there are others involved who work closely with him and who are equally exposed to the noise of the operation both as to its intensity and duration. Only a small number of workers are excluded by this restriction, but we regard it as an unfortunate anomaly, more especially as some of those it excludes themselves used pneumatic tools before moving to their present work of assisting

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other users of such tools. We therefore consider that the cover should be extended to include those who directly supervise or assist with the use of the tools thus providing a close parallel with the cover given to the various participants in drop forging. Such an extension of the scheme, bearing in mind the small number of claims which would be engendered, would not prejudice the scope for extension of cover to other, quite separate, occupational groups."

I note that both in the 1979 and in the 1980 Regulations the word supervision is not qualified by the word direct or directly.

11. Counsel submitted that I should construe paragraph 48(b) without reference to the Industrial Injuries Advisory Council's report. I reject that submission. I am entitled to look at such a report where the language of a regulation is ambiguous (see Decisions R(G) 3/58 and R(I) 3/77) and in order to determine the mischief aimed at by the amendment in the regulation see Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] A.C. 591 and particularly pages 614, 629 and 638. I am satisfied that the amendment in the 1979 Regulation now reproduced in the 1980 Regulation had the purpose of extending the cover to those who directly supervised the use of the prescribed tools. I am satisfied that the object of the amendment was to extend the regulation to those who were part of the operating team ie to the person directly supervising the use of the prescribed tool.

12. There have been a number of decisions which are relevant to this case. In Decision unreported C.S.I. 1/81 a plater who actually instructed a caulker as to the way work was to be carried out was held to be supervising the use by the caulker of the prescribed tools even though the plater could exercise no disciplinary powers over the caulker. I am satisfied that in that case the degree of supervision was both direct and personal. So too in the Decision in Commissioner's file C.I. 243/1980 where it was held that a ship's manager who regularly spent some hour and a half daily directly supervising the use of the prescribed tools was within regulation 48(b). Once again the supervision was both direct and personal. In my judgment therefore it is only supervision which is supervision by the claimant of the use of the particular tool which falls within the regulation. It is not sufficient for a claimant to state and prove that he exercises a general supervision over the use of the specific tool. In my judgment to fall within the regulation a supervision must be personal and direct. Indeed were it not so, a managing director who from time to time walks around a particular shop and exercises a general supervision or indeed gives certain direct orders to operatives of the relevant tool would on the wider construction of supervision undoubtedly fall within paragraph 48(b). I am satisfied that that was not the intention of the amending regulations. I have no doubt at all that the claimant exercises personal control over the various shops that he supervises but I am not satisfied that he supervises the use of the prescribed tools. That supervision has been delegated by him to the various foremen who work under him.

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13. On the facts before me therefore I come to the conclusion that since 1 August 1974 the claimant has in fact not been employed in an occupation prescribed in relation to occupational deafness. Regulation 40(2) therefore applies. It was conceded by counsel that, in the event of the finding that I have made, the claimant could not satisfy the various requirements of the transitional provisions.

14. It may well be that the decision of the local tribunal has in fact been implemented. If it has been so implemented, and any sum paid to the claimant by way of benefit, no question of repayment arises because I am satisfied that the claimant has throughout used due care and diligence to avoid overpayment.

(Signed) I O Griffiths  
Commissioner

Date: 9 April 1981

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Region: Northern