C1 412/1980

DGR/BDS

SOCIAL SECURITY ACTS 1975 TO 1980

APPLICATION FOR LEAVE TO APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

/ORAL HEARING/

Decision C.I. 12/81

1. For the reasons set out below I refuse the claimant leave to appeal on a question of law from the decision of the medical appeal tribunal given on 7 June 1979.

2. The claimant sustained an industrial accident on 6 April 1977, and in addition to claiming and receiving injury benefit he claimed on 23 October 1978 disablement benefit. The history of that claim is set out in the submissions of the Secretary of State dated 22 October 1980, and there is no merit in my repeating such history in this decision. Suffice it to say that the claimant contends that the decision of the medical appeal tribunal of 7 June 1979 (confirming the decision of the medical board of 1 December 1978, to the effect that from the end of the injury benefit period there was no loss of faculty resulting from the relevant accident) was erroneous in point of law.

3. The claimant applied to a medical appeal tribunal for leave to appeal to the Commissioner on a question of law, but on 30 November 1979 leave to appeal was refused. Thereupon the claimant applied, as he was perfectly entitled to do, direct to the Commissioner, and his solicitors put forward certain written submissions. They contended that one of the two members of the medical board, namely Dr S V Rao, had treated the claimant as a patient from 31 December 1960 to 2 May 1973, and that by virtue of this relationship he should not have adjudicated on the claimant's claim. The Secretary of State asked for an oral hearing, a request to which I acceded, and at that hearing he was represented by Mr J P Canlin of the Solicitor's Office of the Department of Health and Social Security. The claimant did not appear in person nor was he represented.

4. Mr Canlin drew to my attention regulation 16(2) of the Social Security (Determination of Claims and Questions) Regulations 1975, which provides as follows -

> "A medical practitioner shall not act as a member of a medical board for the purpose of the consideration of any case referred to the board if he
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> (a) is or may be directly affected by that case; or
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> (b) has taken any part in such case as a medical assessor or as a medical practitioner who has regularly attended the claimant or to whom any question has been referred for examination and report or as an employer or as a witness".

5. Now, can it be argued that, by virtue of the medical attention rendered by Dr Rao to the claimant during the period set out above, Dr Rao was precluded from acting as a member of the medical board pursuant to regulation 16(2)(b)? Mr Canlin drew to my attention 3 Commissioners' decisions which were directed to consideration of whether a member of a medical appeal tribunal, who had attended the claimant, was caught by regulation 20(1)(b) of the same regulations (or the corresponding earlier statutory provision). Regulation 20(1)(b) is in the same terms (but with reference to a medical appeal tribunal, not a medical board) as regulation 16(2)(b), and accordingly exactly the same question arose in those cases as arises in the present appeal. In the first decision appearing on Commissioner's file C.I. 318/1973, it was held that there had been no breach of the relevant regulation. However, in the two subsequent decisions appearing under Commissioner's files C.S.I. 73/77 and C.W.I. 25/79 respectively, the contrary view was taken. But, Mr Canlin submitted that all 3 decisions had missed the crucial point that whether or not the doctor concerned had regularly attended the claimant had to be considered by reference only to the particular case referred for decision to the board or medical appeal tribunal, as the case might be. In other words, whether the relevant member of the board or tribunal had ever regularly attended the claimant did not in itself conclude the matter. The real issue was whether or not he had regularly attended the claimant in connection with the subject matter of the particular case on which the board or tribunal were required to adjudicate.

6. Now, in the present instance there is no evidence, nor is it even contended, that Dr Rao had regularly attended the claimant in connection with his medical condition arising out of the industrial accident. Manifestly, then, regulation 16(2)(b) has no application, and as far as the statutory provisions were concerned, there was nothing to prevent Dr Rao acting as a member of the medical board.

7. However, that does not dispose of the matter. For it is also necessary for me to consider whether or not Dr Rao's membership of the board constituted in the circumstances of the case a breach of natural justice. If it was, I then have to go on to consider the effects of such a breach in the present case.

8. I take the view that it is repugnant to the proper administration of justice that anyone adjudicating on a case should himself be acquainted with the claimant. Of course, I am not suggesting that such a person would allow such acquaintance in any way to influence his judgment, but it is crucial to avoid even the slightest suspicion of prejudice, either in favour of or against the claimant. Justice must not merely be done, but be seen to be done. However, the important thing is whether or not the person concerned knows the claimant, not whether the claimant knows him. Medical boards are made up of general medical practitioners, working in the locality, and it may often be the case that a patient recognises a member of the board as a doctor who has at some time or other treated him. It does not, however, follow that that doctor necessarily recognises or has any recollection of the patient. In matters of this sort everything turns upon the facts of the particular case. Of course, the fact that a patient recognises the doctor is in itself of no consequence. The mischief against which it is necessary to guard is that a member of the tribunal might be prejudiced. However he cannot on any footing be prejudiced if he is at the material time unaware of his connection with the claimant. Accordingly, the only issue is whether the relevant member of the board at the relevant time recognises or does not recognise the claimant as a patient or former patient.

9. Applying this principle to the present case, there is unfortunately no direct evidence as to whether or not Dr Rao did recognise the claimant. He appears not to have been asked. Moreover, the point on which the claimant now relies was not taken till after the decision of the medical appeal tribunal, by which time it is perhaps doubtful whether, if he had been approached, Dr Rao would have had any recollection at all of the hearing before the original medical board. However, in the absence of any positive evidence, I think I can properly take the view that Dr Rao would have throughout acted in an exemplary fashion, and that if he had recognised the claimant, he would have immediately withdrawn from the board. I think I am entitled to presume, in the absence of any evidence to the contrary, that everything was carried out in a regular and proper fashion. It follows from this that I am not satisfied that there was any breach of natural justice.

10. However, if contrary to the view I have taken, Dr Rao did recognise the claimant, but nevertheless continued to adjudicate on the case, so that there was a breach of natural justice, I do not think that even that would have really assisted the claimant. I reach this conclusion for the following reasons. The claimant failed to raise the point, which is now the subject matter of his appeal, until after the decision of the medical appeal tribunal, and that decision was given after a fresh hearing and a fresh evaluation of the medical evidence. Accordingly, any shortcoming on the part of the medical board had been redressed by the complete re-consideration of the claimant's case by the medical appeal tribunal.

11. I have considered whether the claimant could have contended that Dr Rao's continuing to act in the matter after he recognised the

claimant (assuming, contrary to the view I have in fact taken, that this is what actually happened) caused the decision to be void ab initio and as a result there was nothing which could be the subject-matter of appeal. The effect of this argument, if it were right, would be that the decision of the medical appeal tribunal would not have operated to redress the position. The point raised is admittedly a difficult one, but, fortunately, clear guidance has recently been given in a Privy Council decision Calvin v Carr [1979] 2 All E.R. 440. This particular case concerned the appellant's expulsion from membership of the Australian Jockey Club and involved issues very similar to those now before me. In delivering the judgment of the court Lord Wilberforce observed as follows at pages 445-446 -

> "The first issue arising in this appeal is whether the Committee had any jurisdiction to enter on the appeal. The appellant's proposition is that it had not, for the reason that the stewards' decision was, on the assumption stated, void. A condition precedent, it was said, of an appeal was the existence of a real, even though voidable, decision.
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> This argument led necessarily into the difficult area of what is void and what is voidable, as to which some confusion exists in the authorities. Their Lordships' opinion would be, if it became necessary to fix on one or other of these expressions, that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence, in law. This condition might be better expressed by saying that the decision is invalid or vitiated. In the present context, where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent. So to hold would be wholly unreal ..... a decision of an administrative or domestic tribunal, reached in breach of natural justice, though it may be called, indeed may be, for certain purposes "void", is nevertheless susceptible of an appeal.".

12. It is clear, then, that in the present case, even if the decision of the board had been void for being in breach of natural justice, an appeal would lie. But if the original decision were upheld on appeal, would this put the matter right? In the past there has been clear conflict of authority. For example, in Leary v National Union of Vehicle Builders [1971] Ch 34; [1970] 2 All E.R. 713 Megarry J (as he then was) said at pages 49 and 720 respectively as follows -

> "If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? ..... As a general rule ..... I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

However, in Calvin v Carr their Lordships took the view that this was expressing the matter too broadly. In the words of Lord Wilberforce at page 448 -

> "..... it is for the court, in the light of the arguments made, and in addition having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association. Naturally there may be instances when the defect is so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result ..... it is undesirable in many cases of domestic disputes, particularly in which an inquiry and appeal process has been established, to introduce too great a measure of formal judicialisation. While flagrant cases of injustice, including corruption or bias, must always be firmly dealt with by the courts, the tendency in their Lordships' opinion in matters of domestic disputes should be to leave these to be settled by the agreed methods without requiring the formalities of judicial processes to be introduced".

13. Now applying the above principles to the present appeal - admittedly Lord Wilberforce was specifically referring to domestic tribunals, but it is clear from the earlier quotation that he had in mind administrative as well as domestic tribunals - I have no doubt that in the present instance, even supposing that the initial decision of the medical board had been void, overall the claimant's case has been properly and fairly dealt with. There was a complete re-hearing by the medical appeal tribunal, and the medical evidence was reconsidered. I am quite satisfied that any earlier shortcoming was satisfactorily redressed.

14. Accordingly, I find no substance in the claimant's contention that the decision of the medical appeal tribunal was erroneous in point of law, and accordingly I refuse leave to appeal.

(Signed) D G Rice
Commissioner

Date: 25 June 1981

Commissioner's File: C.I. 412/1980
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