

C1 461/1980

RSL/BR

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR INDUSTRIAL DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.I. 4/81

1. This is an appeal by the insurance officer from a decision of the local tribunal holding that prescribed disease No 48 (occupational deafness) is prescribed in relation to the claimant.

The appeal is dismissed.

2. The claimant, a man now aged 56, has been employed all his working life in the shipbuilding industry and by the same employer. According to the employer he was an apprentice and time served welder from 1939 to 1972 and from 17 July 1972 he has been employed as a welding inspector. On 18 September 1979 he claimed disablement benefit on the ground that he had developed occupational deafness.

3. In order to succeed, the claimant must show that his case falls within the terms of regulations 2(d) and 40 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1975 [S.I. 1975 No 1537] ("the PD Regulations"), which are set out in full in the insurance officer's submission to me. Regulation 2(d) provides, amongst other things, that occupational deafness is prescribed only in relation to employed earners who have been employed for an aggregate of 20 years in one or more of the occupations ("the prescribed occupations") set out in the second column of paragraph 48 of Part I of the First Schedule to the PD Regulations. Regulation 40 provides that, subject to conditions designed to facilitate claims made in reliance upon the amendment to paragraph 48 referred to below, disablement benefit is not to be paid to a person whose claim is made more than 12 months after he has ceased to be employed in any of the prescribed occupations.

4. The PD Regulations were amended with effect from 3 September 1979 by S.I. 1979 No 992. Before the amendment paragraph 48(b) of Part I of the First Schedule read:-

"Any occupation involving:

- (b) the use of pneumatic percussive tools on metal in the shipbuilding or ship repairing industries, ..."

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The amendment caused the paragraph to read:-

"Any occupation involving:

- (b) the use, or supervision of or assistance in the use, of pneumatic percussive tools on metal in the shipbuilding or ship repairing industries: ..."

5. The insurance officer accepts that the claimant was employed in an occupation involving the use of pneumatic percussive tools on metal in the shipbuilding industry during the period 1959 to 17 July 1972. The basis of this concession is that in 1959, but not earlier, the claimant began using a pneumatic percussive tool while employed as a welder, and continued to do so until he became a welding inspector. Thus, in order that his claim should succeed, the claimant has to show both for the purposes of regulation 2(d) (the 20 years rule) and for those of regulation 40 (the 12 months rule) that his occupation of welding inspector is one of the prescribed occupations.

6. The claimant contends that that occupation includes the supervision of the use of pneumatic percussive tools on metal. He rests his claim, therefore, on the amended version of paragraph 48(b). And the insurance officer accepts that he satisfies the above-mentioned conditions included in regulation 40 for facilitating claims made in reliance upon the 1979 amendment.

7. Accordingly I turn to the evidence bearing on the question whether, as a welding inspector, the claimant supervises the use of pneumatic percussive tools.

- (1) In a letter dated 18 July 1980 a representative of the employer wrote concerning the claimant:-

"The above named has been employed as a Welding Inspector from 17 07 72 to date. In this occupation he checks welding and marks any faults for the caulker to chip or gouge out. He would not directly supervise the workman when doing the job, but would check the work on completion. ...

At all times he would be employed in workshops or on vessels under construction and working in the close proximity of other trades using pneumatic percussive tools."

- (2) The claimant's own description of his work is very briefly recorded in a statement dated in February 1980. He stated:-

"I am a welding inspector and in the course of my occupation I supervise caulkers and welders. I mark the jobs up for the caulkers and inspect their work. They use pneumatic hammers. I have been doing this job for 7½ years."

- (3) Most of the remaining relevant evidence has been given by a Mr L who is described as the foreman of the welding inspectors for the Quality Control Department of the shipbuilding department of the employer. He told the local tribunal that checking the work of caulkers and welders used to be done by foremen welders but Quality Control took over their duties; quality control had passed from the foremen to the inspectors. He expressed the view that "supervising the use of a tool" consisted of saying how the tool is to be used, for example stating that the metal must be penetrated only to a certain depth.

He subsequently made two further written statements, and I will quote in full one which he made to an inspector of the Department of Health and Social Security on 6 October 1980. He is recorded as stating as follows:-

"Ships compartments are welded together in the workshops. When one of them is initially completed (i.e. in one piece), a welding inspector should go around the compartment and physically mark those areas of scars and welds that need further dressing or cleaning.

Now, in theory at this stage of the operation, the welding inspector should inform the foreman of the welders and caulkers of these defects, and the foreman should instruct a caulker (a tradesman in his own right) to use pneumatic percussive tools to gouge out scars and clean welds. However, in practise this is not so. It is the normal and accepted practise for the welding inspector, if unsatisfied with the welding, to instruct a caulker on the work to be done. This instruction is basic (i.e. on what areas need cleaning or dressing, and to what extent the weld should be smoothed down), as the welding inspectors have no knowledge in the use of pneumatic percussive tools; they only know the results that can be achieved by the use of these tools. This basic instruction given by the welding inspector has been agreed by the unions in the shipyard (i.e. the fact that they can instruct a caulker on the work to be done without reference to the foreman welder/caulker)."

The inspector added that Mr L said that the inspectors are not required or authorised to use, to supervise the use of, or to assist in the use of pneumatic percussive tools; that it is not necessary for the inspector to be present whilst the caulker is dressing the scars and welds; and that all Mr L's inspectors are time served welders, and would not have had occasion to use pneumatic percussive tools in their previous jobs.

- (4) Before leaving this description of the evidence I should add that at the local tribunal's hearing the claimant was represented by the District Secretary of his trade union. The chairman has not recorded any evidence from the claimant himself and it appears that his representative did all the talking. The latter stated that the claimant is in the area whilst the caulker is doing the work.

8. It is a pity that more evidence was not obtained from the claimant himself. I should like to have seen a detailed statement from him as to the precise way in which he carries out his duties and what those duties are. However, I do not wish to delay matters by seeking further evidence at this stage. There is a certain amount of confusion and contradiction in the evidence. For example Mr L appears not to know that the claimant had handled a pneumatic percussive tool for some 13 years before he became a welding inspector. As to Mr L's categorical statement that the inspectors are not required or authorised to supervise the use of pneumatic percussive tools, I read this as an answer to a question asked by the inspector which should never have been put to him. Whether the claimant's occupation includes such supervision is precisely the question I have to answer, and in arriving at an answer I have to determine what the phrase means. Nobody else can perform this duty for me. The inspector should have confined himself to obtaining from Mr L a description as detailed as possible of the claimant's duties. Only facts are required of a witness, not conclusions of law.

9. In my view the crux of Mr L's evidence is that he considers that the supervision of the use of a pneumatic percussive tool is confined to overseeing the technicalities of handling the tool. This is, of course a tenable view. But I consider it too narrow. I am influenced by the consideration that the 1979 amendment of paragraph 48 was partly intended to ensure that a result such as was arrived at in the reported Decision of a Tribunal of Commissioners R(I) 15/75 should not recur. I was a party to the majority decision in that case, and I have no doubt of its legal correctness. But any sensible person coming fresh to the subject and reading that decision must have thought: If that is the law, then the law needs altering. In my view, therefore, the phrase now under consideration should not be too narrowly interpreted. I consider that it includes, besides the technical oversight of the use of the tool, the oversight of the work done with it by the welder/caulker. Accordingly, I hold that the claimant's present occupation of welding inspector involves the supervision of the use of pneumatic percussive tools within the meaning of the PD Regulations.

10. I should, perhaps, add that my attention has been drawn to the Commissioner's Decision C.S.I. 4/80 (unreported), which gave a result unfavourable to the then claimant. That decision was, however, concerned with what constitutes "assistance in the use of" pneumatic percussive tools. I do not think that its reasoning or conclusion bears on the problem of the present case. On the other hand I think that this decision is consistent with the recent Decision C.S.I. 1/81 (unreported) the author of which was also the author of C.S.I. 4/80.

11. For the reasons which I have explained, I agree with the decision of the local tribunal. The appeal is disallowed.

(Signed) R S Lazarus
Commissioner

Date: 18 March 1981

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Region: Merseyside