PD — Can't Bring Yourself Within Procedures Occasioned By Appeal ; PD Rule Not Ultra Vires

RFMH/SH/4

Commissioner's File: CI/466/1994

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Winifred Mason (Mrs)

Appeal Tribunal: Durham

Case No: 1:32:93:35975

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 30 March 1994 is erroneous in point of law and accordingly I set it aside. However, as I consider it expedient to make further findings of fact and to give such decision as I consider appropriate in the light of them, I further decide that, for the reasons set out below, the claimant is not entitled to disablement benefit.

2. This is the claimant's appeal against the decision of the social security appeal tribunal of 30 March 1994, leave having been granted by a Commissioner. There was an oral hearing of the appeal. The claimant attended and was represented by Mr F O'Neil from the Easington and District Citizens Advice Bureau. The adjudication officer was represented by Mr M Shaw, of Counsel, instructed by Mr L Varley of the Solicitor's Office of the Departments of Health and Social Security.

3. On 28 May 1992 the claimant claimed disablement benefit in respect of Prescribed Disease A11 – commonly known as Vibration White Finger, which was accepted as a prescribed disease from 1 April 1985. The adjudication officer disallowed the claim. On 14 June 1993 the claimant made a fresh claim. As there was no further information provided, the adjudication officer disallowed the claim. The claimant appealed to the tribunal against that decision.

4. The claimant and her representative attended the hearing of the appeal before the tribunal on 30 March 1994. The chairman's note of evidence records that the claimant's representative submitted "that although she accepted that [the claimant] did not

work in one of the listed industries as set out in the Act, she did work in analogous conditions to those in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, regulation 2(A) and Schedule 1, namely in (e) 'the holding of material being worked upon by pounding machines in shoe manufacturer'. In the event the tribunal dismissed the appeal. The findings of fact read:-

> "The Tribunal found as a fact that on 28 May 1992 [the claimant] submitted form B1 100B claiming Disablement Benefit in respect of Vibration White Finger A11. On the claim form she considered that the disease had been caused by work as an industrial sewing machinist operating an overlocking machine when employed by Fashion Industries of Hartlepool and Blackhall for whom she worked for 10 or 11 years. The employment described by [the claimant] does not appear to come within the terms of prescription for Vibration White Finger. [The claimant] was contacted on 18 June 1992 by an officer of the DSS at Peterlee. She told the Officer that she had claimed on the advice of people she knew. She had the claim form and the appropriate leaflet and after reading the job involved's description she knew that none of them applied to her but she was urged to submit a claim which was disallowed on 1 July 1992. She submitted a further claim on 14 June 1993 in respect of Vibration White Finger. She quoted the same process and employer and she said on both claims that she had last worked in the industry in 1979 and again it was disallowed from which she appealed.
>
> The job involved by the appellant involved cutting, sewing and stitching the edging of material in a machine which vibrated.
>
> All other facts set out in the form A2 are accepted."

The reasons for decision read:-

> "That the Tribunal are of the opinion that the appellant has not worked in one of the listed industries as set out in the Regulations and therefore cannot qualify. The tribunal accepted that she worked an overlocking vibratory machine in the fashion industry but this was not analogous to any of the industries listed in the Regulations."

5. Section 108 of the Social Security Contributions and Benefits Act 1992 ("the Act") provides so far as relevant:-

> "108. - (1) Industrial injuries benefits shall, in respect of a person who has been in employed earner's employment, be payable in accordance with this section .. in respect of -
>
> (a) any prescribed disease, or

(b) any prescribed personal injury ...

which is a disease or injury due to the nature of that employment and which developed after 4th July 1948.

(2) A disease or injury may be prescribed in relation to any employed earner if the Secretary of State is satisfied that -

(a) it ought to be treated, having regard to its causes and incidents and any other relevant considerations, as a risk of their occupations and not as a risk common to all persons; and

(b) it is such that, in the absence of special circumstances, the attribution of particular cases to the nature of the employment can be established or presumed with reasonable certainty.

(3)-(6) ..."

6. Regulation 2 of Part II of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 ("the Regulations") provide so far as relevant:-

"PRESCRIPTION OF DISEASES AND PRESUMPTION AS TO THEIR ORIGIN

Prescription of diseases and injuries and occupations for which they are prescribed

2. For the purposes of sections 108-110 of the Act -

(a) ... each disease or injury set out in the first column of Part I of Schedule 2 is prescribed in relation to all persons who have been employed on or after 5th July 1948 in employed earner's employment in any occupation set against such disease or injury in the second column of the said Part;

(b)-(d) ..."

7. The list of prescribed diseases and the occupations for which they are prescribed is contained in Part I of Schedule 1 to the Regulations. Paragraph A11 is relevant in the present case and provides:-

"Prescribed disease or injury	Occupation
A11. Episodic blanching, occurring throughout the year, affecting the middle or proximal phalanges or in the case of a thumb the proximal phalanx, of -	(a) The use of hand held chain saws in forestry; or
(a) in the case of a person with 5 fingers (including thumb) on one hand, any 3 of those fingers, or	(b) the use of hand held rotary tools in grinding or in the sanding or polishing of metal, or the holding of material being ground, or metal being sanded or polished, by rotary tools; or
(b) in the case of a person with only 4 such fingers, only 2 of those fingers, or	(c) the use of hand held percussive metal working tools, or the holding of metal being worked upon by percussive tools, in riveting, caulking, chipping, hammering, fettling or swaging; or
(c) in the case of a person with less than 4 such fingers, any one of those fingers or, as the case may be, the one remaining finger (vibration white finger).	(d) the use of hand held powered percussive hammers in mining, quarrying, demolition, or on roads or footpaths, including road construction; or
	(e) the holding of material being worked upon by pounding machines in shoe manufacture."

8. The claimant worked as an industrial sewing machinist in the fashion industry. Mr O'Neil readily agreed that although the claimant suffered from Vibration White Finger, she was not employed in an occupation listed in paragraph 11. Nevertheless, he submitted that the occupation fell to be prescribed by analogy to sub-paragraph (e) because her occupation involved "the holding of material being worked upon by pounding machines" albeit not in shoe manufacture. He argued that the tool used and process referred to sub-paragraph (e) were similar to that of the

claimant. Shoes were an essential item of footwear and by analogy this covered all other items of clothing. Mr O'Neil referred me to Prescribed Disease A8 - traumatic inflammation of the tendons of the hand or forearm caused by the prescribed occupation "manual labour or frequent or repeated movements of the hand or wrist". He stressed that as paragraph A8 included all occupations which involved repeated movements of the hand or wrist, sub-paragraph (e) of paragraph A11 should be extended by analogy to include all occupations which involved the process referred to causing Vibration White Finger without restriction to shoe manufacture.

9. Mr O'Neil argued that it was the clear intention of Parliament to compensate employed earners for diseases and injuries caused by working in certain occupations. With regard to Prescribed Disease A11, sub-paragraphs (b) to (d) all involved striking metal with metal with consequent vibration. In the present case the claimant's occupation involved holding material and therefore coming into contact with a vibrating machine during the process of cutting with a metal blade and stitching with two metal needles. In his view, having regard to all aspects of the claimant's occupation it fell within the spirit of the prescribed occupations listed in paragraph A11 and as a result should be considered as such by analogy.

10. I reject Mr O'Neil's submission and agree with Mr Shaw that whether or not the claimant's occupation was analogous to any of the prescribed occupations stated in paragraph A11 was irrelevant. Regulation 2(a) of the Regulations made in pursuance of section 108 of the Act provided for prescribed diseases and injuries originating from prescribed occupations. These were listed in Schedule 1 to Part I of the Regulations. The list of prescribed diseases or injuries were specific and listed in column I. The list of prescribed occupations were listed in column II. They were specific as to the processes adopted and the trade or industry involved. There was no provision for inclusion by analogy. Under paragraph A(11)(e) it was a condition precedent that the processes adopted had to be in shoe manufacture. The terms were clear and did not include the manufacture of other items such as clothing by analogy.

11. I also agree with Mr Shaw that paragraph 10 of Decision CI/22/91 did not support the claimant's case as contended by Mr O'Neil. The Commissioner concluded that whereas sub-paragraphs (b), (c) and (d) had in common "the fact that they all involved striking metal with metal with consequent vibration" sub-paragraph (a) and (e) were restricted to forestry and shoe manufacture respectively. Even on a very wide interpretation of the prescribed occupations listed in paragraph 11 it could not be said that the claimant's occupation involving "cutting with a metal blade and stitching with 2 metal needles" satisfied the processes referred to in sub-paragraphs (b), (c) or (d). There was no provision to include occupations other than those listed by analogy. If Parliament had intended to include such occupations, they would have legislated accordingly.

12. Mr O'Neil submitted that the tribunal's decision failed to comply with the requirements of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 in that they gave inadequate reasons for rejecting the argument that an overlocking machine in the fashion industry was analogous to the industries listed in paragraph A11, in particular the occupation listed at sub-paragraph (e). I agree. In decision R(I) 18/61 the Tribunal of Commissioners held at paragraph 13:-

> "In cases where some specific contention addressed to the tribunal has been rejected it would certainly be necessary for the tribunal to give reasons for its rejection. We think that it is important to enable a claimant to understand why it is that a decision has gone against him."

I reject Mr Shaw's submission that any reference to the "analogous" argument was superfluous once the tribunal had concluded that the claimant "has not worked in one of the listed industries as set out in the Regulations and therefore cannot qualify". In my view the decision was erroneous in law on this ground.

13. Mr O'Neil then introduced a completely new argument. He submitted that Schedule 1 to the Regulations was ultra vires. This was because the Secretary of State had exceeded his powers in that he had misinterpreted the recommendations in the report by the Industrial Injuries Advisory Council. The result was that the provisions "discriminated" between the "tool process adopted" and the occupations concerned. The processes adopted in sub-paragraph (a), (d) and (e) were tied to specific occupations. This was wrong. In his view as it was the use of specific tools which caused prescribed disease or injury of column I, of paragraph A11, the emphasis should have been placed on the tools used without restriction to a specific occupation. It was irrational to do so. He urged me to accept that any occupation involving the use of a vibrating tool was sufficient to satisfy the prescription requirements in column II of paragraph A11. I reject this submission.

14. Mr Shaw did not require an adjournment to reply to Mr O'Neil's new contention. He argued that provisions could only be said to be ultra vires if the Secretary of State had exceeded his enabling powers under the primary legislation or if he had acted irrationally i.e. that no reasonable Secretary of State could have devised the scheme under Schedule 1. Section 108(2) of the Act (the primary legislation) gave the Secretary of State a wide discretion to prescribe a disease or injury if the conditions in subsections (a) and (b) were satisfied. These conditions were cumulative and not in the alternative. Section 108(2)(a) stressed that the risk involved had to be linked to the "occupations and not as a risk common to all persons". Subsection (2)(b) provided that "the attribution of particular cases to the nature of the employment can be established or presumed with reasonable certainty". In exercise of his discretion the Secretary of State had taken advice from

the Industrial Injuries Advisory Council and acted on such advice. Regulation 2(a) provided that there was a presumption that "each disease or injury set out in the first column of Part 1" of Schedule 1 had its origin "in any occupation set against such disease or injury in the second column of the said Part;". It could not be said that the Secretary of State had exceeded his powers or that he had acted irrationally. The doctrine of ultra vires did not operate in the case of discrimination in the context argued by Mr O'Neil. I agree. Mr Shaw referred me to Appendix 4 of the report by the Industrial Injuries Advisory Council dated May 1995 which listed the occupational exposures recommended for prescription. He noted that industrial sewing machines, whether or not overlocking, were not included in the list of tools under consideration. I accept Mr Shaw's submission.

15. I should add for completeness that reference was made to Directive 79/7/EEC which is concerned with "the progressive implementation of the principle of equal treatment for men and women in matters of Social Security"., Article 2 provides that the Directive shall apply to the working population including self-employed persons, whose activity is interrupted by illness, accident or involuntary employment and persons seeking employment and to retired or invalided workers and self-employed persons. Paragraph 1 of Article 3A provides that the Directive shall apply to statutory schemes providing protection against a number of contingencies, including invalidity, accident at work and occupational diseases. In deciding whether a person is assisted by the Directive it must first be established whether the person concerned is within its personal scope as set out in Article 2. This is commonly known as being part of the working population. A person is not part of the working population if that person has never worked and never sought employment; been employed but such employment has been interrupted by something other than illness and ceased work and is not seeking employment. In the present case the claimant told me that she had ceased work in January 1979 because of pregnancy. She had not sought work after that date because she wished to stay home to bring up her family. I accept that as fact and as a result the claimant was not assisted by Directive 79/7/EEC because she is not a worker in terms of Article 2. Both Mr O'Neil and Mr Shaw agreed with this conclusion.

16. Mr O'Neil did not pursue his contention that the Sex Discrimination Act 1975 was applicable in the present case. Accordingly I do not propose to comment on the issue further.

17. For the reasons stated above the tribunal's decision was erroneous in 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)(ii) of the Social Security Administration Act 1992.

18. The claimant's appeal is dismissed.

(Signed) R.F.M. Heggs
Commissioner
(Date) 7 July 1995