

C1 488/1980

DGR/BDS

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR INDUSTRIAL DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.I. 8/81

1. My decision is that the original decision of the insurance officer awarding special hardship allowance for the inclusive period from 7 November 1979 to 15 July 1980 should be reviewed, but not revised.

2. The claimant had the misfortune to contract byssinosis with effect from 1 July 1977. Disablement benefit was awarded, and on 28 July 1977 he claimed an increase of such benefit in respect of special hardship. Special hardship allowance was awarded and paid at varying rates from 13 July 1977 to 15 August 1978 and continuously from 7 March 1979 onwards. The particular award, which is the subject-matter of the present appeal, was made on 23 October 1979, and covers the inclusive period from 7 November 1979 to 15 July 1980. It was based on the difference between the earnings of a card attendant, which was the occupation of the claimant at the time he contracted byssinosis, amounting to £66.87 per week, and those of a caretaker, a position for which the medical authorities took the view that the claimant was suitable, amounting to £54.68.

3. The claimant was constrained for reasons of health to leave his employment as a card attendant on 13 July 1977. However, he resumed work on 1 January 1978, having obtained a job as a labourer at his old place of employment at the Laburnum Mill. At the time his employers were preparing to open a new mill, known as Unit 1, one of the most modern in the world. That mill was opened for production in March 1978 and the claimant was given the opportunity of working there on a temporary basis to replace somebody who was for the time being absent. In the event, he worked at Unit 1 from 16 August 1978 to 23 March 1979. He was not offered permanent employment, because he was unable to pass the requisite medical examination. It was thought that his health would be at risk working in an atmosphere of cotton dust.

4. It is important to note that the remuneration payable to operatives at Unit 1 was considerably higher than that payable to employees working at the Laburnum Mill. The reasons for this were

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that at Unit 1 there were no demarcations of function, each operative being required to do all the jobs in the Unit, ie carding, blowing, combing etc, and each employee was required to work on a shift basis, which, in the case of men, involved night work. Apparently the response from the employees at the Laburnum Mill, who were given the first opportunity of applying for jobs at Unit 1, was disappointing, and outsiders had to be recruited.

5. It is not in dispute in this case that the claimant satisfies section 60(1) of the Social Security Act 1975 and is entitled to special hardship allowance. The question at issue is purely and simply the amount of such allowance, and the claimant argues that in computing it the earnings of his regular occupation should be assessed by reference to the earnings of an operative at Unit 1. Admittedly Unit 1 was not in operation at the time that the claimant contracted byssinosis, but a position at Unit 1 constituted, according to the claimant, an advancement which he might reasonably expect to have obtained, had he not been struck down by byssinosis (section 60(2) and (3)).

6. After the claimant was required to leave Unit 1 he suffered spells of sickness and unemployment, but eventually on 14 April 1980 he commenced work as a general process worker at Barr's Soft Drinks Ltd, where his average weekly earnings were apparently £61.10. The original award of special hardship allowance had been based on the difference between average wages of £66.87 in the regular occupation of card attendant at the Laburnum Mill and £54.68 in the suitable alternative employment of caretaker. In the circumstances, the insurance officer decided to review his original decision, but not to revise it. The justification for his allowing a review was that there had been a relevant change of circumstances since the original decision had been made (the claimant having obtained on 14 April 1980 work as a process worker), and the reason for his refusing to revise his earlier decision was that, after fresh figures had been obtained for the respective earnings of a card attendant and a caretaker, it appeared that, if anything, a further reduction in the special hardship allowance was called for. Accordingly, the original award was allowed to stand.

7. The claimant appealed against the insurance officer's refusal to revise, and succeeded. The tribunal were unanimously of the view that the claimant had satisfied the requirements of section 60(3). They considered that the claimant would in the normal course have advanced to the position of a machine operator at Unit 1, had he been in good health, and accordingly that the earnings of such an operator should be the basis of the comparison for determining the amount of special hardship allowance. The insurance officer now appeals against that decision to the Commissioner.

8. The local tribunal have proceeded on the basis that an appointment as an operative at Unit 1 constituted an advancement. This assumption has likewise been made by the insurance officer now concerned with the case. However, I do not see on what basis it can be said that an appointment to work at Unit 1 amounted to an advancement within the meaning of section 60(2) or (3). Of course, the position of a machine operator at Unit 1 entailed far greater

earnings than did the position of a card attendant at the Laburnum Mill, but, in my judgment, appointment to a more remunerative position does not in itself constitute advancement. If that was what advancement was intended to mean in the section, the legislature would unequivocally have said so.

9. Normally, advancement occurs on the promotion of the person concerned to a higher position. It involves his elevation to a higher rung on the promotion ladder. More rarely, advancement may come about where there is no improvement in status, but the post, which the person concerned continues to hold, entitles him to greater earnings by reason of his seniority, as is not infrequently the case with government appointments where salary increments are paid at stated intervals within a particular grade to acknowledge the holder's increasing experience. However, the mere transfer from a lower paid job to a higher paid job does not necessarily constitute advancement. The higher paid post may carry with it certain unattractive features, for which the increased remuneration is intended to compensate. The movement then is not upwards but, if anything, sideways. There is a change of job, but not an advancement. Indeed, it would be a travesty of language to contend that a person had been advanced or promoted if for more money he was required, for example, to undertake duties that were particularly dirty or to work unattractive hours.

10. Although the definition of "advancement" was not the matter directly in issue it is to be noted that in Decision R(I) 8/67 the learned Commissioner used language which suggests that the meaning to be attributed to the word is that propounded above. He observed as follows (paragraph 13) (my underlining):

"Section [60(3)] enables a claimant to establish that his regular occupation extends to and includes an employment or employments superior to his actual regular occupation at the time of his accident ... First you ask whether in general persons in the claimant's position are normally promoted or advanced to a particular higher grade or level

11. Now, unless there is an advancement, it is not open to a claimant to take advantage of section 60(2) or (3) for the purposes of calculating the amount of special hardship allowance to which he is entitled. In the present case there is no question of the claimant maintaining that he would have been elevated, had it not been for his health, to a higher rung in the promotion ladder. The evidence is that only a few operatives can hope to acquire an improved status of that kind, and the claimant does not contend that he would have been successful in this respect. His case is that the advancement in question was his appointment on a permanent basis as a machine operator at Unit 1. He argues that he was actually employed in this capacity for a considerable period of time, and would have continued to have been employed, had he been able to pass the medical examination, and such failure was brought about by his having contracted byssinosis.

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12. Accordingly, the first question at issue in this case is whether or not the position which the claimant contends he would have obtained, but for his health, constitutes an advancement. If the answer is in the affirmative, it will then have to be considered whether in all other respects the claimant can satisfy sub-section (2) or (3) of section 60.

13. The employers have explained the reasons why the operatives at Unit 1 were paid considerably more money than those at the Laburnum Mill. Each operative was required to carry out all or any of the various functions called for at Unit 1. There was to be no demarcation of function, and as a quid pro quo the unions had won for their members enhanced rates. Further, it was a condition of employment that the operatives should work on a shift basis, which in the case of men involved night work.

14. The employers described the work as being, not an advancement or promotion, but simply a move to a 'more semi-skilled and higher paid job'. These words perhaps suggest that a greater degree of skill was involved, and it could be argued from this that there was a true promotion or advancement. However, looking at the evidence as a whole, I am not satisfied that this is the true effect of the appointment in question. All the relevant functions were of a semi-skilled nature, and in so far as a person who had been a card attendant was required to do something else, the amount of training was, in my judgment, minimal and certainly something of which I need not take account. Any one appointed from the Laburnum Mill to work at Unit 1 continued in the same occupation.

15. The local tribunal, who went into the case with considerable care and set out their findings of fact in a most helpful manner, observed that the job at Unit 1 'did not necessarily require a more highly qualified operative'. Indeed, there is nothing to suggest that, when the claimant worked on a temporary basis at Unit 1, he underwent any form of re-training. I am satisfied that on the balance of probabilities the increased remuneration was not paid because of any increase of skill, but was awarded in part at least as a quid pro quo for the elimination of any demarcation disputes. But far more important, I am satisfied that the high rate of pay was to a large extent in compensation for the unattractive feature of the job that each operative was required to work on a shift basis, which in the case of men includes nights. The unpopularity of this aspect of the work was reflected in the failure of the employers to attract workers to Unit 1 from the Laburnum Mill. They were forced to go outside to recruit their labour. If the job at Unit 1 had been unequivocally a better position, manifestly this would never have happened. The work had a limited appeal to persons who wished to earn high money, and were prepared to incur the not inconsiderable inconvenience of having to work irregular hours, including night shifts.

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16. I am satisfied that employment at Unit 1 was not a promotion or advancement, but was if anything, a sideways move, which had attractions to some people, but not to others. In my judgment, it was not an advancement within section 60(2) or (3). It follows from this that the earnings derived therefrom cannot be taken into account in computing the amount of special hardship allowance to which the claimant is entitled.

17. Accordingly, although the insurance officer was right to review his decision, he properly refused a revision. The tribunal reached a wrong conclusion and I therefore allow this appeal.

(Signed) D G Rice
Commissioner

Date: 10 April 1981

Commissioner's File: C.I. 488/1980
C I O File: I.O. 5492/1/80
Region: North West (Manchester)