Vibration White Finger — Sec. of State Cannot Specify That a Certain No. of Fingers (is) to be Affected CPAG

★ 67/94

MJG/TEMP/3

Commissioner's File: CI/520/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the social security appeal tribunal dated 27 January 1992 as that decision is not erroneous in law: Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by a claimant, a man born on 28 February 1936. The appeal is against the unanimous decision of the social security appeal tribunal, which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 12 June 1991 in the following terms,

> " Disablement benefit is not payable from and including 23/9/90 because the Medical Board has decided that the claimant has not been suffering from the prescribed disease known as Vibration White Finger or from any condition resulting therefrom. Social Security (Adjudication) Regulations [1986] regulations 43 and 46."

3. The history of this matter is as follows. On 27 October 1989, the claimant made a claim for disablement benefit for prescribed disease A11 (in Part 1 of Schedule 1 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, S.I. 1985 No. 967) commonly known as "Vibration White Finger". The relevant entry in the Schedule reads as follows,

> " <u>Prescribed disease or injury</u>
>
> . . . .
>
> 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) in the case of a person with five fingers (including thumb) on one hand, any three of those fingers, or

(b) in the case of a person with only four such fingers, any two of those fingers, or

(c) in the case of a person with less four such fingers, any one of those fingers or, as the case may be, the one remaining finger (Vibration White Finger)."

4. The claim was referred to a Consultant who in his Opinion dated 12 December 1990 gave the following answers to the questions (underlined) on the relevant form,

" 1. Diagnosis - Vibration White Finger affecting the index and middle fingers of the left hand together with the right ring finger, Taylor Pelmear stage II.

Is the claimant suffering from PD No. A11 or any sequela thereof? - as only two digits are affected by blanching on the left hand and one in the right this falls outside the DHSS definition of the PD. The answer therefore is no."

5. The claimant appealed to a Medical Board who answered the relevant questions (underlined) on their form of decision as follows,

" Symptoms and Signs ... No increased blanching. No loss [of] sensation.

Is the condition from which the claimant is suffering a prescribed disease or a sequela of a prescribed disease? - No."

6. An adjudication officer then gave the decision on 14 May 1991 which is reproduced in paragraph 2 above. The claimant appealed against that decision to a social security appeal tribunal. There does not appear to have been any appeal by him from the medical board to a medical appeal tribunal. His

grounds of appeal, both to the social security appeal tribunal and to the Commissioner, were formulated by his Solicitor as follows,

> " [The claimant] informs us that you have told him that his white finger affects one digit on one hand and two on the other. Leaving aside the Prescribed Diseases Regulations for the moment it would therefore be apparent that [the claimant] does suffer from Vibration White Finger and presumably it has been determined as arising from his employment. Your determination was made on the basis of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 Schedule 1 A11(a) which determines that blanching must affect, in the case of a person with five digits on one hand, three or more of those digits. The Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 are enacted by virtue of Section 76 of the Social Security Act 1975. Nothing within that section gives the Secretary of State the power to make regulations that determine the degree of disablement arising from an industrial disease that is required before that disease is to be prescribed. Once a disease per se is decided as falling within the ambit of Section 76 it must, by virtue of that Section, be prescribed in its entirety. Thus the restriction imposed by the Secretary of State in the Regulations quoted above is ultra vires and this claim should be determined as though the offending parts to those regulations were not there."

7. I deal in detail with that contention below but first I should note that the local adjudication officer pointed out to the tribunal (in paragraph 6.2. of his submission) that in fact the medical board in their findings (set out in paragraph 5 above) had found <u>no</u> evidence of increased blanching or loss of sensation and submitted,

> " It would therefore appear that the [medical board], a higher authority than the consultant who originally decided the claim, [did] not diagnose Vibration White Finger in any digits of either hand. "

8. However, the tribunal did not avert to that particular matter and dealt with the claimant's Solicitor's contention that the relevant regulation (i.e. para A11 of Schedule 1 (Part I] to the 1985 Regulations) was <u>ultra vires</u>. I consider I should do likewise. At that time the Court of Appeal had decided in the <u>Foster</u> case that none of the social security adjudicating authorities (including the Commissioner) had any power to determine whether or not a regulation was <u>ultra vires</u>. As a result, the tribunal accepted the claimant's Solicitor's concession that the question of <u>ultra vires</u> was not a matter for the tribunal, with the result of course that the tribunal had to dismiss the claimant's appeal. Subsequently, however, the House

of Lords in the Foster case has decided that the Commissioner does have power to pronounce on the question of whether or not a regulation is ultra vires - Chief Adjudication Officer and another -v- Foster [1993] 1 All ER 705). I have, however, affirmed the tribunal's decision as being in fact correct in its dismissal of the appeal because I do not consider that the regulation is ultra vires for the reasons given below.

9. I therefore now pass to the question of ultra vires. In response to the claimant's grounds of appeal (set out in paragraph 6 above) the adjudication officer now concerned submits as follows (paragraphs 3-5 of a written submission dated 16 May 1994),

> " Whilst it is accepted that the Commissioners do have jurisdiction [to determine ultra vires issues], it is submitted that the provision in issue in the present case (paragraph A11 of Schedule 1 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985) is not ultra vires. A disease or injury can only be prescribed if the conditions set out in section 76(2) of the Social Security Act 1975 (now Section 108 (2) of the Social Security Contributions and Benefits Act 1992) are satisfied. This provides:
>
> '(2) A disease or injury maybe prescribed in relation to any employed earners if the Secretary of State is satisfied that -
>
> (a) it ought to be treated, having regard to its causes and incidence 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'
>
> The Secretary of State must be satisfied as to these two points before a disease or injury may be prescribed. It is perfectly possible that certain degrees of a disease may fulfil these requirements as to incidence and connection with the nature of an employment whereas other degrees of that

disease may not. It is therefore submitted that it is mis-conceived to argue, as the claimant's representative seeks to do, that there is no power in section 76 of the Social Security Act 1975 giving the Secretary of State power to determine the degree of disablement which must arise before a disease or injury is prescribed.

If the submission in the preceding paragraph is not accepted it is submitted in the alternative that the Secretary of State has power by virtue of Section 166 (2) of the Social Security Act 1975 (now Section 175 (3) of the Social Security Contributions and Benefits Act 1992) to specify the extent of disablement before a condition is prescribed. This sub-section provides:

'(2) Except in so far as this Act otherwise provides, any power conferred thereby to make an Order in Council, regulations or an Order may be exercised -

(a) either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case;...'(my underlining)

It is submitted that the highlighted words give the Secretary of State the power to specify certain degrees of disability as a prescribed disease whilst not prescribing that disease in general.

5. Accordingly it is submitted that the claimant's appeal in the present case should be dismissed."

10. I accept that submission in its entirety as undoubtedly being correct in law. I would also add this. Section 76(1) of the Social Security Act 1975, now re-enacted in similar words in section 108 (1) of the Social Security Contributions & Benefits Act 1992, provides that benefits shall be payable "in respect of any prescribed disease". The word "disease" is not defined in either the 1975 or the 1992 Acts. However, in my judgement the word "disease" is wide enough to include an analysis of the extent to which a person is disabled by an adverse medical condition. For example the description of prescribed disease A10 (occupational deafness) prescribes as the requisite degree of deafness,

> "Sensorineural hearing loss amounting to at least 50dB in each ear, being the average of hearing losses at 1,2 and 3kHz frequencies, and being due in the case of at least one ear to occupational noise (occupational deafness)."

In my judgement that is equally valid as a prescription of a disease. It must be necessary in the case of description of some kinds of prescribed disease that the extent to which a person is affected or disabled by them has to be specified with some certainty.

(Signed) M.J. Goodman
Commissioner

(Date) 1 August 1994