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Content

CI 564 2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal. For the reasons below, the decision of the tribunal is wrong in law. It is set aside. I refer the appeal to a new tribunal to consider in accordance with the directions in this decision. (Social Security Act 1998, section 14(8) and (9)).

2 The claimant and appellant is appealing with my permission against the decision of the Barnsley appeal tribunal on 14 December 2004 under reference U 01 001 2004 01099

3 DIRECTIONS FOR REHEARING

A The rehearing will be at an oral hearing.
B The new tribunal should not involve any member who has previously been a member of a tribunal involved in this appeal.
C The claimant is reminded that the tribunal can only deal with the appeal as at the date of the original decision under appeal.
D The claimant does not have a representative, and is advised to seek the help of a Citizens Advice Bureau, welfare rights office, solicitor or other expert adviser with the rehearing of this appeal.
E If the claimant has any further written evidence to put before the tribunal, this should be sent to the tribunal within one month of the issue of this decision.

These directions are subject to any later direction by a district chairman.

REASONS FOR THE DECISION

The claim

4 The claimant (Mr M) claimed industrial injuries disablement benefit as a result of occupational asthma (prescribed disease D7) from "any other sensitising agent". His specific claim was that he had suffered from "the cement dust, limestone dust and powder, microsilica dust, also the fact of gunning wet concreat in mixers".

5 Enquiry was made of the employer. The employer (a major cement and concrete company) confirmed that the claimant was exposed at work to the listed substances, and that "Mr M developed a sensitive form of asthma, as diagnosed by the company doctor, and we were unable to continue his employment in this industry or environment."

6 The local Jobcentre then made an "occupational asthma sensitiser enquiry" about the substances. This was sent to "OASIS Wilmslow" (the Occupational Asthma Sensitiser Information Service. OASIS reported that "none of the above as known to be respiratory sensitisers." This was turned into a decision by the Jobcentre that (to quote its double negative) "Neither cement dust, limestone dust nor microsicila powder are not sensitising agents". The benefit was refused.

7 Mr M appealed, stating that he had been told by a consultant that he did have asthma caused by cement dust. It came before a paper tribunal at Mr M's request. The tribunal found against Mr M, but it had not been told that he had expert advice. Its decision was set aside, and the case listed for oral hearing.

8 Mr M then produced a full medico-legal report and supporting letter from Dr David Fishwick, MB, ChB, FRCP (Lond. & Edin.) AFOM, MD, Reader in Medicine and Honorary Consultant at the Sheffield Teaching Hospitals. The letter stated:

> "My feeling has always been that your case is difficult, and whilst your exposure to cement dust is not an ordinary cause of sensitisation, you clearly developed asthma symptoms and the requirement for asthma treatment whilst working exposed to cement dust.
>
> There is some evidence from the literature internationally to suggest that cement dust can cause respiratory problems and asthma, although this is fairly sparse.
>
> On balance I feel that you do have asthma related to your previous occupational exposure to cement dust, as these contain chromates. There are no specific tests for sensitisation such as IgE (allergic antibody) tests, and therefore the diagnosis is based on your symptoms, and your previous peak flow charts.
>
> ... if you wish to show this latter to anybody else I am very happy for you to do so."

The report was in expert witness form confirming the medical opinion in the letter and citing the literature (in leading international medical publications). It specifically confirmed:

> "... on the balance of probabilities this gent had developed occupational asthma directly as a result of cement exposure."

The tribunal decision

9 The tribunal heard Mr M's evidence but found against him. Its statement includes:

> 4 For prescribed disease D7 to be satisfied a claimant must have been exposed to any of the agents set out in relation to the disease. Sub-paragraph (x) refers to "any other sensitising agent". A sensitising agent is more than an irritant. A sensitising agent is something to which a person will become allergic.
>
> 5 The Appellant has put forward that in his work he was exposed to limestone dust and microsilica powder and that thee were sensitising agents. There was no evidence that either of these substances are sensitising agents.
>
> 6 The Appellant has also put forward that in his work he was exposed to cement dust. That is accepted. He argues that the cement dust is a sensitising agent. That is not accepted.
>
> 7 The Appellant has produced a long and detailed report from Dr D Fishwick ... This had been produced in respect of a civil claim. The tribunal considered and took into account the whole of the report.
>
> 8 ... Dr Fishwick states that cement dust is ordinarily associated with dermatitis and it is thought to be the chromium component which is etiological. There is an implication in this sentence that there is a chromium component in all cement dust. The tribunal do not accept this implication as correct. The tribunal relied on the experience of the medical member. A chromium component is not a normal part of cement dust whether natural or artificial. There are many different forms of cement and different processes in the manufacture. The most which can be

said is that chromium is an occasional contaminant. There are various theories as to how this has formed part of the cement dust...

10 In his report Dr Fishwick has referred to the literature. There are only two single case reports referred to. Single case reports by their nature do not provide strong supportive evidence.

The tribunal noted Mr M's lack of history of dermatitis, and rejected Dr Fishwick's opinion on the basis that the evidence did not warrant the conclusion.

The grounds of appeal

10 This provoked a strong response from Mr M who, among other things, produced formal technical literature from his former employer, another major cement manufacturing company, and the British Cement Association about the chromium content of cement. It detailed the Chromium Directive of the European Union placing strict limits on the amount of chromium allowed in cement from early 2005. For good measure, Mr M also produced literature from a microsilica manufacturer warning that its products could cause chronic obstructive lung disease as well as pulmonary fibrosis (silicosis).

11 I invited the Secretary of State to comment on this information and the tribunal's decision. In response, the secretary of state's representative referred me to CI 5435 1997, the other decisions cited in that decision, and CI 5209 1997. I also asked for a medical comment and was offered one by Dr Susan Reid, DWP CMG. This explains OASIS Wilmslow as a database of potential sensitising agents regularly updated by Medical Services. It also states:

> "Some substances have been in existence for many, many years, and thus there is a good deal of evidence to support its ability or inability to be a sensitising agent.
>
> Cement dust is one of the substances which as been in existence for many years and thus it is well documented as not being a sensitising agent."

There is false logic hidden in that view, as is pointed out in one of the decisions I cite below. The fact that something is known not to be a sensitising agent is not the same fact as that something is not known to be a sensitising agent.

"any other sensitising agent"

12 "Any other sensitising agent" was added as item (x) in the list of sensitising agents in the Schedule to the Social Security (Prescribed Diseases) Regulations 1985 (SI 1985 No 967) together with specific agents (o) to (w) by SI 1991 No 1938. This followed the adoption by the government of the Industrial Injuries Advisory Council's report on Occupational Asthma, Cm 1244 in October 1990. This was considered in R(I) 8/02, to which I was not referred. The Commissioner commented that the report made it:

> "...quite clear that the expression "sensitising agent" when used medically in this context means a chemical agent which actually causes a person to develop an asthmatic condition when inhaled at work..."

rather than merely irritating the chest and making a condition with another cause worse. The Commissioner upheld a tribunal decision that a claimant had not been sensitised by diesel fumes while working as a bus driver. This was because, the tribunal found from the medical evidence of a consultant, the fumes had been irritants not sensitising agents.

13 CI 5434 1997 (not referred to in R(I) 8/02) was about what is now usually termed passive smoking. The Commissioner reviewed previous decisions and decided that the term "any other sensitising agent" included any agents not in the list from (a) to (w) "provided they are sensitising". The Commissioner sent the case back to a tribunal to make findings on whether tobacco smoke was a sensitising agent so as to establish if the claimant was in a prescribed occupation.

14 In CI 2543 2002 the Commissioner also looked at the 1990 report, in a context similar to R(I) 8/02 (a tractor driver's exposure to diesel fumes and certain other substances). That tribunal decided that despite the exposure to what were accepted as being sensitising agents, the claimant was not sensitised by them. The Commissioner dismissed the appeal. He commented on the difficulties of deciding what was a sensitising agent. He adopted a "triage" approach: there are agents known to be sensitising agents, agents known not to be sensitising agents, and cases where it is not known whether the agent is a sensitising agent. I respectfully agree with that approach as helpful in cases such as this.

15 The prescribed occupation for prescribed disease D7 is "exposure to any of the agents set out". Unusually, this makes the questions whether a claimant works in a prescribed occupation and whether the claimant has a prescribed disease intertwined. It is worth emphasising that a claim that a person is suffering from occupational asthma by reason of "any other sensitising agent" is the only kind of claim for industrial injuries disablement benefit when the questions of prescribed disease and prescribed occupation interact.

16 In general, to show that a claimant is in a prescribed occupation (a question previously reserved to the statutory authorities and social security appeal tribunals) it has to be decided whether the claimant is in one of the listed occupations. In the case of this particular form of occupational asthma only, for the purposes of identifying the prescribed occupation it has to be shown that the claimant was exposed at work to an agent that sensitised her or him to asthma - that is, that the claimant has been sensitised to asthma by exposure to agents at work. This is exactly the same question as the question previously called the diagnosis question, (reserved to the medical authorities and medical appeal tribunals). That jurisdictional distinction was the key point in CI 5435 1997, and it forced an artificial division in a single question, between what might be termed a subjective answer to the question "was this a sensitising agent as regards this claimant " and an objective answer to the question "was the claimant exposed to a sensitising agent at work." It does not appear to have been argued that the statutory question was the same as the diagnosis question. The Social Security Act 1998 and regulation 36 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 have now removed the jurisdictional divide.

17 The question here is whether Mr M, on the balance of probabilities, was sensitised to asthma as a result of exposure to identified agents at work. That is only partly answered by asking in some abstract sense whether cement dust is or is not a sensitising agent. In R(I) 8/02, the expert medical evidence was that diesel fumes were irritants not sensitising agents. In CI 5435 1997 there was no medical or other similar evidence, as against allegation, that tobacco smoke was a sensitising agent. And in CI 2543 2002 the evidence was that the claimant had not been sensitised by the alleged sensitising agents. This case is distinguishable from those decisions because in this case there is expert medical evidence that the claimant was sensitised by cement dust at work.

My decision

18 In my view the tribunal erred in law. It decided to analyse the scientific basis of Dr Fishwick's expert report. It started from the premise that the reason for any reaction to cement dust was the chromium content. In other words, it rightly considered whether any constituent of the named substances might be sensitising agents. But it then deduced from its own expertise, but without evidence either in the expert report or elsewhere in the papers, that chromium, which did sensitise, is not usual in cement. It relied on its own expertise to decide that if there had been chromium in the cement then Mr M would have suffered certain medical consequences that he had not in fact suffered. In so doing, it did not consider whether any particular level of chromium might be relevant to this analysis. It concluded that "there was no accepted evidence to indicate that there was a chromium content present in the cement dust to which the Appellant was exposed. The tribunal exercise his (sic) powers of enquiry and did not decide the case on the burden of proof."

19 The enquiries to which the tribunal referred appear to be those to the claimant at the oral hearing. But to that point there was no evidence one way or the other about the chromium content of cement powder. No notice was given to the claimant of these issues, which were not in the papers. Nor was the claimant given a fair opportunity to produce evidence about the chromium content of cement with which he worked. Nor did the tribunal make any other enquires (or, if it did, it did not tell the claimant or set them out in its reasons).

20 The first opportunity that the claimant had of dealing with this was when he read the statement of reasons. His answer, noted above, was to produce clear evidence - because produced from the former employer, a rival, their industry association, and official sources - that there was a chromium element in much cement dust at a level that caused both industry and official concern. The health and safety guidance produced from the former employer states unequivocally and generally of its products at that time: "Contains chromium (VI). May cause allergic reaction." Elsewhere the company also warns: "Hexavalent chromium salts in these cements are soluble and when mixed with water will give rise to a hazardous solution." Perhaps the strongest evidence that chromium is a known element in cement is the British Cement Association circular of 22 June 2004 about the introduction from January 2005 of European Union Directive 2003/53/EC requiring the chromium element in cement to be reduced to no more than 2 parts per million. This led to the Control of Substances Hazardous to Health (Amendment) Regulations 2004 (SI 2004 No 3386), regulation 3. This requires any cement containing more than 2 parts per million of soluble chromium (VI) to bear a warning from 17 January 2005: "Contains chromium (VI). May produce an allergic reaction." Finally, chromium salts are listed in the Health and Safety Executive's list of sensitising agents although they are not listed in the statutory list for D7.

21 I find it difficult when confronted with this evidence to see how the tribunal could reasonably conclude without reference to any external evidence that Dr Fishwick was wrong. And I find the Secretary of State's attempts to argue that the tribunal could be regarded as expert in the constitution of cement to be unconvincing. Even if the tribunal could so conclude, it should not have done so without giving the claimant a fair chance to deal with the point. I must therefore set the tribunal decision aside.

Guidance to the new tribunal

22 It is for the new tribunal to consider afresh the question under appeal. It should beware the double negatives, and wrongful use of negatives, in the case to date. The question is whether the claimant was or was not sensitised by cement dust and/or the other substances named by him in his claim for industrial injuries disablement benefit. Unusually, this is a combined decision on both prescribed occupation and prescribed disease. Implicit in

this question is the further question whether any of the named substances contained any other substance identifiable as a sensitising agent. The evidence from OASIS is that none of the alleged sensitisers are known to be respiratory sensitisers. The evidential value of this answer is not clear as no one appears to have asked OASIS whether its answer deals with the chromium content of cement. There is evidence of the answer that would have been given by the Health and Safety Executive to that question.

23 I see no equivalent evidence for the contention that the substances, and any probable ingredient of them, are known not to be sensitisers. That being so, the decision for the Secretary of State is wrong (that is, if its double negative is not taken at face value; as drafted, it is technically wrong in any event). This is one of the middle group of cases in the "triage" referred to in CI 2543 2002. There is expert evidence that the substances, or one of them, or an ingredient of one of them, sensitised the claimant. There is now evidence that describes a sensitising agent within cement. The question of fact for the tribunal is whether on the balance of probabilities this, or something else, sensitised the claimant. The question therefore resolves itself into whether, in the light of all the evidence and on the balance of probabilities, the claimant was sensitised by all or any of these work-related substances or by some non-work-related agent.

David Williams
Commissioner

01 June 2005

[Signed on the original on the date shown]