Reasons for not adopting a particular
Reasoning for disagreement
Assessment

73/95

Commissioner's File: CI/636/1993

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons given below the decision of the medical appeal tribunal given on 18 February 1993 determining the extent of the claimant's disablement from prescribed disease No. A11 (vibration white finger) as 10% from 1 April 1985 for life, was in my judgment erroneous in law because the tribunal's reasons for their decision were not stated sufficiently clearly. The decision must be set aside and the case reconsidered by a fresh tribunal which must make its own reassessment of the extent of the claimant's disablement.

2. This appeal comes before me as the result of another Commissioner having set aside his own decision dated 3 January 1995 on the appeal, for the reasons given in his ruling dated 6 February 1995 (page 96 in the papers before me). I am not concerned with the reasons or the correspondence that led up to that ruling. However I do note with regret that my brother Commissioner's decision given almost a year after the appeal papers were completed was for some reason not supplied to the Secretary of State by the Court Service until after the further ruling setting it aside, and that there was then a further delay of some 6 months before the case was referred to me on 26 July 1995. Commissioners are quite rightly critical of administrative lapses in the tribunal service when these are brought to their attention and it is only fair to observe that the Court Service appears to have fallen short of its own standards on this occasion.

3. In the circumstances and because of the view I have formed on the merits of the appeal having read through all the original papers and submissions, I propose to deal with the case and determine the appeal at once on the basis of the papers and submissions down to and including the claimant's reply of 7 February 1994, now numbered pages 50 to 51, which confirmed that he had no further observations in view of the Secretary of State's support for the appeal and was not seeking an oral hearing. A substantial quantity of further documents and correspondence has been added to the file since then but I propose to disregard it, as although I have read through it all it does not appear to contain anything

germane to the issue I have to decide. The only exception is a letter dated 4 July 1995 from the Secretary of State's representative to the nominated officer now dealing with this appeal, which contains observations substantially confirming his earlier support for the claimant. These do not appear to me to add any new points which were not covered in the earlier submissions and I do not propose to defer the case any further by formally asking the claimant if he wishes to make yet further observations; but I direct that this letter should be added to the case papers as page 51A, and a copy furnished to the claimant and his representative with my decision so that they can see everything I have taken into account. If either party objects to this way of disposing of the practicalities of the appeal they may apply to me to reconsider within 14 days of the date of issue of this decision.

4. The claimant is a man now aged 63 who worked at Vauxhall Motors for some 18 years between 1963 and 1981 and during a substantial part of that time was engaged in assembly work involving the use of vibrating air tools. This does not appear to have caused him any immediate problems at the time, and he left his employment due to some chest trouble which continues to affect him and is no doubt not helped by the high blood pressure from which he also suffers. It was not until 12 June 1991 that he sought to claim industrial disablement benefit on the ground that his work with the vibrating air tools had left him with a neurovascular condition in the ends of his fingers known as vibration white finger. This condition has been prescribed disease A11 from 1 April 1985.

5. His claim was initially rejected on the basis of a medical officer's opinion, confirmed by a medical board, that he was not suffering from the condition at all as the relevant "episodic blanching" and loss of circulation in his fingers was not present. He appealed to a medical appeal tribunal and produced a consultant surgeon's report dated 12 August 1992 saying that he was in fact suffering from this condition (pages T24-28). The tribunal accepted the diagnosis and gave a determination on 18 February 1993 (pages T38-39) that he had been suffering from it throughout the material time. They then went on to give a separate decision (pages T41-42) determining the extent of the percentage disablement from which he suffered as a result of the loss of faculty from the disease. This they assessed at 10%, for the period from 1 April 1985 for life.

6. It is against that latter decision that the claimant has brought the present appeal, on the ground that the tribunal's reasons for arriving at the assessment were inadequately explained and they did not appear to have addressed adequately the overall effects of his disablement: see pages 44-45. As I have already said, the Secretary of State supports the appeal on the grounds set out in his submission dated 23 December 1993, confirmed in the letter of 4 July 1995 (pages 48-49, 51A). These are briefly that the tribunal's decision as recorded is erroneous in point of law for failure to comply with the statutory requirements as to stating findings of facts and reasons, as confirmed by the Court of Appeal in *Evans, Kitchen and Ors v. Secretary of State*, (unrep. CA 30 July 1993).

7. In my judgment, the criticisms of the tribunal's decision on the disablement assessment are well founded. The tribunal had before it in addition to the reports of the examining medical officer and the adjudicating medical board, the report of the consultant surgeon to which I have already referred, and two further letters from the same consultant

dealing with more general issues on the diagnosis and assessment of disablement from vibration white finger, (pages T17-23, dated 13 January and 30 June 1992).The second of these letters comments that the legislation does not prescribe any scale of percentages for the assessment of disablement from this disease but leaves it at large, (which is what I think is meant by "arbitrary"). It expresses the view that there would be an advantage in having a fixed scale for the disease, and suggests that this should parallel the fixed percentages prescribed under Sch 2 Social Security (General Benefit) Regulations 1982 SI No 1408 for certain types of amputation of parts of a person's fingers, without any loss of bone but with permanent sensory and nerve damage. The scale suggested would yield a total percentage "disability" of 26% where all four fingers of each hand were affected.

8. Before the tribunal the claimant's solicitor made a specific submission that if the tribunal found in favour of the claimant on the diagnosis question (as they in fact did) then this scale proposed in the consultant's letter of 30 June 1992 should be adopted, so as to give an award of 26% in favour of the claimant. Tempering his submission slightly he suggested that the relevant scale put forward in the consultant's letter would yield an award for the claimant of "at least 14% to 20%". This was the only guidance given to the tribunal on the question of assessment as the same consultant's specific report on the claimant had not suggested any percentage for the specific degree of disablement that was present in his individual case, and had not given any reason for omitting to do so.

9. The assessment of the percentage of the particular claimant's disablement in an industrial accident or disease case must always be a matter of medical judgment, for the medical appeal tribunal which is an expert medical body. Under reg. 11 of the General Benefit Regulations certain specified types of injury are to be assessed by reference to the table set out in sch 2 to those regulations in which various types of severe amputation, disfiguration or loss of sight or hearing are rated at 100% and less severe injuries at lower percentages. In any case not falling within these categories, it is provided by reg. 11(8) that the medical authorities *may* [sic] have "such regard as may be appropriate" to the prescribed degrees of disablement in sch 2, but there is no fixed percentage or scale that must be applied. In such cases the assessment is at large, and the guiding principle under paragraph 1(a) of Schedule 6 to the Act is that of a notional comparison with a person of the same age and sex whose physical and mental condition is normal. The method of assessment to be used to reflect such a comparison, and the percentage figure by which the result is expressed in the individual case, are questions for medical, not legal decision. Thus it cannot in my judgment be an error of law *per se* for a tribunal to fail to adopt a particular method of assessment suggested to them, even where it is backed by expert medical opinion.

10. Whether or how far the duty in law to give reasons for their decision extends beyond saying that the particular percentage arrived at is in the medical judgment of the tribunal the fair one on these particular facts must depend on the nature of the individual case and the issues that have been raised in it. It seems to me that the position is correctly summarised by the Commissioner in R(I) 30/61 at para 8: there may well be cases where a mere statement that the tribunal makes an assessment of a particular percentage is in itself a sufficient record, since it implies that they think that is a fair assessment; but in other

cases findings of fact and an explanation of reasons will be needed to show what evidence the tribunal have accepted or rejected as justifying the making of a smaller or larger assessment, since otherwise the claimant will be left guessing as to the basis on which the decision has been arrived at. And in a case where specific submissions backed with expert medical evidence have been addressed to them on the basis of assessment to be used, it will normally be an error in law for the tribunal simply to state their conclusion in the form of a percentage without making it clear to what extent and for what reasons they are accepting or rejecting the suggested basis, since they will not have carried out the general duty to give reasons on a material issue raised before them: see R(I) 18/61 para 13.

11. In the present case it seems to me that the claimant's representative and the Secretary of State are correct in saying that the tribunal failed to give an adequately detailed explanation of the reasons for their arriving at the assessment of 10%. They said simply "we have heard from the claimant and from [his solicitor]. We accept the diagnosis but do not find him to be significantly disabled by his condition". The standard set in R(I) 18/61 para 13 required them in my judgment to go on to deal, if only very briefly, with the specific submission that had been made to them on the way the disablement should be assessed and why they did not consider it right to adopt it. In addition, their comment that "his nocturnal symptoms are not those of vibration white finger" (which appears to relate to evidence of the claimant having suffered an attack of tingling in his fingers which might or might not have been connected with a circulation disorder: see page T40) was not in my view adequate without at least a brief indication of why that evidence was considered irrelevant. As confirmed by the Court of Appeal in *Evans, Kitchen and Ors* (supra) medical appeal tribunals are obliged to give brief reasons for their conclusions, even on matters depending on medical judgment and expertise.

12. I therefore accept the submission that the tribunal's findings of fact and reasons have been insufficiently stated and that some indication of their reasons for rejecting the evidence in favour of a higher assessment should have been given as required by R(I) 18/61 para 13 and reg 31(4) Social Security (Adjudication) Regulations 1986 SI No. 2218. For these reasons, their decision of 18 February 1993 on the disablement assessment was in my judgment erroneous in law and I set it aside.

13. In another decision in case CI/109/94 (also on vibration white finger) I commented that while other forms of loss of faculty from other causes may indeed provide a useful cross-reference for an assessment in prescribed disease cases it must in each case be a matter for medical and not legal judgment how to determine the actual degree of disablement that results from the particular disease of injury suffered by the claimant, and that failure to adopt a specific percentage table where none is laid down is not by itself an error in law. Having reconsidered the point in the light of the facts and submissions in this case I remain of this view, and the comment of the Commissioner in case CI/189/94 (*17/95) that a tribunal "might well find it useful to consider" the percentages set out in sch 2 to the regulations even though they were not directly applicable should not, I think, be read as suggesting any different principle.

14. I therefore allow the appeal and in accordance with s. 48(5) Social Security Administration Act 1992 I set aside the second of the two decisions of the medical appeal tribunal dated 18 February 1993, that is the decision on the disablement issues. I refer the case to a differently constituted medical appeal tribunal for a fresh determination to be made of those issues only, and I direct the fresh tribunal to have regard to any submissions addressed to them on the method of assessment to be adopted for vibration white finger cases generally or this case in particular, and to make their own reasoned decision on the assessment which, as a matter of medical judgment, they consider the correct one.

(Signed)

P L Howell
Commissioner
5 September, 1995