Disablement Benefit - Accident Prior — N/A To Prescribed Disease

RAS/LB/4

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SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [redacted]

Social Security Appeal Tribunal: [redacted]

Case No: [redacted]

1. This is an appeal by the claimant against the decision of the Doncaster social security appeal tribunal given on 23 October 1995. The tribunal disallowed the claimant's appeal against the decision of an adjudication officer, on review, to the effect that the claimant's 20% disablement in respect of an injury to his left hand and the later 10% assessment in respect of pneumoconiosis should be aggregated so as to produce a total assessment of 20% and a disablement pension calculated on that basis.

2. The claimant injured his left hand in an accident at work on 21 January 1990. He claimed disablement benefit and, eventually, the extent of his disablement was assessed at 15% for life rounded up to 20% pursuant to regulation 15B (1) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985. Disablement pension was awarded at the rate appropriate to a 20% assessment. On 9 June 1993 the claimant claimed disablement benefit in respect of prescribed disease D1 (pneumoconiosis). It was accepted that he was entitled to such benefit. The extent of disablement was assessed at 5% from 13 September 1992 to 31 July 1995 and, pursuant to regulation 20(1A) of the 1985 Regulations (Special conditions for disablement benefit in respect of certain respiratory diseases and occupational deafness) disablement pension was payable at the rate appropriate to a 10% assessment. Until the adjudication officer's decision in 1995, to which I have referred, pensions in respect of each disablement were paid at the rates respectively of 20 and 10%.

3. On renewal of the pneumoconiosis award a special medical board on 24 July 1995 assessed disablement at 5% from 1 August 1995 to 31 July 1998. Thereupon an adjudication officer made the decision awarding disablement pension at the total weekly rate of 20%. So, in effect, the claimant's assessment was reduced to nil in respect of the pneumoconiosis award. The tribunal, as I have said, confirmed that decision.

4. The decision of the adjudication officer and then of the tribunal was based on three provisions in Part IV of the 1985 Regulations. The first provides for the aggregation of percentages of disablement and, so far as relevant, reads -

> "15A(1) After the extent of an employed earner's disablement resulting from the relevant disease has been determined, the adjudication officer shall add to the percentage of that disablement the assessed percentage of any present disablement of his resulting from -
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> (a) any accident after 4 July 1948 arising out of and in the course of his employment, being employed earner's employment, or
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> (b) any other relevant disease due to the nature of that employment and developed after 4 July 1948,
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> and in respect of which a disablement gratuity was not paid to him under the Act after a final assessment of disablement.
>
> (2) Not relevant.
>
> (3) This regulation is subject to the provisions of regulation 15B(3)."

The second is regulation 10 which defines, for the purposes of Part IV, "relevant disease" and, so far as relevant, reads -

> "10. In this Part of these regulations, unless the context otherwise requires, the expression "relevant disease" means, in relation to any claim for benefit in respect of a prescribed disease, the prescribed disease in respect of which benefit is claimed ...".

The next is regulation 15B(1) which provides for the rounding up of assessments and reads -

> "15B(1) Subject to the provisions of this regulation, where the assessment of disablement is a percentage between 20 and 100 which is not a multiple of 10, it shall be treated -
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> (a) if it is a multiple of 5, as being the next higher percentage which is a multiple of 10; and

(b) if it is not a multiple of 5 as being the nearest percentage which is a multiple of 10,

and where it is 14% or more but less than 20% it shall be treated as 20%.

(2) In a case to which regulation 15A (aggregation of percentages of disablement) applies, paragraph (1) shall have effect in relation to the aggregate percentage and not in relation to any percentage forming part of the aggregate.

(3) Where an assessment or a reassessment states the degree of disablement due to occupational deafness as less than 20% that percentage shall be disregarded for the purposes of regulation 15A and this regulation."

The adjudication officer, as I have said, produced his 20% disablement pension by reference to those provisions including, in particular, regulation 15B(2) which requires that the rounding up should operate in relation only to the aggregated percentage. If there were no other matters to be taken into account I would have to agree that the adjudication officer and the tribunal dealt with the case correctly in accordance with the provisions referred to. There are however other matters for consideration.

5. Part V of the 1985 Regulations makes special provision for disablement benefit in relation to certain respiratory diseases including pneumoconiosis. I need refer only to regulation 20(1) and (1A) which provide -

"20(1) On a claim for disablement pension in respect of pneumoconiosis, byssinosis or diffuse mesothelioma, section 57(1) shall apply as if for "14%" there was substituted "1%".

(1A) Where on a claim for disablement pension in respect of pneumoconiosis, byssinosis or diffuse mesothelioma, the extent of the disablement is assessed at 1% or more, but less than 20%, disablement pension shall be payable at the 20% rate if the resulting degree of disablement is greater than 10% and if it is not at one-tenth of the 100% rate, with any fraction of a penny being for this purpose treated as a penny."

The effect is that, contrary to the general rule that there is no entitlement to a disablement pension unless the assessed extent of disablement amounts to not less than 14% (see section 57(1) of the Social Security Act 1975 as amended by paragraph 3(1) of Schedule 3 to the Social Security Act 1986; now section 103(1) of the Social Security Contributions and Benefits Act 1992), entitlement to disablement pension in

respect of pneumoconiosis will arise on an assessment of 1%. And, by virtue of regulation 20(1A), an assessment of 5%, as in this case, entitles the claimant to a disablement pension based on an assessment of 10%.

6. Regulations 15A, 15B(1) and (2) and 20(1) and (1A) were put into the 1985 Regulations by regulation 3 of the Social Security (Industrial Injuries and Diseases) Miscellaneous Provisions Regulations 1986 (1986/1561). That regulation, having effect from 1 October 1986, was consequent on the commencement of Schedule 3 to the Social Security Act 1986. By that Schedule a new scheme of entitlement in respect of industrial injuries and diseases was established. It is enough for me to say that prior to 1 October 1986 an assessment of 20% produced a disablement pension and an assessment of not less than 1% but less than 20% produced a disablement gratuity. In brief, the 1986 Act did away with disablement gratuities and raised the 1% threshold to 14%. Then, I think it is fair to guess, it was thought that a claimant who had more than one relevant injury or disease should be given the opportunity of achieving the 14%. Hence the aggregation provision, which had no earlier counterpart in relation to the 1% scheme, in regulation 15A. I say "guess" because Mr Heath, who appeared before me for the adjudication officer, told me that his researches had not revealed any expressed reason or intention in regard to the introduction in 1986 into the 1985 Regulations of the several provisions to which I have referred. I should perhaps add that because SI 1986/1561 was consequent on the 1986 Act, and made within 6 months from the commencement of Schedule 3 to that Act, the proposals of the Regulations were not referred to the Industrial Injuries Advisory Committee so one has nothing from them on the reasons for and intended effect of the provisions.

7. Part V of the 1985 Regulations contains, as I have said, special conditions in relation to certain respiratory diseases and also in relation to occupational deafness, and regulation 20(1) preserves the 1% regime for the respiratory diseases. As Mr Douglass of the National Union of Mineworkers, who appeared before me for the claimant, pointed out the effect of applying the aggregation provision in relation to the assessment in respect of an accident and that in respect of pneumoconiosis was to defeat the special 1% condition contained in regulation 20(1). For my part, I do not think it could have been intended that aggregation, as operated by the adjudication officer in this case, should leave a claimant worse off than he would otherwise have been. It appears to be the case that, if the adjudication officer is right, an assessment for a relevant respiratory disease would be the only case producing a reduction of entitlement on aggregation; that is doubly odd when account is taken of the fact that the aggregation provision appears to have been intended as beneficial to claimants and the special condition for

respiratory diseases is, without any doubt, a beneficial dispensation from the general 14% rule.

8. In his written submissions, following a direction as to various matters, Mr Heath said that prior to September 1993 it was stated in the Adjudication Officer's Guide that aggregation should be applied only if it was to the claimant's advantage. That advice accords with the history and likely intent of the various provisions to which I have referred. However, for reasons which Mr Heath was not able to ascertain, the Guide was amended in 1993 and adjudication officers were advised that aggregation was mandatory in all cases.

9. Mr Heath acknowledged, I think, that the tribunal's decision in this case produced what seemed to be an injustice but he clung to the view, based on the plain words of the aggregation provision, that aggregation was mandatory in this case. He referred to regulation 15B (3) (introduced by amendment having effect from 13 December 1990), which provides for an exception in relation to occupational deafness, and submitted that, if an exception had also been intended for the respiratory diseases, such would have been expressly provided. In fact the "exception" in relation to occupational deafness is a different sort of exception altogether. The effect of regulation 15B (3) is that a claimant cannot satisfy the 20% condition of entitlement in respect of occupational deafness (see regulation 34(6)) by aggregating with some other unrelated disability.

10. Certainly, Mr Heath is right to say that regulation 15A appears, on its plain wording, to apply to this case. I have however come to the conclusion that it does not apply because, by reason of the special conditions which apply to disablement pension arising from respiratory diseases, "relevant disease" in regulation 15(A) (1) does not have the meaning given in regulation 10; the context demands otherwise so as not to defeat the apparent purpose of regulation 20. As I have said, regulations 15A and 15B were together put into the 1985 Regulations in consequence of the Social Security Act 1986. As regulation 15B (2) shows, the two provisions are interconnected. It seems reasonable to me therefore to read "relevant disease" in regulation 15A (1) as referring to the diseases which are subject to the rounding requirements of regulation 15(B) - these being diseases which are subject to the normal 14% rule. A disease which has its own code, as provided by Part V of the Regulations, is not, in my view, a "relevant disease" for the purposes of regulation 15A in Part IV. That view of course ensures that the purpose of Part V is not defeated and happily prevents what would otherwise appear to be a rank injustice. It also accords with the view taken by the Adjudication Officer's Guide following the introduction of the provisions in question.

11. I allow this appeal and set aside the tribunal's decision. My decision in substitution for theirs is that the assessments in this case made first in respect of the accident on 21 January 1990 and then in respect of pneumoconiosis are not to be aggregated; regulations 15A and 15B do not apply. The claimant's entitlement is to be calculated accordingly.

(Signed) R A Sanders
Commissioner

(Date) 28 January 1997