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CI/2543/2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is not erroneous in point of law. Accordingly, I dismiss the appeal.

2. This is the second Commissioner's appeal arising out of a claim for industrial injuries disablement benefit made by the claimant on 22 April 1998 for prescribed disease D7 (occupational asthma). The basis of the claim is that the claimant contracted asthma as a result of his exposure to diesel fumes, grass and potassium salt and glyphosate herbicides (which the claimant identified by their trade names) while working as a local authority tractor driver between 8 October 1984 and 31 March 1996.

3. The medical adviser who examined the claimant on 9 August 2000 had before her a letter from the claimant's general practitioner stating that the claimant had been seen in 1994 for intermittent wheeze, for which a salbutamol inhaler had been prescribed, but that the first record of any significant respiratory problem had been on 27 October 1997, when asthma was confirmed. On the basis of the history given by the claimant and the letter from the general practitioner, the medical adviser concluded that the history of the claimant's asthma was not that of occupational asthma, and that the asthma was constitutional in origin, aggravated by the claimant's occupation. The claim was therefore rejected, and that decision was maintained on reconsideration after the claimant appealed on 25 September 2000. On 9 January 2001 a tribunal dismissed the claimant's appeal, but on 6 August 2001 I allowed the claimant's appeal against the first tribunal's decision because I considered that the reasons given by the tribunal for dismissing the appeal were inadequate.

4. The tribunal which reheard the appeal on 26 July 2002 took a very careful history from the claimant and dealt specifically with each of the issues which I identified when remitting the case for rehearing. The statement of reasons states that "there is no dispute about the fact that the Appellant was exposed to sensitising agents while employed as a tractor driver", and gives the following reasons for concluding, on the balance of probabilities, that the claimant's asthma was not due to exposure to those agents:

> **"First he does not recall having significant symptoms on any particular occasion when he was exposed to fertilisers, grass or diesel fumes. Secondly, there was a period between 1992 when he first started to use the fertilisers and 1994 when he did visit his doctor with intermittent problems and an inhaler was prescribed. Although asthma was not diagnosed at that time we accept that he did have asthma at that date. However, in spite of exposure to the chemicals reducing after 1994 the Appellant's asthma worsened. If the asthma was due to exposure to the chemicals we would have expected it to have improved. It did not. We would have expected that on ceasing work altogether in March of 1996 these symptoms would have improved further, but again they did not. Indeed they worsened and continued to do so despite there being no exposure to the fertilisers. It was a further 18 months before the appellant went to the GP to seek further treatment and asthma was diagnosed. If the Appellant had been suffering from asthma which was occupationally induced then worsening of the condition after exposure ceased altogether would be unusual and we would not expect it."**

5. In support of his appeal to the tribunal, the claimant provided extracts from the scientific literature relating to the health hazards of both the herbicides to which he had been exposed, although there is no indication in the literature of either agent being a respiratory sensitiser. The claimant's case in this appeal is that the glyphosate herbicide was more harmful to the lungs than the potassium salt and that, although the tribunal were correct in holding that the claimant's overall exposure to chemicals reduced after 1994, they failed to take into account information provided by the claimant's employer to the effect that the quantity of glyphosate herbicide used after that date remained the same. The grounds of appeal also complain that it is not clear why the tribunal concluded that the claimant's asthma did not improve after exposure to the chemicals ceased.

6. Part I of Schedule 1 to the Social Security (Industrial Injuries)(Prescribed Diseases) Regulations 1985 originally prescribed disease D7 in terms of exposure to any of the agents specified in column 1, and the prescribed occupation as "any occupation involving exposure to any of the agents set out in column 1...". Following the 1990 report of the Industrial Injuries Advisory Council on occupational asthma (Cm 1244, October 1990), the Regulations were amended by the Social Security (Industrial Injuries)(Prescribed Diseases) Amendment Regulations 1991 to add a number of additional specific sensitising agents, and a new category:

> **"(x) any other sensitising agent (occupational asthma)"**

Under regulation 4(1) of the 1985 Regulations a claimant is entitled to the benefit of the presumption that, unless the contrary is proved, an occupational disease is due to the nature of the occupation which involved exposure to the agent concerned.

7. The October 1990 Industrial Injuries Advisory Council Report considered a number of different ways of extending the prescription for occupational asthma to cover newly discovered or uncommon sensitising agents. The method which was recommended by the Committee and which was subsequently implemented was described as a "dual system" in which:

> **"...a widened prescription of specific agents would be retained alongside individual proof; those agents which most commonly cause occupational asthma would, over time, be identified enabling them to be added to the prescribed list."**
> (para. 7(c))

The report stated (para. 11):

> **"This proposal fulfils our objectives of making the scheme more equitable and flexible while retaining the benefits of including a list of the important causes of occupational asthma which have been recognised for the purposes of prescription. Agents can be included in the list of prescribed causes as new evidence becomes available. The "other sensitising agent inhaled at work" must be specified by the claimant. The inclusion of this category will enable those who develop asthma caused by an agent inhaled at work, but not on the list, to be eligible for compensation rather than, as at present, having to wait for sufficient evidence to accumulate for the specific cause to be prescribed."**

The reasons for the Committee's view that it was necessary for the claimant to specify the responsible sensitising agent is apparent from paragraph 4 of the Report, in which the possible disadvantages of an 'open' system of prescription are discussed:

> **(a) "The distinction between occupational asthma and asthma not occupationally caused might be difficult to establish. This could place the onus of proof on the**

individual and possibly lead to an increase in the number of inhalation challenge tests. These are potentially hazardous and should be undertaken only by those experienced in their use.

(b) Each of the other methods used to diagnose occupational asthma (history, serial measurements of peak flow or airway responsiveness) has potential problems when used for benefit purposes. Acceptance of a diagnosis of occupational asthma based on one or more of those methods without the need to specify the responsible sensitising agent was thought to be insufficient for benefit purposes."

8. A claim for occupational asthma based on exposure to "any other sensitising agent" therefore differs from a claim based on exposure to one of the specified agents, in that it requires proof that the agent cited by the claimant is, in fact, a sensitising agent. As Mr Commissioner Howell QC made clear in *R(I)8/02*, the expression "sensitising agent" when used in this context means a chemical agent which actually causes a person to develop an asthmatic condition, so that it is not enough to show exposure to irritants which may exacerbate an asthmatic condition, but which do not themselves actually cause asthma to develop. When it has been established that asthma was caused by exposure to a sensitising agent, the claimant becomes entitled to the benefit of the presumption in regulation 4(1), in accordance with the analysis of the provisions by Mr Deputy Commissioner White in *CDLA/2162/2000*:

> **"...the presumption to be found in regulation 4(1) of the Prescribed Diseases Regulations only comes into play once there has been a determination that a claimant who suffers from asthma due to exposure to one or more of the listed agents: the prescribed disease set out in column 1 of Schedule 1 to the Prescribed Diseases Regulations. Then, and only then, is it presumed that the prescribed disease is due to the nature of the employed earner's employment in the prescribed occupation: the occupation set out in column 2 of Schedule 1 to the regulations."**

9. The Industrial Injuries Advisory Council recommendations were based on a recognition of the difficulties of making a diagnosis of occupational asthma on the basis of a history and medical tests alone, and the first step in the investigation of a claim based on exposure to "any other sensitising agent" should therefore be to establish whether the agent to which the claimant was exposed is, in fact, a known sensitising agent. If it is established that it is a sensitising agent, further investigation of the claim can proceed in the same way as a claim based on exposure to one of the specified agents. If the agent is known not to be a sensitising agent, the claim can be rejected at that stage and no further investigation will be necessary. If it is not known whether the agent is a sensitising agent, it may be that the issue can be resolved in the claimant's favour on the basis of a full history and medical tests, for example, if the history indicates occupational asthma and there are good scientific grounds for suspecting that the agent in question is a sensitising agent. However, for the reasons given by the Industrial Injuries Advisory Council, investigation of whether the agent specified by the claimant is a known sensitising agent should normally be the first stage.

10. In this case, no consideration was given until the second tribunal hearing to the question of whether the agents to which the claimant was exposed were in fact sensitising agents. Although the tribunal stated that there was no dispute that the claimant was exposed to sensitising agents, the case papers contain no evidence relating to that issue. I therefore directed the Secretary of State's representative to inform me if any of the agents cited by the claimant are known or suspected sensitising agents, and Medical Services have stated that none of the agents are known respiratory sensitisers. Their report is on a pro-forma which is apparently used in cases where a claimant claims exposure to an unrecognised sensitising

agent, suggesting that it is in fact the practice in at least some cases to establish whether an agent to which a claimant has been exposed is a known sensitising agent.

11. I therefore consider that the tribunal were correct to consider whether the agents specified by the claimant were sensitising agents as a separate issue before considering his medical history. Despite the apparent existence of procedures to enable such questions to be investigated, those procedures do not seem to have been followed in this case. The Secretary of State did not at any stage oppose the claim on the basis that the agents cited by the claimant as sensitising agents were not respiratory sensitisers. In those circumstances, I consider that the tribunal were entitled to treat as undisputed the claimant's claim that the agents to which he had been exposed were sensitising agents, although of course it does not follow that a decision maker should reach the same conclusion in respect of the same or similar agents in any other case.

12. On that basis, I do not consider that the tribunal's decision discloses any error of law. It may be that the glyphosate herbicide, to which the claimant was predominantly exposed in the latter period of his employment, was more harmful on inhalation than the potassium salt, but there was no evidence before the tribunal to link the harmful effects of either herbicide when inhaled to its capacity to cause respiratory sensitisation. The tribunal noted that the claimant ceased working for the Council in March 1996 and the letter from the authority produced by the claimant showed that his last exposure to the glyphosate herbicide was on 16 June 1995. The tribunal found that the claimant's asthma worsened until 1997, when according to the claimant's general practitioner, asthma was diagnosed for the first time. I consider that the statement of reasons makes it abundantly clear why the tribunal found that the claimant's condition did not improve after his exposure to herbicides ceased, and that there was ample evidence to support that conclusion.

13. I can therefore find no error of law in the tribunal's decision. Accordingly, my decision is as set out in paragraph 1.

(Signed) **E A L BANO**
Commissioner

(Dated) **15 December 2003**