

Hand Held Vibrating Machine - PDA12
- Mrs. Barbara Gilchrist
JMH/SH/2..

11/97

Commissioner's File: CI/5408/1995

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: Barbara Gilchrist

Social Security Appeal Tribunal: Newcastle

Case No: 1/40/94/11325

1. My decision is that the decision of the SSAT was erroneous in point of law. I set it aside and, in pursuance of the powers in that behalf contained in section 23(7)(i) Administration Act 1992, I substitute my own decision. That decision is that PDA12 is prescribed in relation to the claimant, because the claimant has been employed on or after 5 July 1948 in employed earner's employment in an occupation involving the use of hand-held vibrating tools.

2. This is an appeal with the leave of the Commissioner from the decision of a SSAT dated 24.2.95. The claimant worked as a cleaner until 11.2.94. In the course of her work, she used an industrial buffing machine and claims that thereby she has developed carpal tunnel syndrome - PDA12. The question for determination is whether her occupation was prescribed in relation to that disease.

3. Carpal tunnel syndrome became a prescribed disease as the result of a Report of the Industrial Injuries Advisory Council dated 5 March 1992. On 11.2.94, the prescribed occupation in respect of carpal tunnel syndrome set out in Part I of Schedule 1 to the Prescribed Diseases Regulations 1985 was simply, "Any occupation involving ... the use of hand-held vibrating tools." That description was later re-defined so as to limit the occupation to such involving powered tools whose internal parts vibrated, in effect annulling or qualifying the ratio in CI/227/94 (and CI/474/95). Nothing turns on that in this case. The tool in this case is a buffing machine which produces its own internal vibration which is transmitted to

the operator. The point in this case turns solely on the question whether the buffing machine used by the claimant was "a hand-held vibrating tool". The new description refers to "powered tools" but there is no question that the buffing machine, in this case, was powered. To the extent that this is a decision on what may or may not be a hand-held vibrating tool, it will be relevant, not only concerning the prescribed occupation as defined in 1994, but also to the new definition which took effect as from 24.3.96. The point before me therefore, is not merely academic only.

4. The claimant made a claim for industrial injuries disablement benefit in respect of PDA12 on 24.10.94. The claim was rejected by the AO on the grounds that the disease was not prescribed in relation to the claimant, because she had not been employed on or after 5.7.48 in employed earner's employment in an occupation involving the use of hand-held vibrating tools. The claimant appealed to a SSAT who, on 24/2/95 dismissed her appeal. From that, she appeals with leave to the Commissioner. The Commissioner who first heard this case based his decision on CI/160/94 and, accordingly, dismissed the appeal. However, when that Commissioner decided the appeal, he had not before him two other decisions which, to an extent disagreed with CI/160/94, namely CI/696/94 and CI/514/95, both decisions of Mr Commissioner Goodman. The Commissioner, therefore, set aside his decision in this case. The appeal, thus, now comes before me for my decision.

5. Before the first Commissioner, the AO did not support the appeal, relying on CI/160/94. I directed that copies of CI/696/94 and CI/514/95 should be sent to the claimant and to the AO for comment and further submission. The claimant does not appear to have replied and must now be well out of time. On the other hand, the AO did reply and did so in these terms:-

"In his decisions [CI/696/94 and CI/514/95] the Commissioner decided that a buffing machine did satisfy the prescription test where there was a considerable and constant grip needed to hold the clutch and to steer a heavy machine. Having re-considered the case in the light of this decision the adjudication officer now wishes to withdraw the appeal against the tribunal decision of 24.2.95."

It was not, of course, the AO's appeal so there could be no question of the AO withdrawing it. By the AO's reference to withdrawal, however, I take it to mean that the AO now supports the appeal. But even if it had been a case of withdrawal of an appeal, such would have required leave under regulation 20(2) of the Commissioners Procedure Regulations and, in the circumstances of this case, where there is a substantive issue for decision, I would have refused leave.

6. Before the tribunal, it was accepted that the claimant suffered from PDA12, and the only issue was whether she had used "hand-held vibrating tools". In front of the Tribunal, her representative described the machine in question thus:-

"Buffing machine is large and heavy and is portable although it rests on floor. User needs to grip firmly the handles and push and pull it across the floor. Handle has to be held firmly and started with button and "dead man's handle"."

And then the representative submitted:-

"Distinguishable with sewing machining in CI/160/1994 which was static and hands merely rested on it. Just because it cannot be lifted up does not make it not portable."

This is not as comprehensive a description of the machine as might have been desired, but, from that, I take it to mean that the machine is heavy, and that it is not easily or readily portable, probably requiring more than one person actually to lift it. Indeed it was probably not designed to be portable in the sense of being easily carried around, since its weight may well be a significant factor in its efficiency in buffing. It is not an essential part of its actual operation that it has to be lifted at all.

The tribunal found:-

"As a matter of fact, the tribunal found that the buffing machine is a hand controlled machine which works by rotary motion which may have some incidental vibration, but no more than that."

However, the tribunal did not base their decision on the fact that the level of vibration emitted by the machine was negligible and could be disregarded under the de minimis rule, for in their reasons they said:-

"[The definition] does not extend to the use of tools of any kind in which some parts of the operation may involve hand steadying or control. The description of the machine by the appellant clearly indicates that it revolves freely on the floor whilst merely guided by hand."

7. In passing, I should note that an initial submission of the AO that the use of the machine by the claimant in this case was so infrequent so as to be negligible was, on the authority of R(I) 4/53, para 11, withdrawn, and in my view, rightly withdrawn. I need not consider that point.

8. I now turn to the authorities.

- (i) CI/160/94 concerned a fixed sewing machine. The Commissioner rejected an argument that any vibrating tool fell within the terms of PDA12 if it could be shown that any part of it was supported or held by the hand of the operator.

In para 14, she said:-

"The expression, is however susceptible to the narrower interpretation that the expression "hand-held" is descriptive of the actual tool in function and not of the use made of the tool by the claimant. On this construction as submitted by Mr Jones it therefore applies only to the particular kind of vibrating tool which is portable and held manually. It does not extend to the use of tools of any kind in which some part of the operation may involve hand steadying or control."

Thus, it appears to me that the Commissioner was making two points:-

- (a) The description of the tool in column 2 of Part I of Schedule 1 of the Regulations is a description of the actual tool in function and not of the use made of the tool. I would not disagree with that statement. Nevertheless, it is, in my view, important to keep in mind that under the regulations it is the occupation which is prescribed, and, that means that the reason why an occupation is prescribed is closely and intimately tied in with the tool concerned, and the effect that the use of that tool has on its operator.
- (b) The tool must be portable and held manually: a tool which merely involves hand steadying for control is not within the description. "Portable" is defined in the OED as "capable of being carried by hand, capable of being moved from place to place, easily carried or conveyed". However in the context of this case and in the consideration of what is meant by "a hand-held tool", I have little doubt that the Commissioner in CI/160/94 used the word "portable" in the sense namely "capable of being carried by hand" or "easily carried or conveyed".
- (iii) CIS/156/94. This also concerned a fixed sewing machine. In this case, the Commissioner agreed with CI/160/94 and thought that a tool is not "hand-held" simply because it required the application of a hand to be used, though at the

same time he expressed the view that the criterion of portability might have to be reconsidered.

- (iv) Finally, there are CI/696/94 followed by the same Commissioner in CI/514/95. The first case involved an industrial rotary scrubbing machine, used for scrubbing concrete floors, and the second, a buffing machine which could not have been significantly dissimilar to the buffing machine in this case. The Commissioner decided that the machine in each case was a hand held vibrating tool. While protesting that he was only "supplementing" the decision in CI/160/94, clearly the Commissioner thought that a tool qualified if it was moveable and had to be moved to do its job though not necessarily being "portable" in the sense used by the Commissioner in CI/160/94. He laid stress on the considerable grip of the hand needed to operate the machine. Neither machine in those cases could fairly be termed "portable" and there is therefore, a difference in principle between the dictum of the Commissioner CI/160/94, where she applied the criterion of portability, and, in these two cases, where the Commissioner did not. That dictum was not strictly speaking, essential to the decision: what was essential to the decision was that the tool in question must not, as it was in that case, to be fixed.

9. At the dangerous risk of over-simplification, I pose this question, "To qualify, does the machine have to be portable, or, does it only have to be moveable for the purposes of operation and hand operated to effect and control its movements?" It is clear from all the cases above that a fixed or static tool would not suffice.

10. In the first instance, I wondered whether any assistance could be usefully derived from a dictionary reference. In the full edition of the OED, various definitions of "hand" in this sort of context can be found, and it comes as no surprise that, in suitable circumstances, it can both qualify nouns so to mean both "portable" and "hand-operated". One definition is, "That is or may be held or carried in the hand, portable", and gives as an example "hand-baggage". But then another definition is given, "With the hand, by hand esp. as distinguished from what is done by machinery." and in Chambers Dictionary (1993) "hand-held" is defined as "Held in the hands rather than mounted on some support". These definitions might at first sight tend to support the view of "portability" as a necessary criterion but, in my view, they do not really address the problems posed in the particular circumstances of

this case. Words are not to be construed, as it were, in vacuo, but always in the context in which they are found. I am not, therefore, sure how far the dictionary references are of very much assistance in this case, but there they are, for what they are worth. The Chambers definition comes closest to the "portability" concept, but, while the buffing machine may, in a sense, be held in the hand, it is not mounted on a support since it is self-supporting. But, for instance, a pneumatic drill, though portable by a strong man, is, when in action, self-supporting too. Nevertheless it is, in my view, a view shared by the Commissioner in para 9 of CI/696/94, clearly "a hand-held tool".

11. It is clearly relevant to seek to discover what was the mischief which gave rise to the making of carpal tunnel syndrome a prescribed disease and the reasons why. As all the Commissioners accepted, in the cases I have referred to above, it is permissible to look at the relevant Report of the Advisory Council. The relevant report was that presented by the Chairman on 5 March 1992, as a result of which, in the defined circumstances, carpal tunnel syndrome became a prescribed disease. I have a copy of that Report in front of me. When looking at that Report, it is, however, quite inappropriate to apply the same rules and standards of construction as are applied to Statutes, deeds, wills and the like. The Report is not a legal document. It was not drafted by lawyers. It is merely an advisory report for the benefit of the Secretary of State who might, or might not, act on it as he chose.

In his introductory letter to the Secretary of State, the chairman of the Council whose Report it was stated:-

"Only for one condition, carpal tunnel syndrome associated with the use of hand-held vibrating tools is the epidemiological evidence strong enough to satisfy our stringent demands. Consequently, we recommend to you that this should be added to the list."

And so it was.

In para 5, the Report states, having set out section 76(2) of the 1975 Act,

"In other words, a disease can only be prescribed if there is a recognised risk to workers in a certain occupation that the link between disease and occupation can be reasonably presumed or established in individual cases."

The report continues:-

(i) Had I reached the opposite conclusion, I would have been in direct disagreement with the actual decisions in CI/696/94 and CI/514/95, whereas I disagree with the Commissioner in CI/160/64 only on the necessity for portability, which was in my view contained in a dictum which, arguably, was, strictly speaking, only obiter, and not essential to her actual decision vis that the fixed machine in that case is not "hand-held". Nevertheless, it is a dictum which has to be treated with great respect.

(ii) The decisions in CI/696/94 and CI/514/95 are dated 27.9.95. The Department took steps generally to re-define "hand-held vibrating tools" following the decision in CI/227/94 - see also CI/474/95. Had they been dissatisfied with the decisions in CI/696/94 and CI/514/95, they could well have taken that opportunity, then and there, to have clarified the position. That they chose not to do so, seems to me to infer that the effect of those cases is accepted.

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(Signed)

J M Henty
Commissioner

(Date)

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