PD A4 - 'Other Repetitive Movements' Cut Down By Preceding Words

CBS

54/96

DGR/SH/2W/SAR

Commissioner's File: CI/6942/1995

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

1. For the reasons set out below, the decision of the social security appeal tribunal given on 2 May 1995 is not erroneous in point of law, and accordingly this appeal fails.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 2 May 1995. Although the adjudication officer now concerned in his written submissions supported the appeal, I found such submissions unpersuasive, and accordingly directed an oral hearing. At that hearing the claimant, who was present, was represented by Ms D Moulton of the Citizens Advice Bureau, whilst the adjudication officer appeared by Mr J Heath of the Solicitor's Office of the Department of Social Security. Initially Mr Heath was inclined to support the written submission of the Adjudication Officer now concerned, but after having in his oral submissions to me analysed the authorities, he reneged therefrom, and accepted that the tribunal had not erred in point of law.

3. On 17 October 1994 a claim form BI100 was received from the claimant claiming disablement benefit in respect of Prescribed Disease No. A4 known as "cramp of the hand or forearm due to repetitive movements". The claimant stated that his occupation, during the course of which he had contracted this condition, had been that of an analytical chemist. On 30 November 1994 a form BI74 was sent to the employer asking if the occupation involved "prolonged periods of handwriting, typing or other repetitive movements of the fingers, hand or arm". On 6 December 1994 the employer

replied in the negative. On 9 December 1994 the adjudication officer disallowed the claim. In due course, the claimant appealed to the tribunal, who in the event upheld the adjudication officer.

4. The tribunal made the following findings of facts:-

> "1. The appellant worked as an analytical chemist for 40 years. This work was laboratory bench work primarily involving the filtration and titration of chemicals and metals.
>
> 2. The appellant's description of his work as stated in the evidence and the finger, hand and wrist movements that it entailed and their frequency were accepted. This indicated some 300 movements in each hand over a 4 hour period or about 75 movements in each hand per hour. Although the movements .... were repetitive and carried out over a prolonged period they were not of the requisite intensity/frequency to compare with handwriting or typing and therefore the appellant's employment was not an occupation meeting the requirements listed opposite A4 of Schedule 1 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985."

The tribunal gave as the reasons for their decision the following:-

> "The burden of proving that his occupation met the requirements opposite A4 of Schedule 1 to the 1985 Regulations.... regarding 'prolonged periods of handwriting, typing or other repetitive movements of the fingers, hand or arm' was on the appellant (R(I) 32/61) and in the view of the tribunal, he had not discharged that burden. The expression 'other repetitive movements etc. ...' had to be read in conjunction with handwriting and typing ('ejusdem generis'). These were intensive actions with constant rapid movement. Manual assembly workers on production lines (of a type fast vanishing) had been held to meet the requirement but the repetitive movements in such cases were, like typing, repeated in seconds. In the appellant's case, on his evidence, each hand moved on average once in every 48 seconds - probably just as well in view of the accuracy required. The tribunal noted that the employing company took the same view. Regulation 2(a) and Schedule 1 (A4) of the above mentioned Regulations applied."

I see nothing wrong in law with the tribunal's decision.

5. The factual position would not appear to be in issue. What was crucial in this case was whether the "ejusdem generis" rule applied, and, if so, whether its effect was to

take the repetitive movements, to which the claimant was subject, out of the definition contained in the second column of paragraph A4 of Schedule 1 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 [S.I. 1985 No. 967].

6. For the claimant to succeed, he has to show that he was, during the relevant period, in an occupation involving:-

> "Prolonged periods of handwriting, typing or other repetitive movements of the fingers, hand or arm."

It is to be noted that the draftsman has chosen to refer to repetitive movements in the context of handwriting and typing. What is the effect of this? Mr Heath very helpfully drew my attention to various observations made by Mr F A R Bennion in his book "Statutory Interpretation". At page 853 the author said as follows:-

> "A statutory term is recognised by associated words. The Latin maximum noscitur a sociis states this contextual principle, whereby a word or phrase is not to be construed as if it stood alone but in the light of its surroundings. While of general application and validity, the maxim has given rise to particular precepts such as the ejusdem generis principle and the rank principle."

At page 858 the author goes on to explain the ejusdem generis rule. He says as follows:-

> "The latin words ejusdem generis (of the same kind or nature), have been attached to a principle of construction whereby wide words associated in the context with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string or genus- describing terms followed by a wider residuary or sweeping-up words."

Later Mr Bennion says at page 860:-

> "(1) For the ejusdem generis principle to apply there must be a sufficient indication of a category that can properly be described as a class or genus, even though not specified as such in the enactment. Furthermore the genus must be narrower than the general word that it is said to regulate.
>
> (2) The nature of the genus is gathered by implication from the express words which suggest it .... Usually these consist of a list or string of substantives or adjectives ..."

7. Manifestly, the tribunal applied the ejusdem generis rule to the prescribed occupation set out in the second column of paragraph A4. They considered that the genus-describing words "handwriting" and "typing" restricted the more general words "repetitive movements of the fingers, hand or arm". They took the view that the prescribed occupation was not wide enough to include all repetitive movements of whatever kind, but was restricted by the ejusdem generis rule to the kind of repetitive movements associated with handwriting or typing. They took the view that these movements involved a particular intensity and frequency, not to be found in the case of the particular activities undertaken by the claimant. If a person is typing he or she is continually moving the fingers. Likewise, if someone is writing, he or she is continually using the fingers. Of course, he or she may stop from time to time, but so long as the handwriting or typing process is being continued, the movement is intense or frequent. In contrast, although the tribunal considered, on the evidence, that the claimant's movements were repetitive, the degree and nature thereof were not compatible with what was experienced in handwriting or typing. Moreover, they were entitled, on the evidence before them, to reach that conclusion. But, on that basis, did the ejusdem generis rule apply, and take the claimant out of the prescribed occupation?

8. In my judgment, this is a clear case where the ejusdem generis rule does apply. The generality of the description "other repetitive movements" has been cut down by the characteristics associated with the specific activities of handwriting and typing, and as a result the extent of the prescribed occupation has to be construed accordingly.

9. Mr Heath drew my attention to Prescribed Disease A8 (traumatic inflammation of the tendons of the hand or forearm, or of the associated tendon sheaths), and pointed out that the relevant prescribed occupation was "manual labour, or frequent or repeated movements of the hand or wrist". Mr Heath stated that, in that case, the repeated movements were at large, and were in no way cut down. The fact that similar language was not used in the case of the occupation relevant to Prescribed Disease A4 indicated that the draftsman had in mind some restriction on the type of repetitive movements to be included in the occupation, and the restriction was by reference to the specific activities of handwriting and typing.

10. Prescribed Disease A4 was introduced in 1959 by the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations 1959 at paragraph 28 of Schedule 1 thereto. It arose as a direct consequence of IIAC'S report of 1958. At paragraphs 32 and 33 of that report the authors say as follows:-

> "32. .... it is clear that technological changes since the diseases [telegraphist's, writer's and twister's

cramps] were added to the Schedule under the Workmen's Compensation Scheme (the first in 1908, the last in 1922) have brought into being many operations requiring controlled skill and repetitive movements of the hands or forearm which can give rise to the conditions, for instance the spread of the now ubiquitous typewriter and the continuing increase in the use of keyboard controlled machines for various purposes. We were also told that the identical condition had been observed in men engaged in firing metal. Equally the occupations now associated with the conditions in the description of the diseases have declined in importance, for example the use of the manually operated Morse-key.

33. It appears to us that the need is for a description of these disorders which would avoid reference to specific processes. We consulted a specialist in neurology to assist us in our search for a formula which would be sufficiently precise to enable the conditions to be distinguished with reasonable certainty as occupational in origin. Our recommendation is that the three 'cramps' at present prescribed should be replaced by one description 'cramp of the hand or forearm due to repetitive movements'. The occupational cover recommended is 'Any occupation involving prolonged periods of handwriting, typing or other repetitive movements of the fingers, hand or arm;. We consider this should cover the three forms of cramp at present prescribed as well as affording cover to typists, linotype operators and other workers whose work entails repetitive movements."

It would seem to me that the compilers of the report had predominantly in mind the users of keyboard machines and those engaged in analogous occupations. The prescription was not to be available at large to all those engaged in repetitive work.

11. Mr Heath also referred to me several reports of cases involving repetitive strain injury, but as they did not fall within the social security legislation, they were of no real assistance to me.

12. Finally, I should mention that the ejusdem generis rule, like all linguistic canons of constructions, applies only where the contrary intention does not appear. In the present case I see nothing to indicate that the rule was not intended to apply.

13. It follows from what has been said above that the tribunal correctly construed the effect of the prescribed occupation applicable to Prescribed Disease A4, and were entitled on the evidence to conclude that the claimant had not been engaged in that occupation. Accordingly, the tribunal did not err in point of law, and I have no option but to dismiss this appeal.

(Signed)

D.G. RICE
Commissioner

(Date) 8 AUG 1996