

Successor Benefit - Industrial Accident -
with Contribution "Account"

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Commissioner's File: CS/102/91

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Doris Martin (Mrs)

Appeal Tribunal: Truro

Case No: 333/01903

1. My decision is that -

- (a) the unanimous decision of the Truro social security appeal tribunal given on 17 February 1988 is erroneous in point of law and is accordingly set aside;
- (b) sickness benefit is payable to the claimant for the inclusive period from 20 February 1987 to 9 February 1988 because she sustained personal injury arising out of and in the course of her employment, which constitutes an industrial accident, and in consequence thereof she has been since the aforesaid date incapable of work.

2. The claimant, to whom I shall refer as Mrs M, appeals with my leave against the decision of the tribunal disallowing her appeal against the decision of the adjudication officer, issued on 26 November 1987, that sickness benefit was not payable to her for the inclusive period from 20 February to 14 December 1987 because she was over pensionable age, had not retired but would not have been entitled to a Category A pension if she had retired and made the necessary claim, and further because contribution conditions could not be taken to be satisfied since her incapacity was not the result of an industrial accident because it had not been established that there had been either -

- (i) an event which in itself was identifiable as an accident, or
- (ii) a particular occasion or occasions on which personal injury had been suffered by Mrs M which would constitute an accident.

The adjudication officer further referred to the tribunal the question whether sickness benefit was payable to Mrs M for the inclusive period from 15 December 1987 to 9 February 1988.

3. Mrs M, who is now aged 66, was employed for some 6 years up

to December 1986 as a sewing machinist for a firm of launderers and dry cleaners. She worked in a room situated directly above a dry cleaning machine, in which the solvent used was perchlorethylene. At about the end of June 1986 Mrs M began to have giddy spells lasting 10 minutes or so, and in early July she also experienced nausea and the sensation of her "heart pounding". Later that month, when her symptoms persisted, she was sent home and she did not return to work until some 16 weeks later, on 1 December 1986. Her symptoms immediately returned, she was sent home again and has not worked since. Mrs M became anxious, developed agoraphobic symptoms and received psychiatric treatment, to which she responded well. On 27 March 1987 Mrs M applied for a declaration that she had sustained an industrial accident, namely exposure to toxic solvent fumes emanating from a broken seal on the dry cleaning machine, in respect of which she sought sickness benefit.

4. This matter has been investigated with great thoroughness. All interested - or potentially interested parties - have been interviewed and statements taken from them. A factory inspector who visited the firm's premises on 22 January 1987 "noted a gap in the loading hatch seal" on the dry cleaning machine and measured the concentrations of perchlorethylene at various times in the surrounding area, including the room in which Mrs M had worked. Medical reports were obtained from Mrs M's general practitioner, the consultant psychiatrist who was treating her, and the consultant physician who had examined her in connection with a civil claim for damages she was making against her former employers (and which was subsequently settled).

5. On 26 November 1987 the adjudication officer decided that sickness benefit was not payable to Mrs M for the reasons set out in paragraph 2 above. There is not, as I understand it, any dispute about the law, which is set out in paragraphs 3 to 6 of the adjudication officer's submission to the tribunal on form AT2 and in paragraph 5 of the submission dated 21 February 1992 by the adjudication officer now concerned with the case. It suffices to say that for someone in Mrs M's position, that is to say, who is unable to satisfy the contribution conditions - which is not in dispute - , to succeed in a claim for sickness benefit under section 50A of the Social Security Act 1975 (now section 102 of the Social Security Contributions and Benefits Act 1992), it is necessary for her to show that she is incapable of work - which in the instant case is also not disputed - and that that such incapacity is the result of personal injury arising out of and in the course of her employment.

6. Mrs M appealed and on 17 February 1988 the tribunal confirmed the adjudication officer's decision and, in respect of the reference, held that sickness benefit was not payable for the period from 15 December 1987 to 9 February 1988. They gave as their reasons for their decision -

"In order to succeed in her claim the claimant has to establish firstly that she has become sick or injured,

secondly that there has been an industrial accident and thirdly, that her illness or injury is a direct result of the industrial accident. In this case the Tribunal are invited to find that sometime between the end of June and July 1986 something occurred which gave rise to a significant increase in the level of toxic fumes entering the area where the claimant worked. The Tribunal were not prepared to accept that the occasion of Mrs [M] becoming ill followed by the discovery in January 1987, some 6 months later, of the gap in the loading hatch seal of the dry cleaning machine, provided sufficient evidence to enable them to make a finding that there had been a specific incident around June or July 1986 which could be classed as an accident which gave rise to a significant increase in the toxic fumes entering her work area. In view of this finding the Tribunal did not consider it necessary to make any findings as to whether there had been a significant increase in toxic fumes in the claimant's work area in the June/July 1986 period, or whether her present condition is a direct result of exposure to toxic fumes."

7. The tribunal's decision is challenged on Mrs M's behalf by her representatives, the Cornwall Welfare Rights Unit, on the basis that the medical evidence showed that Mrs M's incapacity was the result neither of hypertension nor her medication, that the tribunal failed to deal adequately with the question of increase in the fume level which, in view of the later discovery of the broken seal on the machine, it could properly be inferred was present at the end of June 1986 and that the tribunal's decision was accordingly erroneous. Further, it is submitted that, while injury resulting from long-standing continuous exposure to a harmful substance constitutes, as a matter of law, a "process" rather than an accident, there is in the instant case sufficient evidence to warrant a finding of an event, namely a significant increase in toxicity, at the end of June 1986 which would constitute an industrial accident and that I should substitute my own decision to that effect.

8. I am conscious of the obvious care with which the tribunal dealt with this matter. However, I am satisfied that they misdirected themselves as to what could constitute an event, or series of events giving rise to an industrial accident and, in that connection, I am of course aware that they did not and, indeed, could not have had the assistance of R(I) 6/91, a decision which was not given until 16 July 1990, some 2¹/₂ years after that in the present case, which has reinforced me in the view I hold.

9. It would appear that Mrs M had complained about the smell of the solvent on two or three occasions over the years but, as I understand it, she then suffered no ill effects. However, there was plainly a dramatic change at the end of June 1986 when she began to experience giddiness and nausea. The helpful report from her general practitioner effectively rules out the treatment she had been receiving for hypertension for many years and

without adverse reaction as being responsible for her symptoms, and the consultant physician, in his very clear report, was of the opinion that -

"The symptoms of giddiness and nausea ... are compatible with solvent intoxication ... "

and that her tachycardia was probably the result of anxiety occasioned by her becoming intoxicated rather than a direct result of the solvent upon her heart. Further, the consultant psychiatrist's view was that "exposure to the toxic fumes at work was the likely provoking factor" in her anxiety and agoraphobia. In addition to the factory inspector's report I also now have before me, among the documents relating to Mrs M's civil action, which were produced pursuant to my direction of 12 November 1991, a report from a firm of Consulting Forensic Engineers.

10. This is a case in which I clearly can and should substitute my own decision under section 23(7)(a)(ii) of the Social Security Administration Act 1992. Taking all the above evidence into account it seems to me plain there was a sudden and significant increase in the concentration of solvent fumes at Mrs M's workplace towards the end of June 1986 which, in the light of subsequent findings, it is only reasonable to infer were the result of the defective seal on the dry cleaning machine. In my judgment there were specific events at the end of June, the beginning of July and the beginning of December 1986 - the precise dates are immaterial - when, in consequence of that broken seal, Mrs M sustained personal injury, namely solvent intoxication. There can be no dispute that that occurred during and arose out of and in the course of her employment, and it is common ground that she was thereafter incapable of work. It follows that Mrs M fulfilled the conditions of section 50A of the 1975 Act entitling her to sickness benefit during the period of her incapacity. Accordingly I give the decision which is set out in paragraph 1(b) above.

11. For the sake of completeness I should add that intoxication of the nature suffered by Mrs M is not a prescribed disease under the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985.

12. The claimant's appeal is allowed.

(Signed) M H Johnson
Commissioner

Date: 23 April 1993