APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

Meaning of "disability" and "loss of faculty"—causation—reasons for decision

The claimant suffered a blow on the head in an industrial accident and subsequently developed symptoms which led to the diagnosis that she was suffering from multiple sclerosis. A Medical Appeal Tribunal accepted the diagnosis of multiple sclerosis and that it was precipitated by the industrial accident. In their decision they said "However, in our view the constitutional liability to develop the condition must have been present prior to the relevant accident and we regard this as a positive pre-existing disability". They then went on to assess the claimant's disability at 15% overall and offset 10% in respect of the constitutional liability to multiple sclerosis. They also said "In our opinion any subsequent deterioration in the claimant's condition will be attributable to the natural history of the disease and not to any direct consequence of the relevant accident".

The Commissioner, allowing the claimant's appeal, *held*.

(i) the Tribunal had confused "disability" with a "loss of faculty" and had made an offset for something which was not a disability (paras 7–12);

(ii) it is not necessary that deterioration should be a *direct* consequence of the accident (para 16); and

(iii) they had failed to give adequate reasons for their conclusions

1. This is an appeal made by the claimant with my leave from the decision of a Medical Appeal Tribunal dated 22 August 1978.

The appeal is allowed.

2. I have heard the appeal at an oral hearing for which the claimant's solicitor submitted written representations, but at which the claimant did not attend and was not represented. The Secretary of State was represented by Mr J. P. Canlin of the solicitor's office of the Department of Health and Social Security, and I am indebted to him for his assistance.

3. I will refer to the decision under appeal as "the Tribunal Decision" and to the Tribunal which gave it as "the Tribunal".

4. The claimant is a married woman now aged 34. On 28 February 1977 she received a blow on the head in an industrial accident, and subsequently developed symptoms which led to the diagnosis that she was suffering from multiple sclerosis. On 7 November 1977 a medical board made a final assessment of her disablement of 10 per cent for the period 28 August 1977 to 27 August 1978, and the case was then referred to the Tribunal on her appeal.

5. The Tribunal did not confirm the medical board's decision but awarded to the claimant a disablement assessment of 5 per cent for life from 28 August 1977, arriving at this percentage by means of the offset mentioned below. Their reasons are as follows:—

> "We have noted the reports from Prof J. Marshall dated 29 September 1977 and 10 January 1978 and that from Prof D. A. Shaw dated 8 July 1978 with which we largely agree.
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> We now find no convincing abnormal neurological signs on examination except for a generalised decrease in the deep tendon reflexes. There is weakness of grip in right hand and of left leg, but this is plainly of hysterical type and in our view is due to constitutional factors unrelated to relevant accident. Nevertheless we accept the diagnosis of multiple sclerosis now in partial remission and we accept

that the condition was precipitated by the accident of 28.2.77. However, in our view the constitutional liability to develop the condition must have been present prior to the relevant accident and we regard this as a positive pre-existing disability.

We assess overall at 15% for life, offsetting 10%, for the constitutional liability to multiple sclerosis. In our opinion any subsequent deterioration in the claimant's condition will be attributable to the natural history of the disease and not to any direct consequence of the relevant accident."

6. The Secretary of State conceded that the Tribunal Decision is erroneous in point of law and Mr Canlin repeated the concession at the oral hearing. The concession is rightly made and in order to explain it I must describe at some length the law governing the assessment of disablement benefit.

7. That law is found in sections 50, 57 and 108 of, and Schedule 8 to, the Social Security Act 1975 ("the Act") and regulation 2 of the Social Security (Industrial Injuries) (Benefit) Regulations 1975 [S.I. 1975 No 559] ("the Benefit Regulations"). Section 57(1) provides that an employed earner "shall be entitled to disablement benefit if he suffers as the result of the relevant accident from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 1 per cent". Schedule 8 of the Act lays down the general principles according to which the extent of disablement is to be assessed but is subject to regulation 2 of the Benefit Regulations, of which the first three paragraphs read as follows:—

"2.—(1) Schedule 8 to the Act (general principles relating to the assessment of the extent of disablement) shall have effect subject to the provisions of this regulation.

(2) When the extent of disablement is being assessed for the purposes of section 57, any disabilities which, though resulting from the relevant loss of faculty, also result, or without the relevant accident might have been expected to result, from a cause other than the relevant accident (hereafter in this regulation referred to as "the other effective cause") shall only be taken into account subject to and in accordance with the following provisions of this regulation.

(3) Any assessment of the extent of disablement made by reference to any disability to which paragraph (2) applies, in a case where the other effective cause is a congenital defect or is an injury or disease received or contracted before the relevant accident, shall take account of all such disablement except to the extent to which the claimant would have been subject thereto during the period taken into account by the assessment if the relevant accident had not occurred."

8. In the above quotation, and also in the Act itself, the three terms "loss of faculty", "disability" and "disablement" are used. In some contexts these could be synonymous, but in the relevant statutory provisions each is used to denote a concept distinct from that denoted by either of the others. "Loss of faculty" means a loss of power or function of an organ of the body. It is not itself a disability but is a cause, actual or potential, of one or more disabilities. "Disability" means inability, total or partial, to perform a normal bodily or mental process. And "disablement" is the sum total of all the separate disabilities from which the person concerned suffers as the result of the relevant industrial accident. Authority for these definitions is to be found in the speeches of Lord Diplock and Lord Simon of Glaisdale in

Jones v Secretary of State for Social Services, Hudson v Same [1972] A.C. 944 at pp 1010C and 1019F: see also the supplement to the Commissioner's reported Decision R(I) 3/69 at pp 200 and 214.

9. Once the definitions explained in the preceding paragraph are understood, regulation 2(2) and (3) of the Benefit Regulations require no further interpretation. However, I will summarise their legal effect so far as material to the present appeal. They provide as follows:—

(a) They apply to cases of dual causation in which the accident is one cause of disabilities and the other cause is "a congenital defect" or "an injury or disease received or contracted before the relevant accident".

(b) In such a case the only power to make an offset conferred on the medical authorities is for a disability, not for a constitutional condition, a personality defect or anything else which is not a disability.

(c) In such a case, also, the power to offset is further limited in that an offset may only be made for a disability from which the person would have suffered even if the relevant accident had never occurred.

It may yet be questioned what constitutes "a congenital defect". I attempted a description of this condition in paragraph 22 of the reported Decision R(I) 13/75 in the following passage:—

> "...In the context of regulation 2(3) I do not think that congenital should receive its primary meaning, which is "begotten" or "born with"; see the Shorter Oxford English Dictionary. In my view, the word is used in this regulation in a rather wider sense. I think that it must be taken to mean "inherent" or "constitutional", that is to say that it refers to a defect which is a natural constituent of the person's make-up whether physical or mental..."

So far as I know that passage has never been criticised by a Commissioner or challenged by the Secretary of State; and I have not since changed my view. The only alteration I would make in the quoted passage is to substitute for "'begotten' or 'born with'" the phrase "dating from birth".

10. As I understand the findings of fact stated or implied in the Tribunal's reasons, they held that the cause of the claimant's development of multiple sclerosis was a "constitutional liability to develop the condition". In my view that constitutional liability is a "congenital defect" within the meaning of regulation 2(3). Presumably it dated from birth and would be so even if the strictest definition of the phrase were adopted. The Tribunal also held that the claimant's industrial accident precipitated the onset of the disease, so that the claimant's case is just such a dual causation case as regulation 2(2) and (3) are designed to meet.

11. The Tribunal asserted that the claimant's constitutional liability to develop multiple sclerosis was a "positive pre-existing disability". I think that they devised this phrase after reading paragraph 25 of the Commissioner's reported Decision R(I) 2/74. The relevant passage is not authority for their finding. On the contrary, it contradicts the finding. The author (the then Chief Commissioner) wrote:—

> "A pre-existing condition and a disability are different things: the one is positive and indicates what *was there* at the time of the accident: the other is usually negative and indicates that the claimant *cannot* do certain things owing to the relevant *loss* of faculty..."

In their Decision the Tribunal did not point to anything which the claimant could not do prior to her accident. There was no evidence enabling them to do so. In my view, the constitutional liability to develop the disease cannot have been a "disability" because it was wholly symptomless. Such liability corresponds with the statutory concept of "loss of faculty", that is to say it is a potential cause of disability but not itself a disability.

12. Accordingly, the error of law which the Secretary of State admitted consists in the failure by the Tribunal to apply correctly regulation 2(2) and (3) of the Benefit Regulations. In particular, they confused a "disability" with a "loss of faculty", and they made an unauthorised offset, that is to say an offset for something which was not a "disability".

13. The exposition of the law which I have given has appeared in one form or another in Commissioner's Decisions, reported or unreported, times without number in the last ten years. It is, therefore, disturbing to find that a medical appeal tribunal has failed to comply with the law. So far as I can judge, failure to observe the provisions of regulation 2(2) and (3) of the Benefit Regulations is now a common feature of Medical Appeal Tribunal decisions. I think that the reason may be that Tribunals are unfamiliar with the underlying purpose of these paragraphs and adopt an approach to the assessment of disablement in dual causation cases which is inconsistent with them. Many Tribunals seem to me to proceed on the footing that it is their duty in such cases to apportion between the industrial accident and other causes the blame for any disabilities suffered by the person concerned. But, in relation to the kinds of dual causation cases described above in paragraph 9(a), regulation 2 proceeds on a different principle.

14. In my view the purpose, or one of the purposes, of regulation 2(2) and (3) is to incorporate in disablement benefit law a principle of the Common Law applied in personal injury cases. This principle requires that anyone liable to compensate an injured person for his injuries must take him as he is. If he has brittle bones and breaks his leg in a fall, when a man with robust bones would not have suffered a fracture, nevertheless he is to be compensated for having broken his leg. The principle is expressed in Halsbury's Laws of England (4th ed) vol 12 at p 445 (Title "The Measure of Damages in Tort", paragraph 1144) in the following passage:—

> "In tort*, a defendant who commits a wrong must take his victim as he finds him. It is no answer to a claim for damages to say that the victim would have suffered no or less injury if he had not had, for example, an eggshell skull."
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> And in a footnote the addition is made: "There is no difference in principle between an eggshell skull and an eggshell personality: *Malcolm v Broadhurst* [1970] 3 All E.R. 508 at p 511..."
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> *(A "tort" is a non-contractual legal wrong.)

15. Two further points remain for consideration. In one of his representations the claimant's solicitor contended that even if the claimant's symptoms were of a psychosomatic or "hysterical type" they appeared to have been caused by the relevant accident. This refers to the passage in the Tribunal's reasons which reads: "There is weakness of grip in right hand and of left leg, but this is plainly of hysterical type and in our view is due to constitutional factors unrelated to relevant accident". Both the contention advanced on the claimant's behalf and the conclusion of the Tribunal appear to be founded on the following passage from the report written in November 1977 by Professor D A. Shaw, a consultant neurologist:—

> "It is well recognised that patients with multiple sclerosis are sometimes more handicapped than can be accounted for by their organic physical disabilities. In the case of [the claimant], it is my opinion that her continuing disability results from her knowledge that she has been diagnosed as suffering from multiple sclerosis."

It is certainly open to a medical authority to hold that some psychosomatic symptom is not caused by the relevant accident but by a stress situation arising subsequently: see the reported Commissioner's Decision R(I) 13/75, paragraph 23. This approach may well be appropriate if a medical authority is satisfied that the symptom stems from the well-known reaction to a litigation situation referred to colloquially by doctors and lawyers as "compensationitis", but usually described as "functional overlay" in the decisions of medical authorities. However, this is a different kind of case. In this case it may be contended that the claimant's reaction merely indicates that, like most of us, she is not possessed of the psyche of a hero. However, the question raised by the solicitor's contention is essentially one of fact. The Tribunal have held that the symptoms which they have described as "of hysterical type" did not have dual causation, but were caused solely by constitutional factors, by which they must have meant psychological weakness; and that is a decision of fact which is outside my jurisdiction. However this, as well as all other relevant questions of fact, will now fall to be re-determined by another Medical Appeal Tribunal.

16. Finally, the claimant's solicitor has advanced on her behalf a criticism of the last paragraph of the Tribunal's reasons, in which they stated that "any subsequent deterioration in the claimant's condition will be attributable to the natural history of the disease and not to any direct consequences of the relevant accident".

In my judgment, the criticism is sound. It is not necessary that deterioration should be a *direct* consequence of the accident. The Tribunal found that the claimant's development of multiple sclerosis had a dual causation. Consequently, whenever it is necessary to reassess her disablement, the medical authority concerned will, in compliance with regulation 2(2) and (3) of the Benefit Regulations, have to answer the questions: If the relevant accident had not occurred, would the claimant have been subject to all the disablement which we now find to be hers, and if not to what extent would she have been so subject?

The Tribunal did not indicate that they had considered these questions or give any explanation for their conclusion about the future. Whatever were their reasons for arriving at that conclusion therefore they have failed adequately to comply with regulation 23(1) of the Social Security (Determination of Claims and Questions) Regulations 1975 [S.I. 1975 No 558], which requires them to give their reasons, including their findings on all questions of fact. This is, of course, an error of law.

17. For the reasons already stated I allow this appeal. The claimant's appeal from the decision of the Medical Board dated 7 November 1977 will now fall to be re-determined by another Medical Appeal Tribunal which, in accordance with the usual practice, should be entirely differently constituted from the Tribunal of 22 August 1978.

(Signed) R. S. Lazarus
Commissioner
