

DB — MAC Car, ← Saunders, Simeon
Commissioner Pensions Director Not
Secretary 'Pensions' 1

CPAG

DJM/HJD

Commissioner's File: CSI/71/94
*11/95

SOCIAL SECURITY ADMINISTRATION ACT 1992

**APPEAL TO THE COMMISSIONER FROM A DECISION OF A MEDICAL APPEAL
TRIBUNAL UPON A QUESTION OF LAW**

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Elaine PATERSON

Medical Appeal Tribunal: Aberdeen

Case No: 572 489

1. My decision is that the decision of the medical appeal tribunal given at Aberdeen on 5 October 1993 is erroneous upon a point of law. I set it aside. I remit the case to a fresh tribunal for a rehearing.

2. The history of this case is set out in the Secretary of State's observations in the appeal by the claimant to the medical appeal tribunal against the decision of an adjudicating medical authority at Aberdeen on 19 November 1992. It is in the following terms:-

"2. [The claimant] who was employed as a typist, claimed Disablement Benefit for the prescribed disease on 27.4.92. She claimed to have been disabled by the disease since 18.12.91.

3. [The claimant] was examined by an Examining Medical Practitioner on 26.6.92 who reported on 26.6.92 that in his opinion [the claimant] was not suffering from the prescribed disease A4 and had not so suffered at any time.

4. On the basis of this report the Adjudication Officer disallowed the claim.

5. [The claimant] appealed against the Adjudication Officer's decision. The Adjudicating Medical Authority who examined her on 19.11.92 considered the Examining Medical Practitioner's report and decided that [the claimant] was not suffering from the prescribed disease or a sequela of a prescribed disease, and had not so suffered at any time since 5.7.48.

6. [The claimant] has appealed against the Adjudicating Medical Authority's decision."

The prescribed disease referred to in paragraph 1 was PD A4. In paragraph 9 of the observations the following request was made of the tribunal:-

"9. If the Tribunal decide that [the claimant] has suffered from a prescribed disease at any time, it is asked to state from which disease he has suffered and go on to decide whether [the claimant] has any loss of faculty resulting from the disease. If so, the Tribunal is requested to state:-

- a. what the loss of faculty is, and
- b. the extent and period of any resulting disablement."

In addition the Secretary of State gave the following further information to the tribunal:-

"12. SUBSEQUENT CLAIM - PD A8

[The claimant] made a claim for traumatic inflammation of the tendons of the hand and forearm, or of the associated tendon sheaths (PD A8) on 13.1.93. An examining Medical Practitioner decided on 24.2.93 that she was not suffering from the disease. Following an appeal against the subsequent Adjudication Officer's disallowance, and Adjudicating Medical Authority decided on 10.6.93 that [the claimant] was not suffering from PD A8."

The claimant's position in all this was set out in a letter dated 15 July 1993 to the clerk of the medical appeal tribunal. This letter was in the following terms:-

"I first applied for Disability Benefit in April 1992 on the assumption that I suffered from the Industrial Disease PDA4. I attended a medical examination in June 1992. The doctor disagreed that I suffered from PDA4. I appealed against his decision on 1 August, 1992. I then attended a Medical Board for appeal on 19 November 1992. At the examination both doctors agreed that it was PDA8 I suffered from and I had to reapply. I did so on 12 January 1993. I attended another medical with another doctor for the PDA8 submission on 24 February, 1993 where I took a copy of a Consultant Orthopaedic Surgeon's report about my condition, this doctor decided I did not suffer from PDA8. I again submitted an appeal against his decision on 30 March 1993. The Medical Board appeal took place on 10 June 1993 where I saw a Dr. Fioum, who was the same doctor I had seen at the previous medical board appeal in November 1992. He told me it was definitely PDA4 I suffered from and that I should appeal against the Medical Board appeal in November 1992 for the PDA4 claim. I did again submit an appeal on his advise explaining in the appeal form all the circumstances only to receive a reply dated 28 June, 1993 saying I had exceeded the time limit to appeal and asking the reason so you may decide whether to hear the appeal. I did this explaining again the reasons to why the appeal was late on 30 June, 1993, to which I have had no reply."

3. In the event the claimant's appeal in relation to the decision of the adjudicating medical authority dated 19 November 1992 was heard on 5 October 1993. The decision of the tribunal was to confirm the decision of the adjudicating medical authority and to determine that at no time since 18 December 1991 has the claimant suffered from the prescribed disease no. A4 or from a sequela of that disease. In the reasons for their decision the tribunal state:-

"Notwithstanding the Secretary of State's observations (No 9) we were advised and accepted we were dealing only with PDA4. Having considered all the evidence, written and oral, and from their own examination, the tribunal conclude the claimant does not and has not at any time suffered from PDA4."

4. The claimant has appealed against this decision. In a letter from her representative dated 9 June 1994 to the Commissioner it is said:-

"[The claimant] was satisfied that a clear explanation was given as to why her symptoms were not consistent with PDA4.

However, she is appealing on the grounds outlined in her OSSC1 form (copy enclosed). As indicated there, no explanation was given as to why the Tribunal concluded that they were dealing only with PDA4. This was perplexing in view of the Secretary of State's Observations (Schedule of Evidence, Doc 14, Nos. 7 and 9). These observations entitled the Tribunal to "decide afresh whether [the claimant] has suffered from a prescribed disease or a sequela of a prescribed disease at any time."

It appears that at one stage [the claimant] had been advised that she might be suffering from PDA8 (Schedule of Evidence, Doc 18).

In view of the foregoing, it was surprising to find that the Tribunal gave no explanation as to why they decided that only PDA4 was under consideration (Re "Reasons for Decision"). Reference was made to the Secretary of State's Observations. However, they were discounted without any reasons given."

The claimant's appeal is supported by the Secretary of State. In supporting the appeal the Secretary of State submitted in paragraph 9 of his submission:-

"The question of what a MAT could consider in prescribed disease cases was the subject of an oral hearing before the Commissioner in CI/543/92. The Commissioner concluded that regulation 47(a) of the Social Security (Adjudication) Regulations 1986 permitted a MAT to determine any diagnosis question which is related in some way to the diagnosis question actually referred. Applying what the Commissioner said in CI/543/92 to this case, it is submitted that the MAT were entitled to consider prescribed disease A8 as well as prescribed disease A4 and any other diagnosis question that was related to A4. As they did not, it is submitted that their decision should be held to be erroneous in law."

5. In the decision referred to by the adjudication officer the Commissioner quoted the terms of regulation 47(a) of the Social Security (Adjudication) Regulations 1986. I do so also:-

"47. Where a diagnosis or a recrudescence question is referred to a medical appeal tribunal that tribunal, upon determining the question referred -

- (a) may proceed to determine any diagnosis or recrudescence question which arises in connection therewith and any disablement question which arises in consequence thereof and where a decision on any such question has been given by a medical board, and they confirm, reverse or vary that decision;"

The Commissioner then went on to say in paragraph 11:-

"11. In my view regulation 47(a) permits a tribunal to determine any diagnosis question which is related in some way to the diagnosis question actually referred."

He then went on to say in paragraph 12:-

"12. Regulation 47(a) is in its terms permissive. And its use will always be subject to the rules of natural justice. So that what was said in CI/255/91 namely that a tribunal should consider "any other prescribed diseases which might have been pleaded before or during the hearing" seems to me to be essentially a natural justice point. Namely a tribunal should not give a decision on a diagnosis question or indeed on any question if the parties have not had the opportunity of putting their case in respect of it."

The quotation from CI/255/91 comes from paragraph 11 of the Commissioner's decision in that case. I quote more fully what the Commissioner said in that case:-

"In my view the MAT were required to consider the prescribed disease specifically stated on the claim form dated 17 January 1988 and any other prescribed disease which might have been pleaded before or during the hearing. It was not incumbent on the MAT to consider every prescribed disease set out in column 1 of Part I of Schedule 1. This would place an intolerable burden on a MAT. If, however, the medical evidence before a MAT clearly and obviously indicated that the claimant's medical condition fell within the ambit of a prescribed disease not specifically pleaded, I consider it would be incumbent on the MAT in these circumstances to determine the issue by reference to that prescribed disease."

6. I have no disagreement with what the Commissioner said in the cases which I have quoted above. However the one obstacle to the application of what was said in these cases in this case is that the claimant had made a claim in respect of PD A8 and that had been determined by the adjudicating medical authority who decided that the claimant was not suffering from that disease. There was and is no appeal in relation to that decision. However standing the history of the matter as set out by the claimant in her letter to the clerk, which was before the tribunal, and what was said by the Commissioner in the cases I have quoted above I am of the view that the tribunal erred in law when they accepted that they were dealing only with PD A4. The tribunal had an investigatory function and as they did not reject what the claimant said in her letter of 15 July 1993 they were not entitled to ignore the question of PD A8. By doing so their decision in my view errs in law and must be set aside.

7. It seems to me that what the tribunal ought to have done in the circumstances was to adjourn the appeal to enable the claimant to seek to make a late appeal in relation to the adjudicating medical authority's decision of 10 June 1993. In the event of the claimant being allowed to appeal late it could have been arranged for the tribunal to hear both appeals and determine the diagnosis question in both of them.

8. Having regard to the basis upon which I have set the tribunal decision aside and remitted to a fresh tribunal it will be up to the claimant to seek to appeal late in relation to the decision of the adjudicating medical authority given on 10 June 1993 in relation to the PD A8. In the event that she is allowed to appeal late then that appeal should be held at the same time and before the same tribunal to whom I have remitted the present case. In the event that a late appeal is not allowed then I do not consider that it would be open to the fresh tribunal to consider PD A8, upon the basis that notwithstanding what was said by the Commissioner in the cases I have quoted above, the claimant had a determination in respect of PD A8 in respect of which a late appeal was not allowed. I consider that it would be most unfortunate if that were to happen. I can say no more than that as it is not for me to interfere with the discretion on the question of late appeal which will have to be determined by the tribunal chairman.

9. The appeal succeeds.

(signed)

D J May
Commissioner
Date: 25 January 1995