Pneumoconiosis – ... Centile Diagnostic Aid ... Diagnosis ...

DJM/HJD **Commissioner's File: CSI/78/93**

SOCIAL SECURITY ADMINISTRATION ACT 1992 * 83/94

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Robert CHRISTIE

Medical Appeal Tribunal: Glasgow

Case No: 570 07483

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1. My decision is that the decision of the medical appeal tribunal given at Glasgow on 9 September 1993 is erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted medical appeal tribunal for a rehearing.

2. The history of the case is given in the Secretary of State's observations in an appeal by the claimant against the decision of a special medical board who examined him at Edinburgh on 2 September 1992. That history is in the following terms:-

> "1. [The claimant,] who is aged 75, worked as miner from 1936 to 1960.
>
> 2. [The claimant] made a claim for Disablement Benefit for pneumoconiosis on 12.5.92 claiming benefit from 1960. He was examined by a Special Medical Board on 2.9.92 who decided on 11.9.92 that he was not suffering from the disease.
>
> 3. [The claimant] has appealed against the Special Medical Board's decision. His letter dated 25.9.92 refers. (SS Adjudication Regs 1986 Reg 46(1))."

3. There was before the tribunal who heard the claimant's appeal a report from Professor Anthony Seaton dated 20 May 1993. In that report under the heading:-

> "CHEST RADIOGRAPH"

Professor Seaton said:-

> "The films taken when I saw him showed marked overinflation and very few opacities in the upper zones of early pneumoconiosis, Category 0/1qq."

In a section headed "COMMENTS" Professor Seaton said:-

> "There is no doubt that [the claimant] suffers from emphysema, together with minimal coalworkers' pneumoconiosis. The latter condition is insufficient radiologically for him to be eligible for Industrial Injuries Benefit."

4. The decision of the tribunal on the diagnosis question was as follows:-

"The decision of the AMA is confirmed."

Rather unsatisfactorily the signed copy of the decision does not have a record of the findings of the tribunal, the reasons for their decision or the chairman's note of evidence. See pages 23 and 24 of the bundle. However they are recorded elsewhere. The findings of the tribunal were in the following terms:-

> "We adopt the clinical findings of the Adjudicating Medical Authority dated 11.9.92 with the exception that no crepitations were heard on examination today.
>
> We examined all the chest x-rays, there is evidence of over expansion of the lungs. There is little or no evidence of dust retention and certainly nothing above the category 0/1 and in this regard we agree with Professor Seaton's assessment. The films would be in the category of 0/1 and this category is too low to warrant a finding of the prescribed disease. There is also insufficient rounded opacities for the PD."

The reasons given by the tribunal for their decision were as follows:-

> "The issue here was one of diagnosis. It was Mr Linnen's submission for the claimant that on all the evidence and in particular in view of the work history and the recent report from Professor Seaton, the claimant had, on a balance of probabilities, established that he was suffering from PDD1.
>
> Mr Delaney's submission referred to page 13, paras 7 and 8 of the Secretary of State's submissions.
>
> In Professor Seaton's report, he stated that the film showed evidence of early pneumoconiosis, category 0/1. This category is not adequate for certifiable coal workers pneumoconiosis and does not, in our view, allow a finding of PDD1. In addition there is no clinical radiographic or functional support for a diagnosis of asbestosis."

5. The claimant appealed against this decision. The letters that the claimant wrote in support of his appeal do not in my view disclose any error of law on the part of the tribunal. They merely in my view express the claimant's dissatisfaction with the decision in a somewhat polemical way. The Secretary of State did not support the claimant's appeal.

6. On 6 May 1994 I issued a direction having considered the papers in this case. In the direction I referred to the parts of the report of Professor Seaton to which I have referred above. I also referred to the findings of the tribunal commencing at "We examined all the chest x-rays," and to the reasons of the tribunal from "in Professor Seaton's report,". I then directed the Secretary of State to provide written submissions on the following matters:-

> "1. What is the meaning of the expression category 0/1 in the context in which it is used in the findings of the tribunal and Professor Seaton's report?
>
> 2. What is the basis for the proposition that prescribed disease D1 can only become the prescribed disease when it has reached a certain degree? If there is a statutory basis for the proposition or any authority to support it a reference to such a statutory basis or authority should be produced. If there is no statutory basis or authority to support the

proposition is it a matter of practice? and if so what is the practice? and why has it been adopted?"

In response to that direction the Secretary of State provided the following helpful supplementary submission:-

"2. The International Labour Organisation's "International Classification of Radiographs of Pneumoconioses" is used throughout the world to classify and quantify the opacities which are found on the chest radiographs of those with industrial lung diseases. It grades such opacities by their size and whether they are regular or irregular in outline, and by their profusion. The term '0/1' relates to profusion. The assessment of profusion is made by comparing the film in question to type films which demonstrate various degrees of profusion; they are also described in an accompanying text. Originally, there were four categories of profusion; category 0 was normal, and 1 to 3 represented increasing profusion. Currently, category 0 is said to represent "small opacities absent or less profuse than the lower limit of category 1." Categories 1, 2 and 3 are said to "represent increasing profusion of small opacities as defined by the corresponding standard radiographs.

3. This four point profusion scale is extended into twelve according to the following instruction: "The radiograph is classified in the usual way into one of the four major categories by comparison with the standard radiographs. If during the process the major category above or below is seriously considered as an alternative, this is recorded. In radiographs within category 0, a subdivision is also possible. Thus category 0/1 is profusion of category 0, but category 1 was seriously considered. Category 0/0 is a radiograph in which there are no small opacities, or if a few are thought to be present they are not sufficiently definite or numerous for category 1 to be considered.

4. In summary a category 0/1 film was thought by those who graded it to fall, on balance of probability, within a category which could mean that it was a normal film, although the possibility of opacities was seriously considered.

5. There is no basis in the proposition that prescribed disease D1 can only become the prescribed disease when it has reached a certain degree.

6. The ILO states that "The object of the Classification is to codify the radiographic abnormalities of pneumoconiosis in a simple reproducible manner. The Classification does not define pathological entities, nor take into account working capacity. The Classification does not imply legal definitions of pneumoconiosis for compensation purposes, nor set or imply a level at which compensation is payable." "There are no features to be seen in a chest radiograph which are pathognomonic of dust exposure. But the following recommendations are made for the classification of a postero-anterior radiograph:....

3. if the observations <u>might</u> be due to pneumoconiosis, record the observations according to Classification, but note what other aetiology was considered."

7. Thus the question of whether a pneumoconiosis is present or not is not answered by the grading of the radiograph, but is a matter for clinical judgement.

> *8. A film graded 0/1 is really regarded as normal but some doubt was entertained before reaching a decision that it was. The possibility exists that a few opacities were present, but if they were, their presence cannot be taken as proving that any particular diagnosis applied. In interpreting the significance of a small number of opacities, the experience gained from post-mortems of miners and others with opacities on their radiographs is considered with other features of the case and used to answer the question as to whether, on balance of probabilities, pneumoconiosis is present. In this case, the answer from all the qualified experts involved was that the findings did not lead to a diagnosis of pneumoconiosis."*

7. The claimant's response to that submission does not assist me further and I refuse his request for an oral hearing upon the basis that I can decide the appeal without one.

8. I accept the explanation given to me by the Secretary of State in relation to the first question posed by me in my direction of 6 May 1994 which is given in paragraphs 2, 3, and 6 of his submission. I also agree with the submissions which he has made in paragraphs 5 and 7 of that submission. I accept the submission in paragraph 5 particularly having regard to the definition of pneumoconiosis given in Schedule 20 of the Social Security Act 1975 which was "Fibrosis of the lungs due to silica dust, asbestos dust and other dust. The expression includes the condition of the lungs known as dust-reticulation". There is no qualification to that definition in relation to a degree of pneumoconiosis. It seems to me that a claimant has either got the prescribed disease or he has not. I further agree with the Secretary of State that the only way that this can be determined is by exercise of a clinical judgment. It may well be that assistance in coming to that clinical judgment can be obtained by use of what is described as the International Labour Organisation's "International Classification of Radiographs of Pneumoconiosis".

9. It is important not to confuse what is in effect a diagnostic aid with the diagnosis itself. Accepting as I do paragraph 5 of the Secretary of State's supplementary submission the statement made by Professor Seaton in his comments:-

> "There is no doubt that [the claimant] suffers from emphysema, together with minimal coalworkers' pneumoconiosis. The latter condition is insufficient radiologically for him to be eligible for industrial injuries benefit."

is wrong in law. This is in respect that first, if the claimant has pneumoconiosis, to whatever degree, then the diagnosis qualification for the benefit would be satisfied. Secondly that diagnosis qualification is not determined by a radiological category but a clinical diagnosis reached by expert assessment of the evidence presented to the person making it, including the radiological evidence and the categorisation of findings within what appears to be internationally recognised criteria. In looking at the tribunal's decision it is not apparent to me whether the tribunal accepted Professor Seaton's view that the claimant was suffering from minimal coalworkers' pneumoconiosis. They indicated in their findings that they agreed with Professor Seaton's assessment, which I presume is a reference to the categorisation that he made following upon the examination of the radiological evidence. However that does not make clear in terms whether the diagnosis of minimal coalworkers' pneumoconiosis was accepted by the tribunal or not. In my view it was incumbent upon the tribunal to indicate their position on that evidence, which was before them, and in the event that they disagreed with that reasoned diagnosis to give some indication of the reasons why they took that view. I refer in that connection to what was said by Neill LJ in the decision of the Court of Appeal issued on 30 July 1993 in the case of

Kitchen and Others v Secretary of State for Social Services when setting out guidelines for appellate jurisdiction in determining whether the provisions in regulation 31(4) of the Social Security Adjudication Regulations 1986 had been complied with. It is also apparent that in their reasons they made the same confusion between what is a diagnostic aid and the diagnosis that was made by Professor Seaton. They said in respect of the category 0/1 referred to by Professor Seaton:-

> "This category is not adequate for certifiable coalworkers' pneumoconiosis and does not, in our view, allow a finding of PDD1."

The reference to certifiable coalworkers' pneumoconiosis implies that the tribunal may have been having regard to degrees of the disease of pneumoconiosis in determining whether the claimant had the prescribed disease which as I have explained would be an error in law. In all these circumstances I have come to the conclusion that the tribunal failed to make clear the critical finding as to whether or not the claimant had pneumoconiosis. The question before them was not whether the claimant had what is described by them as certifiable coalworkers' pneumoconiosis. The question before them was whether he had pneumoconiosis. The category in respect of which they found the radiological evidence to be placed was not the diagnosis but just an evidential factor to be used by the tribunal in applying their expertise to the same question. In these circumstances I have come to the conclusion that the tribunal's decision erred in law. It must be set aside.

10. It should be apparent to the freshly constituted tribunal the approach they require to take in determining the diagnosis question from what I have said in this decision. It would, I think, be helpful to them if the Secretary of State could arrange for the tribunal to have before them the International Labour Organisations International Classification referred to in paragraph 2 of the supplementary submission to me.

11. The appeal succeeds.

(signed) D J May
Commissioner
Date: 25 August 1994