INDUSTRIAL DISABLEMENT BENEFIT

Review of decision—relevant change of circumstances—burden of proof on review

An insurance officer reviewed an award of special hardship allowance under section 14 of the Act of 1965 on the ground that an opinion of a

medical board (obtained during the currency of the award) that the claimant's incapacity did not result from the relevant loss of faculty, constituted a relevant change of circumstances.

Held that:

(1) It is a relevant change of circumstances that a claimant's incapacity ceases to be the result of the relevant loss of faculty (paragraphs 10, 11 and 12);

(2) a medical opinion of itself is not such a change but may be evidence thereof (paragraph 10);

(3) the burden of proof that there are grounds for review of an award of benefit lies with those who contend that the award should be cancelled or varied on review (paragraphs 9 and 16);

(4) at the date the insurance officer reviewed the award he had not shown on the balance of probabilities that there had been a relevant change of circumstances (paragraph 14);

(5) that there were accordingly no grounds for review of the award (paragraph 15).

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1. My decision is that the insurance officer's decision awarding the claimant an increase of disablement benefit under section 14 of the National Insurance (Industrial Injuries) Act 1965 ("the 1965 act") at the maximum statutory rate from 30th April 1969 to 28th April 1970, both days included, is not to be reviewed or revised.

2. This appeal raised interesting questions as to the interpretation and application of one of the review provisions in section 72 ("section 72") of the National Insurance Act 1965, which are applied to industrial injury questions by section 8 of the National Insurance Act 1966. In view however of the attitude of the insurance officer's legal representative at the hearing before me the legal questions calling for an answer no longer present difficulty, though an issue of fact remains.

3. On 25th October 1966 the claimant, whose regular occupation was that of a steelman, suffered an industrial accident in a coal mine, which caused injury to his left knee. Apart from a short gap of only about a week, he was paid injury benefit for the maximum possible injury benefit period. On his claim for disablement benefit medical boards assessed the degree of disablement at various percentages, always offsetting 5 per cent for a previously existing osteoarthritic condition. The last board on 12th September 1967 found injury to the left knee with meniscectomy in April 1967 to be partly relevant, and they assessed the degree of disablement at 3 per cent for life after offsetting 5 per cent for the pre-existing osteoarthritis.

4. The opinions of the medical boards for the purpose of the increase, commonly known as a special hardship allowance, were all favourable down to and including that of the board of 12th September 1967, who expressed the view that the claimant's incapacity for his regular occupation resulting from the relevant loss of faculty was likely to last for two years from that date. Accordingly the claimant was paid the increase continuously from soon after the end of the injury benefit period onwards. The last award was for the period stated in paragraph 1 above.

5. When the period of two years referred to by the medical board had elapsed the claimant was examined in September 1969 by a further advisory board. They expressed the opinion that the claimant was not now capable of following his regular occupation but that the remaining relevant loss of faculty did not now contribute materially to his incapacity for that occupation. They recorded that in their opinion his present inability to

perform his pre-accident job was due to the progression of the pre-existing gross arthritis.

6. In the light of this opinion the insurance officer on 13th October 1969 reviewed the award for the period stated in paragraph 1 above on the ground that he was satisfied that there had been a relevant change of circumstances, and disallowed the benefit from and including 15th October 1969 The claimant appealed to the local tribunal, who by a majority affirmed the review decision. The claimant's association have appealed to the Commissioner.

7. Whilst the appeal to the local tribunal was pending, the association obtained a report from a consultant orthopaedic surgeon Mr H. who, though he thought that the injury had converted a pain free osteoarthritic knee into a painful one, nevertheless thought that the degenerative changes would have progressed to produce the result by the end of three years from the accident. At the date of his report in December 1969 three years had elapsed. Whilst the association's appeal to the Commissioner was pending, they obtained a further report from another consultant Mr. J., who did not think that any such finite period could be fixed; he said that the claimant should be given the benefit of the doubt and concluded with the opinion that the claimant was incapable of following his regular occupation or work of an equivalent standard as the result of the accident of 25th October 1966. There is no doubt that there was and is a similarly osteoarthritic condition in the right knee.

8. The only part of section 72 which is relevant to this appeal provides that a decision may be reviewed at any time if there has been any relevant change of circumstances since the decision was given. The interpretation of the phrase "any relevant change of circumstances" seems to me to present difficulty. The Workmen's Compensation Acts provided for review of awards; see for example section 11 of the 1925 Act. That section said nothing about change of circumstances; the power to review was in terms unqualified. As a result however of judicial interpretation over a long period it became firmly established that a change of circumstances was necessary, and the very numerous decisions on what constituted such a change are collected conveniently in Willis's Workmen's Compensation Acts (37th Edition) pages 369-372. The phrase "any relevant change of circumstances" appeared in the review section, section 50, of the National Insurance (Industrial Injuries) Act 1946, which was replaced by section 49 of the 1965 Act, which is now replaced by section 72. The difficulty of describing the limits of "relevant change of circumstances" is illustrated by many Commissioner's decisions, and I must not be taken as seeking to lay down any principle beyond what is necessary for the decision of this particular appeal.

9. At the hearing before me the insurance officer's legal representative accepted, in my opinion correctly, that at the outset the burden of proof is on the insurance officer to show on balance of probabilities that there has been a relevant change of circumstances He referred me to *Smeaton v. Taylor* (1933) 26 B.W.C.C. 369. The association's representative naturally did not seek to challenge this view, which is favourable to the claimant, and I accept it.

10. The insurance officer's representative did not argue that the medical board's opinion of 25th September 1969, or the fact that that opinion had been given, of itself constituted a relevant change of circumstances. He did argue that as from that date the claimant's incapacity for his regular occupation *in fact* no longer resulted from the relevant loss of faculty and

that that alteration in the facts did constitute a relevant change of circumstances; the change was the change in the facts, of which the board's opinion was evidence. On this point he referred me to Decisions R(I)56/54 paragraph 28, R(I)11/59 paragraph 18, and Decisions C.I.14/64 paragraphs 12-15 and C.I.5/67 paragraph 16, the last two decisions being unreported. The association's representative naturally did not seek to challenge this contention, which also is favourable to claimants, and I accept it.

11. Normally, on a claim under section 14 the burden of proof is on the claimant to show on balance of probabilities that he satisfies the conditions for making of an award. The first condition is that as the result of the relevant loss of faculty he is incapable of following his regular occupation. Once it is accepted that it is for the insurance officer to prove a relevant change of circumstances and that the relevant change of circumstances is that the incapacity is no longer caused by the relevant loss of faculty, the result is to shift on to the insurance officer the burden of proof on this issue. This shift may be vitally important to the claimant, since in many cases where it is alleged that the cause of incapacity has ceased to be the accident and has become some progressive condition, the comment can often fairly be made that it is really impossible to say which of the two possible causes is the true one. If the change of circumstances had been the fact that the board gave a certain opinion, it would have been completely different, since the insurance officer would have had no difficulty in proving that.

12. The insurance officer's representative submitted thirdly that once he had shown a relevant change of circumstances, it was then for the claimant to establish that he fulfilled the conditions for an award. I do not find it necessary to express any opinion on this in the present case. Undoubtedly there are cases where, although an award may be reviewed, it ought not to be revised. This can happen in a case where there are more issues than one. In my judgment this is not such a case. If the insurance officer has established that from a certain date the claimant's incapacity did not result from the relevant loss of faculty and therefore there has been a relevant change of circumstances, it is absurd to suppose that the Commissioner would then turn completely round and hold that the claimant on the next issue had established the contrary. If, on the other hand, the insurance officer fails to prove that there has been the only alleged relevant change of circumstances, the application for a review fails and the claimant is not called on to prove anything. The claimant's success or failure on the third issue therefore in the circumstances of this case results automatically from the decision on the first two issues.

13. In considering whether the insurance officer has established a relevant change of circumstances, the following distinction is important. Both consultants evidently think that the progressive osteoarthritic condition in the claimant's left knee would at some time, which one of them thinks is three years after the accident and the other thinks cannot be estimated, have caused the pain and incapacity for which in fact the claimant suffers. That however is a different thing from saying that the relevant loss of faculty no longer causes the incapacity. It is conceivable that the incapacity may result from *each* cause. If so, the claimant is entitled to succeed. The situation is quite different from that envisaged by the National Insurance Act 1969 section 7 (not yet in force)* which deals with the position where the same disabilities might have been expected to result without the accident.

14. In this case, the claimant's benefit history sheet shows that in 1962

* Section 7 operative from 28.10.70 by S.I. 1970 No 1550 and S I. 1970 No. 1551.

he had suffered from septic abrasions of the knee, no doubt due to dust or grit getting inside his clothing or knee pad. Apart from that irrelevant matter, however, he had never had any trouble with his left knee until he sprained it at work on 17th October 1966, ten days before the relevant accident. (To protect his position, I think that he would be wise to apply for a declaration that this was an industrial accident.) He was off work however for only three days after that, and then returned and was perfectly all right. For substantially the whole period since the relevant accident he has had continual trouble with the left knee. He struck me, if I may say so, as a good type of man who, though he is 55 years of age, would have returned to his regular and much better paid occupation long ago if he could have done so. Neither of the consultants has said in terms that the effects of the accident have worn off. What they say is that the effects of the pre-existing condition have advanced, which, as I have explained, is a different matter. The claimant's regular occupation involved a lot of crawling whilst advancing props at the face. On the whole my conclusion is that the insurance officer has not shown on balance of probabilities that by 15th October 1969 or even by 28th April 1970 the relevant loss of faculty no longer caused the claimant to be incapable of following his regular occupation.

15. The application for a review therefore fails and must be disallowed. The result of course is that the original award down to 28th April 1970 stands and should be implemented. If the claimant wishes to claim the increase for a further period he should do so, as I advised him at the hearing, without delay, since there are time limits. I must not, however, be taken as indicating that a further claim will necessarily succeed: on that claim the burden of proof will be on him and not on the insurance officer.

16. I think that this case illustrates how important it is that at all levels the fundamental difference between a decision on a claim and a decision on an application for a review, and the nature of the grounds for review should be understood. The difference depends on a simple principle. A claimant must in general prove his title to a benefit. Once he has done so and has been awarded, and perhaps paid, the benefit, he can fairly insist that those who contend that the award should be cancelled or varied on review must shew that there are valid grounds for review. Unfortunately in this case this distinction was overlooked in the insurance officer's written submission to the local tribunal, which did not mention section 72 and stated boldly that the onus of proof was on the claimant. In the insurance officer's written submission to the Commissioner, section 72 was referred to, but the medical board's opinion was relied on as a relevant change of circumstances. It was only in the argument on behalf of the insurance officer at the hearing before me that the legal position was first correctly stated.

17. For these reasons the association's appeal is allowed.

(Signed) R. G. Micklethwait
Chief Commissioner