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

Jurisdiction of Medical Appeal Tribunals—nature of decision where case raises questions already decided ; power to set aside medical board's decision as a nullity

An initial medical board found no loss of faculty resulting from an industrial accident from the end of the injury benefit period. A second claim in respect of the same accident was incorrectly referred to a further initial medical board (instead of to a review board) who gave an assessment

of 20 per cent for a period from the end of the injury benefit period. The Medical Appeal Tribunal, to whom the latter board's decision was referred, refused to treat it as a decision of a review board or to set it aside as a nullity on the ground that it was given without jurisdiction. Instead, having considered the case on its merits, they decided there was no relevant loss of faculty after the end of the injury benefit period.

Held, allowing the Minister's appeal, that while the Medical Appeal Tribunal had jurisdiction to entertain the case, the only decision they were entitled to give, having regard to the principle of *res judicata*, was that the question whether there was any relevant loss of faculty had been decided by the first mentioned medical board ; that that decision was final in the absence of appeal or review ; and that it was therefore not open to them to entertain this question on its merits. Such a decision would have replaced the decision of the board under reference and, in that sense, set it aside.

The Commissioners indicate that when an appellate body deals with an appeal, its decision, even though it be a decision affirming the decision appealed from, sets aside the decision appealed from in the sense that that decision ceases by itself to govern the rights of those concerned. The power of one statutory authority to set aside the decision of another statutory authority is further dealt with in R(U) 3/63 which case was determined by the same Tribunal of Commissioners.

The Commissioners consider the position which appertains when a decision is a " nullity " or " void " and refer to *Craig v. Kanssen* (1943) 1 K.B.256 and *Regina v. West* (1962) 3 W.L.R.218.

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1. Our decision is that the decision of the medical appeal tribunal dated the 28th December 1961 is erroneous in point of law.

2. This is one of three appeals heard orally by us in succession, each of which raises questions as to the power of one of the statutory authorities to set aside the decision of another such authority. Our decisions on the other appeals are on Commissioner's Files C.U.552/62 (Decision R(U) 3/63) and C.U.553/62. The Minister in this case and the insurance officer in the other cases were represented before us by the same counsel, but none of the claimants attended or was represented. Counsel put forward his submissions very fully and fairly and referred us to more than sixty decisions of the courts or the Commissioner. The fact remains however that we have not had the advantage of any argument against the contentions put forward by him.

3. On the 19th August 1954 the claimant suffered an industrial accident, for which he was paid injury benefit. In January 1955 he claimed disablement benefit. He was examined by an initial medical board. On the 16th March 1955 that board decided that the accident had not resulted in a loss of physical or mental faculty. (This of course meant that it had not done so since the end of the injury benefit period in February 1955.) The board accordingly made no assessment of the degree of disablement. The claimant did not appeal against that decision.

4. In 1957 he applied for a review of it on the ground of unforeseen aggravation. He was examined by a review medical board who on the 3rd May 1957 decided that there had not been unforeseen aggravation of the results of the accident since the date of the previous board.

5. On the 11th March 1961 the claimant made a fresh claim for disablement benefit arising out of the same accident. Evidently it was not appreciated in the Ministry of Pensions and National Insurance that this claim related to an accident in respect of which he had already claimed disablement benefit unsuccessfully. This mistake may have been contributed to by two factors. One is that the claimant had given conflicting dates for the accident ; the other is that whereas in 1955 he had alleged an injury to his stomach, in 1961 he was alleging an injury to his right elbow, which he had mentioned in

1957 but not in 1955. No doubt at that stage the claim could have been treated with the claimant's consent as a further application for review. But this was not done ; the case was referred to a medical board as a fresh claim, and they were not asked to decide whether there had been unforeseen aggravation. The board considered the matter on at least two occasions in April 1961 and June 1961. They evidently found the case a perplexing one, and we have considerable sympathy with them, since they were in effect being asked not only to record the claimant's condition at the date of their examination but also to decide whether it was a relevant condition, i.e. whether it had resulted from the accident seven years before. They recorded (apparently in April) that no assessment could be made at that stage and they suggested an X-ray and orthopaedic opinion on the elbow. They described the injury to the right elbow joint as a relevant condition, but in answer to the question whether it was fully or partly relevant or connected, they recorded the answer " unknown." By June 1961 they had received the hospital notes and X-ray report and they then added that still no opinion could be given [on relevance] ; and they stated that the case had been given a good deal of thought but a definite decision on the relevance of the injury in August 1954 was " left to the Minister's discretion " for reasons which they gave. They decided however on the 23rd June 1961 that the accident had resulted in a loss of physical or mental faculty and they assessed the degree of disablement resulting from the loss of faculty at 20 per cent from the end of the injury benefit period on the 16th February 1955 to the 21st October 1961. We think that by these apparently conflicting decisions they meant that the degree of disablement warranted an assessment, if it was relevant, at 20 per cent, but they left it to the Minister to decide whether it was. In their remarks they asked " Can papers of Board held in 1955 be found for possible reference." The case papers do not show when this entry was made ; the handwriting suggests to us that it was in April. The papers do not show what happened in answer to this suggestion.

6. The Minister caused this decision of the 23rd June 1961 to be referred to the medical appeal tribunal. In his submission he set out the facts fully, and in paragraph 7 he referred to section 4(3) of the National Insurance (Industrial Injuries) Act, 1953 (to which we will refer as the 1953 Act). He submitted that where a medical board had decided that there was no loss of faculty from a particular accident that board's decision must stand subject only to appeal or review ; there was no room for another board to give a decision on the same question. In paragraph 8 he submitted that the fresh claim made on the 11th March 1961 should be treated as an application for a review and that, if the claimant agreed, the medical board of June 1961 should be treated as a review board. On that basis he submitted that the elbow condition was not attributable to the accident and there had been no unforeseen aggravation. He drew attention to the earliest date from which an assessment made on review could take effect under the regulation referred to below. Finally, he invited the tribunal to set aside the decision of the medical board of the 23rd June 1961 as a nullity on the ground that that decision was given without jurisdiction.

7. The medical appeal tribunal on the 28th December 1961 decided that from the 17th February 1955 " there is no loss of faculty resulting from the industrial accident " of the 19th August 1954. The reasons for decision including findings on all questions of fact material to the decision were recorded as follows :—

> " The Tribunal is not satisfied that it has power to comply with the suggestion in paragraph 8 of the Observations and treat what bears

ex facia to be an Initial Medical Board Report as the Report of a Review Board. Equally, while agreeing with the submission in paragraph 7, the Tribunal is not satisfied it has power to treat the decision of the Board dated 23.6.61 as a nullity. Nevertheless on the evidence available and after examination of claimant the Tribunal is unable to accept that the present disability of the elbow is attributable to a blow such as claimant describes. The radiological evidence is that of advanced osteo-arthritis and shows no clear evidence of a past fracture."

8. The claimant's application to the tribunal for leave to appeal to the Commissioner was heard orally and refused. After considering a full written submission by the Minister made in advance and oral argument at a hearing by the Minister's counsel who cited a number of the decisions to which our attention was drawn, the tribunal refused the application for the following reasons :—

" The application does not raise any point of law for the Commissioner's consideration.

Counsel for the Ministry, while submitting that the claimant has raised no point of law, moved the Tribunal to " set aside " the decision of the Medical Board of 23.6.61 on the ground that it was a " nullity " (not having been in fact an Initial Medical Board as the Report bears to show) and also the decision of the Medical Appeal Tribunal of 28.12.61 which followed thereon. We consider we have no such power. The Tribunal is a statutory body and its powers are laid down by the Statutes and the Regulations made thereunder. We refer to the judgment of the Lord Justice-Clerk (Cooper) in the case of *Cheyne v. Architects' Registration Council* 1943 S.C. 468. To accede to Counsel's suggestion would be tantamount to reducing the decision of the Board and of the Medical Appeal Tribunal, a process which in Scotland is only competent in the Court of Session. In any event we take the view that a Medical Appeal Tribunal is not a court and that certain decisions concerning courts setting aside their own judgments for lack of jurisdiction are not applicable to the powers of a Medical Appeal Tribunal. The only power the Tribunal has today is to grant or refuse to grant an application for leave to appeal to the Commissioner. This is refused."

9. The Minister then applied out of time to the Commissioner for leave to appeal and leave was granted.

10. All the proceedings referred to in paragraphs 3 to 8 above took place in Scotland.

11. Section 36 of the National Insurance (Industrial Injuries) Act, 1946 (as amended) (to which we will refer as the 1946 Act) entrusts the decision of questions arising under the Act to various authorities. Under section 36(1)(a) certain questions are to be determined by the Minister. These do not include any question relating to the relevance to an accident of a condition or loss of faculty. Under section 36(1)(c) any question whether the relevant accident has resulted in a loss of faculty and any question at what degree the extent of disablement resulting from a loss of faculty is to be assessed and what period is to be taken into account by the assessment are to be determined by the medical board or medical appeal tribunal. The effect of section 36(2) is that subject to section 36(1) any claim for benefit and any

question arising in connection with it is to be determined by an insurance officer, a local appeal tribunal or the Commissioner (commonly referred to as the statutory authorities). Section 36(3) provides that " except as provided by this part of this Act, any decision of a claim or question as provided by the foregoing provisions of this section shall be final." Section 36 is in Part III of the Act, which also contains the provisions for appeals and reviews. Questions under section 36(1)(c) are included in " special questions," and they also constitute the " disablement questions " (section 36(5)). Relevant loss of faculty is defined in section 88(1).

12. Section 39(1) provides : " The case of any claimant for disablement benefit shall be referred by the insurance officer to a medical board for determination of the disablement questions. . . ." If the claimant is dissatisfied with the decision of the medical board he may appeal in the prescribed manner and within the prescribed time " and the case shall be referred to the medical appeal tribunal . . ." (Section 39(2)). " If the Minister notifies the insurance officer within the prescribed time that he is of opinion that any decision of a medical board ought to be considered by a medical appeal tribunal, the insurance officer shall refer the case to a medical appeal tribunal for their consideration, and the tribunal may confirm, reverse or vary the decision in whole or in part as on an appeal " (section 39(3)). Regulations 6 to 13 of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948 [S.I. 1948 No. 1299] make detailed provision for the constitution and proceedings of medical boards and medical appeal tribunals. Regulation 6A has the effect of preventing them from dating back an assessment made on review more than three months before the date of the application for it. Neither the Act nor any regulation makes any express provision for the revocation of a reference under section 39 once one has been made.

13. Section 4(3) of the 1953 Act provides as follows :—

" Where, in connection with a claim for disablement benefit, it is decided that the relevant accident has not resulted in a loss of faculty the decision—

(a) may be reviewed under subsection (2) of section forty of the principal Act as if it were an assessment of the extent of disablement resulting from a relevant loss of faculty ; but

(b) subject to any further decision on appeal or review, shall be treated as deciding the question whether the relevant accident has so resulted both for the time about which the decision was given and for any subsequent time. . . ."

14. Section 40 of the 1946 Act as amended by section 4 of the 1953 Act makes provision for review of a decision of a medical board or medical appeal tribunal. Section 48 provides for the reference of special questions arising on consideration of a claim or question. The right of appeal to the Commissioner from a decision of a medical appeal tribunal was created by section 2 of the Family Allowances and National Insurance Act, 1959, the only ground of appeal being that the decision is erroneous in point of law.

15. The question for our decision is whether the decision dated the 28th December 1961 of the medical appeal tribunal is erroneous in point of law. The reasons given by them for it fall into three parts. They decided first that they had no power to treat the decision of the medical board as a decision on review. It has at no stage been contended that this view was erroneous in point of law and it is therefore unnecessary for us to express any opinion on it.

16. The second and third findings of the tribunal are closely connected. The second was that they had no power to treat the decision of the 1961 board as a nullity. The third was that, after examining the claimant and considering the case on its merits, they held that there was no relevant loss of faculty.

17. We think that this appeal raises difficult points. The matter has been approached in two different ways, but in our judgment, whichever is the correct approach, the medical appeal tribunal's decision was erroneous in point of law.

18. The 1955 board had decided that there was no relevant loss of faculty. It has never been suggested that that decision was irregular in any way. The effect of section 4(3)(b) of the 1953 Act is that that decision is to be treated as a decision that there was no relevant loss of faculty at the time of the decision and further there was and is no relevant loss of faculty during any subsequent period of the claimant's life. That decision is final, subject of course to the qualification that if the claimant had appealed successfully against the 1955 decision, which he did not attempt to do, or had succeeded in obtaining a review in 1957, then the position would have been altered. In the absence of such alteration, however, it is not legally possible to have two decisions by different boards or tribunals on an identical question relating to the same period, which conflict with each other. Nor indeed is it convenient to have two decisions even to the same effect, since if one were reviewed there would then be a conflict.

19. In the course of the argument before us much was said about setting aside decisions, and this was contrasted with reversing them. In our judgment this is not the true distinction. Whenever a judge or tribunal deals on appeal with a decision given by another judge or tribunal, the appellate body in truth always in one sense sets aside the original decision. This may be done by substituting a different final decision for the original decision, which is thereby set aside. Even if the appellate body affirms the original decision, that original decision retains its validity only by virtue of having been affirmed by the appellate decision and expressly or impliedly incorporated in it. The rights of those concerned are controlled by the appellate decision. In other cases the appellate body sets aside the original decision but remits the matter to the original body to decide again. In every case the original decision is set aside, in the sense that it ceases by itself to govern the rights of those concerned. The true distinction is not between setting aside or not; but as to whose decision will replace the decision set aside.

20. The first main question is whether the decisions in 1961 of the medical board and medical appeal tribunal were given without jurisdiction and are null and void and if so with what effects. It is here necessary to notice that words such as "null and void" or "a nullity" have been used in different senses and have different effects in different jurisdictions. In some instances a decision is void in the sense that it is non-existent in law, even though no steps have been taken to set it aside. Thus, where justices acquitted a man of an offence which they had no jurisdiction to try, they had power subsequently to commit him for trial for the same offence, even though no steps had been taken to have the acquittal set aside (*Regina v. West* [1962] 3 W.L.R. 218). In other jurisdictions a decision is described as a nullity where the court will, on the application of the aggrieved party, set it aside as of right. In *Craig v. Kanssen* [1943] 1 K.B. 256 the plaintiff had issued a summons for leave to proceed to enforce a judgment, but the summons had been sent to an address which was not the defendant's

address. This was not a compliance with the relevant rules. The defendant had not received the summons, but an order had been made on it, of which the defendant had first learned more than a year after it had been made. The Court of Appeal held that the order was a nullity. Lord Greene M.R. in delivering his judgment, with which Goddard L.J. (as he then was) agreed, said that the cases to which he had referred appeared to establish that "a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside" (page 262). In that case nobody suggested that it was unnecessary for the defendant to take some steps to have the order set aside.

21. If the correct way of looking at this matter were as one of jurisdiction, and the decision of the medical board was a nullity or void, which words mean the same thing, then in our judgment the position would not be that described in *R. v. West* above. The local insurance officer's duty is to make or refuse an award of benefit in accordance with the decision of the medical board or the medical appeal tribunal as the case may be. In our judgment it is not in accordance with either the spirit or intention or the true construction of the Act, that the insurance officer should have to make what may be an extremely difficult decision of law, whether a decision of a board or tribunal is a nullity of the type that he can safely disregard, or not such a nullity, so that he must give effect to it unless it is appealed against. Moreover, if the medical board's decision in this case was given without jurisdiction and was void in the *R. v. West* sense, it is difficult to see how the medical appeal tribunal could give any decision about it at all. Their duty was to "confirm, reverse or vary the decision in whole or in part as on an appeal" (section 39(3)), which implies the existence of a decision recognised by the law. The result would be that where a medical board in fact had given a decision, the claimant if he were dissatisfied with it (section 39(2)), or the Minister if he were of opinion that it ought to be considered by the tribunal (section 39(3)), would have to decide whether it was merely erroneous and could be taken before the medical appeal tribunal, or whether it was non-existent in law; this would involve considering what steps, if any, were available to them to obtain a decision by other means on the question whether the decision was a nullity. If some steps were not taken, the medical board's decision would continue its non-existent existence in the records of the Ministry, to the confusion of all who might have to deal with any future claims by the claimant including ones for a review. Further, duplication of proceedings and great inconvenience would be caused, if the person concerned wished to contend that the decision was both erroneous and a nullity. In the present case the medical board's action in purporting to leave to the discretion of the Minister a question as to relevance which he had no power to decide, and which it was their duty to decide, was manifestly wrong. It would be strange if, because there was an additional defect relating to the decision, that error could not be put right by the medical appeal tribunal.

22. In our judgment the effect of section 39(2) of the Act is (subject to its proviso) that where a medical board have in fact given a decision (including for this purpose a decision given without jurisdiction), if the claimant is dissatisfied with it, because it was given without jurisdiction, or irregularly, or wrongly in law or in fact, or for any combination of these or other reasons, he is entitled to appeal against it to the medical appeal tribunal. The Minister has corresponding rights under section 39(3). The tribunal then has power to confirm, reverse or vary it, so as to place on record the decision which ought to be given. In our judgment therefore,

even if the medical board's decision is rightly described as being null and void or a nullity, it is so only in the sense described in *Craig v. Kanssen*, and it does not follow that the decision of the medical appeal tribunal was a nullity also. This is in line with Decision R(I) 18/61 and other decisions where Tribunals of Commissioners have held that they had jurisdiction to set aside a decision of a medical appeal tribunal as being a nullity.

23. This brings us to the second main question, which is what decision it was legally possible for the medical appeal tribunal to give. Since they dealt with the case on the merits, they clearly took the view that they had jurisdiction to entertain it. Subject to what follows, we think that they had. Rightly or wrongly the insurance officer had in fact referred the case to the board, and after their decision he had again referred it to the medical appeal tribunal. We think that it was their duty to dispose of the matter referred to them.

24. In our judgment however, it was not open to them, in face of the 1955 decision and in the light of section 4(3), to consider on their merits the questions whether there was a relevant loss of faculty or whether an assessment should be made. We think that this follows by analogy with the doctrine of estoppel in the courts of law. The effect of this doctrine, broadly stated, is that a person may be estopped or precluded from alleging or proving in later proceedings matters which have been decided against him in earlier ones. Thus, if a plaintiff sues a defendant for damages arising out of a motor accident, and the judge decides in favour of the defendant, and the plaintiff then starts a second action against the same defendant for the same matter, in the hope that a different judge will find in his favour, the defendant can then plead that the plaintiff is estopped from making allegations inconsistent with the findings of the judge in the first action. This does not mean that a judge has no jurisdiction to try the second action. On the contrary he will give a decision, and in practice there will be only one decision that he can lawfully give, based on the fact that it is not open to the claimant to make certain contentions. This form of estoppel is known as " estoppel by matter of record " and the phrase " *res judicata* " is sometimes used to describe it. The doctrine has been extended to various tribunals which are not courts of record, and it is then sometimes spoken of as " *estoppel quasi of record* " (see Halsbury's Laws of England, 3rd Edition, volume 15, pages 212-214).

25. In the law of Scotland a similar doctrine is recognised under different nomenclature. In place of the word " estoppel " the term " personal bar " is used ; and the use of this term is in practice limited to estoppel by deed or by conduct. Estoppel in the sense exemplified in the last paragraph would be referred to in Scotland simply as " *res judicata* " : which is a plea meaning that the question raised has been already decided by a competent tribunal in proceedings between the same parties (or parties having the same interest). This is a preliminary plea which (if sustained) excludes consideration of the merits of the case.

26. In our judgment in the present case there was only one decision which the medical appeal tribunal were entitled to give. It was that the question whether there was a relevant loss of faculty had been decided by the 1955 board ; that that decision was final (in the absence of appeal or review) ; and that it was therefore not open to the tribunal to entertain this question on the merits. This decision would of course have replaced that of the 1961 medical board, and in that sense would have set it aside. Since the medical appeal tribunal entertained on their merits allegations which the claimant was estopped or barred from making, in our judgment

the tribunal's decision must be held to be erroneous in point of law, substantially on one of the grounds put before the medical appeal tribunal namely that in view of the 1955 decision there was no room for another decision on the same question.

27. We should perhaps add that nothing that we have said about estoppel or the finality of decisions in any way interferes with the rights of appeal and review provided by the statutes.

28. In view of our decision on the above points we need not decide the further question mentioned by the medical appeal tribunal when refusing leave to appeal (paragraph 8 above) namely whether such a tribunal has power to set aside its own decision.

29. The Minister's appeal is allowed.