THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSI/136/02

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

DEPUTY COMMISSIONER: A C McGAVIN, ADVOCATE.

Appellant: Respondent: Secretary of State

Tribunal: Dundee Case No: U/05/089/2001/01396

DECISION OF SOCIAL SECURITY COMMISSIONER

1. This appeal by the claimant succeeds. The decision of the Dundee appeal tribunal given on 25th October 2001 was, in my judgment, erroneous in point of law. I set it aside and refer the case to a differently constituted tribunal (the new tribunal) for re-determination in accordance with the directions set out below. I do this under and in terms of section 14(8)(B) of the Social Security Act 1998.

History

Contraction of disease

2. The claimant was initially found to have suffered Prescribed Disease 42 (Non-infective dermatitis of external origin, now PD5) from 1st July 1975 until 16th July 1975 (pages 13-15) caused by his work as a cloth handler. The condition at that time affected both hands.

Recrudescence

3. The claimant continued to work as a machine operator handling cloth, but was off work in April, May, June and October 1978 as a result of Prescribed Disease 42 (hereinafter referred to as "dermatitis") and was paid off from his employment in November 1978 (page 31). He was paid injury benefit in respect of dermatitis from 24th April 1978 to 6th May 1978 (page 24). Thereafter he claimed benefit in respect of the same disease from 22nd September 1978 to 30th September 1978 and from 16th October 1978 to 13th November 1978, and a Consultant (W Frain-Bell) was asked to examine the claimant and provide a report on whether or not the claimant's condition in September and October 1978 was a recrudescence or a fresh contraction of dermatitis (page 24). He considered that the claimant's condition during the two periods was a sequel of the earlier attack of the disease which had itself been "triggered off in 1975 by various physico-chemical irritant factors" and that the claimant's skin would be less resistant in future as a result of his original contraction of the disease (page 26). On his examination of the claimant he noted "active eczema (dermatitis)" over the knuckles of both hands and, additionally, "a mild papular rosacea of the skin of the face". In its "Report on Diagnosis – Prescribed Disease Claim" the Medical Board noted in Section 14, "There are patches of dry skin on each hand which are itchy and irritable. The face appears to be affected at times." In the "Symptoms and signs" section of its report, it noted the condition of the claimant's hands and also stated "Skin of face slightly reddened over the cheek bones with slight roughening." The Board concluded "he is obviously still suffering from PD 42" (page 29), and found that this had caused a loss of faculty resulting in disablement which it assessed at 15% from 22nd October 1978 until 21st June 1979 (provisional).

4. The claimant did not return to his previous type of employment as a textile machine operator and became a student (pages 41 and 45). Reassessments by Medical Boards (which mentioned only the skin on the claimant's hands) were dated 16th May 1979, 7th November 1979, 1st May 1980 and 19th May 1981, and resulted in disablement assessments of 10% provisional, 2% provisional, 2% provisional and 2% final until 21st June 1981.

Claim of change of circumstances

5. Nine years elapsed. By B1 168 Form dated 29th October 2000, the claimant notified a change of circumstances since his last (1981) assessment (pages 53 to 56). He stated that the condition of his skin had deteriorated and that whereas previously it was his hands which were badly affected, his face was now "very susceptible to outbreaks of severe attacks". This had begun after he commenced a carpentry course in 1995/1996, and was so severe that he could not finish the course. Thereafter when he was unemployed his skin settled down, but was prone to "periods of outbreaks". These outbreaks had "intensified" he said, during the year prior to his claim of a "change of circumstances".

6. On 27th November 2000 the claimant was examined by a medical adviser (pages 64-69).

7. The medical adviser had available to him previous reports and assessments together with a letter from the claimant's GP dated 24th May 2000. In that letter the claimant's GP states that the claimant has dermatitis affecting his hands and face which is prone to flare up from time to time, and is quiescent at other times. He states that the claimant's condition has not, so far, been easy to control. He states that the claimant first saw a dermatologist on 16th December 1998 and has been tested and found to react to colophony and fragrances.

8. On examination the medical adviser found "no obvious skin lesions on hands, or trunk/lower limbs". He found "slight reddening at the elbows and reddening/erythema of facial skin with dryness". He found no evidence of acute inflammation of the limbs or hands. He stated that there was "no clear evidence of significant change in symptoms since last assessed". He concluded that there was "no clear clinical reason to alter original assessment".

9. On the face of it, the medical adviser's conclusion took no account of the evidence of the GP, whose letter he stated that he had seen (page 66). The medical adviser's conclusion was that the claimant's condition when he saw him was not significantly changed from his condition when assessed in 1981. Therefore the original assessment should not be changed. But this ignored the clear evidence of the GP, Dr Arthur, who wrote that the claimant had dermatitis affecting his hands and face which was prone to flare up and had been difficult to control. It was also clear from this letter that the GP had referred the claimant to a dermatologist on more than one occasion since 1998. It is not known what the medical adviser made of the GP's evidence. He appears to have decided that the claimant's condition was not as described by the GP (acute and fluctuating) but as he, the medical adviser, found it on the day of the examination (effectively quiescent).

10. A decision maker accepted the medical adviser's conclusion and found on 19th January 2001 that the decision of the Medical Board of 19th May 1981 (disablement at 2% from 22nd June 1981 for life, final) was superseded from 31st October 2000 at the same rate.

11. At the claimant's request, this decision of 19th January 2001 was reconsidered by a decision maker on 28th February 2001 who decided that it should not be changed.

Appeal to Tribunal

12. The claimant appealed to a tribunal and an appeal tribunal sat in Dundee on 25th October 2001. The tribunal had the following documentary evidence before it:-

1. Dr Arthur's report of 24.5.00 (pages 59-61)
2. Dr Clark's report of 25.7.01 (pages 83-84)
3. GP's Med Cert of 29.5.01 (pages 85-86)
4. GP's Med Cert 24.8.01(page 88)
5. Letter of 17.4.01 from Mr Jones of Social Security (pages 89-90)
6. Report of Mr Llewellyn dated 4th November 1976 (125) which the claimant states (page 102) he produced to tribunal.

13. It appears that the claimant, who was not represented, attended the tribunal hearing and was examined by and gave evidence to the tribunal. Only part of the Record of Proceedings has been recovered (page 122) the rest having been lost.

14. The tribunal allowed the claimant's appeal. It increased the disablement assessment from 2% for life (final) to 5% for life (final) from 29th October 2000 (date of application) in respect of the condition of the claimant's hands only, and found that the condition of the claimant's face was not due to his previous employment.

Appeal to Commissioner

15. After having been refused set-aside of the Tribunal's decision, and leave to appeal the decision (both decided by the same Chairman of the tribunal who decided the claimant's appeal) the claimant was granted leave to appeal to the Commissioners by a Commissioner.

16. The claimants' grounds of appeal may be considered under two headings:-

i. Change of circumstances argument
ii Article 6(1) of the European Convention on Human Rights argument

17. I deal with them in turn.

Change of circumstances

18. The claimant's main submissions under this heading are –

i. the tribunal was wrong in holding that the condition of his face was unrelated to his original employment (page 102).

ii. the tribunal's conclusion that the condition of his face is unrelated to his original employment is not supported by the Tribunal's observations in its "Decision" (page 103).

19. The Secretary of State's submissions were scanty and effectively restricted to a submission that

“rosacea” is not dermatitis (paragraph 5, page 132).

20. This is what the tribunal said about the claimant’s face. I have placed in italics specific passages to which I shall later refer:-

“Findings of Fact
7. In an effort to improve his employment prospects, he enrolled on a carpentry course approximately five years ago. Shortly after commencing this course he experienced problems with his face which, in his words, “swelled up like a balloon”. Subsequent tests identified that he was allergic to the resin in wood. He had to discontinue the course for this reason. He has continued to experience problems with the skin on his face since that time. He had not experienced any particular problems with the skin on his face prior to attending the carpentry course.

10……His face is generally red with obvious red papules on both cheeks.

11. The terms of the report from Dr Clark which is contained at pages 83 to 84 of the Tribunal papers are incorporated into the findings of fact by reference.

Decision
It is clear from the terms of Mr Duncan’s appeal that a much more significant problem relates to the condition of the skin on his face. There is a clear history which indicates that there were no significant problems with his face up until he went on a carpentry course in 1995/96. We have noted that a mild rosacea was recorded in 1978. We consider that this is probably still playing a contributory part in current facial eruption. He developed serious problems with his face at the time of his carpentry course and it was established that he had developed an allergic reaction to colophony which is contained in wood and glues. The report from Dr Clark contained at pages 83 and 84 of the Tribunal papers is particularly helpful in this respect. We have no doubt that Mr Duncan continues to experience significant problems with his facial skin but we are quite clear that these are not in any way related to his earlier employment as a machine handler. We must accordingly leave these problems out of account.” (penultimate paragraph)

21. There was not, in my view, evidence in this case which entitled the tribunal to conclude that the claimant “had not experienced any particular problems with the skin on his face prior to attending the carpentry course” or to conclude that the claimant’s facial skin problems were “not in any way related to his earlier employment as a machine handler”. Indeed, a number of pieces of evidence pointed in the opposite direction, indicating that the claimant’s facial condition could well be a manifestation of the prescribed disease which had been found to have been caused by his original occupation, but these were not considered or if considered, were not mentioned by the tribunal.

22. Firstly, the prescribed disease from which the claimant was found to be suffering was “dermatitis” not dermatitis of the hands. Dermatitis is, in very general terms, inflammation of the skin. Non infective dermatitis of external origin is a disease which is prescribed for any occupation involving “exposure to dust, liquid or vapour or an other external agent capable of irritating the skin…” (Social Security (Prescribed Diseases) Regulations 1985). It is therefore a matter to be medically decided whether an outbreak of inflammation of the facial skin is a manifestation of this

disease or a completely different and unrelated condition. Dr Clark's report (pages 83 to 84) does not address this point.

23. Secondly, it is clear from the history of the case which I have set out in the beginning paragraphs of this Decision, that the claimant's face has been included in consideration of his skin condition. The many reports and assessments indicate that the most troublesome aspect of the claimant's dermatitis was its effect on his hands, but there is no basis for concluding that the claimant's facial skin condition has not been considered to be a part of the manifestation of his prescribed disease as contracted from his original occupation.

24. Thirdly, the tribunal has adopted by reference into its findings in fact, the report of Dr Clark (dated 25th July 2001). Dr Clark was only involved with the claimant's case from May 1999. He states that the claimant is suffering from chronic dermatitis of his hands and to a lesser extent of his feet and in addition has regular acute dermatitis on his face. It is not, in my view, tenable to reach the conclusion that the claimant did not, prior to 1999, suffer from dermatitis of the face caused by his original occupation, simply because Dr Clark's report was related to the period since May 1999. He did not address the point. Earlier assessments of the claimant's condition prior to May 1999 did not discount the claimant's facial condition.

25. With reference to the rosacea from which the claimant was recorded as suffering in 1978 the tribunal states "we consider that this is still playing a contributory part in his current facial eruption". If the rosacea was noted in the 1978 assessment of the claimant (when it was decided that recrudescence of his prescribed disease had occurred), it was clearly important for the tribunal to have opined as to whether or not this was a manifestation of the claimant's prescribed disease, and if not, why not. They reached no conclusion on the matter.

26. It appears that on the one hand, the tribunal incorporated into its findings in fact, Dr Clark's findings that the claimant was suffering from acute facial dermatitis, but considered, on the other, that this was a separate condition from the dermatitis which the claimant contracted due to his original occupation. Such a conclusion was not supported by the evidence for the following reasons.

27. The report by Dr Frain-Bell in December 1978 (page 26) makes it clear that the claimant became allergic to certain physico-chemical irritant factors. Having become sensitised, Dr Frain-Bell opined that the claimant was likely to experience trouble in the future if he came into contact with these irritants. In addition, the letter from Mr Jones of Social Security (page 89) states that the Medical Team Leader

"notes that you have been a Machinist, a job notorious for the causation of Industrial Dermatitis, in that oils associated with this type of work tend to cause outbreaks of the condition. The person will be affected for the remainder of his or her life by the disorder and would be subject to exacerbations due to contact with similar substances in everyday life."

28. Without a report to the effect that the irritants to which the claimant was found, on testing, to be allergic in 1998, colophony and fragrances (pages 60-61), are not those to which he was sensitised in his original occupation, it is difficult to see how the tribunal could distinguish between

the claimant's previously found hand dermatitis with face involvement, and his latterly found facial dermatitis with continued hand dermatitis.

29. It is not apparent what the tribunal made of Dr Clark's findings that the claimant had dermatitis on his feet also, or what conclusions it reached on its own findings regarding the claimant's groins, elbow and shoulder blades. The claimant had specifically mentioned his groin and elbows in his application for supersession on the grounds of a relevant change of circumstances, and it was incumbent upon the tribunal to deal with the matter, which it did not.

30. In addition, the tribunal had the evidence contained in the letter from Mr Jones of Social Security (pages 89-90) which stated that the Medical Team Leader had stated that the important point about the prescribed disease is that "although on any given day a person can appear symptom free, the underlying systemic problem remains and any further contact with the allergen can bring about a recurrence". The tribunal failed to consider this evidence in conjunction with the medical adviser's report on the claimant's condition (to which I draw attention at paragraph 9 above), in considering whether or not the decision which had been appealed to it (19th January 2001) was wrong.

31. In all of these ways, the tribunal erred in law and its decision must be set aside.

Article 6(1) of the European Convention on Human Rights.

32. The European Convention on Human Rights has been incorporated into the laws of both England and Scotland by the Human Rights Act 1998. The tribunal hearing in this case took place on 25th October 2001, that is, after the coming into force, on 2nd October 2000 of that Act.

33. The relevant part of Article 6(1) of the Convention provides:-

" Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

34. There is no doubt that in deciding the claimant's appeal, the tribunal was determining "his civil rights and obligations" (Schuler-Zgraggen v Switzerland (1993) 16 EHRR 405 at para 46) in terms of Article 6(1) of the Convention.

35. The claimant's submissions were, in effect, that he was denied a hearing by an independent and impartial tribunal.

36. His argument was that the tribunal was not independent because it was in collusion with the appeals service by means of freemasonry to deny him justice because of his professed antipathy towards freemasonry (134). I shall call this the "independence ground". It is closely linked with the claimant's argument that the tribunal, in its decision of 25th October 2001, was personally biased against him, and I shall deal with both arguments together.

37. His argument on impartiality was two fold. Firstly he maintained justice was not done because the chairman of the tribunal's actions showed that he was biased against him when he decided his appeal. I shall call this the "impartiality – subjective test – ground". Secondly, he maintained that justice was not seen to be done because he sought reassurance that the tribunal had no links with freemasonry and his request was ignored or refused. I shall call this the "impartiality – objective test – ground".

38. The Secretary of State's response to the claimant's submissions under the Human Rights Convention is recorded in paragraph 3 of his Submissions to the Commissioner (page 132) and is:-

"The claimant's grounds of appeal relate largely to concerns about freemasonry which have no relevance to this case and will not be addressed in this submission."

I can only describe the response as most unhelpful.

39. For the purposes of Article 6(1) the existence of impartiality is to be determined according to two tests, one subjective, one objective (Piersack v Belgium (1982) 5 EHRR 169 at para 30).

40. In order to satisfy the subjective test the claimant requires to show that the tribunal, in fact, had personal bias against him whereas the objective test requires the claimant to show, not that there was actual bias, but that there was "legitimate doubt" as to impartiality that can be objectively justified (Hauschildt v Denmark (1989) 12 EHRR 266).

The impartiality – objective test – ground.

41. The claimant maintains that he was a person with a known and professed antipathy to freemasonry. In these circumstances, he asked the Appeals Service on two separate occasions (Ms Joan Cattell and Ms Macdonald) (page 87) before his tribunal hearing to state whether anyone who was going to decide his case had any links to freemasonry. He maintains that his request was refused or at least ignored and he was not provided with the information. Further, the tribunal chairman did not address the issue (page 100 penultimate paragraph and page 110) at any time.

42. In Remli v France (1996) 22 EHRR 253, 1996-II p559), a majority court held that there was an obligation on every court to check whether it is an "impartial tribunal" in accordance with Article 6(1) where the point is raised.

43. In that case, Mr Remli and his co-accused were of North African origin. A "Mrs M" submitted a written allegation that she had overheard one of the jurors make the remark "What's more, I'm a racist", before the hearing and outwith the court. The Defence counsel asked the court to take formal note of it. This is what the European Court said:-

"It is not for the Court to rule on the evidential value of Mrs M's written statement or on whether the racist remark attributed to the juror in question was actually made. It notes merely that Mrs M's statement – which contained a serious allegation in the context of the case - was filed with the

Assize Court by the applicant's lawyers, who asked the court to take formal note of it. The court dismissed their application without even examining the evidence submitted to it, on the purely formal ground that it was "not able to take formal note of events alleged to have occurred out of its presence". Nor did it order that evidence should be taken to verify what had been reported – and, if it was established, take formal note of it as requested by the defence – although it could have done so. Consequently, the applicant was unable either to have the juror in question replaced by one of the additional jurors or to rely on the fact in issue in support of his appeal on points of law (see paragraph 21 above). Nor could he challenge the juror, since the jury had been finally empanelled (see paragraph 17 above) and no appeal lay against the Assize Court's judgement other than on points of law (see paragraph 16 above).

48. Like the Commission, the Court considers that Article 6 para. 1 (art.6-1) of the Convention imposes an obligation on every national court to check whether, as constituted, it is "an impartial tribunal" within the meaning of that provision (art. 6-1) where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit.

49. In the instant case, however, the Rhone Assize Court did not make any such check, thereby depriving Mr Remli of the possibility of remedying, if it proved necessary, a situation contrary to the requirements of the Convention. This finding, regard being had to the confidence which the courts must inspire in those subject to their jurisdiction, suffices for the Court to hold that there has been a breach of Article 6 para. 1(art. 6-1)."

44. In the present case, it was the claimant's contention that he would not receive justice if the person deciding his case was a freemason, this was because he was an avowed opponent of freemasonry. It did not matter, in my opinion, whether or not the claimant's views had been reported in the press, or were widely known. He had made them known to the tribunal. He was therefore known by the tribunal to be opposed to freemasonry. In those circumstances, he sought the assurance which he did. He did so by letter dated 27th September 2001 which was in the following terms (page 87):-

"Dear Ms Macdonald

I have received your letter dated 25/9/01.

It is regards my (IIDB) appeal.

I submit some more evidence that you may submit to the tribunal on my behalf
(Enc1&2) + 3.

Furthermore as I have relayed to Ms Joan Cattell I wish to know if anyone from now on who sits and decides my fate has any links to freemasonry.

It is my contention that I should have the right to know this as I feel I have been on the receiving end of corrupt practices for far too long due to my professed antipathy towards this organisation.

I thank you.

Your sincerely

(claimant's signature)"

45. There is no record, in the tribunal's file, of any reply having been sent to the claimant by the Appeals Service. His letter was certainly before the tribunal as it is included in its appeal papers. There is no mention in the tribunal's decision of its having addressed the issue at all. The matter was simply not dealt with.

46. In the Scottish case of Stott v Minogue 2001 SLT (Sh Ct) 25 (to which the claimant refers in his submissions at page 110) an accused lodged a plea at an intermediate diet that he would be denied a hearing by an independent and impartial tribunal without a declaration that the sheriff was not a freemason. This was because he had made certain statements during interview regarding freemasonry and considered that certain police witnesses might be freemasons. The Sheriff at the intermediate diet transferred the case to the Sheriff who was to preside at the trial so that she could deal with the request for a declaration.

47. She decided that "there was no support in the authorities for a right of litigants or accused to require judges to make positive declarations of the kind sought", and she provided reasons for her decision. The difference between that case and the present case is that in the Sheriff Court case, the Sheriff addressed the issue raised under the Convention. She heard Senior Counsel for the accused, and also the procurator fiscal regarding the issue of impartiality. The point was fully argued before the Sheriff who produced a written judgement. In the present case no steps were taken to address the claimant's request. Had the tribunal addressed the issue, it might have agreed with the Sheriff in the case of Stott v Minogue (supra). On the other hand it might not have agreed because there are obvious differences between the two "tribunals". Clearly, the issue of freemasonry did not "immediately appear to be manifestly devoid of merit" (The court in Remli v France supra) to the court in Stott v Minogue (supra), and I consider that it should not have so appeared to the tribunal.

48. Bearing in mind, as the court did in Remli v France supra, "the confidence which the courts must inspire in those subject to their jurisdiction", I find that the tribunal's failure to address the issue of impartiality constituted a breach of Article 6(1) of the Convention. The tribunal's error in law was such that its decision must be set aside.

The impartiality – subjective test – ground, and the independence ground

49. In order to satisfy the subjective impartiality test the claimant requires to show that the tribunal, in fact, had personal bias against him. This is difficult to do because there is a presumption of impartiality until the contrary is proved (Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1; Albert and Le Compte v Belgium (1983) 5 EHRR 533; Debled v Belgium (1994) 19 EHRR 506).

50. The word "independent" where it occurs in Article 6(1) has been held by the European Court to mean independence of the executive and also of the parties (Ringeisen v Austria (No 1)(1971) 1

EHRR 455).

51. The claimant maintained that a number of errors and delays had occurred in the processing of his applications for Disablement Benefit, Reduced Earnings Allowance and Income Support by the Benefits Agency, and he produced a number of letters in which apologies were made to him for these errors and delays.

52. He also maintained that his appeal to the tribunal, although allowed, was, allowed to a very restricted extent and not to the extent that had any practical effect, such as an award of benefit. Thereafter when he sought to have the decision set aside, that application was refused by the same person as had chaired the tribunal hearing, and had not addressed the issue of impartiality which the claimant had raised. Added to the "set-aside" decision were the words "He should carefully consider whether or not he wishes to seek leave to appeal against the tribunal's decision.", which the claimant took to be an "implied threat". When the claimant sought leave to appeal the tribunal's decision, he was again refused, and again the decision was made by the same person as had chaired the tribunal hearing, and refused his set aside application. The claimant considered that the fact that the same tribunal Chairman had made three consecutive decisions in his case, two of which effectively denied him a right of appeal in respect of the first, and had refused or failed to deal with the issue of impartiality which he had raised before the tribunal hearing, showed that there had been actual bias against him when his appeal to the tribunal was heard.

53. He claimed that the tribunal chairman had been appointed to hear his tribunal appeal, his set aside application and his application for leave to appeal, in order to deny him justice. His contention was that there was freemasonry collusion between the Benefits Agency and the Appeals Service. The tribunal chairman had been biased against him and the tribunal had not been independent either.

54. The decision appealed to me is the decision of the tribunal of 25th October 2001, not the tribunal chairman's later set-aside decision nor his leave to appeal decision. The claimant's allegations of bias and of lack of independence were both based upon the premise that freemasons in the Appeals Service and in the Benefits Agency had been involved in processing his benefits claims and in the arrangements for the hearing of his appeal, and that the tribunal chairman was a freemason. He provided no evidence that this was the case.

55. Accordingly, I find that these grounds fail.

Decision

56. The tribunal erred in law as indicated in paragraphs 31 and 48 above and its decision must be set aside. I am unable, without making fresh or further findings in fact to give the decision which the tribunal should have given, nor is it expedient for me to make such findings. Accordingly, I must refer the case to a newly constituted tribunal with directions for its determination, and my directions are as follow.

Directions

57. I direct the new tribunal to conduct a complete rehearing. It must address, as a preliminary issue to that hearing or prior to it, the claimant's request that he be advised as to whether any member of the tribunal has links to freemasonry. It should give an opportunity for full legal argument and the production of evidence thereanent, and I direct the Secretary of State to make submissions on the matter. The issue should be decided by the tribunal before it proceeds, if it considers it may do so, to hear the claimant's benefit appeal.

58. In the claimant's benefit appeal, I direct the tribunal to consider all of the evidence relating to the claimant's skin condition and to determine and state what evidence it accepts, what evidence it rejects, and why. In so far as questions of reliability and credibility arise, I direct the tribunal to explain and justify its assessments. In determining whether or not there was a relevant change of circumstances, I direct the tribunal to make full findings in fact and to base its decision upon those findings.

59. The Appeal is allowed.

(signed)
A C McGavin, Advocate.
Deputy Commissioner
Date:- 14 August 2002