

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

PA-1-92

Royal Courts of Justice,

Monday, 5th October 1992.

Before:

MR. JUSTICE DRAKE

Crown Office List

ERNEST HOLMES

-v-

THE SECRETARY OF STATE FOR SOCIAL SECURITY

JUDGMENT

(As approved by Judge)

MR. JUSTICE DRAKE: Mr. Ernest Holmes was born in 1915 so he is now about 77 years old. He served in the infantry from April 1940 to May 1945 and his service included a period of 13 months in North Africa from the beginning of 1943 until the end of January 1944. He claims a pension on the grounds that his disabilities of an undescended left testicle and rupture are attributable to war service and have remained aggravated thereby. His original claim also included a claim for the disability described as "fits". That is not pursued on the present appeal.

His original appeal to the Pensions Appeal Tribunal was dismissed as long ago as 30th May 1946 -- 46 years ago. But he now appeals to me as nominated judge by leave of the President of the Tribunal granted on 19th June 1991. This is an Article 4 case so the burden of proof lies heavily in favour of the appellant.

For the appellant it is submitted that, when one looks at the history of this appellant and his disabilities, it is clear that the respondent is unable to rebut the compelling presumption in favour of the appellant. But for the respondent it is said that the case is in an unsatisfactory state in that there is a complete lack of evidence as to what was given in evidence before the Tribunal in 1946, other than the few notes we have, largely turning on the medical history and the opinion of the medical division. In those circumstances it is submitted for the respondent that the correct way to deal with this case now is to remit it to the Tribunal for a further hearing.

The position, so far as the disabilities are concerned, is that there is mention in the medical history of an operation performed on the appellant at the age of 14 for double rupture and undescended testicles, at which operation the right testicle was removed and what is described as a plastic operation performed on the left. The opinion of the Medical Services Division given in 1945 stated: "The results of this however were not good and rendered the appellant liable to pains and swelling of the testis for which hospital treatment was required prior to enlistment."

The medical opinion then goes on to state: "There is no evidence of any worsening of this condition during service and in our opinion it cannot be regarded as either attributable or aggravated thereby."

However, that statement seems to be in contradiction of another statement immediately preceding it in the opinion, namely: "Complaints during service led to his category being lowered to B1 and later to C2 in which category he was discharged." There is no doubt on the records that when he enlisted in March 1940 his category was A1, and a medical examination, whilst correctly noting an absence of right testicle, did not mention anything abnormal about the left testicle. Therefore one may assume in my judgment that the left testicle was at that stage found to be normal.

In March 1943, whilst in North Africa, the absence of the left testicle was noted. He was, however; still sent back for duty, but in August 1943 he was categorised as being unfit for duties, including standing or marching, and in May 1944, after his return to the United Kingdom, he was discharged as being unfit with a category C2. The reasons for discharge, somewhat curiously, were stated as being: "His service is no longer required for the purpose for which he enlisted."

I find that this appeal does pose a difficult question in that the absence of the full records of what occurred before the Tribunal in 1946 leads to an unsatisfactory position. It may be that the appellant gave oral evidence before the Tribunal and it may be that some of what he said, at any rate, was rejected. One just does not know on the records we have. I do now have letters from the appellant which fill in some of the background of what he says happened during North Africa, but whether or not those statements or similar facts were before the Tribunal in 1946 is something we simply do not know.

I find myself here in agreement with the opinion of the President of the Pensions Appeal Tribunal when he gave leave to appeal. The approach of the president was simply this. Here was a man who enlisted in 1940 category A1 with nothing wrong with his left testicle and I agree with the President of the Appeal Tribunal that, since nothing was said on enlistment about the left testicle, one is entitled to assume that it was found to be normal. But in March 1943, whilst serving in North Africa, the unusual condition of the left testicle was noted and, following that, he was sent back to the United Kingdom and discharged unfit for duties and categorized C2.

So far as that is concerned, therefore it seems to me that the presumption is overwhelming that something happened to him during service. He was A1 on enlistment and C2 on discharge. His left testicle was normal on enlistment. It was abnormal and gave cause for the discharge. In those circumstances I cannot see how the compelling presumption in favour of the appellant could be rebutted. Therefore it seems to me, as I find, that he has proved his case with regard to the attribution of his disability to service in respect of the left

testicle. The rupture has been argued to go with the left testicle to be treated as virtually one and the same condition, and here it is said that the position is unsatisfactory because of the fact of a previous operation for rupture and the possibility that any rupture condition which contributed to the reasons for his discharge was an aggravation of the condition rather than a condition being attributed to war service.

However, it seems to me that I am entitled in this case to find, as I do in the circumstances, that, since his condition was A1 on enlistment, any previous condition of rupture had by then disappeared and gone away and that his subsequent disability was something new which is attributable to his war service. Therefore, I shall allow the appeal and find that this is a case where his conditions of undescended left testicle and rupture are attributable to war service.

I accept the concern on behalf of the Secretary of State that the mere fact that records do not exist should not be a ground for virtually automatically allowing an appeal. I make it clear that that is not the position. Each case must be looked at on its particular facts. It just happens that in this case I think that the facts are sufficiently in favour of the appellant to lead to the decision that I have made.
