

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

(Tucker, J.)

11th and 17th May, 1945.

MOXON v. THE MINISTER OF PENSIONS (No. 2)

JUDGMENT
(17th May, 1945)

Mr. JUSTICE TUCKER: This case comes before me on a re-statement of the Case pursuant to my Order of 18th December, 1944. It raises the question whether the Minister adduced before the No. 6 Pensions Appeal Tribunal evidence sufficient in law to rebut the presumption under Article 4 of the Royal Warrant of 4th December, 1943, that where a disease which has led to the discharge of a member of the military forces was not noted in a medical report made on that member on the commencement of his war service, he is entitled to a certificate unless the evidence shows that the conditions set out in the Article are not fulfilled.

The following facts were found by the Tribunal on evidence the sufficiency of which is not in dispute:-

- (1) The appellant was called up on 11th November, 1940, and placed in Grade 2. Eleven days later he was placed in Category B.1.
- (2) He served as a Gunner in the Royal Artillery until his discharge on 8th June, 1943.
- (3) From 12th December, 1940, to 2nd February, 1942, he served with an anti-aircraft unit on the East Coast and did duty during air raids.
- (4) On 9th February, 1943, he was admitted to hospital and diagnosed as suffering from simple schizophrenia.
- (5) The disability on account of which he was discharged on 8th June, 1943, was schizophrenia.
- (6) This disability was not noted on his medical examination on enlistment.
- (7) Before joining the army he had not been absent from work except for minor ailments.
- (8) Apart from his period of service on the East Coast there were no other conditions causing strain to the appellant, mental or otherwise.

With regard to his service on the East Coast the appellant had supported his claim by a written statement in which he said: "The whole reason for my present mental debility and instability is the nervous effect of my experiences during my army service. Previous to my army service I had not experienced any cause for anxiety or worry such as would lead to mental debility and instability which now disables me from work, and previous to such army service I led a normal healthy and active life. For one period of my army service I was stationed on the East Coast and there for some considerable time suffered considerable strain by reason of the duties which were necessary during air raid attacks. For some weeks my unit, a heavy anti-aircraft unit, was on duty day and night with very little rest and this subjected me to physical and mental strain such as I had never experienced or had to contemplate in civilian life."

This statement was forwarded to the Officer under whom the appellant had served on the East Coast and he was asked whether he could confirm it. His reply was as follows: "In so far as he would never experience the same in civilian life, most certainly. As to the strain caused it is impossible to say. As an ordinary gun number he would man during air raids and, when this manning a gun at night robbed a man of his sleep, he would make it up during the day. There was no undue period of successive air raids which would call for strain whilst he was under my command."

As to this the Tribunal find as follows:- "The report of the Officer Commanding the appellant's unit, dated 21st March, 1944, is an accurate statement of the appellant's service duties and conditions."

No oral evidence was given before the Tribunal, nor was the appellant present. He was represented by Counsel. All the above facts were found by the Tribunal from the "Statement of the Case," or documents submitted therewith, prepared by the Minister under Rule 5 of the Pensions Appeal Tribunals (England and Wales) Rules, 1943⁽⁵⁾ and sent by him to the Pensions Appeal Office after copies had been supplied to the appellant.

Under this Rule the "Statement of the Case" must set forth (a) the relevant facts relating to the appellant's case as known to the Minister, including the medical history of the appellant, and (b) the Minister's reasons for making the decision against which the appeal is brought.

Under the same Rule the appellant is entitled, but not bound, to submit an answer indicating (a) whether and in what respect the facts in the Statement of the Case are disputed; (b) any further facts which in his opinion are relevant to the appeal; and (c) his reasons for thinking that the decision of the Minister was wrong.

In this case the appellant put in an answer in these terms: "(a) The facts in the Statement of the Case which I dispute are as follows: I dispute the statement of the Commanding Officer of my unit that there was any opportunity to make up lost sleep during the day and I say that I was subjected to undue strain during the period mentioned in my Notice of Appeal."

⁽⁵⁾ S. R. & O., 1943, No. 1757/L.39.

There can be no doubt that under the Pensions Appeal Tribunals Rules - particularly Rule 12 - the Tribunal was entitled to receive the "Statement of the Case" in so far as it consisted of a statement of the relevant facts as *prima facie* evidence of the facts so stated. Moreover, it could receive documentary evidence submitted by either party.

In this case, however, a question arises as to whether the Tribunal was entitled to receive that part of the "Statement of the Case" which consisted of the Minister's reasons for his decision as evidence of any facts or matters of expert medical opinion contained therein and relevant to the issues before them. The Tribunal must, of course, give due weight to these reasons and will no doubt be guided by their medical member in technical medical matters arising therefrom, but that is, of course, a very different matter to treating the reasons as equivalent to a written and signed report by a medical expert.

In this case the reasons for the Minister's decision as set out in his "Statement of the Case" were as follows:

"The appellant was Grade 2 on examination for enlistment in August, 1940. He joined for duty in November, 1940, when his medical category was stated to be B.1, and served until September, 1941, when he was admitted to hospital for mild mastitis. Thereafter no incident is recorded until hospitalization in February, 1943, when he was admitted with a history of being extremely confused and disorientated for time and place. He was stated to have been inefficient at his army duties and was described as slow mentally and physically. Investigations established a diagnosis of schizophrenia, but little improvement could be effected, as he refused electric convulsive therapy and discharge from the service to the care of relatives was advised.

"Schizophrenia is a common mental disorder of constitutional origin, which characteristically manifests itself without regard to external circumstances. In the experience of the Ministry the disorder is no more prevalent amongst service personnel than amongst civilians. In this case it is claimed that the condition was brought about by duties during air raid attacks, but the report of the Officer Commanding unit on M.P.T. 23 does not indicate that undue stress was experienced during the period in question. He left the East Coast in February, 1942, and it was not until a year later that his mental illness became apparent.

"In the Ministry's view nothing occurred in service which can be held to have precipitated the condition or contributed to its worsening and the Ministry is unable to certify that Mr. Moxon's disorder was either caused or its progress accelerated by any war service factor."

The Tribunal deal with this decision as follows: Under paragraph 1 of the Case Stated they say: "Apart from the medical evidence in hospital reports which support the diagnosis of schizophrenia which we accept as correct, there is no medical evidence on the side of the Minister of Pensions to say that this disease could not be caused or aggravated by the matters relied on by the Appellant. All that there is on that subject is contained in the decision of the Ministry and Mr. Mitchison contends that that is not evidence. There is something to be said for this contention. The decision is not signed by anyone and its writer remains anonymous and the opinion given cannot be tested in the ordinary way and is unsupported by evidence documentary or oral. It is not

evidence in the strict sense, but Pensions Appeal Tribunals are not bound by the ordinary rules of evidence and evidence is not to be rejected because it would not be admissible in a Court of law, and, the decision being under review, the reasons for it are also, and it is the duty of the Tribunal to say whether they are correct, and, this being purely a medical question, the Tribunal has the benefit of the wide experience of its Medical Member whose functions are not merely to explain the meaning of surgical and medical terms but to give his opinion generally. Reviewing that decision we are definitely of the opinion that the Ministry's decision is correct and that the matters relied on by the appellant did not and, in view of the nature of the disease, could not cause or aggravate the disease and accordingly the appeal must be disallowed."

Later on, when summarising their findings on this point, they say under paragraph 4(h): "It" (that is the Tribunal) "is entitled to regard the reasons given by the Ministry of Pensions in its decision, set out in the Statement of the Case, as no less evidence than are the comments of the Minister made under Article 15 of the Rules."

They go on to refer to the case of *Irving* ⁽⁶⁾ in the Court of Sessions, and under paragraph 4 (i) they say: "The Medical Member of the Tribunal is charged with the duty to advise the Tribunal on the question whether the reasons for disallowing the appellant's claim to a pension set out in the decision of the Ministry are acceptable in the light of his medical knowledge and experience": and in paragraph 5: "The Tribunal was advised by its Medical Member that the reasons set out in the decision of the Ministry were in his opinion correct, and that in his experience the disorder is no more prevalent amongst service personnel than amongst civilians, and that there were no conditions in the service of the appellant that would render probable the contention that his service conditions caused or aggravated the appellant's disability and the Tribunal accordingly disallowed the appeal."

Earlier in the Case there is a finding of fact by the Tribunal as follows: "3(g). The conditions set out by the Commanding Officer in M.P.T. 23 were insufficient to cause the appellant's disability and that it was due to constitutional causes and origin."

It is clear that the Tribunal's finding is based either on their acceptance of the Ministry's decision as evidence coupled with their Medical Member's advice thereon, or on the advice of their Medical Member given on the undisputed facts as set out in the first part of the Minister's "Statement of the Case" dealing only with facts.

Unless one or other of those bases for their decision can be justified it is in my view clear that the remaining material in the case would be insufficient to discharge the onus which lies on the Minister.

It will, I think, be convenient at this stage to set out in full the relevant provisions of the Statute and Royal Warrant dealing with the onus of proof. Section 6, subsection (4) of the Pensions Appeal Tribunals Act, 1943, provides as follows: "In determining an appeal under this Act in respect of any claim or award, the Tribunal shall be bound by the terms of the Royal Warrant, Order in Council, Order of His Majesty, or scheme under which the claim or award purports to be made and of any enactment under which any such scheme is made, being terms relating to the issue before the Tribunal."

⁽⁶⁾ Post p. 401.

Articles 3 and 4 of the Royal Warrant so far as material to this case read as follows:

"Article 3. *Basic condition of awards.* Under this Our Warrant awards (other than an award under Article 20) may be made where the disablement or death of a member of the military forces is due to war service.

Article 4: *Entitlement.* (1) The disablement of a member of the military forces shall be accepted as due to war service for the purposes of this Our Warrant provided it is certified that - (a) the disablement is due to a wound, injury or disease which - (i) is attributable to war service; or (ii) existed before or arose during war service and has been and remains aggravated thereby.

(2) In no case shall there be an onus on any claimant under this Our Warrant to prove the fulfilment of the conditions set out in paragraph (1) of this Article and the benefit of any reasonable doubt shall be given to the claimant.

(3) Where an injury or disease which has led to a member's discharge during war service was not noted in a medical report made on that member on the commencement of his war service, a certificate under paragraph (1) of this Article shall be given unless the evidence shows that the conditions set out in that paragraph are not fulfilled."

Under Article 2 of the Royal Warrant, dealing with interpretation, it is provided in paragraph (2) that the certificate to be given by the Minister where it involves a medical question shall be in accordance with a certificate on that question of a medical officer or board of medical officers appointed or recognised by the Minister for the purpose.

These provisions as to onus of proof are of the greatest importance to all applicants for pensions and must, one would suppose, be decisive in a large number of cases where the ascertainment of relevant facts is difficult or impossible. In this connection I should like to refer to two passages in the Judgments of the Lord Justice-Clerk in the cases of *Irving* ⁽⁷⁾ and *Mitchell* ⁽⁸⁾.

In the case of *Irving* ⁽⁹⁾ he used this language: "It is of the utmost importance to keep in view that under the new Royal Warrant which regulates the right to pensions it is expressly provided, in contra-distinction to the rule which formerly prevailed, that 'in no case shall there be an onus on any claimant to prove the fulfilment of the conditions and the benefit of any reasonable doubt shall be given to the claimant.' In every case of disputed facts between two parties, the onus of proof must inevitably be either on the one or on the other, and the result of the provision I have quoted is that the onus of proof is on the Minister. This means that if in the end of the day the considerations for and against the grant of a pension are so evenly balanced that the Tribunal is in reasonable doubt whether to allow or to refuse the appeal, the claimant must succeed. The Tribunal in dealing with an appeal are thus in much the same position as a jury in a criminal trial, who, if left in reasonable doubt as to the guilt of the accused, are bound to acquit him. The doubt must of course be a reasonable doubt, and not a strained or fanciful acceptance of remote possibilities. Further, the mere fact that the case is one of complexity or great difficulty is perfectly compatible with a decision being reached

⁽⁷⁾ Post p. 401.

⁽⁸⁾ Post p. 421.

⁽⁹⁾ Post p. 401 at 412.

without reasonable doubt. But in every pensions appeal, the question is not: Has the claimant satisfied us that he is right? but; Has the Minister satisfied us that the claimant is wrong?"

In *Mitchell's* ⁽¹⁰⁾ case he said: "On the first question I propose to say very little. In the recent case of *Irving v. The Minister of Pensions* which we decided in November, 1944, I expressed views, in which my brethren concurred, with regard to the nature and effect of the onus of proof which arises under the Royal Warrant. To that statement I have nothing to add, and there I propose to leave the matter, because in his concluding speech the learned Solicitor-General made it abundantly plain that he had no quarrel with that formulation of the position.

"I shall accordingly proceed to the second issue raised in this case upon the footing that, under Article 4, paragraph (2), of the Royal Warrant, not only is there no onus of proof on the claimant to a pension, but the benefit of any reasonable doubt must be given to the claimant, and therefore the detriment arising from any reasonable doubt must be incurred by the Minister. I further have in view the specialty, which was not present in the case of *Irving* that, by Article 4, paragraph (3) of the Royal Warrant, it is provided that 'where an injury or disease' - I read short - 'which has led to a member's death was not noted in a medical report made on the member on the commencement of his war service, a certificate *shall* be given unless the evidence shows that the conditions are not fulfilled.' In that provision I find an added emphasis upon the outlook of the preceding provisions dealing with the duties in the matter of proof imposed upon the claimant and the Minister respectively."

I respectfully concur in these observations and desire to adopt them as representing my views. As indicated earlier in this Judgment, the Tribunal in accepting the Minister's decision as evidence founded themselves on the decision of the Court of Session in *Irving's* case. That was a decision in relation to Rule 15 which gives power to the Tribunal to take the opinion of a medical specialist or other technical expert. After providing for copies of the specialist's report to be sent to the appellant and the Minister, Rule 15 (3) reads "together with a statement that the appellant or the Minister may comment thereon in writing, if he so desires, or may address the Tribunal thereon at a further hearing of the case."

In *Irving's* case the Minister had submitted a lengthy report in writing with numerous quotations from medical textbooks ⁽¹¹⁾, and it was argued that these "comments" were inadmissible under Rule 15. The Court held that the document was admissible and that it was the duty of the Tribunal to consider it. It is to be observed in that case that in the Minister's Answer to the Note for the appellant under paragraph xi his contention was stated thus ⁽¹²⁾: "The Minister having exercised his right to comment, it became the duty of the Tribunal to take these comments into consideration, not as medical evidence in the case, but as comments within the meaning of Rule 15 (3) and that is what they did." I do not read the Judgment in *Irving's* case on this point as intending to do more than accept the Minister's contention as set out above.

However that may be, in my view the position under Rule 15 is not comparable to that under Rule 5 where the Minister is required to set out the reasons for his decision, that decision being the subject of the appeal.

⁽¹⁰⁾ Post p. 421 at 423.
⁽¹¹⁾ Post p. 401 at 404.
⁽¹²⁾ Post p. 401 at 407.

In my opinion it is impossible, even when dealing with Tribunals which are not bound by the strict rules of evidence, to hold that statements whether of fact or expert opinion contained only in the judgment under appeal, and without any other support oral or documentary, can be regarded as any evidence of the correctness of such facts or opinions, much less as sufficient to shift the onus of proof which lies on the Minister.

It remains to consider whether, apart from the Minister's decision, the Tribunal could have come to the same conclusion on the advice of its Medical Member given on the undisputed facts, such advice relating to a matter of medical science, namely, the characteristics of a particular disease.

It is no doubt true that the Medical Member is appointed for the express purpose of advising the other members of the Tribunal on technical matters arising out of the evidence as to the proper medical inferences to be drawn from the facts established, but it is, I think, of the essence of "evidence" according to English ideas, when used with reference to judicial or quasi-judicial matters, that it should consist of oral statements or documents in writing which are made in the presence of or communicated to both parties before the Tribunal reaches its decision. This is not in my view confined to judicial Tribunals bound by legal rules of evidence, but is equally applicable to a quasi-judicial Tribunal such as a Pensions Appeal Tribunal which is expressly required to have regard to the onus of proof in its adjudications.

Information communicated by the Medical Member to his colleagues during their deliberations does not fulfil these requirements, and cannot in my opinion be relied upon as evidence so as to turn the scale and thus enable the Minister to discharge the onus of proof imposed upon him by the Royal Warrant.

I would venture to suggest for the consideration of the responsible authorities that, where it is intended to lay before the Tribunal expert medical evidence in documentary form, it is desirable that such evidence should show the name and qualifications of its author.

In the result I am of opinion that neither the Minister's decision nor the Medical Member's advice can be regarded as evidence and that the remaining evidence was insufficient in law to discharge the onus imposed on the Minister. On the evidence adduced the appellant was entitled to a certificate, and his appeal must be allowed and the question submitted to me in the Case Stated answered in the negative.