1979 August 24

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MICHAEL TERZIS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTRY OF LABOUR AND SOCIAL INSURANCE AND ANOTHER,

Respondents.

(*Case No.* 244/74).

Social insurance—Disability pension—"Permanently incapable of work" in section 23 of the Social Insurance Law, 1972 (Law 106/72)—Construction of—Applicant found capable of "light work" by Medical Board set up under section 51(1) of the Law—Conclusion of respondent that applicant was not likely to remain permanently incapable of work correct in law—Applicant failed to discharge onus of proving that he was permanently incapable of work.

Social insurance—Disability pension—Appeal to Minister from decision refusing disability pension—Section 62 of the Social Insurance Law, 1972 (Law 106/72)—Discretion of the Minister to hear applicant or give him the opportunity to argue his case before deciding on the appeal—First proviso to section 62(2) of the Law—Applicant never asked to be heard or to be given the opportunity of arguing his case—No defective exercise of the discretion given to Minister by the aforesaid proviso and no violation of the rules of natural justice to the effect that applicant was not given the opportunity of being heard.

Natural justice—Requirements of—Must depend on the circumstances of each case—Appeal to Minister under section 62 of the Social Insurance Law, 1972 (Law 106/72)—Minister's discretion to hear applicant or give him opportunity to argue his case—First proviso

to section 62(2) of the Law—No violation of the rules of natural justice to the effect that applicant was not given the opportunity to be heard—Circumstances of the case did not call for any other form of inquiry.

Words and Phrases—"Permanently incapable of work" in section 23 of the Social Insurance Law, 1972 (Law 106/72).

The applicant, a labourer, met with an accident and was seriously injured. On the 23rd February, 1973 he applied to respondent 1 for a disability pension under the Social Insurance Law, 1972 (Law 106/72) and his application was referred to the Medical Board, established under section 51(1) of the Law, whose opinion* was that the applicant was capable of light work. Thereupon the Claims Examiner dismissed applicant's application on the ground that he was "not likely to remain permanently incapable of work" and informed him accordingly by letter** dated 7th September, 1973. The applicant appealed to the Minister, under section 62 of the Law, who dismissed the appeal on the same ground. Hence this recourse.

Counsel for the applicant contended:

(a) That the words "permanently incapable of work" to be found in section 23*** of the Law should be interpreted as meaning permanently unable to perform remunerative work like the one the injured person was doing before the accident.

(b) That the Minister should have given the applicant the right to be heard or should have given him the opportunity to argue his case as provided by section 62(2)**** of the Law.

Held, (1) that the term "permanently incapable of work" cannot be construed as meaning "incapable to perform his previous work"; that it should be taken as meaning "incapable to perform any type of work"; that a person is incapable of work if having regard to his age, education, experience, state of health and other personal factors, there is no work or type of work which he can reasonably be expected to do; and that by

* The full text of the opinion is quoted at pp. 480–81 *post.*

** The letter is quoted at p. 481 *post.*

*** Quoted at p. 483 *post.*

**** Quoted at pp. 487–88 *post.*

"work" it is meant "remunerative work", that is to say, work whether part-time or whole-time for which an employer will be willing to pay or work as a self-employed person in some gainful occupation (approach of English Commissioners in cases tried under the Social Insurance Acts, found in the Digest of Commissioners' Decisions, National Insurance Industrial Injuries and Family Allowances Acts, by Edgar Jenkins (1964) Vol. 1, pp. 623–626 *adopted*).

(2) That the onus was on the applicant to convince the Minister that because of his injuries it was anticipated that he would remain permanently incapable of work as this term has been construed as above; that, in the light of the aforesaid construction, the *sub judice* decision was correct in law and on the facts as placed before the Minister, the appellant failed to prove that he was permanently incapable of work; and that, accordingly, contention (a) must fail. (*Hadji Yiorki* v. *Republic* (1977) 7–8 J.S.C. 1334 *distinguished*).

(3) That though under the first proviso to section 62(2) of the Law the Minister may, at his discretion, hear the applicant or give the opportunity to him to argue his case, the applicant never asked to be heard or asked for the opportunity to argue his case; that no reasons have been shown suggesting a defective exercise by the Minister of the discretion given to him by the aforesaid proviso; that there has been no failure to comply with the procedure prescribed by the law and in particular section 62(2) thereof; that the requirements of natural justice must depend on the circumstances of each case and in the present instance the circumstances of the case did not call for any other form of inquiry; that, therefore, there has been no violation of the rules of natural justice to the effect that the applicant was not given the opportunity to be heard; and that, accordingly, contention (b) must be dismissed.

Application dismissed.

Cases referred to:

Hadjiyiorki v. *The Republic* (1977) 7–8 J.S.C. 1334 (to be reported in (1977) 3 C.L.R.).

Recourse.

Recourse against the decision of the respondents whereby applicant's application for the payment to him of disability

pension under the Social Insurance Law, 1972 (Law No. 106/72) was dismissed.

E. Vrahimi (*Mrs.*), for the applicant.

C. Kypridemos, Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks a declaration of the Court that the act and/or decision of the respondents—in fact it is that of respondent No. 2—dated 29.1.1974 by which his application for the payment of disability pension under the Social Insurance Law 1972 (Law No. 106 of 1972) was dismissed, is void, of no effect, unwarranted by the facts and has been taken in excess of power.

The applicant, a labourer, who was at the time 56 years of age, married and had one son born in 1957, met on the 25th March, 1970, with an accident and as a result he was seriously injured. On the 23rd February, 1973, he applied, being an insured person, to the Ministry of Labour and Social Insurance for a disability pension. He used the prescribed printed form (Appendix 'A'), gave the necessary particulars and stated therein that the date his disability for work commenced was the 26th March, 1971. He attached thereto a medical certificate from Dr. Papasavvas (Appendix 'B') which contained a brief description of his injuries and the treatment received and in accordance with which the applicant became incapable of work as from 1.1.1973. A more detailed certificate (Appendix 'C') issued on the 3rd February, 1973, was submitted by the applicant; it specifies the percentage of his disability as being 35% to 45%.

On the 10th April, 1974, the applicant was referred to by the Claims Examiner, the Officer in charge of examining the applications for disability pension in accordance with section 58 of the Law, for examination by the Medical Board established under section 51(1) of the Law, the opinion of which was that the applicant was capable of light work. It is useful to refer to the full text of part 4 of the Medical Board's opinion (Appendix 'D') which reads as follows:-

" PART IV—MEDICAL BOARD'S OPINION

(1) Is the claimant incapable of work, *that is, his own work*

and any other remunerative work which he could reasonably be expected to do? No.

If *NO*, what work could he do? Light work.

(2) .....

(3) .....

(4) Remarks (including any opinion whether you consider the claimant would benefit from rehabilitation):
His own doctor considered his disability to 35%–40%.
.....".

The Examiner of Claims then, after taking into consideration all the relevant material, dismissed the claim of the applicant. His decision as communicated to the applicant by letter dated 7.9.1973 (Appendix 'E') reads as follows:–

"Regarding your application dated 22.3.1973 for disability pension, I wish to inform you the following:

An insured person is entitled to disability pension if:

(a) He was incapable of work for 156 days in any period of interruption of employment ending not earlier than the appointed day.

(b) Within such period of interruption of employment he proves that he is likely to remain permanently incapable of work.

(c) Within such period of interruption of employment he proves that he is likely to remain permanently incapable of work.

(d) He satisfies the relevant contribution conditions.

In your case, having taken into consideration, among other matters, the report and opinion of the Medical Board by which you were examined on 10.4.1973, your application is dismissed as you are not likely to remain permanently incapable of work.

If you are not satisfied from my aforesaid decision, you may within 15 days from to-day challenge same by a recourse in writing to the Minister of Labour and Social Insurance mentioning also the reasons on which you base your said recourse".

The appellant thereupon appealed to the Minister under section 62 of the Law by letter dated the 10.1.1974 (Appendix 'ST') which reads:-

> " In the month of April, 1973, I submitted an application for disability pension to your Ministry and a few days ago I received a reply that I am not entitled to disability pension as in accordance with the opinion of the Medical Board I am not completely incapable of work, but I am in a position to perform light, sitting down work.
>
> I regretfully disagree with the said decision as I am completely incapable of any work. The condition of my leg is so tragic that I cannot even walk.
>
> How is it possible for the Medical Board to suggest that I am capable of light sitting down work? Who is this employer who would engage me for such work and for what work? The suggestion is like the case of a man who has been blinded and they tell him that he is not completely incapacitated but he can become telephone operator. I believe that the decision of the Medical Board was taken on wrong facts and I request that you re-examine my case for disability pension".

Although this appeal to the Minister was made out of time, yet same was considered and decided upon by him and by letter dated the 29th January, 1974, the applicant was informed that the Minister having taken into consideration all facts relevant to the case, dismissed the appeal as the applicant was not likely to remain permanently incapable of work. The applicant was further informed thereby that if he felt aggrieved by the Minister's decision, he could appeal to the Court within 75 days from that date.

It is the case for the applicant that this case falls within the provision of section 23 of the Law as on account of the injuries suffered by him, he has remained permanently incapable of work and therefore he should be granted pension. It was argued that the *sub judice* decision was contrary to the law and that the words "permanently incapable of work" to be found in the aforesaid section, should be interpreted as meaning permanently unable to perform remunerative work like the one the insured person was doing before his accident; the legal position being

so, the recourse should succeed as the applicant in his present condition was not in a position to secure the same remunerative type of work as he had before the accident. It was also argued that the Minister should have given the applicant the right to be heard or should have given him the opportunity to argue his case as provided by section 62(2) of the Law.

Section 23 of the Law, so far as relevant, provides:-

"23(1)—Τηρουμένων τῶν διατάξεων τοῦ παρόντος Νόμου, ἠσφαλισμένος δικαιοῦται εἰς σύνταξιν ἀνικανότητος ἐὰν—

(α) ἦτο ἀνίκανος πρὸς ἐργασίαν δι' ἑκατὸν πεντήκοντα ἓξ ἡμέρας ἐντὸς οἱασδήποτε περιόδου διακοπῆς τῆς ἀπασχολήσεως ληγούσης οὐχὶ ἐνωρίτερον τῆς ὁρισθείσης ἡμερομηνίας·

(β) ἐντὸς τῆς τοιαύτης περιόδου διακοπῆς τῆς ἀπασχολήσεως, ἀποδείξῃ ὅτι προβλέπεται νὰ παραμείνῃ μονίμως ἀνίκανος πρὸς ἐργασίαν·

(γ) δὲν συνεπλήρωσε τὴν συντάξιμον ἡλικίαν· καὶ

(δ) πληροῖ τὰς σχετικὰς προϋποθέσεις εἰσφορᾶς.

(2) Τηρουμένων τῶν διατάξεων τοῦ ἄρθρου 58, ἡ σύνταξις ἀνικανότητος καταβάλλεται ἀπὸ τῆς σχετικῆς ἡμερομηνίας ἐν ὅσῳ ὁ ἠσφαλισμένος παραμένει μονίμως ἀνίκανος πρὸς ἐργασίαν καὶ δὲν ἔχει συμπληρώσει τὴν συντάξιμον ἡλικίαν".

And in English it reads:-

"23(1)—Subject to the provisions of this law, an insured person is entitled to disability pension if-

(a) he was incapable of work for a hundred and fifty-six days during any period of interruption of his employment ending not earlier than the appointed date;

(b) within such period of interruption of his employment proves that it is anticipated that he will remain permanently incapable of work;

(c) he has not reached pensionable age; and

(d) fulfils the relevant contribution prerequisites.

(2)—Subject to the provisions of section 58, disability pension is payable from the relevant date whilst the insured

person remains permanently incapable of work and has not reached pensionable age".

Before examining the aforesaid section, it has to be pointed out that disability pension thereunder is different from a disablement benefit payable under section 30 of the Law. Their basic difference is that disability pension under the first section does not require the fixing of a degree of disability, whereas under section 30 of the Law, the degree of disability has to be fixed as is born out from the provisions of the section and the contents of the Seventh Schedule to the Law.

Under section 23, an insured person is entitled to disability pension if he satisfies the provisions set out in sub-section 1, paras. (a) and (d), and the reason upon which the applicant's claim was dismissed was that he did not prove that it was anticipated that he would remain permanently incapable of work as required by para. (b) of sub-section 1 of section 23.

The term "incapable of work" is defined in section 2 of the Law as meaning "incapacity for work by reason of some specific disease or bodily or mental disablement" and "incapable of work" shall be construed accordingly. The definition of the term "incapable of work" under the English Social Insurance Act of 1946, section 78, is the same (See *Halsbury's Statutes of England*, 2nd Edition, Volume 16, p. 669, at p. 763). This term "incapable of work" has been judicially considered in England in cases tried by the Commissioners under the Social Insurance Acts which are to be found in the *Digest of Commissioners' Decisions*, National Insurance Industrial Injuries and Family Allowances Acts, by Edgar Jenkins (1964) Vol. 1, at pages 623, 624, 625, and 626:-

Page 623

" *Test of incapacity*

' A person is incapable of work within the meaning of the National Insurance Act, 1946, Section 11(2)(a)(ii) if, having regard to his age, education, experience, state of health and other personal factors, there is no work or type of work which he can reasonably be expected to do. By 'work' in this connection we mean remunerative work, that is to say, work whether part-time or whole-time for which an employer would be willing to pay, or work as a self-

employed person in some gainful occupation. In decision C.S. 316/50 (not reported) it was pointed out that the fact that there was no such work locally or that owing to the state of the labour market the claimant had only a remote prospect of obtaining it, did not prove that he was incapable of work for the purposes of the National Insurance Act, 1946, because for these purposes he must be incapable of work by reason of some specific disease or bodily or mental disablement (see section 78(1) of that Act)'.

R(S) 11/51 (Tribunal decision)."

Pages 623 *and* 624

"A Self-employed man supplied medical evidence to the effect that he was incapable of full-time work.

Held that a person who is capable of part-time work is not incapable of work. ('It may be that the claimant suffered financial loss by the restrictions which his disablement placed upon his exertions; sickness benefit, however, is not payable in respect of a diminution in earning power by sickness, but only in the event of its total destruction or reduction to an extent so trifling that it could be treated as negligible..... Despite his illness the claimant was able to exercise a measure of control and supervision of the old established accountancy business of which he is the sole proprietor and to participate in the work of that business to an extent which sufficed to keep it going and which was therefore remunerative'). R(S) 13/52."

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".....

(The claimant had 'been unable to move about except at first on two sticks, then on crutches, and finally in a push-chair'. ..... 'It is well settled that a man is incapable of work' in this context only if there is no type of work which he can reasonably be expected to do having regard to his age, education, experience, state of health and other personal factors. It does not matter that he cannot do his former type of work. The question is whether there is any type of work which falls within his scope, and which he is physically capable of doing'.)

R(S) 5/51.

A man who had been in receipt of sickness benefit on account of bronchitis, emphysema, and minor epileptic fits, was examined by a medical officer of the Ministry of Health who reported that he was acting as manager of his own box making business and was fit for that work.

Held that the claimant was not incapable of work. He was obviously capable of managerial work, otherwise he would have had to make arrangements for the management of his factory to be carried on by someone else.

('That is not to say that at certain times there may be temporary periods when the state of his health so deteriorates that he cannot attend to his business'.)

R(S) 22/51."

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" *Prolonged illness or disablement*

'I would be quite prepared to agree that, in a case of temporary illness of short duration, a claimant's capacity for work should be judged by reference to his normal field of employment because he could not reasonably in such circumstances be expected to embark on a new career, but, when a claimant's disabilities last for a long period, the field of employment to be taken into account must be enlarged. Further, the fact that a claimant's past experience and means disincline him to consider many forms of work as appropriate for him does not enable it to be said in relation to a claim for sickness benefit, that he cannot reasonably be expected to do that work, if, taking into account the factors named by the Commissioners (in decision R(S) 11/51) it is a type of work he could do, if willing to try it. Again, it must be borne in mind that the work need not be full-time work'.

R(S) 7/60".

I see no reason why a different interpretation should be given to the term "incapable of work", the definition of which in the Cyprus Law is the same as that in the corresponding English Act to which I have already referred. In my view the term "permanently incapable of work" cannot be construed as meaning "incapable to perform his previous work" as suggested by the learned counsel for the applicant. It should be taken as

meaning "incapable to perform any type of work". As stated in the decisions hereinabove set out, a person is incapable of work if having regard to his age, education, experience, state of health and other personal factors, there is no work or type of work which he can reasonably be expected to do; and by "work" it is meant "remunerative work", that is to say, work whether part-time or whole-time for which an employer will be willing to pay or work as a self-employed person in some gainful occupation. I need not repeat however here the approach of the English Commissioners already set out in this judgment; it is sufficient if I say that I fully adopt them as applicable to our case and the construction of the term "permanently incapable of work" in our Law.

In the light of the aforesaid construction, I have come to the conclusion that the *sub judice* decision was correct in law and on the facts as placed before the Minister, the appellant failed to prove that he was permanently incapable of work. The onus was on the applicant to convince the Minister that because of his injuries it was anticipated that he would remain permanently incapable of work as this term has been construed by the aforesaid authorities. I feel that the case of *Savvas Hadjiyiorki* v. *The Republic* (1977) 7-8 J.S.C., p. 1334*, has to be distinguished. In that case the decision of the Minister was annulled on the ground that once the medical report of the Board was not before the Minister at the time of taking his decision, the same could not be validated ex post facto.

The second and last ground relied upon by the applicant in this recourse turns on the question whether the Minister should have given him the right to be heard and present his case before reaching the *sub judice* decision. Section 62(2) of the Law provides:-

"62.-(2) Ὁ Ὑπουργὸς ἐξετάζει τὴν εἰς αὐτὸν γενομένην προσφυγὴν ἄνευ ὑπαιτίου βραδύτητος, ἀποφασίζει ἐπὶ ταύτης καὶ κοινοποιεῖ ἀμελλητὶ τὴν ἀπόφασιν αὐτοῦ εἰς τὸν προσφεύγοντα:

Νοεῖται ὅτι ὁ Ὑπουργός, πρὶν ἢ ἐκδώσῃ τὴν ἀπόφασιν αὐτοῦ, δύναται κατὰ τὴν κρίσιν του νὰ ἀκούσῃ ἢ δώσῃ τὴν εὐκαιρίαν εἰς τὸν προσφεύγοντα ὅπως ὑποστηρίξῃ τοὺς λόγους ἐφ' ὧν στηρίζεται ἡ προσφυγή:

* To be reported in (1977) 3 C.L.R.

Νοεῖται περαιτέρω ὅτι ὁ Ὑπουργὸς δύναται νὰ ἀναθέσῃ εἰς λειτουργὸν ἢ ἐπιτροπὴν λειτουργῶν τοῦ Ὑπουργείου του ὅπως ἐξετάσῃ ὡρισμένα θέματα ἀναφυόμενα ἐν τῇ προσφυγῇ καὶ ὑποβάλῃ εἰς αὐτὸν τὸ πόρισμα τῆς τοιαύτης ἐξετάσεως πρὸς τῆς ὑπὸ τοῦ Ὑπουργοῦ ἐκδόσεως τῆς ἀποφάσεως αὐτοῦ ἐπὶ τῆς προσφυγῆς".

And in English:

"62.—(2) The Minister shall consider and decide on the appeal without undue delay and shall forthwith communicate his decision to the applicant:

Provided that before deciding on the appeal, the Minister may, at his discretion, hear the applicant or give the opportunity to him to argue his case:

Provided further that the Minister may authorize any officer or committee of officers of his Ministry to inquire into certain questions raised in the appeal and submit to the Minister the conclusions of such inquiry before he decides on the appeal".

Under the first proviso to this subsection, the Minister might, at his discretion, hear the applicant or give the opportunity to him to argue his case. The applicant never asked to be heard or asked for the opportunity to argue his case. He stated in writing the grounds of the appeal and the arguments he thought fit to adduce in support thereof in his letter to the Minister dated 10.1.1974 (Appendix 'ST') which was treated as the appeal provided for by section 62(1) of the law. No reasons have been shown suggesting a defective exercise by the Minister of the discretion given to him by the aforesaid proviso. All the necessary material—unlike the case of *Hadjiyiorki* (*supra*)—was before him and this is expressly stated in the letter of the 29th January, 1974, whereby the decision of the Minister was communicated to the applicant.

So, in my view, there has been neither a defective exercise of discretion nor any other failure to comply with the procedure prescribed by the Law and in particular section 62(2) thereof, nor any other violation of the rules of natural justice to the effect that the applicant was not given the opportunity to be heard.

The requirements of natural justice must depend on the circumstances of each case and in the present instance the circumstances of the case did not call for any other form of inquiry. This ground, therefore, also fails.

For all the above reasons the present recourse is dismissed but in the circumstances I make no order as to costs.

Application dismissed. No order as to costs.