1977
May 19
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SAVVAS C. HADJIYIORKI
*v.*
REPUBLIC (MINISTER OF LABOUR AND SOCIAL INSURANCE)

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION
SAVVAS C. HADJIYIORKI,

*Applicant,*

*and*

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF LABOUR AND SOCIAL INSURANCE,

*Respondent.*

(*Case No.* 449/73).

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*Social insurance—Disability pension—Industrial accident—Self-employed person—Section 23 of the Social Insurance Law, 1972 (Law 106/72)—Dismissal, by respondent Minister, of applicant's recourse against rejection of his application for disability pension by the Claims Examiner—Applicant not examined by Medical Board in accordance with section 58 of the Law—Minister's decision annulled through failure to complete the inquiries and because of insufficient material before him.*

*Administrative Law—Administrative decision taken contrary to Law—Namely section 58 of the Social Insurance Law, 1972 (Law 106/72)—Not validated ex post facto by Court—Even though there was compliance with the said section during the hearing of the recourse.*

*Administrative Law—Administrative decision—Taken without completing the inquiries and without sufficient material as envisaged by s. 58 of the Social Insurance Law, 1972 (Law 106/72)—Annulled.*

The applicant was a self-employed person within the meaning of the Social Insurance Law, 1972 (Law 106/72). On December 2, 1970 he sustained an industrial accident at the place of his work as a result of which he had a traumatic amputation of the 2nd, 3rd and 4th fingers of the right hand and angylosis of the phalangs of the right thumb and the small finger. He applied to the Ministry of Labour and Social Insurance for a disability pension and attached a medical certificate issued to him by the District Medical Officer of Fama-

gusta in which no medical opinion was expressed but only a description of the injuries. The Claims Examiner of the Ministry rejected his application and he appealed to the respondent Minister who dismissed his appeal on the ground that it was not expected that he would remain permanently incapable of work. The applicant filed this recourse against the Minister's decision contending that his case fell within the meaning of section 23(2)* of the above Law. Whilst this recourse was pending Counsel for the respondent arranged an examination of the applicant by a Medical Board, convened in accordance with s. 51 of the said Law. In the opinion of this Board the applicant was "unable to perform any manual work due to complete functional disuse of right hand's end. Nevertheless, he can perform light work with his left hand's end, such as running a kiosk, selling lottery tickets, running a coffee shop etc.".

*Held,* (1) that having in mind the injuries which the applicant has sustained in the industrial accident there are serious doubts whether it was open to the Minister to reach the conclusion that the applicant could not remain permanently incapable of work by means of his disablement, particularly so, having regard to the medical report; that though the onus remained on the applicant to convince the Minister that because of his injuries it was anticipated that he would remain permanently incapable of work, once Law 106/72 was enacted in order to provide with certain benefits both the self-employed and the employed persons, and because the applicant has provided both the Claims Officer and the Minister with a medical certificate which on the face of it showed that it was anticipated that the applicant would remain permanently incapable of manual work, the applicant had discharged that onus and this Court would therefore, have expected the applicant to have been examined by a medical board in accordance with s. 58 of the Law; that having failed to complete the inquiries and because of insufficient material before the Minister, this Court has reached the conclusion that the decision of the Minister is wrong and must be annulled.

(2) (*On the question whether the decision of the Minister is a valid one because of the decision of the Medical Board):* That having in mind the principles of administrative law this Court has reached the view that once the report of the Medi-

* Quoted at p. 150 *post.*

cal Board was not before the Minister at the time of taking his decision, the said decision cannot be validated *ex post facto;* and that, accordingly, the Minister's decision was invalid and must be annulled.

*Sub judice decision annulled.*

**Recourse.**

Recourse against the refusal of the respondent to pay applicant a disability pension under the Social Insurance Law, 1972 (Law 106/72).

*A. Pouyouros,* for the applicant.

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

*Cur. adv. vult.*

The following judgment was delivered by:-

HADJIANASTASSIOU, J.: In these proceedings, under Article 146 of the Constitution, the applicant seeks to challenge the decision of the respondent rejecting applicant's application for the payment of disability pension in respect of his serious permanent disability under the Social Insurance Law, 1972 as being *null* and *void* and of no effect whatsoever.

The applicant was a self-employed person within the meaning of the said law and was working in his flour mill. He was 57 years of age and had paid fully his insurance contributions to the Social Insurance Fund. On December 2, 1970, the applicant, whilst he was operating the said mill, he met with an accident and as a result of that accident, he was taken to the hospital and it became necessary to amputate three of his fingers. According to a medical certificate which was issued to him, he was admitted in the hospital on December 2, 1970, and was discharged on January 13, 1971. He had the following injuries: (1) traumatic amputation of 2nd, 3rd and 4th fingers of the right hand; and (2) Angylosis of the phalangs of (right) thumb and the small finger.

On January, 20, 1973, the applicant applied to the Ministry of Labour and Social Insurance for a disability pension. In fact, he has filed a printed form and attached the medical certificate issued to him by the District Medical

Officer of Famagusta. On January 20, 1973, *i.e.* on the same date, the application of the applicant was rejected by the Claims Examiner, the person in charge of examining the applications for disability pension in accordance with s.58 of the law, and I must confess, I find no reasons for rejecting the application of the applicant.

The applicant, in accordance with that letter, appealed to the Minister of Labour and Social Insurance complaining about the refusal to grant him disability pension.

On August 13, the Director of Social Insurance, informed the applicant that the Minister of Labour and Social Insurance, having gone through his application, and having exercised his powers under s.62 of the law, decided to dismiss the recourse made by the applicant, and the reason given was that it was not expected that he would remain permanently incapable of work.

The applicant, feeling aggrieved because the Minister did not even exercise his discretionary powers under s.62 of the law, to afford him a hearing, filed the present recourse claiming that his case was within the meaning of s.23(2) of Law 106/72, that because of his injuries he would remain permanently incapable of work and he ought to have been paid incapacity pension for the rest of his life.

Counsel on behalf of the Republic gave notice opposing the application—though he conceded that the applicant has paid to the fund his contribution as a self-employed person—on the ground that the decision of the Minister was taken in accordance with the Social Insurance Law of 1972, the provisions of the Constitution and the general principles of administrative law.

I think before dealing with the submissions of counsel I would like to make it clear once again that the injuries of the applicant were sustained as a result of an industrial accident at the place of his work. The applicant, as I said earlier in this judgment, was a self-employed person and quite fairly counsel on behalf of the Republic in his address did not dispute that fact, and admitted that the applicant had complied with the requirements for his social insurance contribution.

Furthermore, I consider it pertinent to state that counsel on behalf of the Republic, feeling no doubt as I do that in the case of the applicant he did not receive proper medical attention, had agreed to have him examined by a medical board once the Claims Officer relied only on a certificate in which no medical opinion was expressed apart from the description of the injuries of the applicant. I take the opportunity to express my indebtedness to counsel of the Republic for his very fair stand and on May 22, 1975, a Medical Board consisting of 2 Medical Officers was convened in accordance with s.51 of the law. According to the document (*exhibit* 6), the Medical Board's opinion was based on these questions at p. 3 of the Medical Board's report:-

"1. Is the claimant at present incapable for work that is, his own work and any *other remunerative* work which he could *reasonably be expected to do?*

2. If your opinion is that claimant is at present incapable for work state whether:

(a) he will remain permanently incapable; or

(b) he will remain incapable in the foreseeable future; or

(c) he will remain incapable for a certain period (specify period) but a statement cannot be made now whether after that period claimant will or will not be incapable for work; or

3. (a) If your opinion is that claimant is not at present incapable state whether he is fully or partially capable for work".

Then we have this opinion expressed in Greek:-

"'Ανίκανος πρὸς χειρονακτικὴν ἐργασίαν λόγῳ τελείας λειτουργικῆς ἀχρηστεύσεως τῆς δ. ἄκρας χειρός.

'Εν τούτοις δύναται νὰ συντελέσῃ ἠπίαν ἐργασίαν διὰ τῆς ἀρ. ἄκρας χειρός, ὡς περιπτεριοῦχος, λαχειοπώλης. καφετζῆς, κ.τ.λ.".

And in English it reads:-

"Unable to perform any manual work due to com-

plete functional disuse of right hand's end. Nevertheless, he can perform light work with his left hand's end, such as running a kiosk, selling lottery tickets, running a coffee shop etc".

Now, in the light of the medical report, it seems clear to me that the Board was of the view that because of the injuries of his fingers the functional operation of the hand became useless and as a result the applicant was unable to do any manual work. Whether or not the Medicl Board could in law proceed to express an opinion that the applicant could do lighter work by using his left hand, such as running a kiosk or selling lottery tickets or working in a coffee shop, I have my doubts in view of the prevailing circumstances in Cyprus as to work in these tragic days, and in any event, I leave this point open because I do not think it is necessary to express a view on this matter at this stage.

I think it is necessary to state that Law 106/72 came into force on January 1, 1973 and it repealed the earlier law, the Social Insurance Law, 1964 (No. 2/64) which latter law established a scheme providing cash benefits for marriage, maternity, sickness, unemployment, widowhood, orphanhood, old age, accidents and death. Furthermore, it is clear that under the new law, s.11, the benefits, other than those due to industrial injuries are more extensive than the corresponding benefits in the repealed law contained in s.13. The benefit known as "incapacity pension" has been introduced for the first time under s.11(1) (2). As I said earlier, the applicant claims that his case falls under the provisions of s.23 of Law 106/72, which, 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".

I do not think that it has been doubted by counsel that by "work" in this connection we mean remunerative work, that is to say work whether part-time or full-time for which an employer would be willing to pay or work as a self-employed person in gainful occupation. With this in mind, I have serious doubts whether the Medical Board, in spite of what we have said earlier, had this in mind when it was suggested in their report that the applicant could run a kiosk or a coffee shop or sell lottery tickets. In the first place, one should not forget that the applicant as well as thousands of other refugees in the year 1974-1975 could not secure a kiosk or a cafe in a village or a town; or indeed a licence to sell lottery tickets of a sufficient number to come within the meaning of a gainful occupation. Hav-

ing regard to the then prevailing circumstances in Cyprus, I think it is necessary to state once again that it would not have been an easy matter to secure work of any kind in a gainful occupation.

Mr. Pouyouros, counsel for the applicant said, Mr. Kypridemos agreed—that no sufficient material (as it appears from the medical report) was in the hands of the Claims Officer, or indeed before the Minister of Labour and Social Insurance when the latter reviewed the decision of the former in order to enable him to decide the appeal of the applicant.

Having in mind the injuries which the applicant has sustained in that industrial accident, I entertain serious doubts whether it was open to the Minister to reach the conclusion that the applicant could not remain permanently incapable of work by means of his disablement, particularly so, having regard to the medical report. It is true, of course, that the onus remained on the applicant to convince the Minister that because of his injuries, it was anticipated that he would remain permanently incapable of work. But with respect, once Law 106/72 was enacted in order to provide with certain benefits both the self-employed and the employed persons, and because the applicant has provided both the Claims Officer and the Minister with a medical certificate which on the face of it showed that it was anticipated that the applicant would remain permanently incapable of manual work, in my view, the applicant has discharged that onus and I would, therefore, have expected the applicant to have been examined by a medical board in accordance with s.58 of the law. Having failed to complete the inquiries and because of insufficient material before the Minister, I have reached the conclusion that the decision of the Minister, is wrong and I am inclined to annul it.

The next question, therefore, is whether because of the decision of the Medical Board I can decide finally whether the decision of the Minister is a valid one. I must confess that I have given this matter a lot of consideration and particularly in order to avoid a lot of duplicity of work, but finally, having in mind the principles of administrative law, I have reached the view that once the medical report of the Board was not before the Minister at the time of

taking his decision, the said decision cannot be validated *ex post facto*. I would, therefore, declare that the decision of the Minister was invalid and for the reasons I have given earlier, it has to be annulled and the case of the applicant to be examined in the light of both the opinion of the Medical Board and the observations made in this judgment.

Before concluding this case, I would like to express my indebtedness to both counsel for their valuable assistance in preparing this judgment.

Decision, therefore, annulled as being void and of no effect whatsoever. Recourse succeeds but in the circumstances of this case, I am not making an order for costs.

*Sub judice decision annulled.*
*No order as to costs.*