IN THE UPPER TRIBUNAL **Case No.** CI/2688/2016
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

The Secretary of State was represented by Ms Emily Wilsdon of counsel, instructed by the Government Legal Department

The claimant was represented by Mr D Buckley of BCP Legal and Advisory Services

Decision: The Secretary of State's appeal is dismissed.

REASONS FOR DECISION

1. This is an appeal, brought by the Secretary of State with permission granted by Upper Tribunal Judge Wright, against a decision of the First-tier Tribunal dated 5 May 2016, whereby it allowed the claimant's appeal against a decision of the Secretary of State dated 21 December 2015, disallowing the claimant's claim for reduced earnings allowance in respect of occupational deafness on the ground that he was not incapable of following his regular occupation. The First-tier Tribunal found that the claimant *was* incapable of following his regular occupation and left other issues arising on the claim to be determined by the Secretary of State.

2. The facts of the case may be shortly stated. The claimant was born in 1942. From 1974 until 2007, he worked for a company making steel tools and, in the course of his employment used large drop stamping hammers and so was exposed to noise leading to bilateral sensorineural hearing loss. It appears that he had in fact worked in the same type of employment since 1957. In any event, he successfully claimed disablement benefit in 1985 in respect of occupational deafness, disablement being assessed at 32% from 5 March 1985 to 4 March 1990. The medical board recorded that he said –

> "I have been getting deaf for at least three years. I have worked all my working life in very noisy surroundings as a drop stamper but have worn ear muffs. I am still doing this same work. I was fitted with a hearing aid three years ago and this has helped. My general health is good."

His disablement was further assessed at 42% from 5 March 1990 for life. His employment came to an end shortly before his 65th birthday when, I think, he was made redundant. He claimed jobseeker's allowance but was unable to find other employment due to his hearing loss. On 22 October 2015, he claimed reduced earnings allowance.

3. Paragraph 11(1) and (10) of Schedule 7 to the Social Security Contributions and Benefits Act 1992 provides (without the qualifications that are immaterial to this case) –

> "**11.—**(1) Subject to the provisions of this paragraph, an employed earner shall be entitled to reduced earnings allowance if—

> (a) he is entitled to a disablement pension or would be so entitled if that pension were payable where disablement is assessed at not less than 1 per cent.; and
> (b) as a result of the relevant loss of faculty, he is either—
> (i) incapable, and likely to remain permanently incapable, of following his regular occupation; and
> (ii) incapable of following employment of an equivalent standard which is suitable in his case,
> or is, and has at all times since the end of the period of 90 days referred to in section 103(6) above been, incapable of following that occupation or any such employment;
> but …
> …
> (10) Reduced earnings allowance shall be payable at a rate determined by reference to the beneficiary's probable standard of remuneration during the period for which it is granted in any employed earner's employment's which are suitable in his case and which he is likely to be capable of following as compared with that in the relevant occupation, but …"

4. The Secretary of State disallowed the claim for reduced earnings allowance on the ground that the claimant was not incapable of following his regular occupation, relying on a medical opinion which, while noting that claimant was unable to fulfil the requirements of his regular occupation because he was "unable to hear workmates and warning sirens due to worsening hearing loss", nonetheless concluded that he was capable of that occupation because –

> "BI 103 indicated that the client remained in the same regular occupation until retirement. Noise induced hearing loss noted but continued with the use of personal protective equipment. No alternative employment sought."

The claimant appealed, conceding that he did not satisfy the "continuous" conditions in paragraph 11(1)(b) of Schedule 7 but submitting that he satisfied the "permanent" conditions in the light of R(I) 2/81. The Secretary of State responded by referring to the medical advice.

5. After a hearing that the claimant attended with his representative but at which the Secretary of State was not represented, the First-tier Tribunal allowed the claimant's appeal, referring to the terms of paragraph 11(1) of Schedule 7 and saying –

> "13. These provisions were considered by Commissioner Lazarus in R(I) 2/81 where it was explained, amongst other things that when considering the test, regard should be had to the principle set out in R(I) 15/74 that a claimant was to be accepted as being permanently incapable if they cannot work in their regular occupation without danger to themselves. It was further explained that the danger included the risk of further hearing loss.
> 14. Applying these principles to the present case, the tribunal finds that in the event of the appellant working in his regular occupation there would be a real risk of further hearing loss. As an expert tribunal it is found both that future hearing loss is in the nature of the condition when exposed to the prescribed excessive noise; and it is demonstrated by the loss in hearing that the appellant experienced whilst continuing in his regular occupation between the assessments of 1985 and 1990.

> 15. The fact that the appellant continued in his regular occupation following his A10 assessment is not material to the issue whether or not the appellant meets the relevant condition, as set out above, in respect of his claim made on 22.10.15.
> 16. Accordingly, the tribunal finds that the appellant is incapable and likely to remain incapable of his regular occupation.
> 17. The appeal is therefore allowed; and the case is referred back to the respondent for determination of the outstanding issues relating to an award of reduced earnings allowance."

6. The Secretary of State sought permission to appeal on two grounds. Judge Wright gave permission on the first, pointing out that, insofar as it had any merit, the second was merely another way of putting the same point. The Secretary of State submits that the First-tier Tribunal failed to distinguish the present case from R(I) 2/81. He submits that the facts of the two cases were materially different because in R(I) 2/81 the claimant left his employment in order to prevent further damage to his hearing, whereas in the present case the claimant stayed in the same employment for 22 years. It is indisputable that the facts are different (although in fact in R(I) 2/81 the claimant did continue to follow his regulation occupation for a very short period after he had claimed disablement benefit). The issue is whether the difference is material. The First-tier Tribunal assumed not.

7. In his written submission, the Secretary of State advances two arguments that require consideration. His first argument is that the claimant's return to work "demonstrates that the claimant was capable of following his regular occupation". His second argument is that "R(I) 2/81 cannot simply be read to mean that regardless of the full evidence and facts, a person suffering from occupational deafness cannot continue with his regular occupation".

8. The second argument is plainly correct. In support of it, Ms Wilsdon referred me to CI/3038/2000, where Mr Commissioner Williams rejected the argument advanced by the claimant in that case that, in the light of official guidance and CI/15803/1996, a claimant suffering from prescribed disease A11 ought automatically to be treated as incapable of following his regular occupation, although he did accept that the appeal tribunal had given inadequate reasons fits decision. He said –

> "14 Another assumption in the guidance is that once that level of degeneration is reached, a person suffering from it should not be expected to continue in the regular occupation. That is also an assumption of fact. It is based, the adjudication officer states, on an analogy with the guidance of the Commissioner in R(I) 2/81 dealing with the degenerative disease of occupational deafness. The proposition of law from that decision, as I understand it, is that it is not erroneous in law to conclude that a person suffering a degenerative disease, caused by continued exposure in a regular occupation, and now of a sufficient intensity to be prescribed, may be found to be incapable of remaining in that occupation because of the totality of risks of the continued exposure to the claimant and others. The adjudication officer's submission to the Commissioner in CI/15803/1996 commented that in the case of A11 the risk was both impaired grip and also "a danger that they might drop tools and thus injure themselves or workmates." Whether that is so, is a question of fact. The tribunal in this case has failed to consider it.

> 15 The claimant's argument is, in substance, that CI/158093/1996 has turned the issue into a question of law. The claimant, understandably, argues that this is not permissive but mandatory – the claimant *must* be regarded as incapable of his regular occupation. The deputy Commissioner in CI/15803/1996 relies on R(I) 2/81 and the paragraph of guidance to conclude that those suffering from A11 "should be regarded as incapable of their regular occupation" (paragraph 3). If that decision is read as if "should" means "must", that there is a general rule of law that tribunals *must in all cases*, regardless of the full evidence, assume that a claimant with prescribed disease A11 cannot continue his regular occupation, then I respectfully disagree. In my view, there is no such rule of law. It may be a sensible medical assumption, but it remains a question of fact. No such rule can be deduced from R (I) 2/81, which I take to be authority for the proposition set out in paragraph 14 and no more. Nor is the guidance given to adjudication officers in any sense independently authoritative on the law. What I take the guidance to be doing is suggesting a recommended course of action to an adjudication officer once A11 is prescribed."

9. It has to be remembered that, at the time that R(I) 2/81 was decided, adjudicating medical authorities determining the "disablement questions" relevant to claims for disablement benefit gave guidance as regards questions relevant to claims for special hardship allowance under section 60 of the Social Security Act 1975 (which was an increase of disablement benefit and the precursor of reduced earnings allowance) but did not decide such questions, which were instead decided by insurance officers from whom appeals lay to national insurance local tribunals. It was not until section 52 of, and paragraph 7 of Schedule 5 to, the Social Security Act 1986 came into force that appeals to Social Security Commissioners from social security appeal tribunals, into which national insurance local tribunals had by then been merged, were limited to points of law.

10. Therefore, while the proposition of law that Mr Commissioner Williams derived from R(I) 2/81 can indeed be derived from that case, Mr Commissioner Lazarus QC actually dealt with the question whether the claimant in R(I) 2/81 was entitled to special hardship allowance as almost entirely a question of fact. He referred to R(I) 15/74, where Mr Commissioner Shewan QC had accepted a concession by the insurance officer "that, if by reason of his physical condition a man could not work in his regular occupation without danger to himself or others, he should be regarded as 'incapable' of following that occupation". (That formulation was consistent with the approach to determining whether a person was incapable of work for the purpose of sickness benefit or injury benefit, which required consideration of "the type of work which he can reasonably be expected to do" (R(S)) 11/51).) However, he then addressed the facts of the case before him in some detail, saying –

> "13. The claimant's decision to seek employment alternative to his regular occupation was finally brought about by an alarming attack of vertigo in July 1976. When he made the change the risk of further hearing loss which he would have incurred if he had continued in that occupation was undoubtedly very great; more a certainty than a risk. But I still have to consider whether it would have continued so. This question is linked with the subject of protective devices. The claimant worked for 33 years in the regular occupation and during that period was never provided by the employers or anybody else either with any form of protection against noise or

with any advice as to the risk of hearing loss which he ran. However, when he started work as a storekeeper he found ear muffs stocked in the stores. None had ever been used in the fork shop when the claimant was working in the regular occupation, but he told me that some have since been taken into use there. I have to consider, therefore, whether their use diminishes the risk of hearing loss to such an extent as to make it insubstantial.

14. Evidence bearing on this point is contained in two reports written since the local tribunal's decision by Professor R. R. A. Coles, a consultant in audiological medicine. These were not written for the purposes of the present proceedings. The first is dated 5 June 1978 and contains the following passage:--

> "The sad thing about this case was that not only was the deafness unnecessary in the first place (if his employers had taken reasonable precautions...) but his change of job once he was deafened was still unnecessary had ear protectors been provided and appropriate advice given. I recall, when I examined (the claimant] on 1.12.77, wondering whether to advise him that he could safely go back to his job if he wore protectors; in the event, I thought it better to say nothing as he would probably not receive the supervision needed and I did not want to advise him to go back to a noise-hazardous situation where I could not be 100% sure that he would be adequately protected.

In his second report dated 12 April 1979 Professor Coles returned to the subject of ear protection and the following are extracts from this report:—

> "On a more scientific plane, it is true that ear protection is not the whole answer. A lot of things can go wrong, e.g. ill-fitting of earplugs, damage to the seals of ear muffs, failure to understand or be instructed precisely as to when to wear plugs or muffs. This is why current Health and Safety Executive ...policy is towards engineering control of the noise in -the first place rather than relying on the vagaries of ear protection...
>
> Finally, it may be relevant to point out that the wearing of ear protection may itself introduce some hazards even in normally-hearing persons. Scientific evidence, including some of my own research, has shown that hearing of speech and warning sounds, etc may be considerably reduced (often in a dangerous way) by the wearing of ear protectors..."

15. Professor Coles seems to blow hot and cold on the subject of the efficacy of ear protectors. But my conclusion on the evidence presented to me, including his reports, is that it would be unsafe to hold that the claimant could, from some date on or after 17 November 1976 have followed his regular occupation without substantial risk of further hearing loss if he had been provided with appropriate protective devices. Nor have I satisfactory evidence that he would have been so provided. Consequently, I hold that, objectively considered, there has hitherto been a sufficient risk of injury to the claimant in his regular occupation to invoke the principle of R(I) 15/74.

16. I turn to consider whether the qualifying conditions of section 60(1) of the Social Security Act 1975, are satisfied by the claimant. Because of the possibility that the risk of injury to him may at some stage be rendered insubstantial by the provision of ear protection devices, I refrain from holding that his incapacity for his regular occupation is likely to be permanent. However, on the facts which I have already found I hold that since 24 June 1976, the date of his development of prescribed disease No 48, he has been continuously so incapacitated. In the circumstances of this case, that date falls to be substituted for the end of the injury benefit period: see regulation 16(b) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1975 (SI. 1975 No 1537). In fact the claimant may have worked in his regular occupation for a brief period after 24 June 1976 but, in my view, he is nevertheless to be regarded as incapacitated for it on the principle of R(I)

> 15/74. The period was very brief because he was on holiday for pan of July 1976 and he was off work owing to sickness from 13 July to 21 August 1976.
> 17. The next question is whether he has been similarly incapacitated for an employment of equivalent standard to the regular occupation. The only alternative employment suggested as suitable for the Claimant is the one he is following, that of a storekeeper. Evidence enabling a comparison to be made between the standards of remuneration of the regular occupation and this employment is lacking in the case papers. But in his evidence at the hearing of this appeal the claimant satisfied me that the employment of storekeeper is not of equivalent standard to the regular occupation. Accordingly, I hold that the claimant satisfies the so-called "continuous conditions" of section 60(1) of the Social Security Act 1975.
> 18. In principle, therefore, I find that an award of special hardship allowance should be made to the claimant for a period beginning on 17 November 1976, and I consider that 29 January 1980 is a suitable terminal date for such period. Upon the claimant claiming' a renewal of the allowance, the insurance officer will be able, if necessary, to investigate and present evidence concerning the provision of ear muffs and their efficiency in reducing the risk of hearing loss. But, in my view, if the insurance officer thinks it right to contest a claim by the claimant to such a renewal it will be for him to show that the risk to the claimant of further hearing loss is too insubstantial to invoke the principle of R(I) 15/74.
> 19. There remains the question of the rate or rates at which the allowance should be awarded to the claimant. This has to be determined in accordance with the provisions of section 60(6) of the Social Security Act 1975. Unfortunately, the figures of earnings included in the case papers are inadequate to enable me to apply those provisions and I must therefore adopt an unusual course. I shall remit the matter to the local insurance officer for the determination of the rate or rates of the award, and in doing so I have in mind that it may be possible for the officer and the claimant to agree on the figures. If there is any difficulty the matter should be referred to me again and I hope to be able to deal with it without the need to reconvene the oral hearing. I should perhaps add for the claimant's information that it sometimes happens that a person is held to satisfy the qualifying conditions of section 60(1) but is found to be entitled to a nil award when the provisions of section 60(6) are applied."

(The reason that the claimant was entitled in principle to reduced earnings allowance only from 17 November 1976 was that, as in the present case, his claim had been late.)

11. I turn then to the Secretary of State's argument that the claimant's return to work in the present case necessarily demonstrates that he was capable of following his regular occupation.

12. It is noteworthy that, in paragraph 16 of R(I) 2/81, the Commissioner regarded the claimant in that case as having been incapable of following his regular occupation while still working in that occupation but, at the same time, he found the claimant to have satisfied the "continuous" conditions for entitlement to special hardship allowance. In the present case, on the other hand, the claimant concedes that the "continuous" conditions cannot be satisfied. Is that concession rightly made?

13. The date from which a claimant of reduced earnings allowance in respect of occupational deafness must have been continuously incapable of following his regular occupation or employment of an equivalent standard is the date of claim for

disablement benefit. That is because the date of onset of occupational deafness is taken to be no earlier than the date of claim for disablement benefit but section 103(6) of the 1992 Act is disapplied (see regulations 6(2)(c) and 28 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI 1985/967). The position was the same under the 1975 Regulations in force at the time material to the decision in R(I) 2/81.

14. Paragraph 11(10) of Schedule 7 to the 1992 Act (the successor of section 60(6) of the 1975 Act) is intended to have the effect that benefit is payable if a claimant has reduced earnings. That is why, in the phrase "employment of an equivalent standard", "'standard' … means 'standard of remuneration'" (R(I) 33/52).

15. The claimant's concession is, I think, made on the basis that the claimant did not actually have reduced earnings while still following his regular occupation after he had claimed disablement benefit. However, that approach, while it produces a sensible result, requires that the claimant be treated as following employment of an equivalent standard to his regular occupation and also that the principle formulated in R(I) 15/74 be applied only to the claimant's capacity to follow his regular occupation and not also to his capacity to follow employment of an equivalent standard. It is true that, in R(I) 2/81, the Commissioner considered the applicability of that principle only when considering whether the claimant was capable of following his regular occupation, but I can see no justification for taking a different approach to capacity to follow employment of an equivalent standard. If a claimant is justified in not returning to his or her regular occupation because it is too risky, he or she must be justified in not turning to an equally remunerative but equally risky alternative employment.

16. It seems to me, therefore, that the better and correct justification for the claimant's concession as regards the "continuous" conditions is that in this particular context a claimant is, as matter of law, estopped from arguing that he is incapable of following an occupation that he is in fact following, or must be deemed not to be incapable of following such an occupation, because Parliament cannot have intended a claimant to be entitled to reduced earnings allowance if he or she does not in fact have reduced earnings. Mr Commissioner Lazarus QC did not have to confront the possibility of the claimant being entitled to special hardship allowance in respect of the short period for which he might still have been receiving earnings from his regular occupation, because that was before the earliest date from which special hardship allowance could be awarded. (I am not quite sure to what he was alluding in the last sentence of paragraph 19. It may have been an observation as to the effect of the way that fluctuating earnings were calculated. But, if it was a recognition of the effect that not applying the R(I) 15/74 principle to capacity to follow an occupation of an equivalent standard would have, then I consider it to have been based on a false premise.)

17. Therefore, in my judgment, the Commissioner's conclusion in R(I) 2/81 that the claimant satisfied the "continuous" conditions may perhaps best be seen as an application of the *de minimis* principle in the light of what he had said in the last sentence of paragraph 16 and I consider that the claimant's concession in the present case is rightly made.

18. Thus, in relation to any period when a claimant is in fact following his or her regular occupation, I accept the Secretary of State's submission that the claimant's return to that occupation "demonstrates that the claimant was capable of following his regular occupation". That is so as a matter of law and will normally preclude entitlement to reduced earnings allowance on the basis of satisfaction of the "continuous" conditions.

19. However, if reduced earnings allowance is claimed only in respect of a period after the claimant has given up his or her regular occupation and with reliance being placed on the "permanent" conditions, different considerations apply. While there is every reason for holding that a claimant who has taken an unreasonable risk in returning to his or her regular occupation should not be entitled to reduced earnings allowance while doing so, I accept Mr Buckley's submission that there is no adequate reason for not applying the principle derived from R(I) 15/74 once he or she ceases to follow that occupation. If the principle derived from R(I) 15/74 were not applied, pressure would be put on those who had initially taken the risk to continue taking it. In the absence of any legislation preventing those suffering from prescribed industrial diseases and conditions from remaining in jobs that have caused the disease or condition, despite the risk of it developing further, it would be contrary to the purposes of the industrial injuries scheme if those who took the risk, no doubt to the advantage of their employers, were not properly to be covered by the scheme afterwards. It is immaterial that the risk may have materialised and taking it has increased the extent of the claimant's disablement.

20. On the other hand, I reject the claimant's submission that, because he was not attempting to show that he satisfied the "continuous" conditions, it was irrelevant that he had returned to work for a period that ended before he made his claim for reduced earnings allowance. The fact that a claimant has returned to his or her regular occupation in the past may be evidence that it was reasonable for him or her to do so and may be evidence of a continuing capacity to do so. That, however, is a question of fact rather than a question of law. In other words, returning to a regular occupation merely points to the need to assess the real degree of risk involved, as was done in R(I) 2/81.

21. Thus, in my judgment, a claimant's return to work *does* demonstrate that the claimant was capable of following his regular occupation during any period when he or she was actually following that occupation and it *may* demonstrate that the claimant is capable of following his regular occupation during other periods. To that extent only, I accept the Secretary of State's argument.

22. It follows that the conclusion reached by the First-tier Tribunal in this case was one it was entitled to reach and I reject the Secretary of State's submission to the contrary. Moreover, despite the language it used in paragraphs 13 and 15 of its statement of reasons, which if read in isolation might suggest that it had erred in law, it can be seen from paragraph 14 that the First-tier Tribunal did not in fact fall into the error of believing that, just because the claimant had occupational deafness, he necessarily, as a matter of law, could not return to work. It made a judgment that

there would be a real risk of further hearing loss were the claimant to return to the environment that had caused his hearing loss in the first place.

23. At the hearing before me, Ms Wilsdon argued that the First-tier Tribunal had erred in not having regard to the possibility of the claimant using ear protectors if he again worked in a noisy environment or, alternatively, that it had given inadequate reasons for its decision by not referring to such protectors. I accept that the possibility of the use of such protectors to reduce the risk of further hearing loss has to be taken into account in a case like this. That is plain from R(I) 2/81 where, although the Commissioner was not persuaded of the efficacy of ear protectors, he refrained from finding that the "permanent" conditions were satisfied because of the possibility that the insurance officer might be able to show in the future that ear protectors would adequately protect the claimant (see paragraphs 15 and 16). However, accepting that possibility would not have been inconsistent with a finding that incapacity for following employment of an equivalent standard was probably permanent. It seems to me that the Commissioner deliberately left the question open, it being unnecessary for him to consider the probability of the "permanent" conditions being satisfied because he was satisfied that the "continuous" conditions were satisfied. He may well have considered it desirable not to say anything more precisely because he anticipated that an insurance officer determining a later renewal claim might investigate more thoroughly the efficiency of ear protectors in reducing the risk of hearing loss with a view to showing "that the risk to the claimant of further hearing loss is too insubstantial to invoke the principle of R(I) 15/74" (see paragraph 18).

24. However, in the present case, the First-tier Tribunal did have to address the "permanent" conditions and the evidence before it was to the effect that, unlike the claimant in R(I) 2/81, the claimant in this case had been wearing ear protectors both before and after he claimed disablement benefit and that he had nonetheless suffered the additional hearing loss mentioned in the statement of reasons. The lack of any further assessment after 1990 did not show that there had been no more hearing loss after then. The Secretary of State had not adduced any evidence that modern ear protectors were likely to be significantly more effective. His response to the claimant's appeal had been based solely on an erroneous assumption as to the legal effect of the claimant having remained in his regular occupation until 2007. The claimant confirmed at the hearing before the First-tier Tribunal that he had used ear protectors and that his hearing had still deteriorated and in my judgment the First-tier Tribunal could properly regard the possibility of ear protectors reducing the risk of further hearing loss to an insignificant level as not being a live issue that needed to be addressed in its statement of reasons. In those circumstances, I am not satisfied that it erred in law in not mentioning ear protectors.

25. That is not to say that it would not now be open to the Secretary of State to obtain evidence that the risk to the claimant of further hearing loss could be made insignificant by the use of modern hearing protectors and to supersede the First-tier Tribunal's decision on the ground of ignorance of a material fact, or on the ground of a change of circumstances, in the light of such evidence. However, it has not been shown to my satisfaction that the First-tier Tribunal erred in law in the light of the evidence and arguments before it.

26. Accordingly, this appeal is dismissed.

Mark Rowland
6 December 2017