JUDGMENT OF THE COURT (Third Chamber)
10 December 1998 *

In Case C-279/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Centrale Raad van Beroep, Netherlands, for a preliminary ruling in the proceedings pending before that court between

Bestuur van het Landelijk Instituut Sociale Verzekeringen

and

C. J. M. Voeten,

J. Beckers

on the interpretation of Articles 40 and 51 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 86),

* Language of the case: Dutch.

THE COURT (Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J. C. Moitinho de Almeida (Rapporteur) and C. Gulmann, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Bestuur van het Landelijk Instituut Sociale Verzekeringen, by C. R. J. A. M. Brent, Director of Legal Affairs (production sector) in GAK Nederland BV, the enforcement agency,

— the Netherlands Government, by J. G. Lammers, acting Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent,

— the Commission of the European Communities, by P. J. Kuijper and P. Hillenkamp, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Bestuur van het Landelijk Instituut Sociale Verzekeringen, represented by A. I. van der Kris, Legal Assistant at GAK Nederland BV, the enforcement agency, acting as Agent, of the Netherlands Government,

represented by J. S. van den Oosterkamp, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, and of the Commission, represented by H. van Vliet, Legal Adviser, acting as Agent, at the hearing on 2 July 1998,

after hearing the Opinion of the Advocate General at the sitting on 16 July 1998,

gives the following

Judgment

1 By order of 10 July 1997, received at the Court on 1 August 1997, the Centrale Raad van Beroep (Higher Social Security Court) referred for a preliminary ruling under Article 177 of the EC Treaty three questions relating to the interpretation of Articles 40 and 51 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 86, hereinafter 'the Regulation').

2 Those questions were raised in proceedings between Mr Voeten and Mr Beckers, on the one hand, and the Bestuur van het Landelijk Instituut Sociale Verzekeringen (National Social Security Institute, hereinafter 'the Institute'), on the other, relating to the grant of invalidity benefits.

The Community legislation

3 Article 40 of the Regulation, entitled 'Determination of the degree of invalidity', provides:

'In order to determine the degree of invalidity, the institution of the Member State shall take into consideration the documents and medical reports and the information of an administrative nature obtained by the institution of any other Member State. Each institution shall, however, retain the right to have the claimant examined by a doctor of its own choice ...'.

4 Article 51(1) of the Regulation, which contains the provisions on 'Administrative checks and medical examinations', states:

'When a person in receipt of benefits, in particular:

(a) invalidity benefits,

...

is staying or residing in the territory of a Member State other than the State in which the institution responsible for payment is situated, administrative checks and medical examinations shall be carried out, at the request of that institution, by the institution of the place of stay or residence of the recipient in accordance with the

procedures laid down by the legislation administered by the latter institution. The institution responsible for payment shall, however, reserve the right to have the recipient examined by a doctor of its own choice.'

The main proceedings

5 Mr Voeten worked as an employee at Zundert, Netherlands, from 19 October 1976 to 21 November 1989. He stopped working on that date because of back, shoulder and knee problems. Mr Voeten has always lived in Essen, Belgium, near the Netherlands border.

6 On 3 August 1990 he was examined by the consultant in the medical service at Breda, Netherlands, to whom his specialist in Antwerp, Belgium, sent information. He also had an interview on 11 December 1990 with the ergonomics expert from the Breda medical service about his capacity for work.

7 By decision of 1 March 1991 he was granted benefit for incapacity for work under the Netherlands legislation, calculated on the basis of 80 to 100% incapacity and with effect from 22 November 1990.

8 As a result of a change in the legislation which came into effect on 1 August 1993, Mr Voeten was summoned to have his incapacity for work reassessed. On 13 February 1995, he attended for an appointment with the consultant in the Breda medical service, who decided that despite his impediments he was capable of working full-time in a job suited to his abilities. On 23 March 1995, Mr Voeten had an interview with the ergonomics expert in the Breda medical service, who recommended that his incapacity for work be recognised as between 35 and 45% on the basis that he was considered capable of earning, in an appropriate job, an

income 36% below his earning capacity compared to the amount he was earning prior to his invalidity.

9 By decision of 20 June 1995 the competent institution changed his benefit with effect from 1 July 1995, calculating it on the basis of 35 to 45% incapacity for work.

10 On 1 July 1995 he returned to work for his former employer. Because of his new income, his benefit was, by decision of 25 October 1995, paid on the basis of 25 to 35% incapacity for work.

11 Mr Voeten brought an action seeking annulment of the decisions of 20 June and 25 October 1995 before the Arrondissementsrechtbank, Amsterdam (District Court, Amsterdam), arguing, *inter alia*, that according to a report from his specialist in Antwerp his incapacity for work was between 80 and 100%.

12 The Arrondissementsrechtbank granted the application in relation to the decision of 20 June 1995 on the ground that he should have been examined by a doctor at the institution of his place of residence before the medical examination by the consultant in the Breda medical service, since in a judgment of 4 May 1992 the Centrale Raad van Beroep had held that it followed from the judgment of the Court of Justice in Case C-344/89 *Martínez Vidal* [1991] ECR I-3245 that Article 51(1) of Regulation No 574/72 required the medical examination of the worker, if necessary, to be carried out by the institution of his place of residence. The right conferred on the institution responsible for payment by Article 51(1) could therefore relate only to additional examinations. The Arrondissementsrechtbank considered it to be immaterial that the institution of Mr Voeten's place of residence was further from where he lived than the institution responsible for payment, because Article 51(1) of Regulation No 574/72 was mandatory.

13 The Institute appealed against that judgment to the Centrale Raad van Beroep, which asks whether there may be an exception to Article 51(1) where the medical examination relates to frontier workers, who are accustomed to travelling to the State of the competent institution on a daily basis and whose place of residence is not necessarily further from that institution than from the institution of their place of residence and who have no objection to the examination being carried out in the Netherlands.

14 Mr Beckers worked as an employee at Born, Netherlands, from 20 February 1989 to 2 September 1993. He stopped work on that date because of back problems. He has always lived in Bilzen, Belgium, near the Netherlands border.

15 On 2 December 1993 he was examined by a consultant in the medical service at Maastricht, the Netherlands, who diagnosed a lumbar disc complaint on the basis of his own examination and information provided by Mr Beckers' orthopaedist. No information was requested from the institution of Mr Beckers' place of residence.

16 On 2 June 1994 he was re-examined by the consultant. He also had several discussions with the ergonomics expert, who decided that despite his disc complaint he could perform other tasks, and recommended that his incapacity for work be recognised as between 15 and 25%.

17 By decision of 12 September 1994 the Netherlands institution refused to accord Mr Beckers benefit for incapacity for work.

18 Mr Beckers brought an appeal against that decision before the Arrondissementsrechtbank, 's-Gravenhage (District Court, The Hague) which, by judgment of 5 August 1996, upheld the appeal on the basis that Article 40 of the Regulation required that the medical examination be carried out by the institution of the worker's place of residence. The court said that no distinction could be made between a first application for benefit and the situation addressed by Article 51(1) of the Regulation, where a benefit currently being paid is to be reassessed.

19 The Institute appealed against that judgment to the Centrale Raad van Beroep, which asks whether Article 40 precludes the competent institution, when first assessing the degree of incapacity for work, from carrying out the medical examination itself without requesting a prior medical examination by the institution of the worker's place of residence.

20 The national court considers that there is nothing in the wording of Article 40 which indicates that the rules applicable in such circumstances may differ from those applicable in the situation which Article 51(1) is intended to cover. The legislation of the State of the institution responsible for payment may in fact provide that the right to the benefit must be determined using a different method from that which applies where benefits are being reassessed pursuant to Article 51(1) of the Regulation — the purpose of which is, in general, rather to determine whether the worker's state of health is still the same.

21 The national court also asks whether Article 40 does not at least require that information or reports be requested from the institution of the worker's place of residence and that such information and reports as exist be taken into account when assessing incapacity, which was not done in Mr Beckers' case. At most, only the information received from Mr Beckers' specialist in his State of residence was considered.

22 In the light of those queries, the national court decided to stay proceedings in both cases in order to refer the following questions to the Court:

' 1. Does Article 51(1) of Regulation (EEC) No 574/72 preclude the competent institution from carrying out in the country of the competent institution a medical examination of the person in receipt of benefit for incapacity for work as part of checking the employee's degree of incapacity in the absence of a prior medical examination carried out by the institution of the place of stay or residence, where the employee is a frontier worker and, as a result, it can be presumed that the distance between his place of residence and the competent institution is not necessarily greater than the distance between his place of residence and the institution of the place of residence?

2. In the case of determination for the first time of entitlement to benefit, does Article 40 of Regulation (EEC) No 574/72 preclude the competent institution from assessing the incapacity for work on the basis of its own medical examination, without a prior medical examination by the institution of the place of residence?

3. If the answer to Question 2 is in the negative: does that also apply where the competent institution has not requested and hence not taken account of medical documents and reports and also information from the institution of the place of residence, but only apprised itself of medical information from the attending practitioner in the country where the employee is undergoing medical treatment?'

The first question

23 By its first question, the national court is essentially asking whether, in the case of a former frontier worker in receipt of invalidity benefit, who is resident in a Member State other than that of the institution responsible for payment and whose place of residence is nearer to that institution than to the institution of his place of

residence, Article 51(1) of the Regulation precludes the competent institution from carrying out the relevant administrative checks and medical examinations without requesting that the institution at his place of residence carry out a prior examination.

24 The first point to note is that according to paragraphs 9 to 16 of the judgment in *Martínez Vidal*, cited above, Article 51(1) of the Regulation is to be interpreted as meaning that where there are administrative checks and a medical examination of a person in receipt of invalidity benefits who is staying or resident in a Member State other than that where the institution responsible for payment is located, those checks and that examination must be carried out by the institution where he is staying or resident, with the competent institution being entitled, if it deems necessary, to carry out an additional examination. To that end, the competent institution may require the person in question to travel to the Member State in which it is established, provided that it reimburses the associated travel and subsistence expenses and that the person is able to make the journey without prejudice to his health.

25 The Institute maintains that the rule that the worker must first be examined by the institution of his place of residence does not apply to frontier workers who, as in the case of Mr Voeten, live further away from the medical service of the institution of their place of residence than from that of the institution of the competent State. In such circumstances, the worker's state of health would not be a ground for refusing to allow the examination to take place in the State of the competent institution and there would not be any appreciable difference between the inconvenience caused to the worker by an examination in the institution of his place of residence and an examination in the State of the competent institution.

26 The Institute considers that the Belgo-Netherlands Agreement of 12 August 1982 on insurance for sickness, maternity and invalidity, which was concluded pursuant to Article 121 of the Regulation, and to which paragraph 8(d) of Annex 5 to the Regulation refers, confirms its view. That provision, it claims, permits two or more Member States to agree, where necessary, on implementing rules which derogate from the Regulation. Thus, Article 23 of the agreement provides that, without prejudice to Article 21 (according to which the medical examination is to be carried out by the institution of the place of residence if the competent institution so requests), the competent institution is entitled to carry out examinations in the

other State or to summon the insured for examination. The Institute concludes that where the Kingdom of the Netherlands and the Kingdom of Belgium are involved, Article 23 of the agreement enables a medical examination to take place in the country of the competent institution without that institution having to request a prior examination by the institution of the State of residence.

27 The Netherlands Government argues that Article 51(1) of the Regulation does not apply to the main proceedings, which are concerned with reassessing the degree of the worker's incapacity for work following radical legislative reform in 1993. Since such reassessment is not a simple medical examination within the meaning of Article 51(1) to check whether the worker's condition is still the same, but rather amounts to a fresh decision on his incapacity for work based on wholly new criteria, it must be deemed equivalent to a first determination of the degree of incapacity for work under Article 40 of the Regulation.

28 If, however, the Court none the less reaches the conclusion that Article 51(1) applies, the Netherlands Government concurs with the arguments of the Institute.

29 In that connection, the Netherlands Government states that in the Netherlands system, a medical examination is just one of the factors to be taken into consideration in the assessment of incapacity. The ergonomics expert's opinion is at least as important as that of the doctor. The ergonomics expert is responsible for establishing which activities the worker can still carry out and for determining the degree of incapacity for work on the basis of his conclusions. He is also responsible for helping the worker to reintegrate into the workplace, which entails making contact with his former employer. The further away the worker lives from the Netherlands, the more difficult it becomes to make contact with those people. That is not true of

frontier workers only — their position is no different in practical terms from that of workers resident in the Netherlands with respect to the chances of such an attempt at reintegrating them succeeding. From a practical point of view, it is clear that the ergonomic examination must be carried out in the Netherlands together with the prior medical examination.

30 The German Government considers that it is in principle for recipients of invalidity benefits to decide whether to make use of the procedure set out in Article 51(1) of the Regulation. It takes the view that it might be easier for frontier workers who live near the border of the State of the competent institution to be examined by that institution. It would be absurd and incompatible with the objective of Article 51(1), which is to simplify administrative matters, to insist in such a case on a prior examination of the recipient of benefits in the State of residence.

31 The German Government also argues that the institution and doctors at the place of residence are less accustomed than the doctors at the competent institution to applying the criteria for assessing incapacity for work under the law of the Member State of the competent institution, criteria which might be very different from those in the Member State of residence (see, to that effect, the judgment in *Martínez Vidal*, cited above, paragraph 14). Where examinations are carried out in another Member State, it is therefore frequently essential that there be an exchange of information and further medical examinations, which is time-consuming and can mean that documents have to be translated.

32 The German Government considers that in such situations the competent institution should therefore be able to have the worker examined by its own doctors and experts from the outset, especially since its right to do so is in any event recognised

by the second sentence of Article 51(1) of the Regulation in the context of additional examinations; in such circumstances, the recipient's option to waive his right to be examined in his State of residence is compatible with the objective of that provision.

33 As regards, first, the Netherlands Government's argument that Article 51(1) of the Regulation does not apply in the main proceedings because the disputed decision, which was adopted pursuant to new legislation, should be deemed to be a first assessment of the degree of invalidity, it must be observed that Article 51 is expressly applicable subject to the condition, which is satisfied in the main proceedings, that the worker is already receiving invalidity benefit under the legislation of the competent Member State when the medical examination is requested. Nothing in the text of Article 51 enables the conclusion to be drawn that it would not apply in the event of amendment — even extensive amendment — of the applicable legislation; nor is there any reason to suppose that the competent institution would not be in a position to apply the provisions of the new legislation on the basis of the medical file already in its possession which could, in appropriate cases, be supplemented by information arising as a result of an examination performed in accordance with Article 51(1).

34 Next, it must be noted that the wording of Article 51(1) does not lend support to the argument that that provision, as interpreted by the Court, would not cover a former frontier worker, even where, as suggested by the national court, he lives nearer to the institution of the competent State than to the institution of his place of residence.

35 It is certainly true that the objective of sparing the worker unnecessary journeys which might entail risks to his health does not apply if he lives nearer to the competent institution than to the institution of his place of residence. However, in such cases, there are other reasons why there should be a prior examination by the institution at the place of residence. Indeed, as the Commission rightly pointed out, it is in principle in the interests of a recipient of invalidity benefits to be examined by

the medical staff with whom he is most familiar and who speak the language of the State in which he lives.

36 Furthermore, as regards the argument based on the Belgo-Netherlands agreement of 12 August 1982 on insurance for sickness, maternity and invalidity, it need only be observed that Article 121 of the Regulation authorises the Member States to conclude agreements designed to supplement the administrative procedure for implementing the Regulation but does not permit them to derogate from provisions such as Article 51(1), which determine the institution authorised to carry out the medical examination for the purposes of invalidity insurance and the place where that examination is to take place.

37 That does not alter the fact that, as the German Government argued, a recipient of invalidity benefit must be entitled to waive a prior medical examination by the institution at his place of residence and so undergo his first examination at the institution of the competent State.

38 Indeed, although the option to waive a prior examination by the institution of the place of residence cannot be inferred directly from the wording of Article 51(1), it must be accepted that, having regard to the objectives of the rules in dispute, namely to protect the interests of the recipient of invalidity benefits, it cannot be the subject of a general exclusion. A waiver of that kind must, however, be accompanied by minimum guarantees, namely that it was both freely made and unambiguous.

39 Those guarantees are all the more necessary because a waiver deprives those concerned of a form of protection which it was the legislature's express intention to bestow, even though, as the Commission noted at the hearing, such persons do not always have an exhaustive knowledge of the rights which Community legislation confers on them. In particular, it is to be anticipated that, if those guarantees did not exist, there would be many people who might attend when summoned by the

competent institution without having any idea that their being so summoned deprives them of a form of protection conferred on them by Community legislation.

40 It is for the national court to determine whether the abovementioned conditions are satisfied in the main proceedings.

41 In the circumstances, the answer to the first question referred is that, in the case of a former frontier worker and recipient of invalidity benefits who lives in a Member State other than that of the institution responsible for payment, and whose place of residence is nearer to the institution of the competent Member State than to the institution of the State of residence, Article 51(1) of the Regulation precludes the competent institution from carrying out the administrative checks and medical examination of that worker without requesting a prior examination by the institution of his place of residence. However, the provision does not preclude the worker from waiving the right to undergo the prior examination by the institution of his place of residence, provided that his waiver is freely made and unambiguous.

The second and third questions

42 By its second and third questions, the national court is asking whether, in the case of the first assessment of an invalidity benefit granted to a resident of a Member State other than that of the competent institution, Article 40 of the Regulation precludes the competent institution from assessing the degree of invalidity on the basis of its own medical examination without requesting a prior examination by the institution of the place of residence and, if the reply is in the negative, whether that provision precludes the competent institution from not taking into account docu-

ments and medical reports, and administrative information, from the institution in the State where the person resides.

43 According to the Institute, the Netherlands and German Governments and the Commission, nothing leads to the assumption that Article 40 of the Regulation obliges the worker to undergo a medical examination in the State in which he is resident before the examination by the competent institution. Furthermore, they consider that Article 40 requires the competent institution to take account of any documents or reports which an institution in another Member State might have drawn up.

44 It must be noted from the outset that, according to the information in the file, Mr Beckers' position was, during the course of his working life, governed exclusively by Netherlands legislation on incapacity for work, pursuant to which the amount of invalidity benefits does not depend on the duration of periods of insurance (see Annex IV, Section A, letter J of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Regulation No 2001/83 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7)).

45 As the Advocate General pointed out at point 55 of his Opinion, Article 40 of the Regulation governs the situation of a worker who has, for the duration of his working life, been subject to the legislation of two or more Member States with that type of legislation.

46 However, the rules applicable where the worker has been subject to two or more sets of legislation under which the amount of invalidity benefit does not depend on the duration of the insurance periods apply all the more, *mutatis mutandis*, where the applicant has been subject to a single set of legislation containing such a provision.

47 In that connection, it must be observed that nothing in the wording of Article 40 leads to the conclusion that the medical examination and administrative checks carried out by the institution responsible for payment in order initially to establish the degree of invalidity must be preceded by an examination by the institution of the Member State in which a worker resides.

48 As the Advocate General pointed out at point 45 of his Opinion, that interpretation is confirmed by Article 39 of Regulation No 1408/71, which applies to workers exclusively subject to legislation such as that applicable in the main proceedings, under which the amount of benefit does not depend on the duration of the periods of insurance. According to that provision, it is for the institution of the Member State whose legislation was applicable at the time when incapacity for work followed by invalidity occurred to determine, in accordance with that legislation, whether the person concerned satisfies the conditions for entitlement to benefits.

49 It must be observed, however, that, as the German Government and the Commission rightly pointed out, Article 40 of the Regulation is to be interpreted as meaning that in order, *inter alia*, to avoid duplicating examinations which have been carried out in other Member States, the competent institution must take into account any documents or reports drawn up by an institution in any other Member State, such as, in the main proceedings, the institution in the Member State of residence.

50 Accordingly, the answer to the second and third questions referred is that in the case of a first assessment of invalidity benefit granted to a person who is resident in a Member State other than that of the competent institution, Article 40 of the Regulation does not preclude the competent institution from determining the degree of invalidity on the basis of its own medical examination without requesting a prior examination by the institution of the place of residence. However, the competent institution must take account of any documents, medical reports and administrative information from the institution in the Member State in which the worker resides.

Costs

51 The costs incurred by the Netherlands and German Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Centrale Raad van Beroep by order of 10 July 1997, hereby rules:

1. **In the case of a former frontier worker and recipient of invalidity benefits who lives in a Member State other than that of the institution responsible for payment, and whose place of residence is nearer to the institution of the competent Member State than to the institution of the State of residence, Article 51(1) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, precludes the competent institution from carrying out the administrative checks and medical examination of that worker without requesting a prior examination by the institution of his place of residence. However, the provision does not preclude the worker from waiving the right to undergo the prior examination by the institution of his place of residence, provided that his waiver is freely made and unambiguous.**

2. In the case of a first assessment of invalidity benefit granted to a person who is resident in a Member State other than that of the competent institution, Article 40 of the Regulation does not preclude the competent institution from determining the degree of invalidity on the basis of its own medical examination without requesting a prior examination by the institution of the place of residence. However, the competent institution must take account of any documents, medical reports and administrative information from the institution in the Member State in which the worker resides.

Puissochet Moitinho de Almeida Gulmann

Delivered in open court in Luxembourg on 10 December 1998.

R. Grass J.-P. Puissochet

Registrar President of the Third Chamber