Case 28/85

Alexandre Deghillage
v
Caisse primaire d'assurance maladie de Maubeuge

(reference for a preliminary ruling
from the cour d'appel de Douai)

(Social security — Recognition of an occupational disease)

Summary

Social security for migrant workers — Insurance against accidents at work and occupational disease — Occupational disease — Diagnosis made in a Member State other than the Member State which is under a duty to pay the benefits — Recognition obligatory
(Regulation No 1408/71 of the Council, Art. 57 (1) and (2))

A diagnosis that a person is suffering from an occupational disease must be recognized by the Member State which, by virtue of Article 57 (1) of Regulation No 1407/71, is under a duty to pay the benefits, even if that diagnosis was made in another Member State and in accordance with its legislation.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 23 January 1986 *

Mr President,
Members of the Court,

A — The question underlying the main proceedings relating to the case which I am to consider today is which body is the 'competent institution' for the purpose of the award of benefits in respect of an occupational disease to an employed person who was exposed to the same risks of occupa-

* Translated from the German.

tional disease in more than one Member State.

The following facts emerge from the request made by the cour d'appel de Douai [Court of Appeal, Douai] for a preliminary ruling and from the documents which it has forwarded to the Court:

1. Mr Deghillage, a Belgian national who started working in 1937, worked from March 1942 to December 1948 in a factory at Feignies (France) where he was employed as a trimmer. From January 1949 to April 1958 he was employed at Jemappes (Belgium) in work in which he had to use pneumatic power tools and welding torches. Finally, from 1958 until 30 November 1981 he resumed his work as a trimmer at Feignies in the same factory in which he had been employed until December 1948.

Since 1 December 1981 Mr Deghillage has no longer been in employment.

On 12 September 1980 Mr Deghillage underwent an audiogram to ascertain whether he was suffering from defective hearing. A second audiogram was carried out on 3 December 1981 and a third on 19 January 1984.

2. On *14 January 1982* Mr Deghillage submitted an 'application for benefits in respect of an occupational disease' to the Fonds des maladies professionnelles, Bruxelles [Occupational Diseases Fund, Brussels, hereinafter referred to as 'the Belgian Fund'].

By a decision of *28 February 1983* the Belgian Fund rejected that application as 'inadmissible' on the following grounds:

'The requirements laid down in the international agreements relating to social security for migrant workers have not been fulfilled. The person concerned was most recently exposed to the risk of occupational disease in the territory of another Member State of the EEC (Article 57 (1) of Regulation (EEC) No 1408/71).'

3. On *5 April 1983* the Belgian Fund forwarded the claim, together with the report and medical certificate of *12 December 1981* establishing that Mr Deghillage was suffering from an occupational disease (deafness induced by trauma), to the Centre de Sécurité Sociale des Travailleurs Migrants [Social Security Centre for Migrant Workers], Paris, which in turn forwarded the documents on *28 April 1983* to the Caisse primaire d'assurance maladie de Maubeuge [Local Sickness Insurance Fund, Maubeuge, hereinafter referred to as 'the French Fund'] requesting it to determine whether the nature of the work carried out by Mr Deghillage in France was capable of causing the complaint diagnosed.

4. The French Fund rejected the application on the ground that, although the work carried out by Mr Deghillage was capable of causing his occupational disease, it was unable to reach the conclusion that he was suffering from one of the occupational diseases set out in Table No 42 [1] since the second audiogram had not been conducted within the prescribed period (three weeks to a year, calculated from the time when the person concerned ceased to be exposed to the harmful noise).

5. By decision of 27 October 1983 the Commission des recours gracieux [Appeals Board] upheld the French Fund's decision.

6. An appeal against that decision was dismissed by the commission de première instance de sécurité sociale [Social Security First Instance Appeals Board], Valenciennes, by decision of 17 April 1984.

7. In the course of an appeal brought against the latter decision, the cour d'appel

1 — Table No 42 (noise-induced occupational diseases) annexed to Decree No 46-2959 of 31 December 1946 implementing the provisions of Book IV of the Social Security Code (as amended by Decree No 81-507 of 4 May 1981).

de Douai, by judgment of 21 December 1984, suspended the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Pursuant to Article 86 of Regulation (EEC) No 1408/71, what consequences must be drawn from the fact that the Belgian institution to which the claim was submitted was late in forwarding it to the French institution?'

B — I shall commence by recapitulating the principal dates.

1. Since on *30 November 1981* Mr Deghillage ceased to carry out work involving the risk of occupational disease, a second audiogram should have been carried out under French law in the period between *21 December 1981* and *30 November 1982*. The audograms undergone by Mr Deghillage on 12 September 1980, 3 December 1981 and 19 January 1984 were not carried out within that period. When he submitted his application for benefits to the Belgian Fund on *14 January 1982*, the period for carrying out the second audiogram had not yet expired. However, it had expired — by more than four months — when the Belgian Fund forwarded the claim for a pension to the French institution on *5 April 1983*.

2. As regards the legal aspects of the case, the views expressed by the *Commission* and, in the course of the oral procedure, by the *Government of the French Republic* are largely in agreement.

Both attribute Mr Deghillage's inability to undergo the second audiogram within the period prescribed by French law to the fact that the Belgian Fund was late in forwarding the application to the French institution.

In their view, according to Article 86 of Regulation No 1408/71 [2] it was permissible for Mr Deghillage to submit his claim to the Belgian Fund whereupon the Belgian Fund should have forwarded it without delay to the French institution. However, no penalty attaches to failure to comply with that obligation.

They maintain that under Article 86, Mr Deghillage's claim is to be regarded as having been submitted in time even though it was late in being forwarded. However, no further consequences can be inferred from Article 86 since it is a purely procedural provision, which must be distinguished from the substantive rules relating to the recognition of occupational diseases.

Since the period prescribed in the French legislation for carrying out the second audiogram which is a requirement for the recognition of damage to hearing was not complied with, they argue that Mr Deghillage is no longer entitled to benefits under French law in respect of his occupational disease.

Furthermore, the *Commission* urges the Court to provide the national court with additional indications for the resolution of the dispute going beyond the wording of the question. In view of its continuing concern to keep national courts fully informed of the scope of Community law, the Court may — if necessary by supplementing the wording of the question — point to other provisions which enable the problem to be resolved.

2 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

To that end, the Commission considers two possibilities:

(a) According to Article 57 (1) of Regulation No 1408/71 a person who, under the legislation of two or more Member States, has pursued an activity likely to cause an occupational disease is entitled to benefits in respect of that occupational disease 'exclusively under the legislation of the last of these States' whose conditions are satisfied.

The Commission considers that in this case France cannot be regarded as the last State within the meaning of Article 57 (1) since, owing to the fact that Mr Deghillage's application was forwarded late, it has become impossible for him to satisfy the conditions laid down in the French legislation. Hence the last State whose statutory conditions could be satisfied is Belgium since, as a result of the diagnosis made on 12 December 1981, the conditions laid down by the Belgian legislation for the award of benefits in respect of an occupational disease were satisfied.

The Commission maintains that if it becomes apparent that Mr Deghillage is not entitled to benefits under French law the French Fund will have to apply Article 67 (3) of Regulation No 574/72.[3] According to that provision, when the institution of the Member State under whose legislation the person suffering from the disease last pursued an activity which might cause the occupational disease in question ascertains that that person does not satisfy the conditions of that legislation, the said institution must notify, without delay, the institution of the Member State under whose legislation the person suffering from the disease last pursued an activity which might cause the occupational disease in question.

The Commission therefore considers that the French Fund should send Mr Deghillage's file back to the Belgian Fund and adds that it was authorized by the Belgian Fund to state before the Court that the latter would consider the plaintiff's claim favourably if it should turn out that he is not entitled to benefits under French law.

(b) A further possibility would be for Mr Deghillage to sue the Belgian social security institution for damages on the ground that the belated transmission of his claim caused him to forfeit his right to compensation in respect of an occupational disease under French legislation.

3. The solution suggested by the Government of the French Republic and the Commission to the effect that the case should be referred back to the Belgian Fund may admittedly be appropriate on the basis of a literal interpretation of Regulation No 1408/71. However, I consider that, in this case, the Court should not confine itself to a purely literal interpretation, since the end result would not be compatible either with the meaning and purpose of Regulation No 1408/71 or with the requirements of effective legal protection. It is self-evident, without any further explanation being called for, that it would be manifestly unjust to refer Mr Deghillage's case back to the Belgian Fund, since it has already taken thirteen months to adopt an incorrect one-page decision and a further five weeks to discharge its duty to forward the claim *without delay* to the French institution.

Since Mr Deghillage spent in France 20 of the 30 years in which he was engaged in hazardous work, the existence of a substantive obligation on the part of the French institution to pay the contested benefits cannot seriously be disputed. Moreover, it is not apparent why the French

3 — 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 (Official Journal, English Special Edition 1972 (I), p. 159).

institution should derive from the wrongful conduct of the Belgian Fund the advantage of not having to pay benefits which it is under a substantive duty to grant.

In seeking an appropriate solution to this legal issue the aim pursued by the Community legislature in adopting Regulation No 1408/71 must not be left out of account, namely 'guaranteeing within the Community firstly equality of treatment for all nationals of Member States under the various national legislations and secondly *social security benefits for workers and their dependants regardless of their place of employment or of residence*'.

(a) It is necessary to consider in the first place whether Article 86 of Regulation No 1408/71 really is only procedural in scope in so far as it lays down time-limits for the submission of claims, or whether it can be given a wider meaning.

Article 86 provides that any claim, declaration or appeal which should have been submitted, in order to comply with the legislation of one Member State, within a specified period to an authority of that State may be submitted within the same period to a corresponding authority of another Member State. In such a case the authority receiving the claim is to forward it without delay to the competent authority of the Member State concerned. The date on which the claim was submitted to the authority of the second State is to be considered as the date of its submission to the competent authority.

Hence where a claim is submitted to an authority of a Member State other than that under the legislation of which the benefit must be awarded, that authority has no power to determine the admissibility of the claim in question. That power belongs exclusively to the authority of the Member State under the legislation of which the benefit must be awarded and to which the claim must in all circumstances be forwarded. [4]

The next question is whether Article 86 is capable of being interpreted as referring not only to the *submission* of claims *in time* but also to the *suspension* of certain periods prescribed by national legislation. One factor in favour of such an interpretation of Article 86 would be that the claimant is not in a position to influence the institution not under a duty to award the benefits with regard to the transmission of the claim 'without delay' to the institution which is under such duty. The simplified procedure provided for by Article 86 for the benefit of claimants would lose much of its effectiveness if the institution not under a duty to award the benefits could, through negligence or dilatory conduct, nullify the very advantages which Article 86 gives to the claimant.

However attractive such an interpretation of Article 86 might seem — and the Court's previous decisions on that provision do not rule it out — certain objections could be advanced if the Court of Justice were to state its position on that general question here, especially since the practical implications of such an interpretation are not fully apparent.

4 — See judgment of 22 May 1980 in Case 143/79, *Walsh* v *National Insurance Officer* [1980] ECR 1639.

In the event, there is a special provision relating to occupational diseases in Regulation No 1408/71 which appears to offer a solution to the present dispute.

(b) Since, according to a consistent line of cases, [5] the Court provides national courts with criteria for the interpretation of Community law which may be useful to them in reaching their decisions, the question submitted by the cour d'appel de Douai should be answered in the light of all the provisions of Community law, even those not expressly mentioned in the question.

I shall therefore consider, in the light of those previous decisions, whether Article 57 (2) of Regulation No 1408/71 can be applied to these proceedings.

Article 57 (2) of Regulation No 1408/71 reads as follows:

'If under the legislation of a Member State the granting of benefits in respect of an occupational disease is subject to the condition that the disease in question was first diagnosed within its territory, such condition shall be deemed to be fulfilled if the disease was first diagnosed in the territory of another Member State.'

I take this provision to contain a further procedural advantage for the claimaint: the institution of the Member State which is under a duty to pay the benefits must recognize the first *diagnosis* of an occupational disease as valid even where that diagnosis is made in the territory of another Member State. In that respect Article 57 (2) derogates from Article 57 (1), which provides that benefits are to be 'awarded exclusively under the legislation of the last of these States'. That may indeed be so, *in general terms*, as regards the evaluation of the amount of the benefit and the procedure for granting it, but it does not apply as regards the first diagnosis of an occupational disease.

If, therefore, the institution required to pay the benefits must recognize a diagnosis made in another Member State that the person concerned is suffering from an occupational disease, that must also be true where that diagnosis was not made in accordance with the procedural requirements of the Member State required to pay the benefits. In fact, it is conceivable that when the occupational disease is diagnosed, it has not yet been established which Member State is under a duty to pay the benefits. Moreover, the doctor called upon to diagnose the disease cannot be required to know the procedural rules of other Member States' social security legislation.

Consequently, Article 57 (2) of Regulation No 1408/71 must be interpreted as meaning that where there is a requirement in the legislation of a Member State making the award of benefits in respect of an occupational disease subject to the disease having been diagnosed for the first time within the territory of that Member State, that requirement is deemed to be fulfilled even if the disease in question was diagnosed in the territory of another Member State and even *if that diagnosis was made in accordance with the procedural rules of that Member State.*

5 — See, for example, the judgment of 11 April 1983 in Case 76/72 *Michel S.* v *Fonds national de reclassement social des handicapés* [1973] ECR 457, and the judgment of 11 July 1985 in Case 137/84 *Ministère Public* v *Mutsch* [1985] ECR 2681.

The French Centre de sécurité sociale de travailleurs migrants also seems to have acted on that assumption when in its — admittedly brief — letter of 28 April 1983 to the French Fund it asked the latter simply to ascertain whether the work done by Mr Deghillage in France was capable of causing the *impairment diagnosed* in his case. Thus the French Fund was not asked to go through the whole procedure for establishing that the claimant was suffering from an occupational disease but merely to state its views on one particular aspect of the case.

However, it should also be mentioned that it is not altogether clear whether under French legislation a condition for the award of benefits in respect of an occupational disease is that the disease must have been diagnosed for the first time in the territory of the French Republic. Admittedly, certain provisions of the French Social Security Code seem to suggest that this is the case, but that is a matter which may have to be resolved by the national court.

That problem does not however need to be resolved in this case. If the diagnosis of an occupational disease made in accordance with the procedural rules of the country of residence of the doctor suffices even where the legislation of the Member State which is under a duty to pay the benefits requires that diagnosis to have been made in its territory, then *a fortiori* that first diagnosis must suffice where no such requirement is expressly laid down by the Member State which is under a duty to pay the benefits. Here too, the basic consideration must apply that the doctor who first diagnoses an occupational disease cannot be expected to know the procedural rules of other Member States' social security legislation.

Lastly, it should also be mentioned for the sake of clarity that the *second* audiogram provided for in Table No 42 appended to Decree No 46-2959, as amended by Decree No 81-507, must still be regarded as part of the *first* diagnosis of an occupational disease for the purposes of Article 57 (2) of Regulation No 1408/71, since that regulation draws a distinction between diagnosis of an occupational disease for the first time and aggravation of the worker's condition (Article 60).

C — In the light of the foregoing I propose that the Court of Justice should answer the question referred to it for a preliminary ruling by the cour d'appel de Douai as follows:

Article 57 (2) of Regulation No 1408/71 in conjunction with Article 86 thereof should be interpreted as follows:

Where a person who has contracted an occupational disease has pursued an activity capable of causing that disease, according to the legislation of two or more Member States, the benefits to which he is entitled are to be awarded under the legislation of the last of those States, on the understanding that it is sufficient if

the occupational disease was diagnosed for the first time in another Member State in accordance with its legislation.

In such a case, it does not matter that the institution to which the claim for benefits was first submitted did not, contrary to Article 86 of Regulation No 1408/71, forward the claim without delay to the competent institution of the other Member State, with the result that the claimant was unable to comply with the period prescribed for the first diagnosis of his occupational disease by the law of the competent Member State.