IN THE UPPER TRIBUNAL **Case No.** CI/3027/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: L T Parker Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (Social Entitlement Chamber) sitting in Middlesbrough on 30 June 2013 (the tribunal) is erroneous in law and I set it aside. I remit the appeal for reconsideration by a differently constituted tribunal in the light of the guidance below.

The appeal is not supported on behalf of the Secretary of State but, after careful consideration of all the case papers, I do not agree with that lack of support.

REASONS FOR DECISION

Background

1. The appellant, born 22 October 1951, worked as a coalminer under ground from 1966 to 1993. He claimed on 5 June 2014 for PD A12 (carpal tunnel syndrome). This was a second claim for PD A12; as the first claim had been rejected, the date of onset for the purposes of the second claim was from 11 April 2012. Advice was given by an examining doctor on 27 August 2014; the medical opinion was that a diagnosis of carpal tunnel syndrome was now identified, with a loss of faculty that I am unable to read, but causing a resultant disability of "impaired dexterity", which affected an ability to handle small objects. The doctor further opined:

> "Overall disability is roughly equivalent to loss of an index finger (assessable at 14%), so 12% is reasonable, with an offset of 6% for the O(pre) condition."

2. The offset was a reference to a successful claim made in 2011 for PD A11 (vibration white finger), for which a date of onset of 1 January 1982 had been given and an assessment made at 6% for life from 1 October 2007. For PD A11, the medical advice on 12 October 2011, had been that the loss of faculty was "painful and restricted movements of the hands", resulting in the disability of "impaired manual dexterity", which had an effect of "discomfort and difficulty handling small items".

3. The claimant also had an assessment of 12% for life from 13 July 2009 for PD A14 (osteoarthritis of the knee) with a date of onset 1 January 1988. Therefore, an issue of aggregation arose; on 4 September 2014, a decision maker (DM) determined that the total of his assessments was 24%, which, on account of the rounding provisions, (if the total disablement from all industrial accidents and diseases is more than 20%, it is rounded to the nearest multiple of 10%, with multiples of 5% being rounded upwards), became a payable rate at 20% from 5 June 2014; an earlier award of disablement benefit was therefore superseded and from and including 5 June 2014, disablement benefit was payable at the weekly rate applicable to 20% disablement, (so with no practical change). The supersession decision is the one under appeal to the tribunal, not simply the assessment for PD A12. I have to say that it is a most tortuous business to elicit the history from the poorly prepared papers.

4. In any event, the appellant appealed to a tribunal on the stated ground of an objection to the offset of 6% for PD A11 from his PD A12 assessment: he said that such was not justified because carpal tunnel syndrome and vibration white finger are different and distinct diseases with different symptoms.

The tribunal hearing

5. The appellant attended the hearing with his representative from the local Miners Association. The constitution of the tribunal included a judge and a medical member. The appellant complained of pain in his arms and hands. He said it woke him at night. He considered that the offset of 6% for PD A11 was very unfair. The appellant was not medically examined. He was not asked any questions about his current problems with vibration white finger nor, though he mentioned his knees, about them either.

The tribunal's decision

6. The tribunal dismissed the appeal. On its decision notice, it confirmed the decision of 27 January 2015 (the mandatory reconsideration notice, which upheld only the determination that the appellant was 6% disabled from PD A12) but *not* the original DM's decision of 4 September 2015, which carried out the aggregation assessment giving 24% from 25 July 2012 for life, therefore payable at the 20% rate from 5 June 2014, the date of his second and successful PD A12 claim.

7. The tribunal's statement of reasons for its decision included the following:

> " …
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> 8. It is not in issue that this appellant has an assessment of 6% in respect of the disability for PD A11.
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> 9. In assessing disability the Tribunal would have to assess the overall disability of the appellant in terms of his hands. They would then have to ascertain how much of that disability was due to factors other than the prescribed disease and eventually having taken those factors into account arrive at an assessment which relates to the prescribed disease alone.
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> 10. In this instance the overall assessment was 12%.
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> 11. It was not in dispute that the only other condition affecting the appellant's hands was prescribed disease A11. The assessment already made by the respondent in respect of that condition was 6%. It was therefore correct to deduct from the overall assessment of disability the assessment awarded in respect of PD A11. That left the appellant with 6%.
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> 12. In reaching this conclusion the Tribunal took note of Regulation 15 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 and Regulation 11 of the Social Security (General Benefit) Regulations 1982 which lay out the procedure to be followed when assessing disability where there is

more than one condition, disease or accident affecting the area of the body the subject of the claim for Industrial Injuries Disablement Benefit.

13. The Tribunal's view was that the respondent had correctly assessed overall disability and correctly deducted from that overall assessment the assessment made in respect of prescribed disease A11.

14. So far as the assessment of disability itself is concerned the Tribunal felt that on the basis of the evidence before it both assessments were more than reasonable."

Appeal to the Upper Tribunal

8. The appellant's representative (the representative) submits that the tribunal erred in law "by applying the wrong offset to the wrong disease". The district judge did not accept that any error of law had occurred but gave permission to appeal. A submission on behalf of the Secretary of State dated 7 January 2016 does not support the appeal, stating that:

> "… the claimant in this appeal already had an award of 6% for PD A11 and this award was left undisturbed. In the assessment of disablement for the later claim for PD A12, there was a statutory requirement to apply the provisions of regulation 11(5) of the Social Security (General Benefits) (*sic*) Regulation (*sic*) 1982 in order to avoid a situation whereby the claimant would benefit 'twice over'. I submit that the tribunal's reasoning in applying regulation 11(5) was clear in the statement of reasons …"

The legislation

9. The relevant provisions are the following:

(a) *The Social Security Contributions and Benefits Act 1992 (SSCBA 1992)*

> "103.-(1) Subject to the provisions of this section, an employed earner shall be entitled to disablement pension if he suffers as the result of the relevant accident from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 14 per cent…
>
> (2) In the determination of the extent of an employed earner's disablement for the purposes of this section there may be added to the percentage of the disablement resulting from the relevant accident the assessed percentage of any present disablement of his –
>
> (a) which resulted from any other accident after 4th July 1948 arising in the course of his employment, being employed earner's employment, and
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> (b) in respect of which a disablement gratuity was not paid to him after a final assessment of his disablement.

…

(3) Subject to subsection (4) below, where the assessment of disablement is a percentage between 20 and 100 which is not a multiple of 10, it shall be treated –

(a) if it is a multiple of 5, as being the next higher percentage which is a multiple of 10, and

(b) if it is not a multiple of 5, as being the nearest percentage which is a multiple of 10.

and where the assessment of disablement on a claim made on or after 1st October 1986 is less than 20 per cent., but not less than 14 per cent., it shall be treated as 20 per cent.

(4) Where subsection (2) above applies, subsection (3) above shall have effect in relation to the aggregate percentage and not in relation to any percentage forming part of the aggregate

…"

(b) *Social Security (General Benefit) Regulations 1982 (the general benefit regulations)*

"11.-(1) Schedule [6] to the [SSCBA 1992] (general principles relating to the assessment of the extent of disablement) shall have effect subject to the provisions of this regulation.

(2) When the extent of disablement is being assessed for the purposes of section [103], any disabilities which, though resulting from the relevant loss of faculty also result, or without the relevant accident might have been expected to result, from a cause other than the relevant accident (hereafter in this regulation referred to as "the other effective cause") shall only be taken into account subject to and in accordance with the following provisions of this regulation.

(3) …an assessment of the extent of disablement made by reference to any disability to which paragraph (2) applies, in a case where the other effective cause is a congenital defect or is an injury or disease received or contracted before the relevant accident, shall take account of all such disablement except to the extent to which the claimant would have been subject thereto during the period taken into account by the assessment if the relevant accident had not occurred.

(4) …any assessment of the extent of disablement made by reference to any disability to which paragraph (2) applies, in a case where the other effective cause is an injury or disease received or contracted after and not directly attributable to the relevant accident, shall take account of all such disablement to the extent to which the claimant would have been subject thereto during the period taken into account by the assessment if that other effective cause had not arisen and where, in any such case, the

extent of a disablement would be assessed at not less than 11 per cent. if that other effective cause had not arisen, the assessment shall also take account of any disablement to which the claimant may be subject as a result of that other effective cause except to the extent to which he would have been subject thereto if the relevant accident had not occurred.

(5) …any disablement to the extent to which the claimant is subject thereto as a result both of an accident and a disease or two or more accidents or diseases (as the case may be), being accidents arising out and in the course of, or diseases due to the nature of, employed earners' employment, shall only be taken into account in assessing the extent of disablement resulting from one such accident or disease being the one which occurred or developed last in point of time

…

(8) For the purposes of assessing in accordance with the provisions of Schedule 6 to the SSCBA 1992, the extent of disablement resulting from the relevant injury in any case which does not fall to be determined under paragraph (6) or (7), … the First-tier Tribunal may have such regard as may be appropriate to the prescribed degrees of disablement set against the injury specified in the said Schedule 2."

[The 'said Schedule 2' in the general benefit regulations is a table of the prescribed degrees of disablement for specified injuries]

(c) *Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (the prescribed diseases regulations)*

"SCHEDULE 2

MODIFICATIONS OF [SECTIONS 94 TO 107 OF THE SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992 AND SECTIONS 8 TO 10 OF THE SOCIAL SECURITY ADMINISTRATION ACT 1992] IN THEIR APPLICATION TO BENEFIT AND CLAIMS TO WHICH THESE REGULATIONS APPLY

In [sections 94 to 107 of the Social Security Contributions and Benefits Act 1992 and sections 8 to 10 of the Social Security Administration Act 1992] references to accidents shall be construed as references to prescribed diseases and references to the relevant accident shall be construed as references to the relevant disease and references to the date of the relevant accident shall be construed as references to the date of onset of the relevant disease."

Discussion

Regulation 11

10. The provisions of regulation 11 of the general benefit regulations (regulation 11) set out the formula for assessing disablement where there is more than one cause of it; except for regulation 11(5), it is concerned with other causes which are not industrial ones. (Schedule 2 to the prescribed diseases regulations modifies regulation 11 so that it always covers prescribed diseases as well as accidents as appropriate.). The objective is an assessment based solely on

that disablement to which any relevant accident or prescribed disease has subjected a claimant, to prevent double-counting; but also to ensure that a claimant is compensated for any greater disablement due to the interaction of the effects of two accidents or diseases i.e. where a claimant's total disablement is more than a simple sum of the two separate disablements considered individually: for example, the loss of vision of one eye is 30% but total loss of sight is 100%.

11. A correct chronology must therefore be established for the purposes of applying regulation 11. In the present case, the date of onset for PD A11 is earlier than for PD A12. In any assessment for A11, there is for consideration a prior left thumb and left wrist injury (see page 84 of the papers). Regulation 11(3) would apply to this earlier injury which was due to an accident as a child. The examining doctor on 12 October 2011 considered that it had "no apparent impact on functioning" so it fell out of the picture at that stage.

12. Regulation 11(5) is then applicable to an assessment for PD A12; an adjudicating authority must assess both the disablement solely attributable to the effects of the carpal tunnel syndrome but then make an addition for greater disablement (if any) due to the interaction of having both vibration white finger and carpal tunnel syndrome. As it was put at paragraph 6 of R(I) 3/91, a decision of a Tribunal of Commissioners:

> "The assessment applicable to the last industrial accident or disease will take into account, not merely the intrinsic disability to which that industrial accident or disease looked at in isolation gives rise, but also the effect of any interaction."

There may be no greater disablement; the effects of carpal tunnel may subsume part of the disability earlier due to vibration white finger rather than add to it.

13. The tribunal followed the examining doctor in making an offset for PD A11. But this is an application of regulation 11(3); it should be used only where the other effective cause is not an industrial accident or disease. Examining doctors get confused but a tribunal should adopt the correct approach. The continuing effects of PD A11 are assessed separately on the probabilities of what they would have been had the carpal tunnel never developed. What is in issue on the PD A12 assessment is carrying out an exercise under regulation 11(5): where there is a string of industrial accidents and diseases under consideration for a new exercise of assessment and aggregation, as here, then that is the starting point; regulations 11(3) and 11(4) are utilised separately if there is a prior or later non-industrial cause of the same disablement.

14. The tribunal erred by adopting the wrong approach under regulation 11. However, on its own, rectification of that error does not help the appellant. Without a fresh look at the facts, he would still receive only 6% for the disablement considered solely due to PD A12 plus any possible interaction with the effect of PD A11, but his PD A11 assessment would remain at 6% and thus for the purposes of aggregation the result would be the same: he cannot receive the 6% given solely for vibration white finger in addition to an assessment at 12% for the combined effects of PD A11 and PD A12. Regulation 11(5) does not mean, as has been argued on behalf of the appellant, that in the PD A12 assessment (as the later of two industrial diseases) he receives *all* of the disablement due to both PD A11 and PD A12; what he receives is compensation for the disablement solely due to PD A12 *plus* an assessment for any *additional* disablement due to the PD A12 in its combination with the effects of PD A11. That is what meant by: "… to which the claimant is subject thereto as a result both of an accident

and a disease or two or more accidents or diseases"; he does not receive twice over an assessment for the disablement solely due to the earlier industrial accident or disease.

Aggregation

15. Section 103(2) SSCBA 1992 mandates the following approach: the starting point is assessing the percentage disablement relating to the particular accident or disease which is the focus of, and trigger for, the assessment in issue (in the present case, a PD A12 assessment), and from the appropriate start date, having regard to the circumstances (11 April 2012 in this appeal, although any resulting disablement benefit is only payable from the date of claim 5 June 2014); secondly, with respect to each accepted industrial accident or disease occurring after 4 July 1948, any existing disablement must be separately assessed as from the same date.

16. It is the duty of the tribunal to make its own assessment of the degree of disablement at the relevant date; figures used in previous awards or non-awards by earlier decision making authorities are not binding (see R(I) 23/61). Disablement from all industrial accidents or diseases since 1948 are to be brought into the aggregation account; the wording of section 103(2) provides no exclusion for those for which there is no current award if, in fact, such industrial events are still causing disablement. In the present appeal, therefore, the tribunal should have considered not just PD A11 but also PD A14 (and furthermore checked whether there were any expired awards), and determined with respect to each of them, if any disablement still existed at 11 April 2012; in context, "present disablement" in section 103(2) must refer to any disablement, resulting from those other industrial causes, which still remains during the same period for which it is applicable to assess disablement for the accident or prescribed disease which has triggered the current aggregation exercise.

17. The tribunal erred in merely considering the reconsideration decision. In front of it was the aggregation decision of 4 September 2014, giving a figure of 24% from 25 July 2012 for life and that is what was required to be looked at afresh. The tribunal failed to do so. It should have been provided by the Department with all the relevant papers relating to that aggregation exercise i.e. certainly the PD A14 papers.

18. In assessing each separate percentage, the regulation 11 rules must be utilised. This is why it is essential to list the accidents and diseases in date order. In practice, in the present kind of case, the process involves looking at the intrinsic disablement from each accident or disease in isolation, (but utilising the regulation (3) or (4) rules if there is another effective cause which is non-industrial), *then adding any element of greater disablement to the last accident, to cover interaction between all of the accidents and diseases under consideration.* As I pointed out, at paragraph 24 of *KW v The Secretary of State for Work and Pensions* [2012] UKUT 181 (AAC), in R(I) 3/91 a Tribunal of Commissioners adopted a different approach, whereby all greater disablement was not necessarily catered for in the assessment for the last industrial accident or disease. But as I then said:

> "… [T]hat case dealt with awards of gratuities for previous accidents which were still in payment, so that it would be impracticable to review and revise those prior awards when assessing a third accident. The present case is quite different: each time aggregation is considered, there has to be a wholly fresh and comprehensive assessment. Aggregation had not been introduced with respect to the period considered in R(I) 3/91, nor gratuities abolished."

19. The percentages must then be added together, after this fresh exercise considering the disablement from each industrial cause of disability applying the regulation 11 rules, and section 103(3) and (4) of the SSCBA 1992 applied to the aggregated figure. The tribunal necessarily erred because it did not follow this approach nor explain how it reached the gross assessment it made. It deducted 6% for the continuing effects of PD A11 as if that 6% was set in stone. It seemed to have no appreciation that the correct assessment of disablement is crucial in the aggregation exercise; and that the rounding up or down rules are likewise very important. If the claimant was assessed even one percentage point higher i.e. 25% rather than 24% he would gain the same benefit as would be applicable in any assessment up to and including 34%. Any number in the range 25% to 34% is paid at the 30% rate.

Adequacy of reasons

20. As was confirmed by a Tribunal of Commissioners in R(I) 2/06 at paragraph 46:

> "… elaborate or lengthy reasons are not necessary, as long as the tribunal identifies and records those matters that were critical to its decision, to enable the parties and others to understand the tribunal's thought processes when it is making its material findings."

21. The Tribunal of Commissioners endorsed (at para 45 of its own decision) the approach of Mr Deputy Commissioner Warren, when he said at paragraphs 7 to 9 of CI/1802/2001:

> " 7. Vibration white finger is not one of those conditions for which there is a prescribed degree of disablement in Schedule 2 of the General Benefit Regulations. Those Regulations therefore state only that the tribunal 'may have such regard as may be appropriate to the prescribed degrees of disablement' when making its assessment. This indicates the very broad discretion which individual tribunals have in this type of case. In many cases it is simply not possible for a tribunal to give precise reasons for the conclusion which it has reached.
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> 8. In my judgment, however, as a minimum, the claimant and the Secretary of State are entitled to know the factual basis upon which the assessment has been made; in other words what disabilities were taken into account by the tribunal in concluding that a particular percentage disablement was appropriate.
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> 9. This can often be simply expressed. In many cases it will be enough to say that the evidence given by the claimant about the effect of a particular accident or disease on his or her daily life has been accepted. In some cases, where the claimant's evidence is for some reason found to be unreliable, it may be that the claimant will state that it felt able to accept only those disabilities which in its expert opinion were likely to flow from problems disclosed on clinical examination. Other cases may need more detail. But if it is not possible to discern the material on which the assessment is based, then the tribunal's statement of reasons is likely to be inadequate."

22. The present statement of reasons does not provide the factual base on which the decision was given nor the precise aspects of functional disability taken into account in the figure arrived at. The tribunal could have said, for example, that despite the assertion made in the appeal to it: "carpal tunnel syndrome and vibration white finger are two separate and

distinct industrial diseases, and have different symptoms and cause separate problems to the sufferer", that the examining doctor's opinion in both cases was that the disability was "impaired manual dexterity", which caused difficulty in handling small items; but a tribunal must outline, even if briefly, what disablement it accepted is due to the vibration white finger alone, what due to the carpal tunnel syndrome alone, and what addition might, or might not, be appropriate for any greater disablement due to interaction between the two.

23. Where the tribunal really let the appellant down was in swallowing wholesale, and without any explanation, why it agreed with the examining medical officer, considering PD A12 on 27 August 2014 that:

> "Overall disability is roughly equivalent to the loss of an index finger (assessable at 14%), so 12% is reasonable, with an offset of 6% for the O(pre-condition)."

The examining doctor clearly thought that the present case is the type of one where it is useful to consider the prescribed degrees of disablement set out in Schedule 2 to the general benefit regulations (the Schedule). But if he considered that the overall disability was roughly equivalent to the loss of the whole of an index finger, it is then wholly inconsistent to opine that "12% is reasonable", without an explanation of why so.

24. It was the tribunal's task to spot that glaring inconsistency and give its own view; bearing in mind that, while the Schedule does not provide assistance in all cases, if it is suitable to use it then as Mr Commissioner Rowland put it at paragraph 16 of R(I) 5/95:

> "Assessments of disablement should be brought into line with those prescribed in the Schedule."

If the tribunal had carried out an aggregation exercise, it would have appreciated that an assessment at 14% rather than 12% with respect to PD A12 was critical in the appellant's case because it would have raised his aggregated assessment to 26%, thus pushing him up to the 30% rate rather than rounding him down to the 20% one.

Summary

25. I therefore set aside the tribunal's decision and the appeal is remitted to a new tribunal to begin again. It is emphasised that there will be a complete rehearing on the basis of the evidence available to the new tribunal and any determination of the case on the merits is entirely for that new tribunal. Although the claimant has been successful in the appeal limited to issues of law, the decision on the facts of this case remains open.

26. Before the appeal returns for the above rehearing, the Secretary of State is to provide the new tribunal with details of any prior accepted industrial accidents or diseases, with papers relevant to their adjudication; this is so whether or not there is any current award applicable.

(Signed on the Original)

L T Parker
Judge of the Upper Tribunal

Dated: **19 February 2016**