THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The appeal is allowed. The decision of the tribunal given at Ayr on 6 August 2018 is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out at the end of this decision.

REASONS FOR DECISION

Background

1. This is an appeal about Industrial Injuries Benefit ("**IIB**"), and whether the appellant (the "**claimant**") suffers from prescribed disease ("**PD**") A11 within Column 1 of Schedule 1 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (the "**1985 Regulations**"). The claimant has been diagnosed with hand arm vibration syndrome ("**HAVS**"). The question which arises in the appeal is whether the First-tier tribunal (the "**tribunal**") made sufficient factual findings and gave adequate reasons for its decision that the appellant's condition was not within PD A11. I have decided that the answer to that question is no, and as a result the tribunal erred in law, for reasons given below.

2. The background facts are that the claimant worked as a maintenance engineer in a mould repair workshop between 2012 and 2017. He used a number of vibrating tools in the course of his work. He was dismissed on grounds of ill health due to chronic hand pain, after attending a number of appointments with occupational health. Before the tribunal, there was a report prepared for the claimant's employer by the occupational health doctor, Dr Liew. It contained a finding that the claimant had bilateral HAVS (stage 3 SN), as well as other findings about his symptoms. He also had issues with carpal tunnel syndrome. Dr Liew recommended that the claimant be permanently restricted from working with vibrating tools. Unfortunately, there was no suitable alternative employment available in his workplace and so the claimant was dismissed with effect from 4 January 2017.

3. The claimant made a claim for IIB. As more fully explained below, claims for IIB can be made in respect of a PD. Relevant diseases are prescribed by being listed in legislation, with identifying numbers such as A2 or D1. The claimant made claims in respect of PD A11 and PD A12. This appeal is only about PD A11; in a separate case, the claimant has been found to meet the criteria for PD A12 (carpal tunnel syndrome).

4. The claimant was examined by a healthcare professional, Dr Duncan, in connection with his claim under PD A11. After examining him, she came to the following conclusion:

> "The various symptoms described in his upper limbs such as his hands shaking (tremor was demonstrated on movement, not at rest) in his right hand, his left hand swelling, the conflicting opinions between the people treating him and the history provided were not consistent or convincing of the criteria required to meet the vascular or sensorineural criteria of A11. The prescribed disease of A11 cannot be diagnosed as the medical criteria are not met".

She also made a number of clinical findings at examination (pages 53-54 in the bundle).

5. In a decision sent to the claimant on 15 March 2017, the Secretary of State for Work and Pensions ("**SSWP**") decided that the claimant did not qualify for IIB. The claimant appealed to the tribunal. The evidence before the tribunal contained the reports of Dr Liew and Dr Duncan referred to above. It also included parts only of a report for court prepared by a Mr McDonald, who is a consultant trauma and orthopaedic surgeon. The parts of the report before the tribunal included a conclusion that, as a result of exposure to excessive vibration between March 2012 and September 2016, the claimant developed HAVS and carpal tunnel syndrome. The parts of the report before the tribunal did not include Mr McDonald's clinical findings on examination. The tribunal, after hearing oral evidence, confirmed the decision of the SSWP, finding that at no time from 5 July 1948 had the claimant been suffering from prescribed disease PD A11.

6. An application for leave to appeal to the Upper Tribunal was made on the basis that there had been an error of law, because two doctors had clearly diagnosed the claimant as suffering from HAVS and these reports did not seem to have been taken into consideration. On 27 December 2018 permission was refused by the judge of the tribunal. The reasons given included that the evidence referred to showed a diagnosis of HAVS which had a degree of similarity to PD A11 but was not conclusive of that prescribed disease. The appellant's evidence of his symptoms was accepted by the tribunal but did not meet the statutory test. On 1 March 2019, permission was granted by a judge of the Upper Tribunal, and the SSWP was directed to make a submission whether in the light of the evidence that the claimant had HAVS the tribunal erred in law in not dealing with that evidence and explaining why it did not satisfy the conditions for PD A11; and if so whether that made any difference to the decision the tribunal made.

7. The SSWP does not support the appeal. She submits that the legal test in PD A11 is very specific and is not necessarily satisfied by a person with a diagnosis of HAVS. The SSWP produces a document headed up "Medical Services – provided on behalf of the Department of Work and Pensions" and entitled "Industrial Injuries Handbook 1 for Health Care Professionals: The Principles of Assessment". This is guidance the DWP makes available for healthcare professionals carrying out IIB examinations. She refers to this extract from the guidance:

> "It should be noted that PD A11 is a distinct entity, which has been clearly defined in the regulations in both its nature and degree. Whilst medical specialists can look at the broad spectrum of vascular and sensorineural impairment, the HCP for PD A11 is confined to the very precise definition set out in the regulations. Therefore, terms such as HAVS, VWF and Raynaud's must be avoided in any PD A11 report".

The SSWP submits that, although the tribunal could have gone further in its explanation, the essential elements are there showing the claimant did not meet the statutory definition. The evidence in the report of Mr Macdonald could have been relevant, but only if it assisted with whether the claimant satisfied the definition in PD A11, which the SSWP submits it did not. She also submits that, even if the tribunal should have provided additional reasons, the failure to do so is not material because the outcome would have been the same anyway.

8. The claimant in response states that medical reports from Dr Liew, Mr Drury and Mr McDonald all reported significant reduction in sensory perception and manipulative dexterity with continuous numbness and tingling present in all fingers including thumbs due to vibration, and encloses a full copy of the report of Mr McDonald.

Governing law

9. Sections 108 and 109 of the Social Security (Contributions and Benefits Act) 1992 make provision for payment of IIB to employed earners who are suffering from a disease or personal injury which was not caused by an accident. Section 108(1) provides that IIB shall be payable for qualifying people in respect of "any prescribed disease". Accordingly, to qualify for the benefit, a claimant must be suffering from a prescribed disease (as well as meeting other eligibility conditions). The Regulations which prescribe diseases are the 1985 Regulations, and a list of prescribed diseases is set out in Column 1 of Schedule 1. Category A11 is as follows:

> *(a)* Intense blanching of the skin, with a sharp demarcation line between affected and non-affected skin, where the blanching is cold-induced, episodic, occurs throughout the year and affects the skin of the distal with the middle and proximal phalanges, or distal with the middle phalanx (or in the case of a thumb the distal with the proximal phalanx), of—
>
> > *(i)* in the case of a person with 5 fingers (including thumb) on one hand, any 3 of those fingers, or
> >
> > *(ii)* in the case of a person with only 4 such fingers, any 2 of those fingers, or
> >
> > *(iii)* in the case of a person with less than 4 such fingers, any one of them or, as the case may be, the one remaining finger,
>
> where none of the person's fingers was subject to any degree of cold-induced, episodic blanching of the skin prior to the person's

> employment in an occupation described in the second column in relation to this paragraph, or
> *(b)* significant, demonstrable reduction in both sensory perception and manipulative dexterity with continuous numbness or continuous tingling all present at the same time in the distal phalanx of any finger (including thumb) where none of the person's fingers was subject to any degree of reduction in sensory perception, manipulative dexterity, numbness or tingling prior to the person's employment in an occupation described in the second column in relation to this paragraph,
> where the symptoms in paragraph (a) or paragraph (b) were caused by vibration.

If a person is found to be suffering from a prescribed disease, then an assessment of disablement is made in percentage terms.

Discussion

10. I accept the SSWP's submission that it does not necessarily follow from a diagnosis by a treating practitioner of HAVS that a person falls within PD A11 and is entitled to IIB. Entitlement to IIB is determined by deciding whether a claimant fulfils particular defined statutory criteria. A person with HAVS may or may not meet the particular criteria within PD A11 set out above, depending on the nature and severity of the symptoms.

11. However, if a tribunal finds a claimant does not qualify for IIB because he does not meet the statutory criteria for a particular PD, the decision must make sufficient findings and give adequate reasons explaining why not.

12. PD A11 is in two parts. The first part in paragraph (a) is concerned with blanching in defined parts of the fingers throughout the year. These are vascular criteria. The second part of PD A11 in paragraph (b) is concerned with reduction in sensory perception and manual dexterity and symptoms such as numbness and tingling. These are sensorineural criteria. The linking word between paragraphs (a) and (b) is "or". It is therefore sufficient if the claimant satisfies one or other of the vascular or sensorineural criteria, where the symptoms were caused by vibration.

13. I am satisfied that the tribunal made adequate findings and explained why the claimant did not fall within the vascular criteria in paragraph (a) of PD A11. There was a factual finding at paragraph 3 that the symptoms only occurred during the winter time, and that only the top of four fingers of the left hand turned white. Since the definition says the condition has to occur throughout the year, and cover more phalanges than the distal phalanx, the informed reader can clearly understand why the tribunal reached the conclusion in paragraph 5 that the claimant did not meet the vascular criteria.

14. However, the informed reader is left guessing why the claimant was not found to satisfy the sensorineural criteria in paragraph (b) of PD A11. What the tribunal says about this is:

> "Insofar as the appellant gave evidence relating to a degree of pins and needles in his fingers it is noteworthy that he was found on appeal to suffer from PDA12. Such sensations as he described in the tribunal's view were relevant to PDA12 and were related to carpal tunnel syndrome and did not meet the statutory test for PDA11".

Although pins and needles are relevant to sensorineural criteria, there are other relevant matters for consideration given the actual terms of PD A11, such as sensory perception, manual dexterity and numbness. The tribunal made no findings about these matters, stating at paragraph 7 that in the light of its conclusion that the statutory test was not satisfied, it did not require to set out findings in fact relating to any difficulties the appellant experiences with the use of his hand and fingers. But without further findings, it is not self evident why the claimant did not fall within PD A11(b).

15. The tribunal's decision is not saved by its adoption of the clinical findings of Dr Duncan at pages 73-74 of the bundle. It is true that some of these findings lend support to the tribunal's decision, for example normal findings on sensory testing and a full range of fine finger movements. But there was a significant body of other evidence before the tribunal of the existence of sensorineural symptoms. In the report of Dr Liew at page 26 it was noted that the claimant struggles with activities involving fine dexterity (ie picking small objects, buttoning his shirt, writing etc) and manual handling activities. In the claim form at page 32 the claimant reported suffering from loss of grip and dexterity and having to rely on his wife to do simple household tasks; and mentioned pins and needles at page 48 and that it never went away on page 49; and at page 51 that he struggled opening bottles of juice, jars, and spilled coffee. Loss of dexterity and grip strength are mentioned in the extract in the report of Mr McDonald at page 93. From the full copy of this report now produced before the Upper Tribunal, it can be seen that Mr McDonald examined the claimant and made clinical findings about sensorineural symptoms. The tribunal cannot be faulted for failing to consider parts of this report not put before it. (Or indeed a report of a Mr John Drury now referred to by the claimant in the form UT3 produced in response to the SSWP's submissions on the appeal, because that does not appear to have been put before the tribunal). But what can be said is that there was a clear conflict between the evidence of Dr Duncan on the one hand, and on the other hand the evidence the tribunal had before it from Mr McDonald, Dr Liew, and the claimant, in respect of the extent of sensorineural symptoms. The tribunal appears to have accepted the claimant's evidence in other respects (paragraphs 3, 5 and 6). The tribunal does not address the conflict in the evidence about sensorineural symptoms at all and explain why it preferred the evidence of Dr Duncan. Indeed, it does not even expressly refer to the reports of Dr Liew and Mr McDonald. It may be that some of the claimant's symptoms are related to carpal tunnel syndrome, as the tribunal says, but this is an incomplete explanation, given the various criteria in PD A11(b). It is not clear to the informed reader what facts the tribunal accepted about the particular sensorineural symptoms

listed in PD A11(b) (sensory perception, manual dexterity, numbness and tingling) and why, and why it rejected (if it did) the evidence of Dr Liew, Mr McDonald and the claimant about these. There was therefore an error in law.

16. I am unable to accept the SSWP's submission that, even if the tribunal erred in law, it made no difference to the outcome. Given the conflicting evidence available in respect of the sensorineural symptoms, and given that PD A11 can be satisfied if either the vascular symptoms in paragraph (a) or the sensorineural symptoms in paragraph (b) are satisfied, it cannot be said that the claimant would inevitably fail.

17. I therefore consider that the case should be returned to the First-tier to consider afresh, in accordance with the directions given below. In setting aside the tribunal's decision and remitting the case, as set out above it does not automatically follow from the claimant's diagnosis of HAVS that he satisfies PD A11. On the evidence currently available, the claimant may or may not fall within PD A11. It is clear from the wording of PD A11(b) that to qualify, the claimant must have significant, demonstrable reduction in both sensory perception and manipulative dexterity with continuous numbness or continuous tingling all present at the same time in the distal phalanx of any finger. This means, for example, that it will not be enough if the claimant has reduced dexterity but normal sensory perception; or if any reduction is not significant; or if the numbness or tingling is not continuous. It is a matter for the new tribunal to find the relevant facts and then decide whether the claimant falls within PD A11 or not. If the tribunal finds that the claimant's condition falls within PD A11, it will then have to go on to consider whether he satisfies the other criteria for IIB.

DIRECTIONS

1. **The case is to be reconsidered at an oral hearing. The members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision which has been set aside. When re-determining the case, the new First-tier Tribunal should have regard in particular to paragraphs 9-15 above.**

2. **The claimant is directed to lodge a full copy of the reports of Mr McDonald and Mr John Drury (referred to in the UT3 form at page 332) with the relevant First-tier Tribunal HMCTS office within one month from the date of issue of this Decision.**

3. **Parties may provide any further evidence upon which they wish to rely before the First-tier Tribunal to the relevant HMCTS office, the deadline for doing so being one month from the date of issue of this Decision. The new tribunal is not permitted to take account any circumstances not obtaining at the time that the decision under appeal was made, that is 15 March 2017. Any further evidence, to be relevant, should shed light on the position at those times.**

4. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It may consider all aspects of the case entirely afresh, and it may reach the same or a different conclusion to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

A I Poole QC
Judge of the Upper Tribunal
Date: 17 June 2019