EMPLOYMENT TRIBUNAL

Claimant: Mr Hafeez Ahmed

Respondent: Department for Work and Pensions

HELD AT: Birmingham **ON:** 24 May 2023

BEFORE: Employment Judge Kelly (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr Paulin (counsel)

DECISION

The Claimant was not disabled by reason of depression in the period 22 to 25 September 2020.

DETAILED REASONS

1. The Claimant has brought a number of claims against the Respondent. Of the eight claims presently in existence, I am dealing solely with the preliminary issue of disability, in respect of two claims (claim 6 – ET Ref: 1302114/2022 and claim 8 ET Ref: 1308045/2022).

2. By Order of Employment Judge Faulkner of 1 March 2023, I am tasked with determining:

   "the question of whether the Claimant was at the relevant times a disabled person by reason of depression".

3. The Claimant in this case says he has two discrete disabilities: (a) one caused by a physical condition, namely, Paroxysmal Noctural Hemoglobinuria ("PNH") and (b) one caused by a mental condition, depression. The question for me, as framed, contemplates two distinct causes of disability within the meaning of s.6 of the Equality Act 2010 ("the 2010 Act").

4. PNH is a physical condition, it is a blood abnormality. There is no dispute as to the existence of PNH or that it meets the required definition of disability under the 2010 Act. As to the discrete illness, of depression, which is said to give rise to a disability, that it not accepted by the Respondent.

5. It is recognised by the parties that PNH some of the symptoms that depression would cause, including stress, anxiety and fatigue, but the Claimant argues in this case that depression has itself arisen, which caused a freestanding disability, quite aside from any symptoms that might arise from PNH.

6. The parties have agreed that the relevant period for my findings is to be the period 22 September 2020 to 25 September 2020 ("the Relevant Period"). The Claimant had self-certified for part of the period of absence around this time, namely, 15 September 2020 to 21 September 2020 (inclusive).

7. The focus of this judgment, as a preliminary issue, is to determine solely whether there is in fact and law a disability by reason of depression. I am not addressing issues relating to, for example, the Respondent's state of knowledge in respect of this alleged disability, such issues and many others fall to be addressed the final hearing.

Preliminary matters

(a) *The Bundle*

8. I was provided with a detailed bundle prepared by the Respondent's legal team. In addition, claimant had provided, shortly prior to the hearing, a short bundle of documents, comprising a four-page set of submissions and thirteen pages of documents (excluding blank pages) comprising (a) ET Presidential Guidance Note, on disability, (b) an NHS factsheet "Symptoms –

Clinical depression" (c) a "self-certified sick leave" form signed by him on 28 September 2020 (d) a "Stress Management Plan" prepared by the respondent (e) a copy of two medicines taken by him, namely Sertraline 50mg (prescribed 19 April 2023) and Mirtazapine 15mg (prescribed 26 September 2022), and (f) an email between DWP and (g) an internal email from DWP of 14 October 2020. Mr Paulin for the Respondent confirmed that he had no objection to the Claimant's Additional Documents being relied upon by the Claimant at the hearing.

(b) *The reason for this hearing*

9. On 1 March 2023 Employment Judge Faulkner ("the Faulkner Order") directed, at paragraph 2.2 of the Faulkner Order, that a hearing had been listed on 24 May 2023 to determine the disability status relating to depression. The wording of paragraph 2 of the Faulkner Order appeared to presuppose that this hearing was already listed, which I raised at the outset with the parties, because there was a previous order of Employment Judge Flood on 18 November 2022 that directed this disability issue be determined at the final hearing listed for September 2023.

10. The Claimant was of the view that the Faulkner Order was the thing that listed this the hearing before me, rather than simply referring to what was already listed. Mr Paulin was unfortunately was unable to assist further on this, but ultimately, both parties agreed that it now made sense in any event for me to determine the preliminary issue that had both turned up to argue.

(c) *Reasonable adjustments*

11. I queried with the Claimant whether reasonable adjustments could be made to accommodate any disability he had, especially noting from his own materials before me that he felt he could become abnormally fatigued and suffer from difficulties where he meets confrontation. Breaks were offered and, whilst initially, the Claimant suggested none were needed, and indeed refused some offered during the hearing, stating simply that he simply wished to get on with matters, there were two short breaks taken when the Claimant requested them.

(d) *Witness evidence on the disability by depression issue*

12. A further point raised with the parties at the outset of the hearing, was my concern that there had been no direction for the provision of witness evidence in the preliminary issue. The parties suggested that the best way to proceed was for the disability impact statement, served by the Claimant, should stand as the Claimant's evidence as to his disability by reason of depression.

13. I drew to the attention of the parties that, whilst this seemed a potentially sensible approach, the disability impact statement was not prepared for the purpose of advancing evidence specifically and perhaps was less detailed that might otherwise have been the case. Nonetheless, the Claimant was willing to proceed on this basis nonetheless, insisting that he just wanted this particular issue determined.

14. The Respondent sought to rely upon a number of narrative comments on a schedule appended to Mr Paulin's skeleton argument, which were said to be short-term absences, the explanations for which the claimant said did not reflect the reason he had those absences as notified to his employer. Such issues were not addressed in the disability impact statement and they were not addressed in any evidence from the Claimant. Mr Paulin properly accepted that he could not

provide evidence for the Claimant as to whether the table of descriptions presented for various absences was correct, it being noted by the Respondent that he disputed those descriptions. Nonetheless, the Respondent's position was that there should be no adjournment, that this matter should proceed for a determination based on whatever evidence was before me.

15. One further preliminary point raised by the Claimant, was that he had not received a medical report from an expert for use in these proceedings. He told me that the Respondent had refused to agree to this, and indeed, the tribunal had refused permission in the past for such expert evidence to be given. It typical that expert evidence is not necessarily required to establish disability, because strictly, there is no need to determine whether a diagnosable medical condition was present within the Relevant Period, it being permissible instead to look at the effect of symptoms said to exist, and make a determination as a matter of fact whether there is an impairment which has an adverse long-term effect on normal day-to-day tasks. However, in this case, there is one accepted disability (the PNH) and one alleged disability, both of which the parties accept have overlapping symptoms. As such, this is the type of case for which such expert evidence may well have been beneficial to me in making a determination as to whether there is disability by depression and whether the source of any depressive style symptoms were the result of depression or the PNH within the Relevant Period. In any event, there is no such evidence before me.

The Claimant's Case

16. The essence of the Claimant's case was that he was disabled by reason of depression within the Relevant Period, the symptoms for which were identified at least from 12 August 2018 (when referenced in an occupational health report) and which has worsened in severity since that time.

17. The Claimant says that his condition "*…culminated in [his] being declared unfit for work from October 2021*". He says he has three fit-notes covering a twelve-month period of absence. However, these fit-notes to which the Claimant refers were for the period 18 October 2021 to 25 May 2022.

18. In his disability impact statement, the Claimant set out the specific symptoms he said existed by reason of his depression which he says means he has a disability. He identified the effect of his impairment (by reason of depression) by identifying, amongst others, the following effects:

The effect of the impairment

18.1. that he was declared unfit for work in October 2021 (he self-certified his absence in September 2020);

18.2. that he is fatigued, has low mood, poor motivation and can fall asleep during the day;

18.3. he can have poor concentration and find it very difficult to concentrate for more than an hour at a time without losing focus, being prone to making mistakes;

18.4. that he develops headaches when he has to focus on something;

18.5. that he can be forgetful, and become upset quickly, where he find himself unable to walk away from a situation in which he feels bullied, ill-treated, lied to or treated badly because he is Asian and Muslim;

18.6. he has poor sleep, finding it difficult to fall asleep and waking frequently during the night not being able to fall asleep again, resulting in the aforementioned fatigue;

18.7. that he skips eating meals, lacks energy and goes to bed without eating dinner;

18.8. he has no motivation to do household tasks;

18.9. he limits his driving, he cannot drive for more than one hour without becoming fatigued to the point he needs to stop – he avoids travelling at rush hour because it increases his fatigue and can cause agitation and frustration and he avoids journeys sometimes due to this;

18.10. he does not go out shopping due to low energy, low mood and fatigue;

18.11. he has no interest in reading, listening to music, watching tv, activities that he used to enjoy, with difficulties holding concentration on films watching them only part way though;

18.12. he avoids answering the phone, opening letters or checking emails because he does not wish to deal with things and, sometimes, he will reply to emails impulsively without reading them properly;

18.13. he procrastinates at completing tasks that require use of a computer, and he makes silly mistakes and fails to address include/certain points;

18.14. he sometimes engages in blunt communications, expressing his feelings without inhibition.

The Respondent's position

19. The Respondent does not accept that the Claimant had a disability by reason of depression at within the Relevant Period.

20. The Respondent recognised that PNH constitutes a disability. It is noted that there is an overlap of symptoms between that and the alleged disability by depression.

21. The Respondent reminds me that the burden is on the Claimant to prove he suffered from depression resulting in a disability within the Relevant Period.

22. It is said that there is no evidence of a clinical diagnosis of depression that has lasted for 12 months or more, that there is no evidence of any specific clinical assessments as to any condition of depression, and that there is no evidence of any therapeutic evaluation that would assist me in concluding that there was depression causing disability within the Relevant Period.

23. It is further said that references to any stress/anxiety or depression in any of the OH reports is down to usual life stressors, such that it is not depression, and that these arise from the PNH and not a freestanding impairment of depression.

24. The Respondent says that depression first appears to have arisen is in response was in June 2021, after the instigation of the Respondent's disciplinary processes. It is said that I cannot conclude there was depression until June 2021.

Disability – s.6 Equality Act 2010

25. There was nothing contentious between the parties as to what was meant by "*disability*" under s.6 of the 2010 Act. It states:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect."

26. Thus, for there to be a disability in this preliminary issue by reason of depression, I need to be satisfied, on the balance of probabilities, that:

26.1. the Claimant had a mental impairment in the Relevant Period;

26.2. that the impairment had, or was likely to have, (a) a substantial and (b) a long term, impact upon (c) the Claimant's abilities to carry out normal day to day activities.

27. The Claimant's case is that his impairment (in addition to the PNH) was depression.

The claimant's evidence

28. The Claimant provided the only evidence.

29. The Claimant was sworn into give evidence and did so by reference to the content of his disability impact statement, as agreed in the preliminary part of the hearing.

30. The focus of challenge was really on (a) the credibility of the evidence given, and (b) whether any "*mental impairment*" (e.g. any depression symptoms) was the result of depression such as to cause a disability.

31. The Claimant accepted that his PNH causes stress and anxiety, and that he had himself attributed what he now says was depression down to side effects of his PNH, given the overlap. Indeed, he says this is something that others, including work colleagues and/or members of Occupation Health will have done too.

32. The Claimant was taken in cross examination to various occupational health reports, with an initial focus on that from 12 October 2018. He accepted that it was a referral made to occupational health regarding his PNH but disagreed that it did not reference depression. The Claimant believed the report set out the starting signs of depression. Mr Ahmed noted that his February 2018 occupation health report stated:

"Hafeez feels unsupported by his peers, I would like to relocate him to 1st-floor with his team."

33. The Claimant says this was a reference to the first signs of depression and explained that he had, generally, attributed his feeling unwell, stressed or tied to his PNH, but that stressors at work had exacerbated the issue.

34. The Claimant noted in his evidence that the terminology used by the assessor in the OH reports, seemed to reflect that given in NHS Guidance, such as "*severe depression*" being where it *"is almost impossible to get through daily life"*, and "*moderate*" being a "*significant impact on daily life*". He feels these are specific terms used by an OH assessor who was a qualified nurse and thus, she would know to use those terms advisedly, in recognition of actual clinical depression.

35. The 12 October 2018 OH report that states:

"*[the Claimant is] …suffering from symptoms with mild pain, moderate anxiety and moderately severe depression. This condition appears to be having a significant impact upon Hafeez's mobility and his ability to manage his normal day to day activities…[PNH] is a very rare, acquired bone marrow disorder characterised by intravascular haemolysis and, frequently, life threatening thrombosis.*"

36. The Claimant says these are indications of his depression at the relevant times; he says the depression is not a side effect or symptom of his PNH but a freestanding impairment in its own right. That is the crux of the issue for this Tribunal to determine.

37. I pause to note that I pay no regard to the opinions of the OH advisor insofar as they suggest whether the stress and anxiety reported amounts to a disability, that is a legal matter for me, based on the requirements of the 2010 Act. I note, for example, that in the OH advisor's comments in 2017, that the condition had not been ongoing for 12 months and thus could not be a disability, that is incorrect, because the supplementary provisions within Paragraph 2 of Schedule One of the 2010 Act, which recognise an impairment as "long term" where it has lasted for at least 12 months, or *is likely to last* for at least 12 months, or is likely to last for the rest of the life of the person affected. What was not explored in the OH report from 2017, or indeed in any of them, is the nature of the reference to Birmingham Healthy Minds, the purpose of that referral, the timing of it, and the specific underlying aetiology being addressed, although it would appear to be down to a history of social anxiety. What is clear, however, is that the Claimant was, in 2017, receiving some support for some form of mental health impairment, which clearly included reference to "depression".

38. SSP fit-notes are relied upon by the claimant, which relate to the period between 18 October 2021 (citing depression) to 25 May 2022 (citing mixed anxiety and depressive disorder). All other reports as to the Claimant's condition arise from OH reports, based on those with some medical knowledge, completing reports from information provided solely by the Claimant.

39. The Claimant was absent from work in August 2020 and September 2020, and "*stress*" is noted by the Respondent as the reason for those, although the Claimant suggests this is a select from a drop-down box exercise on its systems and does not accurately reflect what he told the Respondent. The Claimant says his absence was down to depression.

40. The OH advisors are not qualified doctors, both parties recognise that, although as noted earlier, the Claimant says the OH advisor is a trained nurse. There is no actual medical evidence in this case from a doctor, whether in the form of expert evidence, GP records, or otherwise, and the closest we get is the OD reports.

41. The Claimant told me that he was first prescribed anti-depressants in or around September/October 2021, when his first sick note was submitted. He said this was the first time he went to his GP about depression was when he went for the first sick note, and there would be no records about depression prior to that.

42. The Claimant accepted that, despite what was said in the OH reports, he remained fit and able to carry out his work requirements. There were some adjustments recommended.

Submissions and Conclusions

43. By order of 14 July 2022, the Claimant was directed by Legal Officer Metcalf to, by 25 August 2022:

"… serve upon the respondent:
(a) Copies of any medical notes, reports and other evidence on which the claimant relied for the purposes of the disability issue; and
(b) A witness statement (or statements) dealing by specific reference to the Equality Act Schedule 1 and any relevant provision of any statutory guidance or Code of Practice with the effect of

the alleged disability on the claimant to carry out normal day to day activities at the relevant time."

44. The Claimant did not supply medical records from his GP. He says that he did not appreciate the need to disclose GP records and referred me to "*Guidance Note 4: Disability*" within the Presidential Guidance Note, in particular, paragraph 6, which states:

"6. Claimants must expect to have to agree to the disclosure of relevant medical records or occupational health records."

45. The Claimant's position was that he had a disability arising from depression by reason of the effects outlined above, which have had, and continue to have, a significant and long term adverse effect upon his ability to carry out normal day to day activities.

46. The Claimant did not refer me to other parts of that specific guidance note, but I consider he will have read them, given his identification of the presidential guidance note and the paragraph cited, and it is important to bear in mind that it additionally states:

"12. Claimants must remember that they have the burden of proving that they are disabled. They may be satisfied that they can do this, perhaps with the assistance of the records of their General Practitioner, their medical consultant and their own evidence."

47. The Respondent says there is insufficient evidence before the tribunal such that the burden on the Claimant to establish disability could be shown due to the absence of GP records and further, that the Respondent is prejudiced by the absence of such evidence, there being "*no bird's eye view*" of the overall impairment by reason of depression. I am not convinced it is right to say the Respondent is prejudiced, as such, rather, the absence of evidence of a specific kind might well be said to favour the Respondent in denying the existence of an impairment and/or of its effects and the extent of those effects.

48. The Respondent says that there is no (a) diagnosis of clinical depression or a free-standing depressive disorder or condition, (b) that had lasted 12 months or more (c) that was deemed to be a disability, (d) that there was no evidence of a specific clinical assessments as to a condition of depression, and € that the was no evidence of therapeutic evaluations that show, or tend to show, that the Claimant has a condition that constitutes a disability within the statutory tests.

49. The Respondent refers me to the EAT's decision in *J v DLA Piper UK LLP [2010] UKEAT 0263_09_1506*:

"The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act.
The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events". We dare say that the value or validity of that distinction could be questioned at the level

of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived".

50. The point made, therefore, is that there may be a fine line between depression and an adverse reaction to life events and that it is said, the issues identified by the Claimant in this case, if I accept them as existing in the Relevant Period, are more likely a case of an adverse reaction to day-to-day events rather than depression. It is difficult to know on the state of the evidence, it says.

51. The Claimant notes, quite rightly, that in *J -v- DLA Piper*, it was said that it is not strictly necessary to identify the existence of a specific diagnosed impairment, in this case depression, and that it is permissible to if the existence of the impairment can be identified from the evidence of an adverse effect on the Claimant's day to day activities. Further, the Claimant points out, again correctly, that there is no need to establish the cause of any potential impairment when determining whether there is a disability, although, that is right only to a point. That is certainly so when looking at whether there is one disability, but where there are different disabilities, it is important to identify which impairment causes adverse long term effects and thus, which impairment causes a disability.

52. The Claimant resists any criticism regarding the lack of GP evidence in this case, by pointing out that the Respondent could have made an application for inspection of those GP records. In my judgment, that is an unrealistic criticism, because it is always for the Claimant to prove his case, not for the Respondent to compel him to do so by making applications of the kind mentioned.

53. I should add, I note that the Respondent had indeed brought to the Tribunal's notice the lack of medical records being provided in an email of 7 September 2022, copying in the claimant, when it said: "*… the Claimant has not served on the Respondent copies of any medical notes, reports and other evidence on which the Claimant relied for the purposes of the disability issue or a witness statement pursuant to paragraph 1 of LO Metcalf's Order*". This should have been sufficient warning to the Claimant that it perhaps was sensile to provide copy medical records, although, as it turns out, it is doubtful that they would have assisted anyway, because the Claimant told me that he sought not assistance form his GP regarding depression until he was signed off sick in 2021.

54. I note the explanation given by the Claimant to me that he did not know that he would have to provide GP records. Instead, he says, the way the orders were worded led him to believe that OH Reports might suffice. The Claimant is clearly an able and intelligent individual, who has raised points of law in these proceedings and argued them coherently and in a structured way before me. This is but one set of many sets of proceedings this Claimant is involved with, against the same Respondent, and whilst I know little of the other claims, the reality is that he is an individual who spends considerable time looking into the legal and procedural aspects relevant to his Employment Tribunal claims and that this is so is evident from the submissions made to me in these proceedings. He has a sound grasp of the relevant legal issues. Whilst I do not imbue him with the knowledge of an experienced lawyer, I do believe he would have appreciated the relevance of medical records and that it was appropriate to provide them. That he has not done so is the consequence of his recognition that in fact, the GP records would not have supported his case.

55. I have been through the OH reports and extract from them insofar as relevant the following:

55.1. OH Report dated 17 August 2017:

"[The Claimant] reports symptoms of stress that he states are entirely due to work related issues, of which his manager is aware. He also describes a history of social anxiety and he completed an online programme 3 months ago regarding coping strategies. He states this was advised by Birmingham Healthy Minds and he is currently waiting to see if any further treatment of support tis required or available. He hasn't seen his GP in recent months regarding the stress and anxiety and I have advised him to do so."

"…[The Claimant] reports he is struggling to complete the tasks required of him in t he timescales expected due to the fatigue experienced as a result of the PNH. This in turn is increasing the stress and anxiety…"

"The symptoms of stress are not due to an underlying medical condition they are a reactive response to work related issues"; and

"… PNH is likely to be considered a disability as it is a lifelong condition and can have a significant impact on normal daily activities. The stress and anxiety are unlikely to be considered disabilities because they have not been having a significant impact on normal daily activities for longer than 12 months."

55.2. OH Report dated 5 February 2018:

"I carried out a telephone review today on [the Claimant]…

…[The Claimant] is at work with …PNH and work related stress.

Unfortunately, because [the Claimant] has been referred with a couple of health issues over a long time period it is not possible to address them individually within a standard OH consultation. I have addressed the main problem, of PNH which is what [the Claimant] believed this referral to be regarding…

[The Claimant] managed the condition with diet… the condition impacts on his ability to get good sleep which increases hid fatigue…the lowered immunity and fatigue impacts on his ability to concentrate at times, and he feels that some aspects of the work coach duty requires a lot of concentration, which he funds difficult…"

55.3. OH Report dated 9 October 2020 - this notes:

"[The Claimant] reported work related stress for 15 months";

he reports that stress results in him "feeling nauseous";

"He advised that if ill or overstressed he loses blood and becomes anaemic as a result"; and

"Hafeez's reporting today suggests he is work related stress attributed to disciplinary matters."

"A validated psychological wellbeing assessment undertaken today suggests he may be suffering experiencing symptoms of moderately severe depression and moderate anxiety and he has been advised to consider emotional support with can be provided with PAM Assist…"

55.4. OH Report dated 13 July 2021 – which states:

"[the Claimant] identifies that stress factor is one of the major triggers of his condition as this could lead to sever exacerbation of his condition. [The Claimant] states that he was shielding during the period of Covid-19 lock down, but he has been able to return to work in a single small office."

"Given the nature of [the Claimant's] underlying medical condition, it is reasonably foreseeable that he will have further exacerbation of his symptoms periodically…"

"Emotionally, a PNH diagnosis can be quite overwhelming…"

55.5. OH Report dated 5 January 2022:

"…[the Claimant] tells me he has been off work from September 2021. He mentions he has been off due to a relapse of symptoms of depression caused by work related stress… He states if his work-relates stress issues were resolved successfully, he would be at work… He tells me he has been taken (sic) medication for his mental health however due to side effects this remains under review with his GP…

… I have completed a mental health assessment with him today using a well validated tool. Results of this show he has moderate to severe levels of depression and mild levels of anxiety. Stress is not an illness nor is it a diagnosis … It is prudent that he is contacting healthy minds …"

56. Many of the issues now relied upon within the Disability Impact Statement (e.g. limits on driving, no interest in reading/listening to music, avoiding answering phone, skipping eating meals, and not going out shopping) were not referred to in any of the OH Reports, although I recognise, that there are some references to such things as headaches, lack of concentration, and interrupted non-restful sleep, do overlap and were previously referred to.

57. The Claimant had been working from home, shielding from COVID19 in the period March 2020 to August 2020. His PNH puts him at increased risk from infections. There was no evidence that suggests he had difficulties during that period in particular due to depression, although there are references either side of that period.

58. The Claimant's first absence was 14 August 2020. It was followed by an absence between 15 September 2020 to 21 September 2020. The reasons recorded by the employer were "*stress*". I give no weight to the label attached to the reason for absence by the employer, there was no evidence as to why that description would be there, save from the Claimant, who noted that there was a "*drop down*" selection system used by the employer and not necessarily representative of what he told the Respondent. The Claimant tells me he felt depressed at the time these references to stress absences were made, but as he himself notes, it is perhaps not best to ask a depressed person whether they are in fact depressed – he is not the best person to judge that objectively.

59. The occupational health report of 9 October 2020, just before the Relevant Period, refers to "*a validated psychological wellbeing assessment undertaken today suggests he may be experiencing symptoms of moderately severe depression and moderate anxiety…*". Thus, there was an increase in the level of depressive symptoms at this point. I note this is when the Claimant has just returned after working from home due to COVID.

60. The Claimant explained that he was presently suffering as per the content of his disability impact statement. However, he did not state that he had been experiencing those effects within the Relevant Period, although even if I were to assume this is what he meant, it is still difficult to separate those issues out from the symptoms of PNH. There was no attempt by the Claimant in his evidence to specifically note that he was suffering the effects set out in his Disability Impact Statement within the Relevant Period, or just prior to, or just after.

61. I further have regard to the following:

    61.1. the lack of evidence of any kind as to a clinical assessment by those qualified to diagnose depression;

    61.2. the overlapping nature of the symptoms likely to arise from PNH and depression;

    61.3. the lack of evidence of therapeutic evaluations at or around the Relevant Period (the earliest potentially being September/October 2021), that show or tend to show that the condition constitutes a disability within the statutory tests (perhaps partly because the Claimant was unable to distinguish necessarily between effects of his PNH and any mental impairment);

61.4. the Claimant's period of sick, with fit-notes certified by a doctor, cite "*depression*" in the period 18 October 2021 to November 2022 (about the same time the Claimant told me he sought medical help for depression from his GP);

61.5. the Claimant had seen his doctor prior between October 2020 and July 2021, because the July 2021 OH Report references that the Claimant *"…is on prescription supplementation medication to help improve his symptoms of constant chronic fatigue, severe insomnia, reduced levels of concentration and explained bruising/bleeding, shortness of breath – sometimes he has received hospital treatment in the past when his condition was highly exacerbated...*" – yet, the issue of depression appears not to have been raised;

61.6. there is an absence of reference in the doctors visit between October 2020 and July 2021, by the Claimant's evidence, that there will be nothing in the notes referencing depression;

61.7. the lack of timeline given by the Claimant in his evidence, whether in his disability impact statement or in evidence before me, identifying the start date for the various issues and how at the Relevant Period he was said to have suffered for in excess of 12 months, or was likely to so suffer;

61.8. the absence of any medical assistance for depression being sought until September/October 2021, when prescription medication was provided; and

61.9. that the Claimant had self-certified his absences for the period immediately preceding the Relevant Period, and that he had not sought medical assistance at that time via his GP and instead it took a year before he first sought any assessment or treatment form his GP.

62. As I note above, the burden is on the claimant to establish all elements of the definition of disability and, to do so, by reason specifically in relation to depression, as distinct from PNH. I am not satisfied that he has met that burden.

63. Taking account of the above, I conclude that the Claimant was not suffering from a disability by way of depression during the Relevant Period.

Employment Judge Kelly
Dated: 24th July 2023