IN THE UPPER TRIBUNAL **Case No.** CCR/1247/2016
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: I allow the injured person's appeal. I set aside the decision of the First-tier Tribunal dated 29 January 2016 and remit the case to the first-tier Tribunal to be re-decided by a differently-constituted panel.

Direction: I direct the First-tier Tribunal to consider obtaining the Appellant's medical records (perhaps in respect only of the period from, say, January 2010 to December 2013).

REASONS FOR DECISION

1. This is an appeal, brought by the injured person with my permission, against a decision of the First-tier Tribunal dated 29 January 2016, whereby it dismissed her appeal under section 11 of the Social Security (Recovery of Benefits) Act 1997 against a certificate of recoverable benefits, issued by the Secretary of State for Work and Pensions on 17 October 2014 but revised on 28 May 2015, on which it was stated that there was recoverable from the compensator contributory employment and support allowance amounting to £6,482.69 paid to her in respect of the period from 28 June 2012 to 31 August 2013. The original certificate had stated that £14,480.05 contributory employment and support allowance was recoverable in respect of the period from 28 June 2012 to 5 February 2015.

2. The Appellant was the partner of the licensee of a public house. She had been in receipt of incapacity benefit since 22 August 2009. On 6 April 2012, she was injured in an accident in the public house. With effect from 28 June 2012, the award of incapacity benefit was converted to an award of contributory employment and support allowance. She suffered a further injury in December 2012, which she attributed to the first one. She brought a claim for damages in respect of her injuries against the owners of the public house. The claim was settled and, on 6 February 2015 a consent order was approved by a proper officer of the county court, whereby it was ordered –

> "1. Judgement be entered in favour of the Claimant for the sum of £64,480.05 in respect of her claim for damages, inclusive of interim payments and deductible benefits.
>
> 2. The Defendant do pay the Claimant's reasonable costs and disbursements of this action to be assessed on a standard basis if not agreed.
>
> 3. That [sic] upon payment to the Claimant of the sum of £37,000 in respect of damages within 14 days of the date of this order and the costs and disbursements as above the defendant be discharged in full in respect of their liabilities to the Claimant arising in this action."

3. The Appellant had received £13,000 in interim payments and so the effect of paragraph 3 of the consent order was that she received a total of £50,000. The Defendant was, of course, liable to pay £14,480.05 to the Secretary of State by virtue of the certificate of recoverable benefits as then in force and payment was duly made by the compensator on 10 February 2015. The total amount paid by the compensator to both the Appellant and the Secretary of State was therefore the sum of £64,480.05 mentioned in paragraph 1 of the consent order.

4. After the £37,000 had been paid by the compensator, the Appellant's solicitors submitted to the Secretary of State's Compensation Recovery Unit an appeal dated 9 February 2015 against the certificate of recoverable benefits, on the ground, firstly, that the injured person had been entitled to benefits before the relevant accident and therefore the benefits had not been awarded to her "in respect of the accident" and, secondly, that in any event the benefits could not have been set off against the claim for damages because there had been no claim for loss of earnings. "Mandatory reconsideration" having been introduced, that was treated as an application for review and, on 28 May 2015, the Secretary of State reviewed the certificate after taking medical advice. In respect of the first ground of appeal, he accepted that the Appellant had recovered from the relevant injuries to the extent that employment and support alliance had not been payable in respect of them from 1 September 2013 but he maintained that, following the accident the injured person's "need to claim benefits changed" and he noted that medical certificates had been submitted "which all state 'knee problem' to support her 'new incapacity'. He did not address the second ground of appeal at all. In consequence of the review, a revised certificate of recoverable benefits was issued, stating that £6,482.69 was recoverable, and £7,997.36 was sent to the Defendant's solicitors (although the decision had said it would be sent to the Appellant's solicitors) and it was received by the Appellant in July 2015.

5. Represented now by Mr Chris Browne of St Helens Citizens' Advice Bureau, the Appellant submitted an appeal to the First-tier Tribunal, solely on the ground that she had been in receipt of benefits before the relevant accident occurred. The Secretary of State submitted with his response the medical advice he had received, the health care professional's report dated 18 May 2012, completed for the purpose of determining whether the Appellant's award of incapacity benefit qualified for conversion to an award of contributory employment and support allowance, the medical advice he had sought and documents from the civil proceedings that had been submitted with the appeal, including medical reports and the surveillance reports. The response itself analysed the medical evidence in some detail and then said –

> "35. However, even if it was accepted that [the Appellant] continued to experience unrelated health problems, it is my submission that provided she satisfied the appropriate conditions of entitlement, she is awarded benefit regardless of whether or not she suffers from more than one cause of incapacity. In his respect, I would observe that Commissioner Rowland, when considering whether benefit was paid otherwise than in consequence of an accident, determined that it was not necessary that the relevant accident be the sole cause of the payment of benefit. However, it was necessary that the relevant accident be an effective cause of the payment of benefit, as in this case (CCR/5336/1995). I would therefore submit that even if [the Appellant] suffered from unrelated medical conditions, the ESAC paid from 28.6.12

was paid as a result of the injuries sustained in the relevant accident and subsequent accident and remains recoverable.

36. In concluding the Response, the Tribunal is respectfully reminded of another contention that was raised in the Mandatory Reconsideration request. [The Appellant's] former representative pointed out that she received ESAC and contended that this benefit was only capable of being set off against a claim for loss of earnings. The representative added that [the Appellant] did not claim for loss of earnings, but rather her claim comprised of a claim for pain and suffering and loss of amenity which is exempt from recovery.

37. In this regard I would observe that section 6(1) of the Social Security (Recovery of Benefits) Act 1997 provides that a person (Compensator) who makes a compensation payment in any case is liable to pay the Secretary of State an amount equal to the total amount of recoverable benefits. Therefore, the fact that a compensation payment has been made, irrespective of how it is made up, places a liability on the Compensator under the provisions of section 6.

38. The issue of compensation relative to benefits paid was considered by Commissioner Goodman in decision CCR/8023/95. The Commissioner held that: –

> 'There is no justification in the legislation (for a limitation to the 18 months period or) for any limitation of recoupment from that element of compensation (damages) which relates to loss of future earnings … the recoupable amount shall be determined in accordance with the certificate of Total Benefit and shall be equal to the gross amount of any relevant benefits paid or likely to be paid to or for the victim during the relevant period in respect of that accident, injury or disease.'

39. Whilst the Commissioner's decision relates to the previous Recovery of benefits scheme, the precedent set equally applies to the provisions of the Social Security (Recovery of Benefits) Act 1997."

6. In an application for a direction, Mr Browne submitted that much of the evidence from the civil proceedings was irrelevant and that the Secretary of State should be directed to provide other documents. The Secretary of State then submitted such documents as the Compensation Recovery Unit was able to obtain, which included a work capability assessment dated 6 May 2010, the Appellant's ESA50 questionnaire signed on 23 March 2012 and the Secretary of State's conversion decision awarding employment and support allowance. Those documents ought to have been produced with the original response to the appeal.

7. Mr Browne made a final written submission, arguing that the award of employment and support allowance had been made on the basis of incapacity due to the Appellant's pre-existing conditions.

8. Neither party asked for an oral hearing and so the First-tier Tribunal considered the case on the papers. It dismissed the Appellant's appeal. An application for the decision to be set aside, on the ground that the Appellant had not expected the case to be decided on the papers and had mistakenly said on her appeal form that she wanted her appeal to be decided on the papers, was rejected.

9. In its statement of reasons for dismissing the appeal, the First-tier Tribunal identified as the key issues those that had been raised by the Appellant's solicitors in the application for review. As to the first, it considered the medical evidence, rejecting at paragraphs 34 to 37 of the statement of reasons Mr Browne's argument that the evidence relating to the civil claim was not relevant, and decided that the employment and support allowance had not been paid in respect of the relevant accident. In the course of its analysis, it said –

> "27. It is established law that it is not necessary that the relevant accident is the sole cause of payment of benefit but it is necessary that the relevant accident is an effective cause of payment – see the comments of then Commissioner Rowland in CCR/5336/1995."

That was obviously derived from paragraph 35 of the Secretary of State's submission.

10. As regards the second issue, the First-tier Tribunal decided –

> "32. … that there was no merit in the argument that the benefits in this case can only be set off against a claim for loss of earnings and that to suggest otherwise is to misinterpret the provisions of section 8 of the Act."

That, I suspect, was derived from paragraphs 36 to 39 of the Secretary of State's submission.

11. Mr Brown submitted an application for permission to appeal on behalf of the Appellant, again arguing that the First-tier Tribunal had wrongly relied on the evidence. Permission to appeal was refused by the First-tier Tribunal but I granted permission to appeal on the basis that, although I was far from confident that the appellant had any real prospect of success, there were points that merited consideration. The Secretary of State resists the appeal. The compensator is the Second Respondent to the appeal but has not played any part in it.

12. At the beginning of my reasons for giving permission to appeal, I said –

> "1. I have had occasion before to comment on the Compensation Recovery Unit's continued reliance in the submissions it makes to the First-tier Tribunal on decisions made by Social Security Commissioners under the very different scheme for the recovery of social security benefits from compensation that existed before the Social Security (Recovery of Benefits) Act 1997 came into force. Under the 1997 Act, the amount of benefits paid in respect of an injury are recoverable from the compensator irrespective of whether the compensator may deduct a similar amount from the gross compensation payable to the injured person, which a compensator may do only in accordance with section 8.
>
> 2. In this case, the Compensation Recovery Unit, acting in the name of the Secretary of State, has cited at doc 12 an unreported decision of mine (CCR/5336/1995) under the earlier legislation, without citing a reported decision of mine under the 1997 Act that appears to be completely inconsistent with its main submission (see R(CR) 3/03, at paragraph 17). It also cites an unreported decision of Mr Commissioner Goodman (CCR/8023/1995) and asserts that "the precedent set equally applies to the provisions of the Social Security (Recovery of Benefits) Act

> 1997", without making any reference to a reported decision of a Tribunal of Commissioners (R(CR) 1/02), in which the differences between the earlier legislation and the 1997 Act were clearly explained, and without making any reference to the precise terms of section 8(1) of the 1997 Act, which, read with Schedule 2, shows that the whole of the statement of Mr Goodman upon which reliance is placed cannot possibly hold good under the current legislation.
>
> 3. This apparent ignorance on the part of the Compensation Recovery Unit's submission-writers of the few key decisions in the narrow area of the law in which they make submissions seems to me to be both inexplicable and unjustifiable. The unhelpful submission may have contributed to the First-tier Tribunal falling into error in this case."

The Secretary of State has not sought to defend paragraphs 35 to 39 of the submission that the Compensation Recovery Unit made to the First-tier Tribunal and I am satisfied that the First-tier Tribunal erred in adopting what was said there. However, it does not follow that this appeal should be allowed.

13. It is convenient first to consider the argument that the amount of compensation paid to the Appellant by the compensator should not have been reduced by "deductible benefits". Contrary to what the First-tier Tribunal held in paragraph 32 of the statement of reasons, only "compensation for earnings lost during the relevant period" may be reduced by the amount recoverable by the Secretary of State from the compensator in respect of employment and support allowance. The Scheme of the 1997 Act is very different from that of its predecessor. In particular, benefit paid in respect of accidents, injuries or diseases is recoverable by the Secretary of State from a person liable to pay compensation to the claimant (see section 6, read with sections 1, 5 and 9(4)(b)), rather than being recoverable from the claimant, and, by virtue of section 17, the compensator may reduce the amount of compensation in respect of social security benefits only to the extent allowed by section 8, which applies only where compensation is attributable to a head of compensation listed in column 1 of Schedule 2 and the benefit in question is shown against that head in column 2 of the Schedule. The only head of compensation against which employment and support allowance is listed in Schedule 2 is "compensation for earnings lost during the relevant period".

14. It appears that the Appellant did not include within her claim for compensation a claim in respect of lost earnings, because she had not been in employment when the accident occurred, in which case her solicitors were right that there should not have been any deduction from the compensation. However, that does not assist the Appellant on this appeal because, as the Secretary of State submits, whether there should be a deduction under section 8 and, if so, the amount of the deduction were matters that arose in the proceedings in the county court because they were issues as to the amount of compensation payable. Consequently, there is no right of appeal to the First-tier Tribunal under section 11 of the 1997 Act in respect of that issue. An appeal lies only against the certificate of recoverable benefits, which does not determine whether or not benefits may be deducted from compensation under section 8

15. Moreover, because an injured person does not have a direct interest in the certificate of recoverable benefits unless compensation has been reduced under

section 8, he or she does not have a right of appeal to the First-tier Tribunal under that section unless there has been such a reduction (see section 11(2)(b)). That raises the question whether there was in fact a reduction under section 8 in this case. If not, the Appellant had no right of appeal to the First-tier Tribunal at all and it ought simply to have struck her case out. When I gave permission to appeal, I observed –

> "5. …. An "injured person" has a right of appeal to the First-tier Tribunal against a certificate of recoverable benefits only if the amount of the compensation payment has been "calculated under section 8", which appears to mean on the basis that benefits listed in a certificate of recoverable benefits have been deducted from an award of damages. Not only was there no deduction expressly made under section 8 in this case, but there was, as the Appellant has always submitted, no claim for compensation for loss of earnings against which the amount of employment and support allowance might properly have been set. There therefore seem to me to have been no deductible benefits in this case. Benefits mentioned in a certificate of recoverable benefits are not necessarily deductible from the gross amount of compensation payable.
>
> 6. Thus it currently seems to me that, if paragraph 1 of the consent order in the county court proceedings (doc 139) is to be construed literally, the Appellant ought to have received from the Second Respondent the whole of the £64,480.05 mentioned in that paragraph. …."

16. However, I accept the Secretary of State's submission that paragraph 1 of the consent order is to be read to the effect that judgment was to be entered for the gross amount of the compensation payment that was due but that both interim payments and benefits listed in the certificate of recoverable benefits were to be deducted from that sum so that the outstanding amount due to be paid to the Appellant was £37,000, as stated in paragraph 3. That is plainly what was intended. Therefore, although it appears that there was no proper basis for a deduction under section 8, one was made, with the result that the Appellant had a right of appeal to the First-tier Tribunal and the compensator had no interest in bringing such an appeal as it had accepted that its total liability to both the Appellant and the Secretary of State was £64,480.05 in any event.

17. There is, however, a degree of artificiality or inconsistency in the case because the injured person is bringing an appeal which, on her case, should really have been left to the compensator to bring. To some extent, she finds herself arguing against the case she advanced in the personal injury proceedings. The effect of the consent order was that the risk of failing in the appeal has been transferred from the compensator to the Appellant by the apparent agreement that there should be an unlawful deduction under section 8. That may have been a deliberate part of the compromise but, if so, it seems to me to have been improper and, in any event, the Appellant's solicitors should have realised that she could not argue that the section 8 deduction was unlawful when challenging the certificate of recoverable benefits.

18. I turn then to the First-tier Tribunal's consideration of the question whether the employment and support allowance was paid "in respect of" the relevant accident. Whatever the position under previous legislation, it is quite plain that the 1997 Act

imposes on a tortfeasor a liability to compensate the Secretary of State for benefits paid in consequence of the tort (see the analysis in R(CR) 1/02). Therefore, as the Secretary of State now accepts, the compensator is not liable to compensate the Secretary of State for benefits to the extent to which they would have been paid due to pre-existing conditions even if the relevant tort had not been committed (see R(CR) 3/03). The First-tier Tribunal did not expressly ask itself the question whether employment and support allowance would have been paid to the Appellant from 28 June 2012 to 31 August 2013 even if the relevant accident had not occurred. Nonetheless, the Secretary of State submits that its analysis of the evidence effectively and adequately answered that question in the negative and therefore the First-tier Tribunal did not make any material error of law. Mr Browne appears no longer to be acting for the Appellant and in her reply, she has merely reiterated the point that she was already in receipt of benefit before her accident and says that she still suffers from the same conditions as well as others. She has not provided any further evidence in support of her case, despite being asked whether there is any. Neither party has asked for an oral hearing.

19. The Secretary of State submits, rightly in my judgment, that the First-tier Tribunal was quite entitled to take into account the evidence derived from the court proceedings. I accept Mr Browne's argument that it was not for the First-tier Tribunal to reconsider the claim that had been before the court. However, section 12(3) of the 1997 Act provides only that it must take into account any decision of the court, as it no doubt would even if that provision were not there. It is not bound to reach a decision that is consistent with the court's decision even where the issues were fully ventilated before the court, because the Secretary of State was not a party to those proceedings and it would therefore be unfair for her to be bound by them. Nor is it bound to find that benefit was paid in respect of an accident because that was the basis upon which it was paid, which seems to be Mr Browne's principal submission. It is entitled, for instance, to find that the benefit ought not to have been paid at all. This is because the compensator was not a party to the claim and it would be unfair for it to be bound by the decisions made on the claim (R(CR) 1/02). Therefore, as the Secretary of State submits, evidence may be relevant whatever its source although, of course, in weighing the medical reports, regard must be had to when and for what purpose they were made and also to the material, or lack of it, that was available to the person making the report. I reject Mr Browne's submission that evidence from the court proceedings was not relevant at all because it was not before the health care professional and decision-maker when employment and support allowance was awarded. Moreover, the exercise required on an appeal under the 1997 Act does not require it to be considered whether the award of benefit ought to be superseded or revised. Indeed, no-one has suggested that the Appellant was not entitled to employment and support allowance at the material time. The argument is about the factual basis, or the possible factual basis, of her entitlement.

20. It is a material part of the background to this case that the Appellant was still in receipt of incapacity benefit at the time of the relevant accident but that the process for considering whether it should be converted to an award of contributory employment and support allowance had already commenced. She had completed the ESA 50 questionnaire just before the accident occurred. The consultation with the health care professional took place after the accident and the conversion of the award took place shortly after that. The Secretary of State has never included

incapacity benefit paid between the date of the accident and the date of the conversion in the certificate of recoverable benefits – whether because he considered that it was not paid in respect of the relevant accident or whether for administrative reasons does not matter – and so the question arising on the appeal to the First-tier Tribunal could be framed as: would the award have qualified for conversion if the relevant accident had not occurred?

21. Before the relevant accident, the Appellant had been suffering from depression and hypertension. A work capability assessment was carried out on 6 May 2010. It is apparent that the Appellant had said that she had problems walking, both on level ground and up and down stairs but the examining medical practitioner did not accept that she had any material problem in that regard. He also considered her mental health problem to be "very mild" and his findings suggested that no points were scored in respect of any activities listed in the Schedule to the Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311). However, he found her to have very high sitting blood pressure and advised that she was suffering from a severe uncontrolled or uncontrollable disease because she was suffering from "severe hypertension which is not currently under control". He also advised that that condition was unlikely to change for at least 2 years. I accept the Secretary of State's submission that it is probable that it was therefore decided that she was to be treated as incapable of work under regulation 27(2)(a) of the 1995 Regulations and that that was the basis for her continued entitlement to incapacity benefit. There is no evidence of any further consideration of her case until the conversion process was started in 2012.

22. In her ESA 50 form, completed just before the relevant accident, the Appellant said she was suffering from severe hypertension, transverse myelitis, positional vertigo and depression. She claimed that she could not move 50 metres without needing to stop, that she could not move from one seat to another right next to it without help and that she also had difficulties with reaching, picking things up and manual dexterity due to her vertigo. She also claimed difficulties with communicating with other people, getting around safely, staying conscious when awake and with mental health activities (although some of her answers in relation to mental health activities suggest some misunderstanding of the questions).

23. In the relevant accident, the Appellant broke her left patella. Shortly afterwards, the health care professional carrying out the assessment necessary for the purposes of determining entitlement to employment and support allowance, a registered medical practitioner, recorded that the Appellant was suffering from myelopathy which "started about 1 year ago", vertigo which "started about 18 months ago", hypertension, depression and a problem with her left leg as a result of the accident which, incidentally, he recorded as "due to balance problem" although it is not clear whether that was an assumption on his part and in any event that is not inconsistent with the immediate cause being an accumulation of water due to a leak in the roof of the public house, as was alleged in the particulars of claim. He did not make detailed findings in relation to the activities in Schedules 2 and 3 of the Employment and Support Allowance Regulations 2008 (SI 2008/794) but said –

> "The client was found to meet support group criteria.

> [The Appellant] suffers from spinal cord problem and vertigo which causing [sic] constant loss of balance and pain and she fell recently and broken [sic] her left leg. She loss [sic] balance very frequently and she is under regular follow up.
>
> Today she walked very slowly with pain and difficulty and poor balance and she has problems with upper limb functions due to pain.
>
> It is likely for the condition to cause severe functional limitations with mobility, by walking or self propelling [sic] wheelchair, repeated and reliably.
>
> The history and examination indicates that the client may return to work and undertake work related activity in the medium term."

24. On the basis of that advice, the award of incapacity benefit was converted into an award of employment and support allowance including the support component. A year later, on 12 June 2013, the award was continued on scrutiny of the "ESA 50, Med 3 and previous report", the first two of those documents suggesting to the health care professional that the Appellant "cannot mobilise 50 metres repeatedly, within a reasonable timescale and unaided by another person, because of significant discomfort or exhaustion due to musculoskeletal problems / vertigo."

25. As she had suffered a nasty comminuted facture to the patella very recently, it seems fairly clear that, when it was first awarded, the Appellant would have been entitled to contributory employment and support allowance including the support component as a result of the relevant accident alone, whether or not she would also have qualified by virtue of pre-existing conditions. It is also clear that the award was in fact continued on the basis of her difficulty with mobilising. However, as I have said, the issue is whether she would have been entitled to employment and support allowance at any rate for any part of the period in dispute by virtue of the pre-existing conditions alone. In considering the history, it has to be borne in mind that, to the extent that health care professionals and decision-makers were satisfied that she was entitled to the maximum amount of benefit on one basis, it was not necessary for them to consider whether she might also have been entitled on another basis.

26. It is, of course, the case that the Appellant had stated in her ESA 50, completed before the relevant accident, that she was severely disabled. However, the First-tier Tribunal noted that the Appellant had also stated on a disability living allowance claim form on 21 June 2012 that her walking difficulties had started 18 months to two years previously, with transverse myelitis being one of the reasons and that that was directly contradicted by what she had said to Mr Pennie, a consultant orthopaedic surgeon, when she saw him in connection with the court proceedings and told him that she had no problems with walking as a result of the transverse myelitis and continued playing golf and horse-riding. The First-tier Tribunal considered that what the Appellant had told Mr Pennie was probably correct, because of the reference to golf and horse-riding, and that what she had said in the disability living allowance claim form was not correct. It seems a reasonable inference that it also concluded that what she had said in her ESA 50 was not correct.

27. She also told Mr Pennie that her vertigo had developed in December 2010 but had settled after a few months and that her high blood pressure had been brought

under control. As the First-tier Tribunal pointed out, depression was not mentioned. The First-tier Tribunal also referred to a joint report made by two consultant neurologists on 13 October 2014 to the effect that the Appellant had made a full recovery from transverse myelitis (although they did not say when) and that she had had "an episode of labyrinthitis resulting in vertigo in December 2010, symptoms of which improved within 3-6 months". The reasons for those views can be seen from their several reports. The joint report was made for the purpose of arguments about the cause of the relevant accident and the subsequent injury and was favourable to the Appellant in that regard because the authors ruled out the conditions as a potential cause. However, it tends to undermine the Appellant's case that she would have been entitled to employment and support allowance in 2012 as a result of the vertigo.

28. As to hypertension, the First-tier Tribunal said that it would not contribute to, or cause, falls and, although it did not directly address the issue, it seems fairly plain that it would not have found any of the descriptors in Schedules 2 or 3 of the 2008 Regulations to have been satisfied due to that condition. However, the real question was whether it was uncontrolled, as it had been found to be in 2010 in relation to her award of incapacity benefit, or whether it might otherwise have been found either that the Appellant was suffering from a life-threatening disease that was uncontrollable or that there would be a risk to her health if she were found not to have limited capability for work or work-related activity (see regulations 29(2) and 35(2)). The First-tier Tribunal did not expressly address that issue. As the Secretary of State submits, there was evidence against the Appellant. Despite what had been accepted in 2010 in relation to her award of incapacity benefit, she had told Mr Pennie that she had remained stable on her medication for some eight years before the relevant accident (doc 154) – the First-tier Tribunal in fact noted the reference (see paragraph 19 of the statement of reasons). One of the neurologists, Dr Sambrook, who both interviewed the Appellant and reviewed her medical records, also found that that her condition was controlled (doc 195). On the other hand, I accept that the date by which it was controlled is left unclear in his report and he was concerned with whether it might have contributed to either of the accidents or to entitlement to disability living allowance, rather than with the issues raised by regulations 29(2) and 35(2). I also note that the registered medical practitioner who had accepted in 2010 that the Appellant was suffering from a severe uncontrolled or uncontrollable disease, had recorded that she not only saw her GP in relation to her hypertension but she was also attending a cardiology out-patient clinic at a hospital in Liverpool. He had also recorded that her sitting blood pressure was 173/112 (doc 253), which he described as "very high" (doc 245).

29. As to depression, there is no evidence that the Appellant's mental health had deteriorated since it had been found not to have been a ground of entitlement to incapacity benefit and, as the First-tier Tribunal pointed out, it is simply not mentioned in the history given to any of the consultants involved in the court proceedings, which, even though none of them was a psychiatrist, tends to suggest that it was not a serious problem such as would have assisted the Appellant to qualify for employment and support allowance.

30. I am satisfied that the First-tier Tribunal did err in law because it asked itself the wrong question. I accept the Secretary of State's submission that the error does

not vitiate its findings of fact but, for reasons that I have indicated, I do not consider that it made findings on all the issues that it would have had to consider had it asked itself the right question. I therefore do not agree that its error can be regarded as immaterial in the sense that the outcome could not possibly have been affected by the error. On the other hand, save in one respect, I would be prepared to make the limited additional findings that are required on the basis of the evidence that was before the First-tier Tribunal and I would see no reason not to adopt such findings of fact as the First-tier Tribunal did make.

31. The issue, as I have said, is whether the Appellant's award of incapacity benefit would have qualified for conversion to employment and support allowance had the relevant accident not occurred. The statements that the Appellant made in her ESA50 are not consistent with what she told Mr Pennie and are not supported by any of the other medical evidence. I accept that I have not seen her medical records, but the specialists making the reports that are before me had. It is noteworthy that she had remained entitled to incapacity benefit from 2010 only because it had been accepted that her hypertension was uncontrolled. For the reasons that I have indicated above, I would therefore be quite satisfied that, except for the effects of the relevant accident, none of the conditions from which the Appellant was suffering between 28 June 2012 and 5 August 2013, or had previously suffered, was causing disablement during that period such as would have led to any of the descriptors in Schedule 2 or Schedule 3 to the 2008 Regulations being satisfied.

32. However, there is also the question whether the conditions of regulations 29(2) or 35(2) would have been satisfied during that period on the basis of her hypertension or any other condition. While I am not at all sure that the conditions of either of those regulations would have been satisfied, I consider that the issue ought to be determined by the First-tier Tribunal, which has a doctor among its members and which can call for the Appellant's medical records if it considers that they might be helpful. For this reason only, I remit the appeal.

33. Despite the narrow ground upon which I remit the appeal rather than deciding it myself, all issues of fact will be open before the First-tier Tribunal.

Mark Rowland
10 August 2018