IN THE UPPER TRIBUNAL **Case No** CE/3887/2016
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Liverpool on 2 November 2016 under reference SC068/16/03215 involved the making of an error of law and 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 in paragraph 19 of the Reasons.

REASONS FOR DECISION

1.The appellant had a number of problems with her hands, including Raynaud's disease and carpal tunnel syndrome. She had sustained damage to her hands as a consequence of a severe electric shock she received from a faulty shower unit in 2006, which had necessitated treatment at a burns unit and it appears, following a myocardial infarction, in a cardiology unit.

2. By a decision dated 19 July 2016 she was awarded 0 points and regulation 29 was held not to apply, so she neither had Limited Capability for Work ("LCW") nor could be treated as having LCW. The decision was upheld on appeal to the First-tier Tribunal ("FtT").

3. When the file first reached me, I directed the respondent to supply a proper history of the claim, observing that the appellant had been in receipt of ESA since 2009. There was no reason to suppose any improvement in the appellant's conditions so far as her hands are concerned. There did not appear to have been any explanation given by the respondent in the papers about the history of adjudication on the appellant's claims for ESA. Equally though, the appellant's representative, according to the FtT's statement (para 6) "an experienced advocate", did not appear to have made any application for that history (or any associated evidence) to be provided. I considered it highly likely that the DWP would have re-assessed the appellant between 2009 and 2016. Even though it had not been raised on the appellant's behalf, that she should after 7 years on ESA lose it for unexplained reasons and despite an acknowledged disability in my view merited further examination.

4. In response, the Upper Tribunal was informed:

> a. on 27 January 2010 the appellant had been examined by a Health Care Professional ("HCP") and found to have LCW but not Limited Capability for Work-related Activity ("LCWRA");

b. on 20 September 2010 a scrutiny report by an HCP reached the same conclusion;

c. on 22 July 2011, a further assessment by an HCP found no significant functional impairment and thereafter a decision was taken that the appellant had neither LCW nor LCWRA; and

d. on 13 June 2012, a FtT allowed the appellant's appeal against the decision referred to in c, concluding that, from 7 September 2011 (a date whose significance is not explained) she had both LCW and LCWRA and so qualified for membership of the "support group".

5. Copies of the assessments of 27 January 2010 and 22 July 2011 and of the scrutiny report of 20 September 2010 were provided. The FtT's decision notice was not available and it was unlikely that a request for a statement of reasons was made.

6. The appellant's representative was given the opportunity to file supplemental grounds of appeal directed to the matter I had raised in the observations summarised in [3] above, but the opportunity was not taken up.

7. On 18 August 2017 I nonetheless gave permission to appeal, observing:

" It seems to me that it is at least arguable that the appellant's letter of appeal to the FtT (p22), in indicating that "I had a severe electrical accident in 2006 and lost much of the use of my hands" is, as regards the consequences of that accident, to be understood as a submission that the consequences are unchanged. If that is so, it appears to me that the DWP's submission to the FtT has failed to comply with the requirements of *ST v SSWP (ESA)* [2012] UKUT 469 (AAC) *JC v DSD (IB)* [2011] NICom177; [2014] AACR 30 *FN v SSWP* [2016] AACR 24 and indeed the Department's own internal guidance (cited at [87] of *FN*). In the absence of any submission or application from the representative that such material be provided, was the FtT put on notice by the lengthy period in receipt of ESA and the origins and apparent irreversibility of the appellant's disability resulting from the accident so as to have erred in law by not calling for the past papers? Had it done so, it is suggested that the information it could have obtained (now produced by the respondent) might have been material. In particular (a) previous decisions in the appellant's favour, insofar as the rationale for them can now be determined, do not appear to have relied on now repealed descriptors (such as the inability to turn a star headed tap) and so may have continuing relevance; (b) the available evidence in connection with them suggests (notably as regards right hand grip) variation from that observed by the 2016 HCP; (c) they provide a variety of circumstantial evidence which might be considered to lend weight to the appellant's claims and (d) the evidence suggests that, as regards, for example, the ability to transfer a large empty cardboard box, a healthcare professional was able to take a diferent

> view from that reached by the FtT which might at least have caused them to reflect.

8. The respondent's representative, Mr Hampton, opposes the appeal. He relies substantially on the decision in *JC v SSWP (ESA)* [2015] UKUT 706(AAC). Along with its companion case, *FN v SSWP (ESA)* [2015] UKUT 670(AAC); [2016] AACR 24 it was a decision of a three judge panel. Mr Hampton draws attention to the panel's ruling that the earlier decision in *ST v SSWP* [2012] UKUT 469 (AAC), properly understood, applied to the responsibilities of the Secretary of State, not to determining whether the FtT erred in law. According to *JC*, para 71 it was "not necessary, **as a matter of law**, for a tribunal to have before it and consider the evidence of a claimant's previous assessment in connection with the WCA or PCA in each and every case."

9. Mr Hampton particularly relies on the endorsement by the panel in *JC* at [74] of the decision of a Tribunal of Commissioners in Northern Ireland, *JC v Department for Social Development (IB)* [2014] AACR 30, [2011] NICom 177 ("the NI decision"), which had indicated that the previous adjudication history and the documentation associated with it would be relevant

> '… in a limited class of case, where there is an assertion that there has been no change in the claimant's condition, and where the evidence associated with the previous adjudication history is relevant to that submission or, for example, where the claimant's medical condition, and the evidence associated with the previous adjudication history assists in the assessment of the claimant's overall capacity.'

10. Mr Hampson places emphasis on the words "limited" and "assertion", emphasis which is not to be found in *JC* or the NI decision. "Limited" adds little: it is unsurprising that a "limited" class is referred to when there had been suggestions that such material was required in a far greater range of cases.

11. Mr Hampton then focuses on whether there has been an "assertion" and draws my attention to the dictionary definition of the word. He suggests that the sentence to which I had earlier referred in Directions (see [7]) cannot be construed as an assertion of no change.

12. It seems to me that whether there has been such a submission is not to be judged exclusively by an abstract consideration of the semantics of the words used. I note that in the companion case to *JC*, *FN*, the panel (at [102]) expressly contemplated whether "the First-tier Tribunal ought to have <u>inferred for itself</u> that a submission of no change was being made" (emphasis added). It is a matter for the expert tribunal, with its knowledge of the conditions and disabilities concerned, to listen to and interpret what it is being told, orally and in writing. Context is very important.

13. An expert tribunal will understand that some conditions heal; others do not. Some can be addressed by an operation or other treatment; others can not. In the case of some conditions, a person may adapt over time; in others

that is not going to happen. Such awareness is important, as an individual party to proceedings may not feel they need to spell out too overtly to a tribunal containing a doctor the implication of a condition as being permanently disabling where that is widely known.

14. The passage at issue in the present appeal occurs in the ”grounds for appeal” section of the appeal form (p22). Set out in full, it reads:

> “The information used by the Decision Maker for the medical assessment was not accurate or complete.
>
> I cannot prepare and cook food.
> I need assistance to cut up food.
> I struggle because I cannot use both my hands to deal with tablets, washing and bathing, design and undressing, toilet.
> I have problems going out by myself.
> I would not be safe in a workplace or training environment.
>
> I HAD A SEVERE ELECTRICAL ACCIDENT IN 2006 AND LOST MUCH OF THE USE OF MY HANDS.
> I RECEIVE ASSISTANCE FROM MY DAUGHTER AND MY FRIENDS.” (use of capitals in original).

15. The FtT know that at the time it heard the case, some 10 years after the index incident, the appellant remained under the care of the vascular clinic, the pain clinic and her regional centre for neurology. It had also been told (p113) that a carpal tunnel release in 2009, both hands, had not helped.

16. Seen against that background, the natural reading of the letter of appeal is that the determinative factor (cf. the use of capitals) was the 2006 accident which (writing 10 years on) continued to have the negative effects on the appellant’s manual dexterity in the respects she identified above the capitalised passage. In context, it was not, contrary to Mr Hampton’s submission, a “plain statement of historical fact” but a submission of no change.

17. Even though the panel in *JC* was at pains to highlight the responsibilities of representatives to ensure that relevant evidence was before the tribunal, a responsibility which does not appear to have been discharged by the representative in the present case so far as this type of evidence was concerned, I still consider that the FtT erred by failing to call for the “missing” history and evidence. Its jurisdiction is an inquisitorial one. The period at issue in this case was a notably lengthy one. The appellant’s condition did not appear to have changed much from the available evidence. The FtT will have been well aware that the DWP frequently calls claimants for ESA in for medical examination and it was virtually inconceivable that it would not have done so several times over the intervening 7 years period. To take away someone’s ESA after they have been in receipt of it for seven years, in the absence of (say) obviously ameliorating recent treatment (of which there was no evidence) is a significant step. Decisions such as R(M)1/96 serve to

illustrate the importance of explaining why previous decisions are being departed from. As R(M)1/96 notes at [15]:

> "An adverse decision without understandable reasons in such circumstances is bound to lead to a feeling of injustice".

To be able to give that explanation, the tribunal needed to know the history and relevant evidence behind it.

18. I do not need to deal with any other error on a point of law that the tribunal may have made. Any that were made will be subsumed by the rehearing.

19. I direct that the tribunal must conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration. While the tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to these but must consider all aspects of the case, both fact and law, entirely afresh. The tribunal must not take into account any circumstances that were not obtaining at the date of the decision appealed against – see section 12(8)(b) of the Social Security Act 1998- but may take into account evidence that came into existence after the decision was made and evidence of events after the decision was made, insofar as it is relevant to the circumstances obtaining at the date of decision: R(DLA)2/01 and 3/01.

20. The fact that this appeal has succeeded on a point of law carries no implication as to the likely outcome of the rehearing, which is entirely a matter for the tribunal to which this case is remitted.

CG Ward
Judge of the Upper Tribunal
20 March 2018