IN THE UPPER TRIBUNAL **Appeal No. CI/2224/2018**
ADMINISTRATIVE APPEALS CHAMBER

Before: Deputy Upper Tribunal Judge Gullick

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 1 June 2018 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**

3. **The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**

4. **The Respondent must send to the relevant HMCTS office within one month of the issue of this decision any notes or records of meetings between Dr O'Hanlon and the "Wembley Lead" regarding the Appellant's case between 26 September 2017 and 29 September 2017, inclusive. If no such notes or record exist then the Respondent must send evidence setting out the purpose and content of any such meetings. Any evidence filed in accordance with this direction shall also set out the role and medical qualifications (if any) of the "Wembley Lead".**

5. **The new tribunal will be looking at the appellant's circumstances at the time that the decision under appeal was made, that is 3 November 2017. Any further evidence, to be relevant, should shed light on the position at that time.**

6. **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 will 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.

REASONS FOR DECISION

Introduction

1. This is an appeal regarding the Appellant's entitlement Industrial Injuries Disablement Benefit (IIDB) under the provisions of Part 5 of the Social Security Contributions and Benefits Act 1992.

2. References below to page numbers are to the pages of the bundle of documents before the Upper Tribunal.

3. Although the Appellant sought to appeal on a variety of grounds, permission to appeal was granted by Upper Tribunal Judge Wright on a limited basis. The appeal necessarily proceeds on that limited basis. I say that because it appears from the Appellant's submissions of 4 January 2019 at page 192 that he has requested an oral hearing of the appeal to address the correctness of the findings of fact made below. Such an argument does not however come within the scope of the limited grant of permission to appeal.

4. I have had regard to the terms of the Appellant's request for an oral hearing but I do not consider that it is necessary to hold an oral hearing of this appeal which, as I have said, proceeds on a strictly limited basis. The appeal can in all the circumstances properly be determined on the basis of the parties' written submissions.

Background

5. The Appellant, who is now aged 59, was involved in a workplace accident on 1 May 2013 when he injured his back whilst lifting a heavy piece of machinery onto a table, having been asked to do so by his line manager.

6. The Appellant claimed IIDB on 25 March 2015 (pages 45-57). He was awarded IIDB with a disablement of 15 per cent following examinations by registered medical practitioners on 19 May 2015 (pages 58-69) and 21 May 2016 (pages 84-95). Those assessments were both provisional rather than final and expired on 21 November 2017.

7. In advance of that date, the Appellant was reassessed by another registered medical practitioner, Dr O'Hanlon, on 26 September 2017 (pages 96-109). In her Renewal Advice form, completed on 29 September 2017, she expressed the opinion that the Appellant's continuing symptoms were "*likely to be constitutional and unlikely now to be related to injury in 2013*" (page 109). That report was competed shortly after the Appellant had received hospital treatment in May 2017 for a psoas abscess.

8. On 3 November 2017, the Respondent superseded the previous decision. The Respondent's award of IIDB was disallowed from 22 November 2017 on the basis that he had no remaining loss of faculty from the accident on 1 May 2013.

9. The Appellant requested reconsideration of the Respondent's decision, but on 13 February 2018 the Respondent refused to revise the decision (pages 131-135). The Respondent made clear that the decision was based on the advice given by Dr O'Hanlon.

10. The Appellant appealed to the First-tier Tribunal (FTT). There was an oral hearing of the appeal before the FTT on 1 June 2018 before a panel comprising a judge and a medical member. The appeal was brought on a variety of bases, set out at paragraph 5 of the FTT's Statement of Reasons (page 151). Importantly for present purposes they included that the Respondent had not provided any information in response to the Appellant's request for disclosure of what had occurred at a meeting between Dr O'Hanlon and the "Wembley Lead", to which I will make further reference below.

11. The Appellant attended the hearing and gave evidence. The Respondent did not send a representative to the hearing. The Appellant relied on a medico-legal report from a consultant orthopaedic surgeon, Mr Mackay FRCS, which had been prepared in March 2016 (pages 70-83) apparently in connection with a civil claim for damages arising from the accident on 1 May 2013. Mr Mackay had concluded that the Appellant was suffering from "*a chronic low back disorder which is consequent upon the index accident*" (page 79) which might improve, but not resolve, with treatment (page 80).

12. By a notice of decision issued on 1 June 2018 (pages 147-148), the FTT dismissed the appeal. The FTT found that the Appellant's continuing symptoms were not the result of the accident and were more likely to have been caused by years of manual work and the abscess which he developed in 2017. The FTT found it was extremely unlikely that the abscess had been caused or contributed to by the accident in May 2013.

13. The FTT's decision was supplemented by a Statement of Reasons requested by the Appellant and issued on 25 July 2018 (pages 150-153) in which the FTT set out its conclusion that the accident on 1 May 2013 had caused a temporary sprain (soft tissue injury) but no permanent physical injury and that the Appellant's continuing symptoms resulted from other causes. The FTT expressly disagreed with the conclusion of Mr Mackay (paragraph 23 at page 155) on the basis that it was not consistent with other evidence about the Appellant's historic problems with his back from the late 1980s onwards, including that the Appellant had confirmed in evidence that he had problems with his back in the 1980s after doing heavy lifting at work (paragraph 19 at page 155), that the Appellant had developed back and leg pain resulting from work in 1994 (paragraph 20 at page 155) and that the Appellant had hurt his back when lifting a weight whilst sailing in July 2012 (paragraph 22 at page 155). The Tribunal found that the abscess suffered in 2017 could not have been connected with the accident in 2013; had it been, it would have manifested itself soon after the accident rather than four years later (paragraph 27 at page 156).

14. The Appellant sought permission to appeal. That was refused by the FTT (pages 156-157). The same judge of the FTT who had sat on the panel at the hearing determined the application for permission to appeal. Whilst that is by no means unusual, I mention it because of the issue which I discuss at paragraph 27 below regarding the wording of the decision to refuse permission to appeal.

The Appeal to the Upper Tribunal

15. The Appellant then sought permission to appeal from the Upper Tribunal (pages 158-182). Permission to appeal was granted by Upper Tribunal Judge Wright on 24

September 2018. Judge Wright made it clear that permission to appeal was granted on a limited basis, in respect of the following two points only:

a. Whether Dr O'Hanlon was or was not a 'registered medical practitioner' on the GMC register when she completed her assessment.

b. Whether, if Dr O'Hanlon was a 'registered medical practitioner' the FTT had erred in law in failing to investigate the nature and circumstances of the discussion between Dr O'Hanlon and the "Wembley Lead" between 26 September 2017 and 29 September 2019 and what impact that discussion had on Dr O'Hanlon's advice.

16. The Respondent filed written submissions opposing the appeal dated 28 November 2018 (pages 188-190). The Appellant filed written submissions in response dated 4 January 2019 (pages 191-194). At the further direction of Upper Tribunal Judge Wright, both parties then filed further material addressing the specific issue of whether Dr O'Hanlon was a 'registered medical practitioner'.

Discussion

17. Both the Appellant and the Respondent have filed submissions with the Upper Tribunal which state that Dr O'Hanlon is a 'registered medical practitioner' on the General Medical Council's (GMC's) register and that her registration date was 9 May 2012. On this basis the first issue in this appeal falls away. Whilst the Appellant complains that Dr O'Hanlon is not on the GMC's register of General Practitioners (GPs), that is immaterial to the issue of whether she was at the time of the completion of the assessment a 'registered medical practitioner', which is for present purposes the status required by ss.19(1) and 39(1) of the Social Security Act 1998. It is clear from the observations filed by both parties, which are to the same effect, that she was so registered with the GMC at the material time.

18. That leaves, however, the second point on which Upper Tribunal Judge Wright granted permission to appeal, i.e. whether the FTT erred in law in not dealing further with the point about the discussion between Dr O'Hanlon and the "Wembley Lead". In the Statement of Reasons, the FTT stated at paragraph 7 that the issues which it had to determined were "*unlikely to be clarified by the additional evidence which* [the Appellant] *had sought*" (page 151) and that the Appellant had said that he understood that. The question is therefore whether the FTT's decision to proceed with the hearing in these circumstances gives rise to a material error of law.

19. On the final page of her assessment (page 109), Dr O'Hanlon wrote this next to the box on which she gave the 'date of examination' as 26 September 2017 and the 'date of completion' as 29 September 2017:

> "*Part 9 completed on 29/09/2017 after case discussion with Wembley Lead. I was not available for case completion 27 + 28/09"*

20. The Appellant's position, as I understand it, is that this comment shows that there was some discussion of his case between Dr O'Hanlon and one or more other persons and that this discussion took place at some point after he met Dr O'Hanlon on 26 September and before she completed Part 9 of her report (the statement of her findings) on 29 September. I agree with the Appellant to that extent. What is not

clear however is with whom Dr O'Hanlon discussed matters, for what reasons, what was discussed and what impact, if any, that had on Dr O'Hanlon's conclusions. All these matters might have been addressed by the Respondent before the FTT or indeed before this Tribunal, but they have not been.

21. It is clear however that the FTT was aware of this issue. In the final bullet point of paragraph 5 of the Reasons, which summarises the Appellant's arguments on the appeal, the FTT stated:

> "*He* [i.e. the Appellant] *had asked the DWP for: … a transcript of the minutes of a decision on his case in Wembley on 27th and 28th September 2017, who was there and what was their role and qualifications… but the DWP had failed to comply…*"

22. As I have set out above, however, the FTT took the view that the issues which it had to determine were unlikely to be clarified by such evidence. That might have been the case; however the primary issue as it appears to me is not what such evidence might or might not have shown, but whether as a matter of fairness the Appellant was entitled to know for what purpose and with what effect the discussions between Dr O'Hanlon and the "Wembley Lead" had taken place. That is a different question. The Respondent in her submissions dismisses this point as being "*of no relevance*" (paragraph 6 at page 189). I reject that submission. There is clear authority to the contrary.

23. In his decision in *CDLA/4127/2003*, Mr Commissioner David Williams addressed a situation in which the Respondent had sought certain alterations in the content of the medical advisor's report. Those alterations were made by the medical advisor. On appeal, the tribunal accepted the view set out in the amended report. This was held to have involved an error of law. At [17], Commissioner Williams stated:

> "*The Secretary of State is entitled to arrange for and rely on whatever medical evidence Parliament authorises and he thinks fit. But a tribunal must be fair as between the Secretary of State and the claimant. In particular, the tribunal must ensure an "equality of arms". It should be alert about circumstances when the Secretary of State can seek clarification of an "independent" report when a claimant cannot take the same action. In particular, it should remember that the Secretary of State has had a chance in a case like this to get the report altered before the claimant even sees it. The only chance that the claimant has to get a similar change made is at the tribunal hearing, or by direction of the tribunal. As Lady Hale again reminded us about tribunals in* [Kerr v Department for Social Development (Northern Ireland) [2004] UKHL 23]*, "the process is inquisitorial, not adversarial". That, as the decision in Kerr emphasises, means inquisitorial in a case like this of the Department and the examining medical practitioner as much as of the claimant and the general practitioner.*"

24. To like effect was the decision of Upper Tribunal Judge Wikeley in *AG v Secretary of State for Work & Pensions* [2009] UKUT 127 (AAC). In that case, a medical examination had been conducted by one doctor but the report had been signed by another doctor some three months after the examination had taken place. The Respondent's decision contained the following explanation for this: "*the original*

medical report… was returned for rework on two occasions as the decision maker had some queries which required clarification by Medical Services." Those queries were not explained in the decision or the evidence filed on appeal to the tribunal. The Appellant's representative had criticised the report before the tribunal, alleging that it had been "*fabricated*". The tribunal however did not address this issue in its decision. Judge Wikeley held that this was an error of law, concluding at [18] that:

> "*… It had no evidence before it as to the nature of the "reworking" which had been carried out. It was incumbent on the tribunal at the very least to adjourn to obtain a full explanation of that process, given the challenge that had been made to the status of the report. Its failure to do so and its purported reliance on the… report amounted to an error of law.*"

25. Judge Wikeley endorsed as being of general application in this context the view of Mr Commissioner Howell QC in *CIB/511/2005* (a case on rather different facts) at [3]: "*Tribunals ought… to take particular care to satisfy themselves that reports presented to them in this form really do represent considered clinical findings and opinions by the individual doctor whose name they bear, based on what actually appeared on examination of the particular claimant*."

26. Having regard to these authorities, in my judgment purely as a matter of fairness to the Appellant, the FTT ought to have adjourned the hearing and required the Respondent to provide a full explanation of the process followed by Dr O'Hanlon in compiling her assessment, including the involvement of the "Wembley Lead". The FTT in considering that such evidence was unlikely to affect the substance of its decision did not address the issue of whether proceeding in the absence of such evidence was fair to the Appellant. In my judgment, it was not. I do not consider that the FTT having recorded that the Appellant 'understood' the point being made to him in this regard as sufficient to validate the FTT's decision to proceed. The FTT had not put the point to the Appellant in terms of procedural fairness but rather in terms of what the content of such evidence might be and its impact on the FTT's ultimate decision. In any event, the FTT's inquisitorial function in an appeal of this sort, with an unrepresented appellant, required it go further than it did.

27. Bearing that issue in mind, I turn to the issue of materiality. It is right to point out that nowhere in its findings of fact (paragraphs 14-28, pages 152-154) did the FTT refer to or rely on the content of Dr O'Hanlon's assessment although it did not state expressly that it had entirely disregarded that assessment. In the decision refusing permission to appeal, the FTT judge stated that the FTT's findings had been based on the evidence from the Appellant and his doctors and that they "*did not depend on the findings of the assessor* [i.e. Dr O'Hanlon]".[1]

28. In those circumstances it might be said that the error of law identified above cannot have been material to the outcome before the FTT. I do not however accept that. Firstly, the issue is primarily one of fairness to the Appellant. Secondly, even if

[1] The Respondent's written submissions (paragraph 6 at page 189) assert that the FTT accepted the evidence of Dr O'Hanlon: "*Part 9 of the renewal advice has been fully completed and full reasoning has been provided as to why the opinion was given that the claimant's* [sic] *on going back problems were constitutional. The First-tier Tribunal have accepted this evidence and have afforded probative weight in terms of the facts in issue…*" That Dr O'Hanlon's evidence was accepted does not however appear from the FTT's Statement of Reasons and the FTT judge's statement when refusing permission to appeal positively contradicts the Respondent's submission, which I do not accept.

the issue is whether the further material sought by the Appellant might have made a difference to the decision of the FTT, I bear in mind that the nature and content of the discussion that took place between Dr O'Hanlon and the "Wembley Lead" has still not, even now, been disclosed. Nor indeed have the medical qualifications, if any, of the "Wembley Lead".

29. In connection with that second issue, it is possible – no more than that – that the discussion with the "Wembley Lead" influenced the content of Dr O'Hanlon's assessment. It is also possible – again, no more than that – that the content of the discussion might, had the FTT known about it, have affected the FTT's decision as well. For example, if Dr O'Hanlon's provisional opinion following her assessment had been in accordance with that of Mr Mackay but had changed after her discussion with the "Wembley Lead", then that might have influenced the conclusions that the FTT reached. However, these are no more than possibilities, indeed they can be no more than speculation, because the Respondent has not provided the relevant information either to the Appellant or to the FTT or to this Tribunal. It is in my judgment clear on the evidence that I have before me that the FTT's error in failing to adjourn to obtain that further information was a material error because it might have made a difference to the outcome irrespective of the issue of fairness to which I have already referred.

30. It is in my view most regrettable that the Respondent has at no stage supplied any of this information. The Respondent's submission that this issue is simply irrelevant is incorrect. As the decisions that I have set out above make clear, it is important for appellants and tribunals to be able to satisfy themselves that assessments such as those conducted on this Appellant by Dr O'Hanlon represent the individual clinical judgment of the professional concerned. Where there is reason to believe this is not the case then a full explanation ought to be provided to enable an appellant and any tribunal to understand what input, if any, any other person has had into the assessment.

31. It might well have been the case, had the Respondent provided a sufficient explanation even before this Tribunal to the concerns raised by the Appellant, that I would have been in a position to re-make the decision under appeal. However, the Respondent has provided no such explanation and I am not in any such position. Accordingly, the appeal will have to be re-heard by another panel of the FTT.

Conclusion

32. I therefore allow this appeal. There was a material error of law on the part of the FTT. I set its decision aside. I am not in a position to re-make the decision under appeal. There will need to be a fresh hearing before a new panel of the FTT. I should make it clear that I am making no finding about nor expressing a view on the appellant's entitlement to IIDB. That is for the new tribunal to decide. The new tribunal will form its own judgment on the merits of the Appellant's appeal against the Respondent's decision of 3 November 2017. I have made case management directions in respect of the provision of further material to the FTT that re-hears the appeal relating to the discussion between Dr O'Hanlon and the "Wembley Lead" and further case management directions may be made by the FTT in due course.

Signed on the original
on 5 April 2019

Mathew Gullick
Judge of the Upper Tribunal