[2021] UKUT 257 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CI/940/2020**

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

PA

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 18 October 2021
Decided on consideration of the papers

Representation
Appellant: In person
Respondent DWP Decision-Making and Appeals, Leeds

DECISION

The appeal is allowed.

The making of the decision of the First-tier Tribunal given at Liverpool on 5 February 2020 under reference SC250/19/00040 involved the making of an error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

I draw the claimant's attention to the fact that those directions are addressed to him as well as to the First-tier Tribunal and that Direction 5 below includes a time limit.

DIRECTIONS

To the First-tier Tribunal

1 The First-tier Tribunal must hold an oral hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 12(8)(a) of the Social Security Act 1998 and to its duty to conduct a fair hearing—any other issues it may consider it appropriate to decide.

2 The members of the First-tier Tribunal who are chosen to reconsider the case (collectively, "the new tribunal") must not include the judge or medical member who made the decision I have set aside.

To the claimant

3 You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal that heard your appeal on 5 February 2020 made a legal mistake, not because it has been accepted that you are entitled to PIP. Whether or not you are entitled will now be decided by the new tribunal.

4 You are reminded that the new tribunal must consider whether the Secretary of State's decision was correct at the time it was made. That means:

(a) it cannot take into account changes in your circumstances that occurred after 14 June 2019; and

(b) it can only consider evidence from after that date if it casts light on how you were on or before 14 June 2019.

5 If there is any further written evidence that you would like the new tribunal to consider (and which relates to the period on or before 14 June 2019) you must now send it to HM Courts and Tribunals Service at Liverpool, quoting the reference, SC250/19/00040, so that it is *received* no later than **one month** from the date on which this decision is *sent* to the parties.

REASONS

Introduction

1. The claimant appeals against the above decision of the First-tier Tribunal, with my permission.

2. As I have decided to remit the appeal, I will say no more about the facts than is necessary to explain my decision.

3. In May 1981, the claimant injured his back in an industrial accident ("the Accident"). He claimed industrial injuries disablement benefit in July 1986 and his disability was assessed at 7% final for the period from the 91st day[1] following the Accident for life.

4. In April 2014, he applied for that decision to be superseded following a change in his circumstances but, in June 2014, the Secretary of State's decision maker declined to do so on the ground that no change had occurred.

5. In May 2019, the claimant applied again for the decision to be superseded and, in a decision notified to him on 17 June 2019, the decision maker again declined to change the original decision because she was not satisfied that there had been a relevant change of circumstances.

6. The claimant appealed to the First-tier Tribunal which, on 5 February 2020, confirmed the Secretary of State's decision.

Reasons for giving permission to appeal

7. On 30 August 2020, I gave the claimant permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision for the following reasons:

> "3. I have given permission to appeal because, although I am at present unpersuaded by the proposed grounds of appeal, it is arguable with realistic prospects of success that the First-tier Tribunal's decision involved the making of a material error on a point of law.
>
> 4. Paragraph 21 of the written statement of reasons records that:

[1] Calculated in accordance with section 103(6) of the Social Security Contributions and Benefits Act 1992

> "The Tribunal was satisfied that there was some deterioration suffered by the Appellant [that] could be attributed to the necessary surgery undergone by the appellant due to the [Accident]. However, the Appellant also had spondylitis and general wear and tear that led to a deterioration in the Appellant's condition and functional ability and this could not be attributed to the IA."

> 5. Examples of the dual causation of disablement are scarcely unheard of in the industrial injuries scheme. As the Tribunal found that there had been deterioration in [the claimant's] condition, and that at least some of it was caused by surgery to correct the effects of the Accident on 13 May 1981, should it not have then applied regulation 11 of the Social Security (General Benefit) Regulations 1982 to assess the extent to which [the claimant's] disability that was attributable to the [Accident] was greater than the previously awarded 7%?
>
> 6. Was refusing to supersede without first having regard to regulation 11 not an error of law?"

In fairness to the Tribunal, it was an overstatement to have suggested that it had no regard to regulation 11 at all. The written statement of reasons does refer to parts of that regulation, but not to the provisions I discuss below.

Reasons for setting aside the First-tier Tribunal's decision

8. The Secretary of State's representative agrees that it was an error for the Tribunal not to have had regard to regulation 11, but submits that the error was immaterial. She puts it this way:

> "5. I agree that in this case the First-tier Tribunal appear to accept that there was an element of dual causation of disablement and in this regard they should have indicated that they then went on to consider whether Reg 11 of the Social Security (General Benefits) Regulations 1982 applied. However, in terms of dual causation, I submit that Reg 11(2) provides:
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> > "When the extent of disablement is being assessed for the purposes of section [103 of the Social Security Contributions and Benefits Act 1992], any disabilities which, though resulting from the relevant loss of faculty, also result, or without the relevant accident might have been expected to result, from a cause other than the relevant accident (hereafter in this regulation referred to as "the other effective

> cause") shall only be taken into account subject to and in accordance with the following provisions of this regulation."
>
> 6. In my submission reg 11(3) specifically deals with other effective causes which arise or exist before the date of the relevant accident. I submit that this does not appear to apply in this case. Further, reg 11(4) concentrates upon other effective causes which arise after the date of accident (or onset of disease in question). In contrast to reg 11(3) there is an explicit clause allowing for interaction to be taken into account but only where the assessment of disablement from the industrial accident (or prescribed disease) is 11% or more. Again, this does not appear to apply as the claimant had been awarded 7% from and including 11/11/81 for life. Finally, reg 11(5) deals with the assessment of disablement in respect of two or more industrial accidents or diseases. In this case only one industrial accident was the issue in this appeal. It is my submission that none of these sub paragraphs of reg 11 apply in this particular case. Accordingly, although the First-tier Tribunal were required to consider reg 11 of the Social Security (General Benefits) Regulations 1982, in actual fact none of the above were applicable to the circumstances of the claim."

9. The claimant has been given an opportunity to reply to that submission but did not do so other than to confirm that he does not wish there to be an oral hearing of this appeal.

10. I have set aside the First-tier Tribunal's decision because I do not accept the Secretary of State's submission on the interpretation of regulation 11(4). That provision reads as follows:

> "(4) Subject to paragraphs (5A) and (5B) any assessment of the extent of disablement made by reference to any disability to which paragraph (2) applies, in a case where the other effective cause is an injury or disease received or contracted after and not directly attributable to the relevant accident, shall take account of all such disablement to the extent to which the claimant would have been subject thereto during the period taken into account by the assessment if that other effective cause had not arisen and where, in any such case, the extent of a disablement would be assessed at not less than 11 per cent. if that other effective cause had not arisen, the assessment shall also take account of any disablement to which the claimant may be subject as a result of that other effective cause except to the extent to which he would have been subject thereto if the relevant accident had not occurred."

Paragraphs (5A) and (5B) relate to industrial diseases and so do not apply in this case.

11. For these purposes, the disablement arising from the loss of faculty in the claimant's back is "directly attributable to the relevant accident" if it was caused by either the Accident itself or the subsequent surgery to his back which was undertaken to reduce that loss of faculty.

12. Therefore, to the extent that the Tribunal accepted that some deterioration suffered by the claimant since the 91st day could be attributed to that surgery, that deterioration was directly attributable to the Accident.

13. By contrast, the deterioration suffered as a result of degenerative changes that were constitutional in origin were the result of "the other effective cause".

14. Therefore, as the Tribunal acknowledged the existence of deterioration resulting from the Accident, regulation 11(4) required it to perform a notional assessment as a building block towards the actual assessment. The Tribunal should have assessed how disabled the claimant would have been "during the period taken into account by the assessment" if the constitutional degenerative changes had not occurred.

15. If that notional assessment was 11% or higher, then the Tribunal should have made the actual assessment by adding the disability arising out of the other effective cause to the notional assessment "except to the extent to which [the claimant] would have been subject that disability if the [the Accident] had not occurred".

16. If, on the other hand, the notional assessment was 10% or less, then the notional assessment and the actual assessment should have been the same.

17. It seems to me that the interpretation of regulation 11(4) suggested by the Secretary of State's representative involves a misreading of the phrase "during the period taken into account by the assessment". That interpretation assumes that, in this case, the assessment referred to was the existing assessment of 7% for life final.

18. In my judgment, however, the "assessment" referred to is not any existing assessment but to the future assessment that will be made after regulation 11 as a whole has been applied to the circumstances of the case as a whole.

19. To see that that is the case, one only has to consider the application of regulation 11(4) when the assessment being made is the first assessment on a claim, rather than, as here, a putative superseding assessment.

20. In those circumstances, the phrase "during the period taken into account by the assessment" must be a reference to the *future* assessment to which the application of regulation 11 will lead. It cannot refer to an existing assessment because there is no

such assessment. The assessment must be expressed either as a percentage, or nil, and so cannot be finalised until the the outcome of the regulation 11(4) process is known.

21. The meaning of the phrase "during the period taken into account by the assessment" cannot vary according to whether the decision assessment being made is the result of a new claim or an application to supersede.

22. To take this case as an example, any superseding decision that the decision maker or the Tribunals might have made would have had an effective date in May 2019. In those circumstances, the "period taken into account by the assessment" is the period beginning with that effective date, not the period of the existing life assessment that began on the 91st day. The notional assessment referred to in paragraph 14 above must be carried out by reference to the extent of the claimant's disablement (including in this case the deterioration that the Tribunal accepted as having been caused by the surgery) during the former period.and not during the period of the existing assessment which was made before the deterioration occurred.

23. For those reasons, the First-tier Tribunal's decision was made in error of law and I have exercised my discretion to set it aside.

Reasons for remitting the appeal

24. Having set the decision aside, I must next decide whether to re-make the decision myself or to remit the matter to the First-tier Tribunal with directions.

25. I considered re-making the decision in the same terms as it seemed unlikely that the claimant would benefit from the application of regulation 11(4).

26. Even if the notional assessment referred to at paragraph 14 above, were to come out at 11% or higher, it is in the nature of constitutional changes that claimant would have been subject to them if the Accident had not occurred. On that basis, the concluding words of the regulation would prevent them from being taken into account.

27. And although I am aware that, in some cases, an accident can cause consitutional changes that would eventually have occurred in any event to occur sooner than they would otherwise have done (the so-called "acceleration effect"), the effective date of any superseding decision would be 38 years after the Accident, by which time the acceleration effect might[2] well have ceased.

[2] It will now be a decision for the new tribunal.

28. However, to take that course would have been to ignore the bigger picture. The Tribunal found that the claimant had suffered deterioration that was attributable to the Accident but also decided that there had been no material change of circumstances and that the existing assessment of 7% did not fall to be increased to reflect that deterioration.

29. Putting it at its lowest, there is a tension between those conclusions. If the Tribunal had had regard to regulation 11(4), what I have called the notional assessment would have drawn its attention to to that tension. Even if the notional assessment was less than 11%, the claimant would nevertheless have been entitled to have the existing assessment of 7% increased to reflect any additional disability caused by the deterioration attributable to the Accident.

30. The only exception to that would be if the additional disability was so trivial that it was insufficient to affect the 7% assessment. If that was the case, the written statement of reasons should have explained *why* that it was the case.

31. I have therefore decided that I should remit the matter to the First-tier Tribunal for reconsideration in accordance with the directions given above.

32. I should perhaps stress that the new Tribunal will make its own findings of fact based on the evidence as a whole and is neither bound to take, nor prohibited from taking, the same view of the case as the previous tribunal.

33. I mention this because the claimant should be aware that the new tribunal may not agree with the previous tribunal that any of the deterioration in his condition is attributable to the Accident. If so, then most of what I say above will become academic.

Authorised for issue
on 18 October 2021

Richard Poynter
Judge of the Upper Tribunal