**IN THE UPPER TRIBUNAL** **Appeal No. UA-2021-001076-II**
**ADMINISTRATIVE APPEALS CHAMBER**

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

**Between:**

**DW**

Appellant

– v –

**Secretary of State for Work and Pensions**

Respondent

**Before: Deputy Upper Tribunal Judge Rowland**

Decision date: 7 July 2022
Decided on consideration of the papers

**Representation (in writing):**

Appellant: Mr Arvin Narendra, solicitor, of Duncan Lewis Solicitors
Respondent: Mr Alexander Rogers of DMA, Department for Work and Pensions

## DECISION

**The claimant's appeal is dismissed.**

## REASONS FOR DECISION

1. This appeal is brought by the claimant against a decision of the First-tier Tribunal dated 29 October 2020, whereby it dismissed his appeal against a decision of the Secretary of State dated 13 March 2018 to the effect that, from 5 March 2018, the claimant was not entitled to a disablement pension in respect of an industrial accident that he had suffered on 29 March 2010 because he was no longer suffering from any loss of faculty as a result of that accident. Neither party has asked for an oral hearing, and I am satisfied that I can properly determine the appeal without one.

2. The decisions were made against the background of section 103(1) of the Social Security Contributions and Benefits Act 1992 which, insofar as is material, provides that "… an employed earner shall be entitled to disablement pension if he suffers as

the result of the relevant accident from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 14 per cent. …".

3. The case has a slightly unusual history. It is not in dispute that the claimant suffered an injury on 29 March 2010 when lifting a door weighing about 40 kg in the course of his employment as a joiner. He was subsequently awarded a disablement pension in respect of the accident from 11 July 2010 until 4 March 2018, based on a series of five provisional assessments of disablement that may be summarised schematically as follows:

| **Assessment date**<br>**Loss of function** | **24/01/11** | **15/12/11** | **10/04/13** | **23/03/15** | **04/03/16** |
|---|---|---|---|---|---|
| Impaired lumbar spine function | 20% | 20% | 20% | 20% | 15% |
| Impaired cervical spine function | 5% | 5% | 5% | 10% | 10% |
| Impaired lower limb function | - | 5% | 5% | 5% | 10% |
| Impaired bladder/bowel & erectile function | - | - | - | - | 10% |
| **T0TAL** | **25%** | **30%** | **30%** | **35%** | **45%** |
| **Period of assessment** | 11/07/10 to 24/01/12 | 25/01/12 to 24/01/13 | 25/01/13 to 10/04/15 | 11/04/15 to 23/03/16 | 24/03/16 to 04/03/18 |

It is not in dispute that the Appellant has continued to suffer from significant disablement since then (although the First-tier Tribunal was clearly not convinced that he was quite as disabled as he claimed), but, on 15 February 2018, the same doctor as had assessed the claimant's disablement on the three previous occasions advised that the claimant "is unlikely to have ongoing loss of faculty as a result of injury in March 2010".

4. The reason for her change of mind was that the claimant had told her on that day that he had recently seen an orthopaedic surgeon regarding his back and had been told he had an old fracture in the lower lumbar spine. She noted that when he had injured his back in March 2010, he had felt pain from his neck down to the lower back but had not required acute or urgent treatment and she considered it unlikely that the lifting injury had resulted in a fracture to the lumbar spine. She also said that he had never been diagnosed with prolapsed discs in his neck or back that might explain his continuing problems. She therefore considered it unlikely that his continuing problems were due to the 2010 injury. She later added that a letter from a consultant neurologist dated 17 September 2015 suggested multilevel degenerative changes in his neck and back which "are clearly consistent with ongoing symptoms and not with index injury".

5. The Secretary of State accepted the advice and, on 13 March 2018, decided that disablement benefit was not payable from 5 March 2018. (The date was given as 5 April 2018 on the actual decision (page 123), but that seems to have been a mistake that was not repeated when a letter was sent to the claimant on 20 March 2018 (page 126).)

6. Having obtained the explanation for the decision, the claimant purported to appeal, providing further medical evidence (pp127- 137). He said that, after the 2010 accident, he had been referred to an orthopaedic surgeon, that a herniated disc had

been diagnosed in each of the lumbar region and the cervical region and he was told by the surgeon that the accident had brought on degenerative disc disease. He further argued that x-ray evidence showed no fracture in 2010 but did show a fracture in 2013 that could have been caused by a caudal epidural injection that he had after being referred to the surgeon or by one of his "many falls". Another medical adviser considered the evidence and stated (page 140) that the injury was unlikely to have caused degenerative changes but that it was "likely that previously asymptomatic degenerative changes in the spine due to constitutional condition were accelerated by this injury by few years" and that the effect of the injury would have been resolved so that continuing symptoms were from the constitutional condition. The purported appeal was, quite properly, treated as an application for revision but, in the light of the further advice, the original decision was not revised and a "mandatory reconsideration notice" was issued (pages 143 to 145).

7. The claimant then lodged an effective appeal (page 12). He initially did not wish to attend an oral hearing due to his disabilities, but the First-tier Tribunal considered that one would be desirable and also asked the claimant to provide a copy of his medical notes. He did that and eventually accepted the First-tier Tribunal's sensible suggestion that a telephone hearing be arranged. (As the claimant accepted, that meant that there could be no examination by the medically-qualified member of the Tribunal, but the Tribunal considered that such an examination would not have been helpful in this case because the important dispute was not about the degree of the claimant's disablement but about its cause.) The claimant was represented at the hearing by Mr Narendra, who had earlier provided a written submission arguing that the medical evidence did not show any that the claimant had been suffering from a spinal condition before the relevant accident.

8. The First-tier Tribunal dismissed the appeal, saying in its decision notice –

> "5. The appellant has degenerative disc disease and also a congenital fusion in the cervical spine (pp.321, 331). Medically, it was improbable that such degeneration arose from an incident only a few months before the MRI scan done on 6.12.10, and which did not involve a fracture or other bony injury. The Tribunal concluded that his impairment arose from a constitutional condition which existed prior to the incident even though giving rise to few symptoms at that time."

At the claimant's request, the First-tier Tribunal provided a clearly written, 10-page statement of reasons (pages 359 to 368). Having summarised the history of the proceedings and of the claimant's claims and having also summarised the claimant's arguments and his medical history, it stated that it "was not satisfied that the evidence showed the appellant's continuing impairment was the result of the accident at work in 2010" (paragraph 70) and it then set out its reasons in paragraphs 71 to 94, under a series of headings, before referring in paragraphs 95 to 97 to various legislative provisions.

9. In relation to the Appellant's previous arguments, it is important to note that, at paragraphs 43 and 44, the Tribunal recorded that, on 26 June 2011, the orthopaedic registrar had diagnosed "L5/S1 left paracentral disc prolapse" but had made no reference to the cervical spine (page 331) and that, on 13 July 2011, following an MRI scan, the surgeon had said that "the previous disc bulge in the L5 impingement is resolved now". At paragraph 63, it noted a report by another surgeon (page 276), in which he said that he could find no evidence of an acute fracture.

10. With permission given by Upper Tribunal Judge Levenson, the claimant appeals on the grounds that the First-tier Tribunal has failed to give adequate reasons for its "dismissal of the successful claim decisions and HCP reports made by previous HCP assessors for the Appellant's previous successful IIDB claims" and "has taken into account irrelevant issues to dismiss the appeal". I do not consider that the second ground adds anything to the first. The only further reference to an "irrelevant issue" in the grounds of appeal appears in the third paragraph on page 371 and is concerned with the First-tier Tribunal's reasons for not following the earlier medical advice and decisions. There is also a reference in the following paragraph to having taken "irrelevant facts" into account but, again, the submissions are really that the First-tier Tribunal's reasoning was inadequate, being "based on assumptions on past HCP assessments and not the medical evidence and even the current PIP award".

11. Moreover, I agree with the Mr Rogers' submission, on behalf of the Secretary of State, that the First-tier Tribunal was entitled to consider the issue of causation afresh and has provided adequate reasons for not placing weight on the earlier medical advice and assessment decisions. It was required to consider causation because section 103(1) of the 1992 Act requires that an assessment be of disablement resulting from a loss of faculty that must itself be "the result of the relevant accident" and it was not bound by the earlier decisions because, although each was final for the purpose of section 17 of the Social Security Act 1998, they were made in respect of earlier periods. The reasons given for not placing weight on the decisions were essentially that causation had not explicitly been considered in them – because it was not considered a live issue at the time – and that the medical advisors had not had the medical evidence that was before the First-tier Tribunal and caused the First-tier Tribunal to consider that the assessment decisions had been based on mistakes of material fact (see paragraphs 71 and 72 of the statement of reasons). That is perfectly proper reasoning. It was not by itself enough to justify reaching a conclusion adverse to the claimant, but the First-tier Tribunal went on, in paragraphs 74 to 91 of the statement of reasons, to give reasons for reaching a different conclusion from that implicitly reached in the earlier decisions and, in paragraphs 92 to 94, for not relying on evidence that the claimant had been awarded personal independence payment.

12. The only challenge to that further reasoning that is made in the grounds of appeal is to paragraph 76, where the First-tier Tribunal said –

> "76. Significantly, none of the specialists give as their opinion that the appellant's symptoms were a consequence of the accident. In fact, the only comments about causation refer to 'degenerative changes'."

It is again asserted that that is not an adequate reason for disagreeing with the previous assessments and decisions. I again agree that it was not an adequate reason by itself, but it was a legitimate factor to take into account among the other reasons given in paragraphs 74 to 91.

13. For the above reasons, I am not persuaded by either of the grounds of appeal and I reject them.

14. That, however, is not an end of the case, because Mr Rogers supports the claimant's appeal. He, too, argues that the First-tier Tribunal's reasoning was inadequate, but he does so on entirely different grounds from those advanced by Mr Narendra.

15. First, he criticises paragraph 77 of the statement of reasons, where the First-tier Tribunal said –

> "77. The evidence showed that there was some previous history of trauma or symptoms, giving indications that the appellant had pre-existing musculo-skeletal problems. Shoulder pain, back pain, a head injury and a fall are reported to have occurred prior to the index accident. Any of these could have contributed to, or been related to, the symptoms and conditions which occurred later."

He argues that the First-tier Tribunal has not explained the comment and, in particular, has not explained "why 'any' of these injuries are [sic] more likely to have contributed to the appellant's current symptoms than the index incident itself." I incline to the view that the observation was not a very helpful one or perhaps not very happily worded, particularly as it was made before the First-tier Tribunal had set out its reasons for finding the relevant accident to be an improbable cause of the symptoms. However, it is clear enough that the First-tier Tribunal was merely saying that the injuries *could* have been connected to the symptoms. It did not find that any of them was in fact a probable cause and so, in my judgment, it was not required to explain itself further. Moreover, the observation must be read in the context of the other reasoning. The First-tier Tribunal was satisfied that the symptoms were probably the result of degenerative disc disease that was unlikely to have been caused by the relevant accident. It was not a necessary part of the First-tier Tribunal's reasoning that the earlier injuries or symptoms should have been connected to the symptoms suffered by the claimant after the date of the accident.

16. Mr Rogers' second point focusses on the First-tier Tribunal's finding that the relevant accident was unlikely to have been a cause of degenerative disc disease and on paragraphs 88 and 89 of the statement of reasons, where the First-tier Tribunal said –

> "88. Medically, it was improbable that such degeneration arose from an incident only a few months before the MRI scan done on 6.12.10, and which had involved only soft tissue injury, with no fracture or other bony injury.
>
> 89. From the evidence, the Tribunal concluded that the appellant's impairment arose from a constitutional condition which existed prior to the incident even though giving rise to few symptoms at that time."

He submits that, in paragraph 88, the First-tier Tribunal was making two points: first, that degeneration could not have occurred so quickly between the 2010 accident and the MRI scan and, secondly, that the degeneration could not have been caused by a soft-tissue injury and he then submits that the First-tier Tribunal has not given reasons as to why the degeneration could not have happened within that time frame and why a soft-tissue injury could not have caused it. Similarly, in relation to paragraph 89, he submits that the First-tier Tribunal has not identified either the "constitutional condition" or the "few symptoms". I do not accept those submissions.

17. In courts, medical expertise is provided by witnesses who are entitled to give opinion evidence. If there is a dispute as to the evidence, the witnesses may be required to give reasons for their opinions and the court is then required to consider that reasoning. As was said in *Flannery v Halifax Estate Agencies Ltd* [1999] EWCA Civ 811; [2000] 1 WLR 377 at 382B –

> "… where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must

> enter into the issues canvassed before him and explain why he prefers one case over the other."

Otherwise, the court may simply rely on the opinion offered. Where a tribunal includes a registered medical practitioner as a member and so has its own expertise, it is required to give reasons for its conclusion but is generally entitled to rely on its own expertise. I do not accept that the First-tier Tribunal is obliged to give reasons for its reasons in the absence of reasoned evidence that contradicts its opinion. It may be that, on an appeal to the Upper Tribunal, a party is entitled to adduce evidence for the purpose of showing that there is a contradictory body of medical opinion and that, in the circumstances of a particular case, the First-tier Tribunal's reliance on its unexplained opinion is inadequate, but that has not been done here as regards Mr Rogers' paragraph 88 point. On the contrary, he readily accepts that "[w]hat the Tribunal states may be correct".

18. As regards paragraph 89, I do not accept that the First-tier Tribunal failed to identify the "constitutional condition". In paragraphs 84 and 85, it mentioned references in the medical evidence to a congenital fusion in the cervical spine and to possible Scheuermann's disease that might have been relevant but, more importantly, the degenerative disc disease itself was, in its view, a constitutional condition although it accepted that other injuries and other constitutional conditions might have contributed to it. In my judgment, it is plain that in both paragraph 89 of the statement of reasons and in paragraph 5 of the decision notice, the constitutional condition to which the First-tier Tribunal was referring was the degenerative disc disease. It was satisfied that that condition was the immediate cause of the claimant's 2018 symptoms and that it was constitutional rather than attributable to the relevant accident. At paragraph 90, it expressly rejected the Secretary of State's view that the relevant accident had accelerated the degenerative changes by a few years.

19. As to the reference to "few symptoms", the First-tier Tribunal was clearly not convinced that the degenerative disc disease had been entirely asymptomatic at the time of relevant accident – it had, in particular, noted that a previous episode of back pain might have been related to it. However, it did not matter for the purpose of its decision whether the condition was entirely asymptomatic or not at the time of the relevant accident and so it was not required to be specific.

20. Mr Rogers helpfully referred to the well-known passage in *South Bucks District Council v. Porter* [2004] UKHL 33; [2004] WLR 1953 at [36], where Lord Brown of Eaton-under-Heywood, with whom the other members of the House agreed, said –

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful

> opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

The last sentence of that passage is particularly relevant in the present case. Where the First-tier Tribunal's reasons are correctly said to lack precision, it is on matters where it was entitled to be imprecise because nothing of fundamental significance turned on them.

22. Not having been persuaded by the parties' arguments, I have nonetheless considered whether the First-tier Tribunal erred in not expressly considering the question whether the relevant accident might have made the claimant's symptoms worse so that the disablement from which he was suffering in 2018 could be said to have been at least partly caused by that accident (see regulation 11(3) of the Social Security (General Benefit) Regulations 1982 (SI 1982/1408), to which the First-tier Tribunal did not refer). However, upon reflection I am satisfied that the question did not arise on the First-tier Tribunal's findings of fact because it appears clear that, although it may have accepted that the relevant accident might have contributed to the disc prolapse at L5/S1 and so have been responsible for some of the claimant's disablement for a year or so after the accident, it did not accept that it played a significant role after that prolapse had resolved.

23. The only substantial criticism of the First-tier Tribunal's statement of reasons that can be made is of its summary of the legal framework against which its decision was being made. Paragraph 95 of the statement of reasons may have been taken from another case, because the Secretary of State's response to the appeal before the First-tier Tribunal in this case did not have a page F and did not cite section 94 of the 1992 Act as the "key provision". It cited section 103(1), which was far more important. Paragraphs 96 and 97 of the statement of reasons refer to the powers of the Secretary of State to revise and supersede previous decisions, but they appear formulaic and do not explain the relevance of those powers to this case. That is not surprising, because they were not relevant. I have already said that the previous awards of disablement pension related to earlier periods and were not binding on the First-tier Tribunal. The decision of the Secretary of State that was under appeal to the First-tier Tribunal was clearly made on the basis that the claim in the case was still open and had not finally been determined because the previous awards had been for fixed periods, based on provisional assessments of disablement that required further consideration of the claimant's entitlement at the end of those periods. Accordingly, the Secretary of State's decision was not made in exercise of any power to revise or supersede the earlier awards and the First-tier Tribunal had no reason to consider those powers. However, despite these criticisms, nothing in paragraphs 95 to 97 affects the First-tier Tribunal's decision and, accordingly, the inclusion of those paragraphs is immaterial and does not make the decision erroneous in point of law.

24. Finally, I observe that, when making the provisional assessments, the Secretary of State identified the injury caused by the relevant accident in vague terms such as "injury to lower back and neck" (page 68) and, as far as I can see, no attempt was made to obtain from the claimant's general practitioner or medical notes a specific diagnosis. That is perhaps understandable when the first provisional assessment was

made for a period of two years, but, at least with hindsight, it appears unfortunate that more information was not obtained before further assessments were made, given that the claimant had by then reported that he had been referred to a hospital and had had an MRI scan and he was claiming deterioration to the extent that he was suffering not just from impaired spinal function but also from impaired lower limb function.

25. In any event, for the reasons that I have given, I am satisfied that the First-tier Tribunal's decision was not wrong in law and, in particular, that the judge recorded an adequate – indeed, impressive – statement of reasons for its decision.

**Mark Rowland**
**Deputy Judge of the Upper Tribunal**

Signed on the original on 7 July 2022