IN THE UPPER TRIBUNAL **Appeal No. UA-2019-002304-II**
ADMINISTRATIVE APPEALS CHAMBER (formerly CI/2136/2019)

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

Between:

N.P.

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 20 October 2022
Decided on consideration of the papers

Representation:
Appellant: In person
Respondent: Mr Peter Thompson, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made on 8 February 2019 under number SC188/17/02715 does not involve any material error of law (section 11 of the Tribunals, Courts and Enforcement Act 2007).

Case no: UA-2019-002304-II

REASONS FOR DECISION

Introduction

1. This appeal is about a claim for occupational asthma under the prescribed diseases provisions in the industrial injuries scheme.

2. There is ample evidence that the Appellant worked in exceptionally dusty and unhealthy conditions underground in the coal mining industry in the 1960s and 1970s. There is also no doubt but that the Appellant is today seriously disabled by his respiratory ill-health, including his asthma. However, that does not necessarily mean his asthma was caused by his exposure to coal dust. He was also exposed in later workplaces to other sensitising agents that can cause occupational asthma. But, in summary, the First-tier Tribunal's decision that the Appellant had a form of constitutional asthma, and so was not suffering from the prescribed disease of occupational asthma, does not involve any error of law. I start this decision by dealing with two preliminary matters.

Two preliminary matters

3. First, I appreciate that the Appellant will be both surprised and disappointed at the outcome of this appeal, given the Secretary of State's representative had at least initially supported his appeal to the Upper Tribunal. However, the Secretary of State's view is obviously just that, a view, and is not binding on the Upper Tribunal. As the Upper Tribunal office's standard covering letter sent with a copy of the Secretary of State's first written submission explains, "Please note that the Upper Tribunal judge may not accept what the respondent has said in their observations. In particular, if the respondent's representations supported your appeal, the judge may not agree that the decision appealed against was wrong in law." For the reasons that follow, the initial support for the appeal from the Secretary of State's representative is not persuasive.

4. Second, I am satisfied that it is fair and just to decide this appeal 'on the papers' and so without holding an oral hearing. The Appellant seeks an oral hearing as he wishes "to explain myself that at my 1st tier tribunal the examining doctor did not examine my respiratory output that the appeal was based on". As such, the Appellant appears to wish to pursue a challenge to the way the First-tier Tribunal hearing was conducted. However, his complaint in that regard does not relate to either of the grounds on which permission to appeal to the Upper Tribunal has been given. The Appellant has also had ample opportunity at various stages to make detailed written representations on all aspects of the case, whether or not they relate directly to the grounds of appeal. Meanwhile, the Secretary of State's representative does not seek an oral hearing. In all those circumstances I am satisfied that an Upper Tribunal oral hearing is not needed for the fair and just disposal of this appeal.

The case in summary

5. The Department for Work and Pensions (DWP) decision-maker decided that the Appellant was not entitled to industrial disablement benefit on the basis of occupational asthma, prescribed disease (PD) D7 (see further Schedule 1 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI 1985/967; 'the 1985 Regulations'). This decision reflected the DWP

examining medical advisor's opinion that "the overall history, examination and supporting information is not typical for a diagnosis of PD D7 on a balance of probabilities." The First-tier Tribunal dismissed the Appellant's appeal. I also dismiss the Appellant's further appeal to the Upper Tribunal, which at this juncture, as noted above, initially had the support of the Secretary of State's representative. However, for the reasons that follow the decision of the First-tier Tribunal does not involve any material legal error.

Prescribed Disease D7 (Occupational Asthma)

6. Schedule 1 to the 1985 Regulations prescribes occupational asthma as one of the 'Miscellaneous conditions' (or 'D' diseases) in the following terms:

Prescribed disease or injury	Occupation
D7. Asthma which is due to exposure to any of the following agents:— (*a*) isocyanates; (*b*) platinum salts; (*c*) fumes or dusts arising from the manufacture, transport or use of hardening agents (including epoxy resin curing agents) based on phthalic anhydride, tetrachlorophthalic anhydride, trimellitic anhydride or triethylenetetramine; (*d*) fumes arising from the use of rosin as a soldering flux; (*e*) proteolytic enzymes; (*f*) animals including insects and other arthropods used for the purposes of research or education or in laboratories (*g*) dusts arising from the sowing, cultivation, harvesting, drying, handling, milling, transport or storage of barley, oats, rye, wheat or maize, or the handling, milling, transport or storage of meal or flour made therefrom (*h*) antibiotics; (*i*) cimetidine; (*j*) wood dust; (*k*) ispaghula; (*l*) castor bean dust; (*m*) ipecacuanha;	Any occupation involving: Exposure to any of the agents set out in column 1 of this paragraph.

(*n*) azodicarbonamide (*o*) animals including insects and other arthropods or their larval forms, used for the purposes of pest control or fruit cultivation, or the larval forms of animals used for the purposes of research, education or in laboratories; (*p*) glutaraldehyde; (*q*) persulphate salts or henna; (*r*) crustaceans or fish or products arising from these in the food processing industry; (*s*) reactive dyes; (*t*) soya bean; (*u*) tea dust; (*v*) green coffee bean dust; (*w*) fumes from stainless steel welding; *(wa)* products made with natural rubber latex; (*x*) any other sensitising agent (occupational asthma).	

The factual background to this case

7. The background to the appeal to the First-tier Tribunal was fully explained and explored by Upper Tribunal Judge Mitchell in his detailed grant of permission to appeal, itself made following an oral hearing at the Cardiff Civil Justice Centre. For convenience, I include much of Judge Mitchell's grant of permission below (paragraphs 14-19 inclusive; I have anonymised the original text as appropriate so as to preserve the Appellant's anonymity and privacy):

> *The Secretary of State's decision and Mr P's appeal to the First-tier Tribunal*
>
> 14. Mr P appealed to the First-tier Tribunal against the Secretary of State's decision that he was not entitled to Disablement Benefit in respect of disease D7, occupational asthma. The Secretary of State found that Mr P did not have occupational asthma.
>
> 15. On 18 February 2018, Mr P wrote to the First-tier Tribunal (p.127). He argued that, of the D7 specified sensitising agents, of relevance in his case were (d), (e), (w), (wa) and (x). Mr P went on to argue that his normal work at a coalmine from 1964 to 1976 involved exposure to specified agent (x). He also identified other sensitising agents in relation to his subsequent work: GKN (1976-77): agents (d) and (w); Motil Plastics

(1977-79): agent (x); Norgine (1979-99): agents (e), (w), (wa), (x); Sogefi Filtration (2001-7): agent (x); Sunrise Senior Living (2007-12): agent (wa).

16. As part of the First-tier Tribunal's hearing of Mr P's appeal, he was examined by the tribunal's medical member. The medical members 'findings on examination' were:

> "Some shortness of breath talking. Barrel-shaped chest. Limited expansion. Trachea central percussion note dull right base. Fine to medium inspiratory crackles right base. No wheeze." (p.281)

17. The First-tier Tribunal dismissed Mr P's appeal and decided that he did not suffer from prescribed disease D7. The tribunal's statement of reasons (p.284) includes the following findings:

> (a) Mr P had hay fever as a teenager. The tribunal rejected Mr P's claim that, when signing a DWP medical assessor's report which mentioned hay fever, the assessor did not first read the report to him;
>
> (b) Mr P was exposed to certain sensitising agents during his working life namely fumes and dust from metal welding (GKN), latex gloves (Norgine and Sunrise) and isocyanates (Norgine);
>
> (c) Mr P was exposed to coal dust when working as a coal miner, underground and on the surface, but "this [*coal dust*] is not a sensitising agent";
>
> (d) "Because of his exposure to coal dust the appellant experienced wheeziness and chest tightness…When the appellant was away from this environment for an extended period…his symptoms improved slightly but returned as soon as he went back to work";
>
> (e) while working at GKN from 1976-77, Mr P was exposed to sensitising agents "namely fumes and dust from an arc furnace". During this period, Mr P's daily wheezing and breathlessness became gradually worse;
>
> (f) while working at Norgine between 1979 and 1999, Mr P was exposed to sensitising agents namely latex gloves and epoxy resin. Mr P "experienced chest pains when using the epoxy resin and this substance did cause him breathing problems sufficient to make him go to his office to sit down";
>
> (g) while working in care homes between 2007 and 2012, Mr P was again exposed to latex gloves;
>
> (h) Mr P had a long-standing history of asthma and was prone to allergic responses (shown by hay fever and eczema);
>
> (i) "It is likely that his work and exposure to the substances referred to above exacerbated his pre-existing asthma, but they provided a general allergic response rather than an immunobiological response to a specific substance. This is consistent with the appellant's description of gradually worsening symptoms rather than significant acute worsening of symptoms immediately upon exposure to one of the prescribed sensitising agents. It is also consistent with the

observation of Dr Davies (page 222) that, whilst he had been able to identify a worsening of the appellant's asthma in certain environments, this was not the case in relation to exposure to sensitising agents".

Medical evidence

18. The medical evidence supplied to the First-tier Tribunal by Mr P included:

(a) 22 April 1998, Consultant Physician's letter: "his asthma is generally under control" (p.40);

(b) 2 August 2002, solicitor's letter: "the Respiratory Specialist has assessed you as being 20% disabled, all of which is attributable to asthma" (p.41);

(c) 31 August 2005, Consultant Physician's letter: "his problems relate to the development of significant asthma with wheeze. He has intermittent trigger factors [*unspecified*]" (p.46);

(d) 27 March 2014, Consultant Physician's letter: "the lungs were clear and I was content that his asthma has settled" (p.44);

(e) 13 January 2016, Consultant Physician's letter: "I write in support of this patient's application for disability benefits. He has substantial asthma. His lung function tests are only 40% of normal…more recently…respiratory infections have worsened his asthma such that he is now breathless on walking on the flat…He has nocturnal wakening and he has required a course of injectable steroids to bring him under control" (p.48);

(f) 4 March 2016, Consultant Physician's letter:

> "I first saw [Mr P]…in 1982. At that time he told me that he had long standing hay fever but with little in the way of pollen asthma and had only a small amount of medication to control his hay fever. However, in the mid 70's following the death of his father, he had an acute attack of asthma. This subsided and he was then well again. Many months before I saw him in 1982 he had bought a budgie and his asthma had started to deteriorate markedly. He had nocturnal complaints and he had exercise induced bronchospasm. Skin testing had been positive to mites and he was only mildly allergic to grass. Interestingly at that time he was working for Norgine as a maintenance fitter and was exposed to various exotic perfumes. We did not explore it further as a case of occupational asthma as the pattern did not suggest the disease. Prior to working for Norgine he had worked in the mines for 12 years… At that time he had active asthma, his peak flow was variable around 600 litres and he was commenced on regular preventative therapy with great benefit. Initially he was able to come off medication during the summer and most of his attacks of asthma were related to infective episodes… eventually I had to move him to high dose

> steroid inhalers using Becloforte and I also had to treat his nose because he started to get more and more rhinitis. He had a number of documented episodes in the 80's of severe asthma… Compliance was pretty good with his medication but slowly, towards the end of the 80's and early 90's, he started to lose control of his asthma… by the mid 90's he was having significant problems with exercise induced asthma…
>
> I…reviewed him in 2005. He was by now working a 12 hour shift at Fram Filters in Treforest in senior management with a considerable amount of hands-on work. He was developing increased asthma with wheeze…By now his FEV1 had fallen to only 1.96, 59% of normal and his small airflow obstruction was even worse [treatment] seemed to work very well and he picked up nicely. However, he then had an apparent myocardial infarction and again Aspirin was recommenced and his asthma deteriorated. I swapped him to Plavix and there was an improvement in his asthma…In 2014 he had had increasing cardiac problems…He continued to have acute attacks of asthma…he obviously remains a chronic, severe asthmatic.
>
> Overall I felt that his asthma these days is mostly related to salicylate and Aspirin sensitivity…" (p. 50);

(g) 21 September 2016, Consultant Physician's letter: "this patient has a previous diagnosis of chronic bronchitis related to his coal dust exposure whilst a miner and he now has significant emphysema present on lung function…I therefore feel that he has developed the added complication of emphysema related to his coal mining exposure" (p.52);

(h) 11 October 2017, entry in GP records: "feels that working in the pit caused his asthma but the coal board are saying it is probable he already had asthma due to his history of atopy. Tried to explain that this is a reasonable explanation but coal dust exposure likely trigger of asthma symptoms, he would have had asthma anyway;

(i) 4 June 2018, Consultant Physician's report (the First-tier Tribunal issued directions for the Physician to answer certain questions):

> "I have not been able to satisfy myself after looking after Mr P for many years that he has occupational asthma. There is no doubt that he has worsening of his asthma in certain environments particularly in the coal mines but I was not able to delineate any asthma worsened by exposure to latex or pharmaceutical agents.
>
> …As I do not regard him as having occupational asthma due to prescribed agents, there is no percentage of overall functional impairment due to occupational asthma" (p.222).

> 19. I should note that the same Consultant Physician wrote each letter, a Dr Davies whose letterhead described him as "Consultant Physician in General and Respiratory Medicine and Allergy".

The Appellant's grounds of appeal to the Upper Tribunal

8. As Judge Mitchell noted (at paragraph 20 of his grant of permission to appeal), the Appellant's "written arguments, as amplified at the permission hearing at Cardiff Civil Justice Centre, are extensive." Furthermore, Judge Mitchell ruled, "some of his grounds relate to the facts and merits of his case, rather than describing errors of law made by the First-tier Tribunal … Permission to appeal is refused in respect of those grounds which simply re-argue the facts and merits of the case put before the First-tier Tribunal." Having carefully identified those submissions which could properly be characterised as potential error of law grounds, Judge Mitchell gave limited permission to appeal but on two grounds only.

9. The first ground of appeal on which permission was granted was that the First-tier Tribunal had "failed to deal with an issue that arose on his appeal namely whether a worker with previously diagnosed asthma could become sensitised to another occupational agent, leading to occupational asthma" (paragraph 21(3) of the grant of permission).

10. The second ground of appeal was framed as follows by Judge Mitchell (at paragraph 26 of the grant of permission):

> At paragraph 7 of the First-tier Tribunal's statement of reasons, it found that coal dust "is not a sensitising agent". No reasons were given for that finding and the tribunal did not explain why the "any other sensitising agent" category was inapplicable. In this respect, the tribunal arguably gave inadequate reasons for its decision.

11. It follows that the Appellant's appeal to the Upper Tribunal is confined to considering those two grounds of appeal alone. The limited grant of permission to appeal means that the Appellant's other challenges to the First-tier Tribunal's decision or the conduct of its hearing necessarily fall away.

The proceedings before the Upper Tribunal

12. The Appellant, who acts in person, has understandably highlighted evidence on the appeal file that links his respiratory conditions to his various former employments, often in rather general terms. His submissions do not focus on further supporting the two grounds of appeal in respect of which limited permission to appeal was granted.

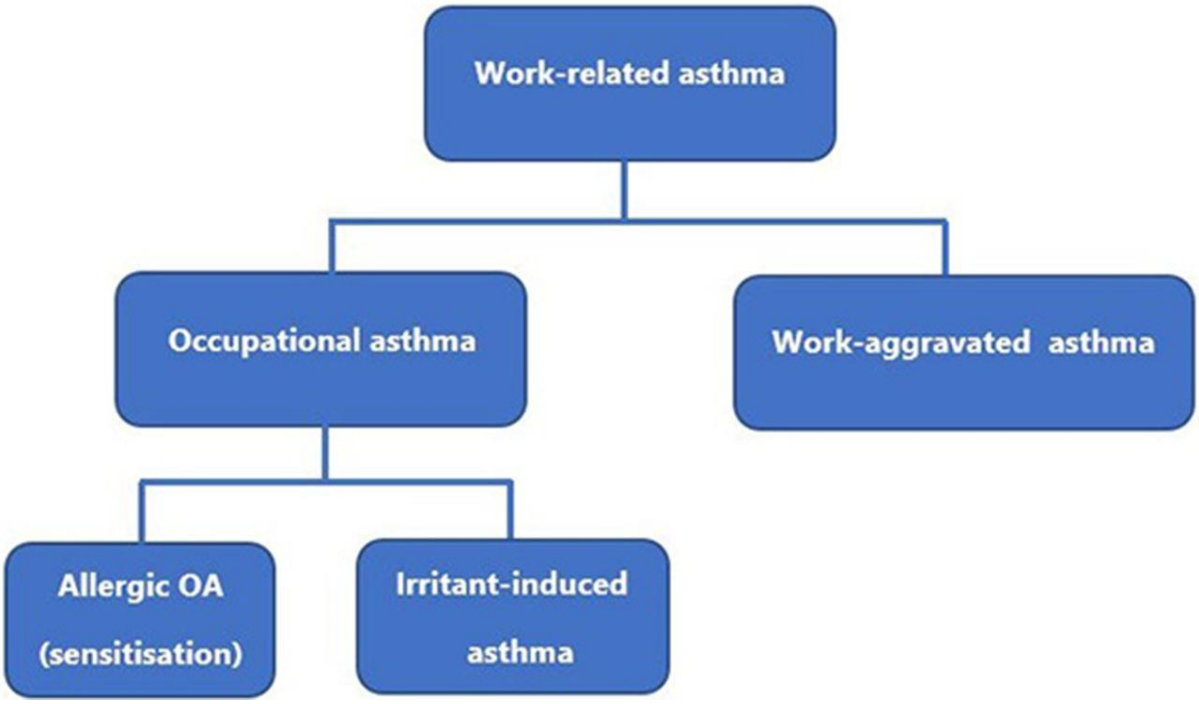
13. Mr Peter Thompson, the Secretary of State's representative in these proceedings, has filed two written submissions responding to the Appellant's appeal. The first submission supported the appeal to the Upper Tribunal on both grounds and proposed that the First-tier Tribunal's decision be set aside and the case remitted for re-hearing before a new First-tier Tribunal. I then issued further observations and directions on the appeal, prompting Mr Thompson's second written response to the appeal. This second response involved a partial *volte face*; the Secretary of State's position now is that the First-tier Tribunal probably came to the correct decision on the facts, and any error of law on its

part may well have been not material. As such, Mr Thompson indicates he is "content for the judge to decide whether to remit the case or dismiss the appeal."

14. For all the reasons that follow, I dismiss the Appellant's appeal to the Upper Tribunal. I start by considering the current state of medical knowledge about work-related asthma.

A typology of work-related asthma

15. This case requires some understanding of the different types of asthma affected by the working environment. *Work-related asthma* in general means asthma where there is some association between increased symptoms and workplace exposure. There are generally accepted to be two types of *work-related asthma*. The first is *work-aggravated asthma*, meaning (as the label implies) asthma that is aggravated, but not caused, by exposure to an inhaled agent at work. This type of asthma is not compensated under the industrial injuries scheme. The second is *occupational asthma*, being asthma that is caused by exposure to an inhaled agent at work. *Occupational asthma* may be one of two types. The first is *occupational asthma with sensitisation*, typically where a worker has developed an allergy or sensitisation to an inhaled agent at work. Depending on the circumstances, this may be covered by the prescribed disease provisions for PD D7 in the industrial injuries scheme. The second is *acute irritant induced asthma*, where asthma develops after a single very high dose exposure (or perhaps multiple symptomatic high doses) to inhaled irritants. This type of asthma may be covered by the accident provisions in the industrial injuries scheme (rather than under the prescribed disease rules). This overall typology can be illustrated diagrammatically:



16. For the source of this medical organogram and a further analysis of this typology, see D. Fishwick and N. Warren, 'Asthma at work, Part 1: nature, extent and causes of occupational and work-related asthma' (2018) 15 *Occupational Health at Work* 15(2): 25-30 and C.M. Barber et al., 'British Thoracic Society Clinical Statement on occupational asthma' (2022) *Thorax*: 1-10, available at https://thorax.bmj.com/content/77/5/433.

17. The Appellant's remaining two grounds of appeal need to be considered against that scientific background. However, I must first consider the points made by the Appellant in his reply to Mr Thompson's second written response on behalf of the Secretary of State.

The Appellant's reply

18. The Appellant makes three main points by way of reply to Mr Thompson.

19. The first is his argument that the evidence demonstrates beyond reasonable doubt that his disability was the result of industrial disease. He refers to statements at e.g. pp.41, 42 and 46 of the appeal file. However, these documents all refer to his successful claim for compensation against the National Coal Board for chronic bronchitis. They do not show that he has occupational asthma as a result of exposure to coal dust (or indeed any other prescribed agent).

20. The Appellant's second point is that one DWP decision-maker had accepted that "prescribed disease number D7 is prescribed in relation to the claimant on the balance of probability" (p.78). This was because "clt [claimant] worked at Sunrise Private Care Home as maintenance co-ordinator from 2007 to 2012 and used latex gloves for most of the day on a daily basis" (p.79). However, this finding at p.78 was not a conclusion that the Appellant had PD D7 – it was merely a finding that he had been employed in a relevant occupation at a material time, and so the disease was prescribed (or listed) in relation to him and so a claim was *potentially* open to him. However, another DWP decision-maker then decided in the negative the separate diagnosis question of whether the Appellant had actually been suffering from prescribed disease D7 (pp.78-79).

21. The Appellant's third point is his assertion that the decision to refuse his PD D7 claim was based on a report by a DWP medical adviser that had been "changed without my knowledge and consent". The Appellant argues that he had told the medical adviser there was no family history of asthma but this was changed by the examining doctor to say that there was. There are at least two difficulties with this assertion. The First-tier Tribunal specifically rejected the Appellant's "claim that, when signing a DWP medical assessor's report which mentioned hay fever, the assessor did not first read the report to him". In addition, Judge Mitchell expressly refused permission to appeal on this issue (at paragraph 28(a) of his grant of permission to appeal).

22. I now turn to consider in more detail the two grounds on which Judge Mitchell granted permission to appeal.

Ground 1

23. The first ground of appeal was that the First-tier Tribunal had failed to deal with an issue that arose on his appeal, namely "whether a worker with previously diagnosed asthma could become sensitised to another occupational agent, leading to occupational asthma" (paragraph 21(3) of Judge Mitchell's grant of permission).

24. The key passage in the reasoning of the First-tier Tribunal relating to the first ground of appeal is at paragraphs 8 and 9 of its statement of reasons (the emphasis in paragraph 9 is in the original):

> 8. On the totality of the evidence, and using its expertise, the tribunal was not satisfied that the Appellant has Occupational Asthma, PD D7. Although the appellant was undoubtedly exposed to relevant sensitising agents in the course of his employments, and he has severe asthma, the clinical history that he has consistently provided does not support a diagnosis of occupational asthma. This is consistent with the opinion of Dr Brian Davies, the appellant's treating clinician over many years. Dr Davies repeated this opinion in answer to specific questions put to him by the tribunal in a Directions Notice (page 222). It is also consistent with Dr Whittaker's diagnosis of eosinophilic asthma (rather than occupational asthma) (page 174-175).
>
> 9. The appellant has a long-standing history of asthma and is prone to allergic responses (demonstrated by his hay fever and eczema). It is likely that his work and exposure to the substances referred to above exacerbated his pre-existing asthma, but they provided a general allergic response rather than an immunobiological response to a specific substance. This is consistent with the appellant's description of gradually worsening symptoms rather than significant acute worsening of symptoms <u>immediately</u> upon exposure to one of the prescribed sensitising agents. It is also consistent with the observation of Dr Davies (page 222) that, whilst he had been able to identify a worsening of the appellant's asthma in certain environments, this was not the case in relation to exposure to sensitising agents.

25. As to this ground of appeal, Judge Mitchell made further observations in the grant of permission in the following terms:

> 22. The First-tier Tribunal found that Mr P suffered from asthma that pre-dated his exposure to prescribed sensitising agents, but which was exacerbated by exposure to such agents. However, this did not amount to occupational asthma because the exacerbation was due to a 'general allergic response'. It seems to me that what the tribunal said was, yes, we accept that Mr P had asthma before his exposure to sensitising agents and that exposure aggravated his symptoms but this was because he was prone to allergic reactions, rather than an immunobiological response, so that means this is not a case of occupational asthma.
>
> 23. I am not a doctor so do not know the difference between an allergic response and an immunobiological response, but I assume a doctor does and that the difference is capable of being established by evidence. However, I am not sure why it should matter for the purposes of claims to

industrial injuries benefit in respect of prescribed disease D7. The rules for assessing disablement in regulation 11 of the Social Security (General Benefit) Regulations 1982 take account of pre-existing diseases so that a claimant is not compensated for symptoms to which he would have been subject in any event. On the tribunal's reasoning, however, benefit would be reserved to those who have immunobiologically exacerbated asthma (or a 'new' type of asthma on top of their old asthma if that is how it works). Other asthma-sufferers, which would include Mr P on the tribunal's findings of fact, could not claim even if their symptoms were far more severe. I can understand why this has caused Mr P some frustration. The tribunal says that his health was damaged (in the form of worsened asthma) at least partly by exposure to sensitising agents at work but he has the wrong type of worsened asthma (not being immunobiologically worsened asthma) and so he cannot claim to have occupational asthma.

24. I am not certain that the industrial diseases legislation was intended to operate in this way being a scheme that was created, as I understand it, to ensure that certain workers whose health is damaged by doing inherently risky work are compensated by the state which, of course, benefits from the economic activities involved. Arguably, the First-tier Tribunal erred in law by failing to apply a purposive interpretation of the legislation which treated exacerbated asthma, caused by exposure to a prescribed sensitising agent, in the same way as 'new' asthma (or immunobiologically-based exacerbated asthma). This is the first ground of appeal.

26. Mr Thompson, for the Secretary of State, initially supported this ground of appeal but on a somewhat narrower basis, based on the adequacy of the First-tier Tribunal's reasoning. He argued that the First-tier Tribunal was entitled on the evidence, and on the balance of probabilities, to reach the view that the correct diagnosis for the Appellant was probably one of eosinophilic asthma (a severe form of constitutional asthma). But Mr Thompson then observed somewhat tentatively as follows:

> 12. However, it is clear that the claimant did suffer episodes of worsening asthma when working with accepted sensitising agents and I am not sure that the tribunal went far enough to explain why it felt that none of these agents had directly caused at least a degree of asthma which might have brought the claimant within the terms of the prescription. At paragraph 7 of the statement of reasons the tribunal begin by saying:
>
> > *"In the absence of evidence identifying specific antibodies in the appellant's system from which an offending sensitising agent could be positively identified (in reality only available in a specialist clinical setting), the tribunal questioned the appellant about the onset and nature of the symptoms."*
>
> 13. However, the tribunal accepted that exposure to sensitising agents caused breathing and other difficulties. I therefore submit that the tribunal erred by failing to give adequate consideration to this aspect of the evidence and of the claimant's condition and it did not explain adequately what it thought the link was between these agents and the worsening of

his condition. If the tribunal had established that at least some of his condition was caused by the agents, it could have applied reg 11 of the Social Security (General Benefit) Regulations 1982.

27. Mr Thompson subsequently sought medical advice and provided a second written submission. The medical advice he received – consistent with the typology outlined above at paragraph 15 – was that occupational asthma and work-aggravated asthma are mutually exclusive conditions with separate causation. On the basis of that further medical advice, Mr Thompson was inclined to accept that the First-tier Tribunal was entitled to find that the Appellant had a case of work-aggravated asthma rather than a form of occupational asthma caused by exposure to a sensitising agent in the workplace.

28. I deal first with Mr Thompson's initial support for this ground of appeal. He was concerned that the First-tier Tribunal may not have gone "far enough to explain why it felt that none of these agents had directly caused at least a degree of asthma which might have brought the claimant within the terms of the prescription". However, the Tribunal's reasoning must be understood against the relevant frame of reference, being the typology of work-related asthma described above. The Tribunal's clear conclusion was that this was a case of *work-aggravated asthma* rather than either form of *occupational asthma*. The Appellant had not advanced his claim on the basis of *acute irritant induced asthma*. The Tribunal also found it was not a case of *occupational asthma with sensitisation*. On this point, and in the inevitable absence of detailed clinical data (hence the Tribunal's comment at paragraph 7), the Tribunal had to rely on evidence about onset and symptomology. In that regard, the Tribunal made its finding that the Appellant's reaction to the several sensitising agents identified was a general allergic reaction rather than one induced by exposure to specific agents.

29. The First-tier Tribunal gave two reasons for this finding. First, it found this to be "consistent with the appellant's description of gradually worsening symptoms rather than significant acute worsening of symptoms <u>immediately</u> upon exposure to one of the prescribed sensitising agents". Second, it was also consistent with the evidence of the Appellant's own specialist ("There is no doubt that he has worsening of his asthma in certain environments particularly in the coal mines but I was not able to delineate any asthma worsened by exposure to latex or pharmaceutical agents": p.222). The Tribunal's reasoning may perhaps have been a little compressed but it was certainly adequate, not least given the evidence of the Appellant's own consultant. The bottom line is that the Tribunal provided an adequately reasoned conclusion for its finding that the Appellant experienced work-<u>aggravated</u> asthma rather than work-<u>caused</u> occupational asthma, applying the guidance on adequacy of reasoning laid down by the Court of Appeal in *Evans v Secretary of State for Social Services* (reported as *R(I) 5/94*). The conclusion that the Appellant was not suffering from prescribed disease D7 was a factual finding by a First-tier Tribunal comprising a judge and a medical member which I must respect.

30. Turning to Judge Mitchell's broader observations, the case of asthma is arguably a good example of the problems faced by the prescribed diseases part

of the industrial injuries scheme in dealing with health conditions which are common in the general population as well as being a higher risk in certain occupations (see further the Industrial Injuries Advisory Council report, *Diseases with multiple known causes, occupational injuries, and medical assessment* (Cm 9632, June 2018)). The key question in such cases is often one of causation. The difference between a general allergic response and an immunobiological response matters because it represents the distinction between existing asthma that is aggravated by workplace exposure and asthma that is actually caused by a sensitising agent. In the present case, as noted above, the First-tier Tribunal has explained adequately why it concluded this was a case of *work-aggravated asthma* and not *occupational asthma*. If the Appellant's asthma has not been *caused* in the first place by the workplace exposure, then the prescribed diseases provisions simply have no purchase (see further reported decision *R(I) 8/02*, discussed below).

31. In summary, the first ground of appeal does not succeed.

Ground 2

32. The Appellant's second ground of appeal is that the First-tier Tribunal erred in law by failing to explain why the miscellaneous category (x) of "any other sensitising agent", as listed at the end of the terms of prescription for PD D7, was inapplicable to coal dust. This ground of appeal relates to the Tribunal's brisk finding (at paragraph 7(2) of its reasons) that "The appellant worked underground and on the surface as a miner from 1964 to 1976. He was exposed to coal dust, but this is not a sensitising agent. Because of his exposure to coal dust the appellant experienced wheeziness and chest tightness, and regularly coughed up phlegm…". This ground of appeal requires some consideration of both the legislative and the case law context.

33. So far as the legislation is concerned, the position was helpfully explained by Mr Commissioner Bano in *CI/2543/2002* in the following terms:

> 6. Part I of Schedule 1 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 originally prescribed disease D7 in terms of exposure to any of the agents specified in column 1, and the prescribed occupation as "any occupation involving exposure to any of the agents set out in column 1…". Following the 1990 report of the Industrial Injuries Advisory Council on occupational asthma (Cm 1244, October 1990), the Regulations were amended by the Social Security (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 1991 to add a number of additional specific sensitising agents, and a new category:
>
> "(x) any other sensitising agent (occupational asthma)"

34. Thus, the entry for prescribed disease D7 in Part I of the Schedule to the 1985 Regulations refers, in column 1, to "asthma which is due to exposure to any of the following agents" (see paragraph 6 above). A number of agents are then specified, including the following which were identified by the Appellant as relevant to his claim at various dates:

(d) "fumes arising from the use of rosin as a soldering flux";

(e) “proteolytic enzymes”;

(w) “fumes from stainless steel welding”;

(wa) “products made with natural rubber latex”;

(x) “any other sensitising agent”.

35. However, neither statute nor Schedule 1 to the 1985 Regulations defines what is meant by “any other sensitising agent”, so we have to turn to the case law for guidance. The early unreported case law authorities, if I may say so, were not especially helpful. Thus, one Social Security Commissioner expressed the view that the phrase “any other sensitising agent” in category (x) had to be read *ejusdem generis* (of the same kind or nature) with the agents listed in paragraphs (a) to (w) (*CI/73/1994*), while another Commissioner considered there was no such restriction, with the expression catching any agent that was in fact sensitising (*CI/4987/1995*).

36. More helpful is the pair of unreported decisions in *CI/2543/2002* and *CI/564/2005*, which identify a threefold approach. Applying this typology, agents must by definition fall into one of three mutually exclusive categories, namely: (i) agents which are known to be sensitising agents, (ii) agents which are known not to be sensitising agents, and (iii) cases where it is not known whether the agent in question is a sensitising agent. So, for the purposes of PD D7 claims, agents are either a Yes (group (i)), a No (group (ii)) or a Don’t Know (group (iii)).

37. The leading case on the point is now the reported decision of Mr Commissioner Howell QC in *R(I) 8/02*, which concerned a London bus driver (emphasis in the original):

> 4. Taking into account the terms of the report of the Industrial Injuries Advisory Council dated 28 August 1990 which led to these extra provisions being introduced (Cm 1244, October 1990) from which it is quite clear that the expression "sensitising agent" when used medically in this context means a chemical agent which actually **causes** a person to develop an asthmatic condition when inhaled at work, the tribunal were in my judgment quite correct in directing themselves that the question they had to consider on the evidence in the claimant's case was whether it had been shown that the diesel fumes, particulates, dust and so forth he inhaled while driving his bus had been the actual cause of his asthmatic condition, rather than merely irritating his chest and making it worse.
>
> 5. As the tribunal correctly recorded, the evidence before them on this issue consisted first of medical advice obtained by the department that diesel exhaust and other vehicle fumes and dust of the kind to which a person is exposed in heavy traffic, while they would certainly act as irritants, would not operate as "sensitisors" or causative agents for occupational asthma in the way required by the regulations making this a prescribed disease. In addition there were medical reports by three separate doctors on behalf of the claimant himself at pages 35 to 41 which as the tribunal correctly recorded in their statement of reasons at page 46 did not at any point report or state that his asthma had actually

been **caused** by exposure to diesel fumes, though they all agreed that it was made much worse by his continuing to work as a bus driver and that it would be a great deal better for him to move to another job. In the words of the consultant physician's report dated 18 February 1999 at page 36:

> "He told me that he developed respiratory symptoms after an episode of pneumonia in November 1997 … Subsequently he has been troubled by breathlessness on exertion … This gentleman clearly has troublesome asthma which is worse when he is outdoors and at work. It is likely that cold air and irritant fumes to which he is exposed at work are exacerbating his asthma and have been the cause of his losing considerable time from work."

38. Returning to the instant appeal, Mr Thompson's submission is that the First-tier Tribunal was correct in this case to find that coal dust is known to be not a sensitising agent (and so fell into group (ii) of the typology at paragraph 36 above). In support of this proposition, he states that UK Occupational Asthma Sensitising Information Service (OASIS) lists coal dust as a non-sensitising agent for the purposes of PD D7. However, even so, Mr Thompson contends that the First-tier Tribunal did not provide an adequate explanation for its finding that coal dust is not a sensitising agent.

39. Notwithstanding Mr Thompson's limited support for this ground of appeal, I conclude it is not made out. I have two reasons for reaching this conclusion.

40. The first reason is that in stating that coal dust is not a sensitising agent the First-tier Tribunal was simply reflecting and stating the prevailing view in medical science. It certainly had no persuasive evidence before it that coal dust was recognised as a sensitising agent for the purposes of PD D7. In this context I note that the Health and Safety Executive (HSE) does not include coal dust in its on-line publication *List of substances that can cause occupational asthma*: see https://www.hse.gov.uk/asthma/substances.htm.

41. However, there is one other matter of note that is of more general significance. As mentioned above, in his written submissions Mr Thompson relies on the fact that the UK Occupational Asthma Sensitising Information Service (OASIS) lists coal dust as a non-sensitising agent for the purposes of PD D7. I had assumed that OASIS was some independent non-governmental agency, perhaps an offshoot of the HSE. However, it appears that OASIS is the name given to the in-house system operated by the Centre for Health and Disability Assessment (CHDA), which conducts medical assessments on behalf of the DWP. It follows that OASIS is in fact effectively an emanation of the Respondent to this appeal. Mr Thompson advises that within the OASIS system there is a document entitled *Sensitising Agents for Respiratory Prescribed Diseases*. Part of this document is a schedule entitled "Recognised Non Sensitising Agents for PD D7", which includes coal dust as one such recognised non-sensitising agent. Mr Thompson has helpfully provided a copy of the relevant part of the OASIS schedule. He adds that it is not available on-line as it is an internal document, but there are very many DWP internal documents and guides which are readily accessible to members of the public in such a way. I simply observe that if DWP decision-makers are routinely relying on OASIS listings when deciding

prescribed disease claims it would seem only fair that such material is made publicly available.

42. The second reason is that in the final analysis, even if the First-tier Tribunal's finding had lacked an adequate explanation, it would have made no material difference to the outcome of the Appellant's claim for industrial disablement benefit. It will be recalled that the Secretary of State's decision-makers had made two relevant decisions. First, the employment question had been answered in the affirmative so far as exposure to latex had been concerned. Secondly, however, the diagnosis question – was the Appellant suffering from PD D7? – was answered in the negative. But even if coal dust was recognised as a sensitising agent, the decision-maker would have had to consider the various other conditions of entitlement to industrial disablement benefit. In particular, the decision-maker would necessarily have had to have regard to regulation 36 of the 1985 Regulations. The relevant provisions are as follows:

> **36.**—(1) Subject to paragraphs (2) and (3), disablement benefit and sickness benefit payable by virtue of section 50A shall not be paid in pursuance of a claim in respect of occupational asthma which is made later than 10 years after the latest date, before the date of the claim, on which the claimant or, as the case may be, the person in respect of whom the claim is made worked in employed earner's employment in an occupation prescribed in relation to occupational asthma.
>
> (2) Paragraph (1) shall not apply to any claim made before 29th March 1983 by or in respect of a person who ceased on or after 29th March 1972 to work in employed earner's employment in an occupation prescribed in relation to occupational asthma.
>
> (3) Paragraph (1) shall not apply to any claim made by or in respect of a person who has at any time been found to be suffering from asthma as a result of an industrial accident and by virtue of that finding has been awarded disablement benefit either for life or for a period which includes the date on which the aforesaid claim is made.

43. Neither of the exceptions in paragraphs (2) and (3) applied to the Appellant's circumstances. It follows that he was subject to the normal rule in paragraph (1), namely that industrial disablement benefit "shall not be paid in pursuance of a claim in respect of occupational asthma which is made later than 10 years after the latest date … on which the claimant … worked in employed earner's employment in an occupation prescribed in relation to occupational asthma". The Appellant was employed by the National Coal Board between 1964 and 1977. His claim for industrial disablement benefit was not made until January 2017. It follows that, even if coal dust was indeed "any other sensitising agent", and so working underground at a colliery was a prescribed occupation for the purposes of PD D7, the claim on that basis was necessarily way out of time and in effect statute-barred.

44. I recognise that the Appellant in the present appeal had gone to a great deal of trouble in providing details of his former employments over a period of more than 50 years. However, as a result of the ten-year-rule in regulation 36(1) of the 1985 Regulations, the Appellant must have worked with the relevant

sensitising agent which caused their asthma within the ten years immediately before the date of their claim. In this case, ultimately the only work that potentially counted for the purposes of PD D7 was the Appellant's employment with an automotive filter manufacturer (2001-2007) and at a residential care home (2007-2012). The Appellant had argued that in those jobs he was exposed to metal working fluids (agent (x)) and latex products (agent (wa)) respectively (see pp.134-137). The DWP decision-maker had recognised that prescribed disease D7 was prescribed in relation to the Appellant as regards the care home employment (see paragraph 20 above). However, that did not assist him as the diagnosis question was decided against him.

45. Furthermore, had this appeal to the Upper Tribunal succeeded, and the case been remitted for re-hearing by a new First-tier Tribunal, the Appellant would have had to counter the Department's case that the history of his asthma was not that of occupational asthma, but rather that his asthma was constitutional in origin, albeit aggravated by the Appellant's many and varied workplace occupations. In that respect the Appellant's task would have been made substantially more difficult by the combination of the legal effect of the time bar in regulation 36(1) and the evidential problem posed by the fact that his own consultant did not support a diagnosis of occupational asthma. In that context I would also add that the specialist was most likely applying the clinically recognised criteria for a diagnosis of occupational asthma rather than the more restrictive requirements laid down for PD D7 by the 1985 Regulations.

46. Be all that as it may, I therefore find that the second ground of appeal is not made out. Any inadequacy in the First-tier Tribunal's explanation as to why coal dust was not a relevant sensitising agent for the purposes of a PD D7 claim was not material to the outcome of the Appellant's appeal.

Conclusion

47. It follows from the reasons above that neither ground of appeal succeeds. I therefore conclude that the decision of the First-tier Tribunal involves no material error of law. I accordingly dismiss the appeal to the Upper Tribunal (Tribunals, Courts and Enforcement Act 2007, section 11).

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 20 October 2022