**[2021] UKUT 189 (AAC)**

**IN THE UPPER TRIBUNAL** **Appeal No. CI/365/2020**

**ADMINISTRATIVE APPEALS CHAMBER**

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

**Between:**

**KH (deceased)**
**(by his appointee AMH)**

Appellant

**-v-**

**Secretary of State for Work and Pensions**

Respondent

**Before: Upper Tribunal Judge Poynter**

Decision date: 4 August 2021
Decided on consideration of the papers

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

## DECISION

The appeal is allowed.

The First-tier Tribunal made a legal mistake in relation to the claimant's appeal (ref. SC064/19/00783) which was decided at Manchester on 11 November 2019.

That decision is set aside and the case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

**I draw the appointee's attention to the fact that those directions are addressed to her as well as to the new tribunal and that Direction 7 below includes a time limit.**

## DIRECTIONS

### To the First-tier Tribunal

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

2 The First-tier Tribunal must hold a 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.

3 For the avoidance of doubt, the decision of the First-tier Tribunal dated 11 November 2019 has been set aside *in full*. The new tribunal must therefore make its own decision on the diagnosis of PD D9 as well as on the diagnosis of Pneumoconiosis. Post-mortem evidence may now be available (*e.g.*, the claimant's death certificate) that bears on those issues.

4 That hearing may take place in accordance with any relevant Practice Directions and Practice Statements that are in force during the Covid-19 pandemic.

### To the appointee

5 You should not regard the fact that the 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 late husband's appeal on 11 November 2019 made a legal mistake, not because it has been accepted that he was entitled to industrial injuries disablement benefit. Whether or not he was entitled will now be decided by the new tribunal.

6 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 late husband's circumstances that occurred after 30 April 2019; and

(b) it can only consider evidence from after that date if it casts light on how he was on or before 30 April 2019. In this case, that might include any evidence that has become available for the first time after your husband's death.

7 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 30 April 2019) you must now send it to HM Courts and Tribunals Service at Liverpool, quoting the reference, SC064/19/00783, 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 issue underlying this appeal is whether the claimant suffered from either Pneumoconiosis (Prescribed Disease D1) or Unilateral or bilateral diffuse pleural thickening (Prescribed Disease D9). (In the interests of brevity, I will refer to the latter prescribed disease as "diffuse pleural thickening".)

2. I say "suffered" because, sadly, the claimant died during the course of the proceedings before the Upper Tribunal. The Secretary of State has appointed his widow to proceed with his claim under regulation 30(1) of the Social Security (Claims and Payments) Regulations 1987.

### Procedural history

3. The claim for industrial injuries disablement benefit ("IIDB") was made on 8 March 2019 on the basis that the claimant was suffering from Pneumoconiosis.

4. Two medical advisers subsequently reported to the Secretary of State that, in their opinion, the claimant did not have Pneumoconiosis. They also considered whether he might be suffering from diffuse pleural thickening, but formed the view that was not.

5. On 30 April 2019, the Secretary of State's decision maker refused to award the claimant IIDB. The basis for that decision was set out in a letter to the claimant dated 15 May 2019 as follows:

> "… you were examined on 17/04/2019 and the medical adviser stated 'radiology reports indicate extensive pleural plaques, both calcified and non-calcified, but there is no mention of asbestosis or lung fibrosis. Radiology reports include a CT scan from Nov 2018 and chest x-ray from Feb 2019 with no lung diagnosis other than pleural plaque in keeping with a past history of asbestos exposure. Despite being requested, copies of hospital notes were not received, but clinically there were no chest crackles when examined on 17/04/2019 and the

> history indicates no referral to a respiratory specialist. These two pieces of evidence also go against a likely diagnosis of asbestosis. In summary, therefore, there is no good evidence to support a diagnosis of asbestosis and so PD D1 is not diagnosed or advised. In addition, although an x-ray report from 2/9/08 … records blunting of the left costophrenic recess due to pleural thickening, multiple x-ray reports since then plus CT report make no mention of pleural thickening, only plaque and as x-ray images could not be viewed, there is insufficient evidence to support a diagnosis PD D9, on balance of probability. No other asbestos-related prescribed disease is therefore diagnosed or advised.'"

6. The Secretary of State's decision was not changed on mandatory reconsideration and the claimant appealed to the First-tier Tribunal against it on 11 July 2019.

7. On 11 November 2019, the Tribunal refused that appeal and confirmed the Secretary of State's decision, holding that "[a]t no time has [the claimant] suffered from Prescribed Disease No. PDD1 or PDD9".

8. The claimant's appointee now appeals to the Upper Tribunal with my permission.

**The Tribunal's decision**

9. The Tribunal's written statement of reasons set out the procedural history of the case (which was not in dispute) and the findings of the medical examination. It then considered whether it could fairly make a decision in the claimant's absence and concluded—correctly, if I may say so—that it could. It then gave its reasons for dismissing the appeal in the following terms:

> "20. As indicated the Tribunal had the benefit of the medical expertise of Dr L, a Respiratory Consultant. Having reviewed all of the evidence and considered in detail the chest x-ray images, the Tribunal agreed with the assessments of [the medical advisers] which led to the decision on 30 April 2019 because it was consistent with the evidence presented and with the Tribunal's understanding of the conditions that [the claimant] suffered from.
>
> 21. The chest x-rays upon being reviewed by the Tribunal, showed similar appearances with extensive bilateral calcified pleural plaques. This was consistent with the written evidence in the bundle.
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> 22. The CD-ROM disc also contained [the claimant's] two CT chest scans from 19 November 2018 and 22 February 2019. Both showed extensive large-volume calcified pleural plaques

> bilaterally. They did not show evidence of lung fibrosis, nor did they show diffuse pleural thickening. This was once again consistent with the documentary reports within the bundle of evidence available to the Tribunal.
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> 23. [*See paragraph 22 below*]
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> 24. … the Tribunal was limited to considering the evidence which was available to it. Based on that evidence, it concluded that the only asbestos-related condition which [the claimant] suffered from was pleural plaque. This did not qualify as a prescribed disease within Schedule 1 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1995. The Tribunal could not therefore be satisfied that [claimant] suffered from any prescribed asbestos-related disease within the statutory regulations applicable.
>
> 25. Accordingly, [the claimant's] appeal was refused because he did not have a prescribed industrial disease and therefore did not qualify for industrial injuries disablement benefit."

It will become relevant that the respiratory consultant, Dr L, who is referred to in paragraph 20 of that quotation was the medical member of the Tribunal: see paragraphs 22 to 23 below.

10. It is convenient to note at this point that the claimant's death certificate records "pulmonary fibrosis" as one of the secondary causes of death (the primary causes being a cardiac arrest and myocardial infarction). I do not know whether there was a post-mortem examination, before those causes were certified.

**Reasons for giving permission to appeal**

11. The claimant was not—and the appointee is not—professionally represented. It is therefore understandable that the stated grounds of appeal concentrated on matters of fact and on additional evidence that was not before the Tribunal when it made its decision (as to which see paragraph 21 below).

12. However, an appeal to the Upper Tribunal is not a second chance to argue the facts of a case. On the contrary, it is only possible to appeal to the Upper Tribunal if there is a realistic prospect of establishing that the First-tier Tribunal made a mistake about the law.

13. I considered that there was such a prospect, but on grounds that the claimant had not raised. What I said was as follows:

"6 [The clamant] has claimed [IIDB] for Prescribed Diseases D1 and D9.

7 To be diagnosed as suffering from a prescribed disease, a claimant's condition must fall within the legal wording that is used to define that disease.

8 For PD D1, that legal wording is:

> "Pneumoconiosis"

and for PD D9, it is

> "Unilateral or bilateral diffuse pleural thickening"

*PD D9*

9 As presently advised, I consider that the written statement of reasons adequately explains why the Tribunal decided that [the claimant] did not suffer from PD D9.

10 The definition for that disease is self-explanatory. The claimant must be suffering from thickening of the "pleura" (i.e., the membrane that forms the lining of the lungs). That thickening need only affect one lung ("unilateral")—although it may affect both ("bilateral")—but it must be "diffuse", which is another word for "widespread". Pleural thickening that is localised (which is often called "pleural plaques") does not meet the definition.

11 The Tribunal reviewed the evidence, including X-rays and CT scans, and decided that, although it established the presence of "extensive pleural plaques", the thickening of the pleura was not sufficiently widespread to qualify as "diffuse". This was an expert Tribunal and it was bound use its expertise in making that assessment. It did so and—given the self-explanatory definition—it was neither possible nor necessary to give a more detailed explanation.

*PD D1*

12 However, my provisional view is the same cannot be said of the explanation that Tribunal gave for its decision about PD D1. The definition of that disease is not self-explanatory: it is a name "Pneumoconiosis" rather than a description. I would expect there to be formal diagnostic criteria for the condition, or at the very least

> a range of diagnostic criteria that commands a wide consensus among the medical profession.
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> 13 If that is so, then the Tribunal's written statement of reasons appears to me merely to re-announce the decision on this aspect of the appeal rather than explain it. It does not say much more than that [the claimant] does not have Pneumoconiosis because the Tribunal says that is so: the statement was inevitably going to come down to that unless it first explained what would amount to a diagnosis of pneumoconiosis.
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> 14 In my provisional view, the statement should have set out what the diagnostic criteria for pneumoconiosis are and then explained why they decided [the claimant] did not satisfy those criteria by comparing the Tribunal's clinical and other findings against them."

**Reasons for setting aside the Tribunal's decision**

*Adequacy of reasons*

14. Although the Secretary of State's representative supports this appeal, I no longer hold the provisional view set out in paragraph 14 of that quotation.

15. As the response points out—and as I had overlooked—there is a legal definition of pneumoconiosis in section 122(1) of the Social Security Contributions and Benefits Act 1992. It reads as follows:

> ""pneumoconiosis" means fibrosis of the lungs due to silica dust, asbestos dust or other dust, and includes the condition of the lungs as dust-reticulation;"

It follows that the distinction between the definitions of "unilateral or bilateral diffuse pleural thickening" and "pneumoconiosis" that I sought to draw when giving permission to appeal cannot be sustained. Although the word "pneumoconiosis"—which is all that appears in Schedule 1 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985—is just a name, the definition in section 122(1) is a description of PD D1 in the same way that "unilateral or bilateral diffuse pleural thickening" is a description of PD D9.

16. As that definition requires the existence of "fibrosis of the lungs", the Tribunal's finding that the evidence did not establish that the claimant's lungs were fibrotic was—if correct—conclusive that the claimant was not diagnosed with the prescribed disease, pneumoconiosis.

17. And if the statement of reasons had quoted the definition in section 122(1)—and, in fairness to the Tribunal, the Secretary of State's response in the proceedings before it did not refer to it—then it would have been an adequate explanation of the decision it had reached. Contrary to my provisional view, it would not—at least in these circumstances—have been necessary for the Tribunal to discuss the diagnostic criteria in greater detail.

18. However, as the definition was not quoted, I agree with the Secretary of State's representative that the Tribunal's reasoning was inadequate. The claimant could not have been expected to understand the link between the Tribunal's finding that fibrosis was not established and the loss of his appeal if he was not also told that the statutory definition of pneumoconiosis required the presence of fibrosis. Inadequate reasoning is, of course, an error of law.

19. Nevertheless, I would not have set the Tribunal's decision aside on the basis of that error. Given its findings of fact, the Tribunal made the only decision open to it. If the evidence did not show the presence of fibrosis, then the claimant did not suffer from PD D1 and it would have been pointless to remit the matter just so that the First-tier Tribunal could make the same decision again.

20. Which brings me to the additional evidence.

*The additional evidence and rule 37*

21. The claimant's immediate response to the Tribunal's decision appears to have been to send in additional documents (which are now at pages 81-88 of the Upper Tribunal's papers). At least one of these—a letter dated 13 August 2019 from Dr G, a cardiology registrar (pages 81-82)—had not been before the Tribunal when it made its decision. Under the heading "Diagnosis" (on page 81), that letter stated that there was "[e]vidence of pulmonary fibrosis on [the claimant's] CT scan".

22. The statement of reasons dealt with that evidence as follows:

> "23. In pursuing this appeal, [the claimant] … filed a further report from the cardiology department completed by Dr G, a Cardiology Registrar in August 2019. This report was not filed with the Tribunal prior to 11 November 2019 and therefore was not available to it. Dr G noted evidence of fibro elastic changes in the lungs and evidence of calcified granuloma in the right lower lung lobe. This evidence was not before the Tribunal and so could not be considered by it. However, even if the report by Dr G had been available to the Tribunal, it would have been unlikely to have materially affected its findings given the expert findings of the Respiratory Consultant, Dr L which was [*sic*] consistent with the

> findings of [the medical advisers who recommended to the Secretary of State that Mr Hall was not diagnosed with a prescribed disease]. The Tribunal would have been likely to have preferred the findings of a respiratory consultant over a cardiology registrar."

23. That paragraph confuses the role of Dr L, the Tribunal's medical member, and that of the other doctors in the case. The final sentence implies that there was a conflict of evidence between Dr L and Dr G that the Tribunal needed to resolve. That was not so. Dr G (and all the other doctors mentioned in the papers) were witnesses: their role was to provide evidence. Dr L's role in the case was as a judicial member of the Tribunal: his or her role was to assess that evidence and exercise judgment.

24. Further, the learned judge's observation that "[the] Tribunal would have been likely to have preferred the findings of a respiratory consultant over a cardiology registrar" was potentially based on a false premise. The finding of pulmonary fibrosis is *reported* in Dr G's letter but that does not mean that he or she *made* the finding. As paragraph 23 omits to mention, the basis for that finding was a CT scan that does not appear to have been available to the Tribunal (Dr G's letter was dated before the two CT scans to which the Decision Notice refers). It is therefore possible that the finding was made by a specialist radiologist with practical experience of interpreting such scans. There was certainly no reason for assuming the contrary.

25. Given the section 122(1) definition, pulmonary fibrosis, as identified in Dr G's letter, is potentially diagnostic of pneumoconiosis. The quoted passage suggests that the Judge did not actually ask Dr L whether the late evidence might have affected the outcome, so I am unclear how he reached the conclusion that it would not.

26. The written statement of reasons is supposed to represent the findings and reasoning of the Tribunal *as a whole*. It is unclear what paragraph 23 is doing in it at all if Dr L had no input into it.

27. And even if he or she did, it is not the function of a statement of reasons to discuss and dismiss evidence that the Tribunal did not take into account when reaching its decision. Rule 34(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 refers to a "written statement of reasons for a decision which disposes of proceedings". The rejection or acceptance of Dr G's letter formed no part of the Tribunal's reasons for dismissing the appeal.

28. That, however, is not to say that the new evidence should have been disregarded. As regards pneumoconiosis, the central issue in the appeal was whether the claimant's lungs were fibrosed. There was a clear tension between Dr G's evidence that

pulmonary fibrosis had been observed on a CT scan and the Tribunal's conclusion that fibrosis was not present. That tension went to the very heart of the case.

29. Despite the fact that there appears to have been no covering letter, it seems unlikely that the claimant submitted the additional documents merely for the edification of the tribunal members. It is far more probable that he wished the Tribunal to change its decision in the light of their contents.

30. That was not possible without more because, once made, a judicial decision can only be changed in a very limited number of ways.

31. But in my judgment [the claimant] had established that there was at least one "document relating to the proceedings [that] was not sent to the Tribunal at an appropriate time" and therefore that a ground existed on which the Tribunal's decision could be set aside under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the Rules"). A judgment needed to be made about whether it was therefore in the interests of justice to set the Tribunal's decision aside.

32. I have no hesitation in holding that the Social Entitlement Chamber's enabling role required the District Tribunal Judge to treat the document as an application under rule 37.

33. As I have explained on a number of occasions but, most relevantly, in *CE/2042/2018* (which does not appear on the website of the Administrative Appeals Chamber):

> "8 In *CS v Secretary of State for Work and Pensions (DLA)* [2011] UKUT 509 (AAC) Upper Tribunal Judge Warren stated at paragraph 18:
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> > "... Appellants often have difficulty in identifying the decision or decisions which they should appeal.... In my judgement the approach to be adopted, is that, once the appellant has expressed a grievance in the letter of appeal, it is then for those more knowledgeable with the process, be they officers of the DWP or tribunal judges to identify the decision or the decisions which are the source of the appellant's grievance and then to treat the letter of appeal accordingly."
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> That approach was subsequently endorsed by Upper Tribunal Judge Wikeley in *AJ v Secretary of State for Work and Pensions (II)* [2012] UKUT 209 (AAC) at paragraph 34.

> 9 In my judgment that principle applies to post-hearing applications under Part 4 of the [Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber)] Rules [2008] as it does elsewhere …"

In this case, the claimant had sent in evidence which had not been before the Tribunal, and which flatly contradicted the Tribunal's findings on the crucial question of whether his lungs were, or were not, fibrotic. To use the language of *CS*, his "grievance" was that that evidence had not been taken into account and the source of that grievance was the decision itself. In those circumstances, any competent representative would have advised the claimant to make an application to set the decision aside under rule 37. The very reason for the existence of the Tribunal's enabling role is to ensure, so far as possible, that claimants who are unrepresented are not thereby disadvantaged.

34. For those reasons, I judge it to have been an error of law for the District Tribunal Judge not to have treated the submission of additional evidence in the form of Dr G's letter as an application under rule 37.

35. But was that error material? Does paragraph 23 of the statement not suggest that, if the judge had considered the issues in the context of a rule 37 application, he would have decided that it was not in the interests of justice to set the decision aside?

36. My answer to the first of those questions is "yes"; and my answer to the second is that it is not the right question to ask. As the error of law in this case is a procedural one, the test of materiality is whether it might have made a difference to the outcome, not whether it would inevitably have done so.

37. In my judgment, relying on what I have said in paragraphs 23 and 24 above—and notwithstanding what is said in paragraph 23 of the statement—the additional evidence might have made a difference.

38. Further, if my belief that the judge did not consult Dr L before including paragraph 23 in the statement is correct, then that paragraph amounts to a judge's informed guess as to how a respiratory consultant might weigh an item of apparently relevant additional medical evidence. It is no substitute for ascertaining what weight would actually be ascribed to that evidence if it were placed before a different tribunal including a respiratory consultant at a re-hearing. Given how central the issue was to the case; the importance of the matter to the claimant; and the Secretary of State's interest in ensuring that those who are entitled to benefit receive it—see *DTM v Kettering Borough Council (CTB)* [2013] UKUT 0625 (AAC) at [63]—a District Tribunal Judge, properly directing him- or herself might well have concluded that it was in the interests of justice to set the Tribunal's decision aside.

39. In those circumstances, my decision is as set out on page 1 above.

40. Finally, and to avoid any misunderstandings, I should confirm that I am aware of the recent line of authority, culminating in the decision of Upper Tribunal Judge Wikeley in *MA v Secretary of State for Work and Pensions (PIP)* [2020] UKUT 172 (AAC), that the power of the First-tier Tribunal to set aside a decision under rule 37 cannot be exercised on its own initiative (or, as lawyers say "of its own motion"), but is dependent on there being an application from one of the parties.

41. I regret that, as presently advised, I am unable to say that I agree with those authorities. I acknowledge, however, that at present they are binding on the First-tier Tribunal, so I will approach this decision on the basis that they were correctly decided.

42. But even on that basis, those authorities have no application to the circumstances of this case. Rather, they apply to proceedings in which a party:

(a) has made an unequivocal application for something—usually a written statement of reasons—that is not the setting aside of a decision; and

(b) rule 41 of the Rules does not empower the Tribunal to treat that application as being also, or instead, an application to set aside.

In my judgment, they do not apply to the many cases before the Social Entitlement Chamber where it is unclear what, if any, application has been made.

43. In such cases the Tribunal has to interpret the documents that have been submitted and decide—following the approach in *CS*—whether an application was intended and, if so, what the application should be treated as being for.

44. If, as a result of that process, the Tribunal concludes that the documents should be interpreted as being an application to set aside an earlier decision then, in my judgment, the procedural requirements of rule 37 are satisfied even on the basis that *MA,* and the cases that preceded it, were correctly decided.

Authorised for issue
on 4 August 2021

Richard Poynter
Judge of the Upper Tribunal