Bulletin 171

DECISIONS OF THE TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. These four appeals raise similar issues in respect of prescribed disease D1 (pneumoconiosis) for coal workers. This disease is defined in section 122(1) of the Social Security Contributions and Benefits Act 1992:

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

2. The Chief Commissioner set up a Tribunal of Commissioners to determine these appeals. They raise issues relating to the interpretation and application of the statutory definition in the light of developments in medical understanding and terminology, particularly as they affect the evidence of the effects of coal dust obtained after death.

Layout

3. We first set out a discussion that is common to all the cases (paragraphs 7 to 20). We then set out our decisions as follows:

Case	*Paragraphs*
CI/1819/2001	21 to 31
CI/2314/2001	32 to 46
CI/5130/2001	47 to 58
CI/2885/2001	59 to 67.

Finally, we make some comments on social security adjudication and the work of coroners (paragraphs 68 and 79).

The oral hearing

4. We held an oral hearing in Cardiff on 14th October 2002. The appellants were represented by Mr I Bowley, of counsel, instructed by Morgan Cole, solicitors, on behalf of the NUM. The Secretary of State was represented by Mr S Kovats, of counsel, instructed by the Office of the Solicitor to the Department for Work and Pensions.

5. Two medical experts attended. Dr S Kiberu MD, FRCPath, PhD is Consultant Pathologist at Prince Charles Hospital in Merthyr Tydfil. He carried out the post mortem examinations in all four cases. Dr P Wright is Medical Policy Adviser on occupational health in the Office of the Chief Medical Adviser to the Department for Work and Pensions.

6. We are grateful to counsel for their clear and succinct submissions and to the medical experts for their evidence and help with the issues that arose. We are particularly grateful to Dr Wright for the papers that he produced in response to directions earlier in the proceedings.

Common background

7. All four appeals have this common background.

8. The deceased worked in the coal industry. Following his death, a post mortem was carried out by Dr Kiberu. He produced two reports: a post mortem report and a histology report. The post mortem report referred to 'coal workers pneumoconiosis'. That suggested the possibility that the cause of death might have been due to 'industrial disease'. This was reported to the coroner in accordance with regulation 41(1)(f) of the Registration of Births and Deaths Regulations 1987. That provision is made under the authority of the Industrial Diseases (Notification) Act 1981. There is no definition of 'industrial disease' in either the Act or the Regulations. An inquest was held at which the coroner saw Dr Kiberu's post mortem report, but not his histology report. Dr Kiberu told us that that was standard practice. The coroner then recorded the cause of death as set out in the post mortem report, adding 'Verdict Industrial Disease'.

9. These circumstances allowed a person to apply to be appointed to make a claim for disablement benefit that the deceased would have been entitled to if he had claimed during his life: see regulation 30(6A) and (6B) of the Social Security (Claims and Payments) Regulations 1987. This allowed a claim to be made for disablement benefit in respect of prescribed disease D1. The Secretary of State treated the claim as made on the date of death.

10. The claim was referred to a specialist medical adviser. He gave the opinion that the deceased did not have the prescribed disease. The Secretary of State accepted this advice and refused the claim. The refusal was confirmed on appeal by an appeal tribunal consisting of a legally qualified panel member as chairman and a Consultant medically qualified panel member.

11. We have borne in mind that the decisions in all four appeals were written by the tribunals' legal chairmen after the hearing. The previous practice of writing decisions on the day with the advice of the Consultant members no longer obtains. It is possible that the reasons in all these cases would have recognised the possibility of other interpretations of the evidence if the Consultant had been more directly involved in their formulation.

12. Both the adviser and the appeal tribunal had a copy of the death certificate and of Dr Kiberu's post mortem report on which the coroner had relied. However, neither interpreted the reference to 'coal workers pneumoconiosis' as covering the statutory definition of the disease. Nor, in the case in which they also had a copy of the histology report, did they interpret a reference to 'scarring' in the lungs as a reference to fibrosis.

The terminology and its significance

13. This is a convenient point to deal with the terminology used and its significance in these cases.

14. The statutory definition was originally enacted in section 1(2) of the Workmen's Compensation Act 1943 and was adopted for the new industrial injuries scheme under the National Insurance (Industrial Injuries) Act 1946.

15. It was soon recognised that the definition was unsatisfactory, but it was retained for two reasons. First, a replacement has not been found that commands general support. Second, there has been reluctance to remove any advantage that claimants might derive from the present definition.

16. The result of this has been that medical evidence often does not reflect the statutory language. This means that the issue for appeal tribunals, as for the Secretary of State's medical advisers, does not depend on the use of particular terminology. It is a question of substance whether or not the evidence shows that the statutory definition is satisfied. We are sure that tribunals and advisers know this. It does, however, appear that the medical adviser, and the tribunals before whom these cases came on appeal, did not appreciate the significance of Dr Kiberu's language.

17. The change of terminology is clearest in the case of 'dust-reticulation', which was considered in *R(I) 7/98*. Both Dr Kiberu and Dr Wright agreed that this was no longer of significance. In so far as it refers to a radiological appearance, it is now recognised that this was produced by low quality x-rays. In so far as it refers to pathology, it is no longer a term that is used and it is unlikely to be of practical significance in pneumoconiosis cases.

18. As for 'scarring', Dr Kiberu told us that by this he meant fibrosis. Dr Wright agreed that this is how he interpreted the word, although it said nothing of the cause of the fibrosis. So, it is safe for tribunals to rely on the words as synonymous, although the cause must still be determined.

19. However, tribunals cannot rely on 'coal workers pneumoconiosis' in post mortem reports and death certificates as conclusive that the statutory definition is satisfied. We have come to this conclusion for two reasons. First, experts differ in their use of the term. Dr Kiberu told us that by this he meant a disease process that involved fibrosis as a result of the retention of coal dust in the lungs. He said that, to his knowledge, this was standard usage among pathologists. Dr Wright did not accept the proposition that this condition always involved fibrosis. In his view, the reference to it had to be interpreted in its context of the other causes of death and conditions contributing to that cause. Second, even when a particular doctor's use of the term is known, as Dr Kiberu's now is, it is still only one doctor's opinion, which must be assessed in the context of the evidence as a whole. Also, as Dr Kiberu admitted, in a post mortem report it is only a provisional conclusion that may be changed as a result of contrary findings on microscopic examination.

20. We were told that the previous practice had been for lungs to be fixed at post mortem and preserved for inspection by the pneumoconiosis medical panel. This had been introduced in order to reduce the possibility of inconsistent decisions between coroners and the adjudicating medical authorities. See the Home Office Circular on *Deaths Believed To Be Due to A Prescribed Industrial Disease* (number 18/1980). The practice was abandoned with the abolition of death benefit. Now that the medical adviser does not have the chance to examine the lungs, any histological evidence is likely to be important in cases like these. We do not accept that a tribunal will always go wrong in law if it does not obtain any histology report that is made after a post mortem. It is, though, always good practice for tribunals to enquire about these reports if they are not already in evidence. And, in the context of a particular case, a tribunal may go wrong in law by not obtaining the report.

CI/1819/2001

Decision

21. Our decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.

21.1. The decision of the Cardiff appeal tribunal under reference U/03/188/2000/01403, held on 24th January 2001, is erroneous in point of law.

21.2. We set it aside and remit the case to a differently constituted appeal tribunal.

21.3. We direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision.

Post mortem investigations

22. The deceased died on 2nd October 1999.

23. Dr Kiberu carried out a post mortem and produced a post mortem report and a histology report. In the post mortem report, he wrote that there was 'heavy anthracotic pigmentation' of all the lobes in both lungs. He certified:

> **'In my opinion the cause of death was:**
>
> 1(a) GASTRO-INTESTINAL BLEEDING
>
> (due to (or as a consequence of))
>
> 1(b) DUODENAL ULCER
>
> (due to (or as a consequence of))
>
> 1(c)
>
> 2. Other significant conditions contributing to the cause of death, but not related to the disease or condition causing it:
>
> EMPHYSEMA DUE TO COAL WORKERS PNEUMOCONIOSIS.'

In the histology report, Dr Kiberu wrote that sections of the left lung showed 'severe emphysema with focal anthracotic pigmentation with associated scarring involving all lung lobes.'

24. An inquest was held and the cause of death was certified in accordance with Dr Kiberu's opinion in the post mortem report.

The claim

25. The deceased had made 12 claims for disablement benefit in respect of prescribed disease D1 during his life. His widow made a claim following the certification of the cause of his death. It is that claim which is before us. The claim was referred to a medical adviser. He saw both of Dr Kiberu's reports. His advice was that the deceased did not have prescribed disease D1. He commented that there was 'no mention of reticulation or fibrosis in the microscope report.' The Secretary of State accepted that advice and refused the claim.

The appeal to the appeal tribunal

26. On appeal, the appeal tribunal confirmed the refusal of the claim. The chairman's statement of the reasons for the tribunal's decision (reflecting the clinical findings noted at the hearing) records that neither of Dr Kiberu's reports mentioned fibrosis or reticulation. It concluded that 'In view of the absence of fibrosis or dust-reticulation in any of the medical evidence, we were unable to find that the [deceased] satisfied the definition of Pneumoconiosis and therefore did not suffer from PDD1.'

Did the tribunal go wrong in law?

27. Yes, it did.

28. Mr Bowley argued that post mortem evidence was the best evidence of pneumoconiosis. If a pathologist and a coroner identified coal workers pneumoconiosis as a cause of death or a condition contributing to the cause of death, that showed that the deceased had fibrosis. This was confirmed by the reference to scarring in the histology report. Alternatively, he argued that at least the tribunal should have explained why it was not satisfied by this evidence that the deceased had prescribed disease D1.

29. Mr Kovats argued that the evidence as a whole was sufficient to support a decision either that the deceased had the prescribed disease or that he did not. The appeal tribunal, as an expert body, was entitled to interpret the evidence as it did.

30. We have already explained why we do not accept that any particular piece of evidence is necessarily conclusive. The evidence before an appeal tribunal must be interpreted as a whole. The evidence in this case included the histology report. The chairman's statement of the reasons for the tribunal's decision shows that the tribunal went wrong in law in one of two ways: either it failed to understand the language of the report or it failed to explain why the claim was refused despite the evidence in the report.

The rehearing

31. If the tribunal at the rehearing accepts the reference in Dr Kiberu's histology report to 'focal anthracotic pigmentation with associated scarring involving all lung lobes' as demonstrating the presence of fibrosis due to coal dust retention, it must find that the deceased had prescribed disease D1. If, in the light of what Dr Kiberu said at the oral hearing before us, the Secretary of State is now satisfied that this is the effect of that evidence, he may be willing and able to give a decision that obviates the need for a rehearing.

CI/2314/2001

Decision

32. Our decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.

32.1. The decision of the Cardiff appeal tribunal under reference U/03/188/2000/04138, held on 24th January 2001, is erroneous in point of law.

32.2. We set it aside and remit the case to a differently constituted appeal tribunal.

32.3. We direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision.

Post mortem investigations

33. The deceased died on 19th November 1999.

34. Dr Kiberu carried out a post mortem and produced a post mortem report and a histology report. In the post mortem report, he wrote that there was 'focal anthracotic pigmentation' in both lungs. He certified:

> **'In my opinion the cause of death was:**
>
> 1(a) BRONCHOPNEUMONIA
>
> (due to (or as a consequence of))
>
> 1(b) CHRONIC OBSTRUCTIVE AIRWAYS DISEASE
>
> (due to (or as a consequence of))
>
> 1(c) COAL WORKERS PNEUMOCONIOSIS
>
> 2. Other significant conditions contributing to the cause of death, but not related to the disease or condition causing it:
>
> RIGHT TEMPORAL LOBE CEREBRAL INFARCT.'

In the histology report, Dr Kiberu wrote that the left lung showed 'emphysema with focal anthracotic pigmentation associated with focal scarring.'

35. An inquest was held and the cause of death was certified in accordance with Dr Kiberu's opinion in the post mortem report.

The claim

36. The deceased had made 2 claims for disablement benefit in respect of prescribed disease D1 during his life. His widow made a claim following the certification of the cause of his

death. It is that claim which is before us. The claim was referred to a medical adviser. He saw Dr Kiberu's post mortem report, but not the histology report. His advice was that the deceased did not have prescribed disease D1. He commented that 'The presence of black pigmentation in the lung without fibrosis does not constitute coal pneumoconiosis, therefore PDD1 is not diagnosed. The description of the lungs does not accord with the causes of death given.' The Secretary of State accepted that advice and refused the claim.

37. The deceased had claimed disablement benefit in respect of prescribed disease D1 during his life. On one of those claims, the medical board had written that an x-ray 'shows some nodular fibrosis of a minor degree, but insufficient to constitute PDD1.'

The appeal to the appeal tribunal

38. On appeal, the appeal tribunal confirmed the refusal of the claim. The chairman's statement of the reasons for the tribunal's decision records that the post mortem report 'does not refer to or make a finding of fibrosis or dust-reticulation as required by the definition' of the prescribed disease. It concluded that 'In view of the absence of a finding of fibrosis or dust-reticulation, a diagnosis of coal workers pneumoconiosis alone in insufficient to satisfy the ... definition.'

The Secretary of State's written support for the appeal

39. Before the oral hearing, the representative of the Secretary of State had supported this appeal on the ground that the tribunal had applied the wrong standard of proof. This submission was based on a passage in the tribunal's reasons that referred to there being 'no convincing evidence' that x-rays should be categorised as category 1 rather than category 0 in the ILO classification The argument is that the word 'convincing' shows that the tribunal applied a higher standard than the balance of probabilities.

40. We invited argument on this issue at the oral hearing. Having heard that argument, we reject the Secretary of State's written support for the appeal. All too often we see cases in which a claimant or representative has presented an unrealistic argument that the tribunal has overlooked some basic proposition of law. This argument is then supported by reference to an occasional infelicitous word in the statement of the reasons for the tribunal's decision. We do not want to encourage submissions of that sort or to encourage the Secretary of State to support them.

41. There are two flaws in the Secretary of State's argument.

42. The first flaw is that it is based on isolated use of language rather than on the substance that the language is trying to convey and the context of the reasoning as a whole. Some propositions of law are of fundamental importance in the work of the tribunals. It is inconceivable that the members of appeal tribunals are not aware of them. It is almost inconceivable that a tribunal will have misdirected itself on them. The nature of the civil burden and standard of proof are examples. We are entitled to assume, and do assume, that tribunals have understood these propositions of law, unless there is something to show otherwise in the substance of what the tribunal has decided.

43. The second flaw in the Secretary of State's argument is that it misunderstands the point at which the burden and standard of proof are applied. They are applied to the issue before the

tribunal as a whole. They are not applied to a Consultant's expert interpretation of an individual x-ray.

Did the tribunal go wrong in law?

44. Yes, it did. This is accepted by the Secretary of State. That allows us to deal with the issue briefly.

45. There was evidence from an earlier claim that the claimant had 'some nodular fibrosis'. That evidence was based on a reading of an x-ray with which the tribunal disagreed. However, as *R(I) 1/96* decides, the issue does not depend solely on x-ray classification. The evidence should have been considered as a whole. That evidence included both the opinion of the previous medical adviser and Dr Kiberu's post mortem report. The tribunal went wrong in law by not explaining how it dealt with that evidence. It also did not explain why, in view of that evidence, it did not make enquiries about the histology report.

The rehearing

46. Dr Kiberu's histology report is now available. It records his conclusion that there was scarring in the deceased's left lung. We have directed a rehearing so that the evidence may be considered with the assistance of a medically qualified panel member. However, in view of the evidence at the oral hearing before us, it is possible that the Secretary of State may be willing and able to give a decision that obviates the need for a rehearing.

CI/5130/2001

Decision

47. Our decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.

47.1. The decision of the Cardiff appeal tribunal under reference U/03/188/2001/01336, held on 12th September 2001, is erroneous in point of law.

47.2. We set it aside and remit the case to a differently constituted appeal tribunal.

47.3. We direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision.

Post mortem investigations

48. The deceased died on 12th March 2000.

49. Dr Kiberu carried out a post mortem and produced a post mortem report and a histology report. In the post mortem report, he wrote that there was 'wide spread anthracotic pigmentation' in both lungs. He certified:

> **'In my opinion the cause of death was:**
>
> 1(a) BRONCHOPNEUMONIA
>
> (due to (or as a consequence of))
>
> 1(b) CHRONIC OBSTRUCTIVE AIRWAYS DISEASE
>
> (due to (or as a consequence of))
>
> 1(c) COAL WORKERS PNEUMOCONIOSIS
>
> 2. Other significant conditions contributing to the cause of death, but not related to the disease or condition causing it:
>
> LEFT VENTRICAL FAILURE WITH ISCHAEMIC HEART DISEASE.'

In the histology report, Dr Kiberu gave his conclusion that 'These findings are consistent with emphysema associated scarring due to coal workers pneumoconiosis.'

50. An inquest was held and the cause of death was certified in accordance with Dr Kiberu's opinion in the post mortem report.

The claim

51. The deceased had not claimed disablement benefit in respect of prescribed disease D1 during his life. His daughter made a claim following the certification of the cause of his death. It is that claim which is before us. The claim was referred to a medical adviser. He saw Dr Kiberu's post mortem report, but not the histology report. His advice was that the deceased did not have prescribed disease D1. He commented that 'The autopsy describes severe anthracotic pigmentation. There was no mention of fibrosis or reticulation. Therefore no prescribed industrial lung disease is diagnosed (PDD1).' The Secretary of State accepted that advice and refused the claim.

52. The medical adviser also made an extract from hospital case notes. The extracts were made after he had written his advice. One extract refers to 'fibrosing alveolitis'. Dr Kiberu told us that this condition involved fibrosis, but did not usually arise from coal dust. Another extract refers to a chest x-ray on 27th March 2000. That date must be wrong, because it was after death. That aside, it showed 'generalised background nodularity to both lung fields.' Dr Kiberu told us that this was indicative of the possible presence of fibrosis.

The appeal to the appeal tribunal

53. On appeal, the appeal tribunal confirmed the refusal of the claim. The chairman's statement of the reasons for the tribunal's decision records that the post mortem report showed the presence of dust and discoloration from it, but no structural changes in the lungs. It

concluded that 'the appeal has been disallowed because *all* of the medical evidence does not support it.'

Did the tribunal go wrong in law?

54. Yes, it did. This is accepted by the Secretary of State. That allows us to deal with the issue briefly.

55. There was evidence that there might be fibrosis present. That raised two questions. Was there fibrosis? And, if there was, what was the cause? The tribunal should have explained how it dealt with that evidence.

56. The way in which the tribunal's final conclusion is expressed also shows that it failed to take account of the significance of Dr Kiberu's opinion on the cause of death. If it did not understand or accept that opinion, it should have enquired whether there was a histology report that might provide more detailed evidence of the state of the deceased's lungs on death.

57. In those two respects, it went wrong in law.

The rehearing

58. Dr Kiberu's histology report is now available. It records his conclusion that there was scarring. We have directed a rehearing so that the evidence may be considered with the assistance of a medically qualified panel member. However, in view of the evidence at the oral hearing before us, it is possible that the Secretary of State may be willing and able to give a decision that obviates the need for a rehearing.

CI/2885/2001

Decision

59. We grant leave for this appeal to be withdrawn under regulation 26(2) of the Social Security Commissioners (Procedure) Regulations 1999.

Post mortem investigations

60. The deceased died on 20th September 1999.

61. Dr Kiberu carried out a post mortem and produced a post mortem report and a histology report. In the post mortem report, he wrote that there was 'heavy anthracotic pigmentation' in both lungs. He certified:

'In my opinion the cause of death was:

1(a) CONGESTIVE HEART FAILURE

(due to (or as a consequence of))

1(b) CHRONIC OBSTRUCTIVE AIRWAYS DISEASE

(due to (or as a consequence of))

1(c) COAL WORKERS PNEUMOCONIOSIS

2. Other significant conditions contributing to the cause of death, but not related to the disease or condition causing it:

RIGHT CEREBRAL INFARCT.'

In the histology report, Dr Kiberu made no reference to scarring.

62. An inquest was held and the cause of death was certified in accordance with Dr Kiberu's opinion in the post mortem report. The coroner, remember, did not have the histology report.

The claim

63. The deceased had not claimed disablement benefit in respect of prescribed disease D1 during his life. His widow made a claim following the certification of the cause of his death. It is that claim which is before us. The claim was referred to a medical adviser. He saw Dr Kiberu's post mortem report, but not the histology report. His advice was that the deceased did not have prescribed disease D1. The Secretary of State accepted that advice and refused the claim.

The appeal to the appeal tribunal

64. On appeal, the appeal tribunal confirmed the refusal of the claim.

The withdrawal of the appeal

65. When Dr Kiberu's histology report was obtained for the oral hearing before us, it became clear for the first time that Dr Kiberu had changed his opinion about the cause of death. He explained that the opinion given in the post mortem report was based on visual appearances only. At that stage, his opinion was that he was able to see fibrosis and that coal workers pneumoconiosis was present. However, under the microscope he was unable to see any fibrosis.

66. Mr Bowley asked for our leave to withdraw the appeal in view of the histology report. We agreed, because there is now no evidence that the claimant had prescribed disease D1. Indeed, the evidence shows that he did not.

67. We have referred to this case in some detail, because it supports us in our conclusion that no piece of evidence is necessarily conclusive. Even the opinion given in a post mortem report, on which a coroner's verdict is based, is open to reconsideration and change following findings on microscopic examination of tissue.

The coordination of the work of coroners and social security authorities

68. The practice of coroners is not within our jurisdiction. However, their practice was referred to at the hearing and we hope that our comments may be useful to the consultations that the Home Office is holding with senior coroners. Dr Wright told us that there was a meeting on the day of our hearing. Dr Kiberu also told us of consultations being carried out by the Royal College of Pathologists.

69. There are two respects in which the work of coroners and the social security authorities could be better coordinated in order to avoid the human distress that inevitably accompanies inconsistent decisions. First, coroners do not as a matter of routine see histology reports. Dr Kiberu told us that his opinion in post mortem reports was subject to change on microscopic examination. That is what happened in *CI/2885/2001*. Second, it is understandable that the 'industrial disease' for which an inquest may be held is not limited to those diseases that are prescribed for disablement benefit or to the terms in which they are defined. However, it would be beneficial if coroners were aware of the terms of the social security prescription so that apparent disagreements can be avoided.

Signed on original

P L Howell
David Williams
Edward Jacobs
Commissioners
21st October 2002