Bulletin 181

PLH *Commissioner's Files: CI 5270 & 5271/02*

SOCIAL SECURITY ACTS 1992-1998

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Claims for:	Disablement Benefit (PD A11 & A12)
Appeal Tribunal:	Barnsley
Tribunal Case Refs:	U/01/001/2001/00226 (PD A11)
	U/01/001/2002/01751 (PD A12)
Tribunal date:	22 August 2002
Reasons issued:	3 October 2002 (PD A11)
	11 October 2002 (PD A12)

[ORAL HEARING]

1. These are two appeals by the same claimant against separate decisions of the same tribunal relating to claims by him for disablement benefit for two different prescribed diseases, A11 vibration white finger and A12 carpal tunnel syndrome.

2. The appeal on file CI 5270/02 relating to disease A12 is allowed, as in my judgment the tribunal who found him to be suffering from that disease with a "date of onset" for benefit purposes of 11 January 2002 misdirected themselves in holding they were precluded from addressing what was the real date of onset of his disease by the existence of a previous decision of the Secretary of State disallowing an earlier claim for the same disease on 10 January 2002. The tribunal's decision on that case (tribunal reference No. 01751) is therefore set aside and the case remitted to a fresh tribunal to redetermine all relevant medical and other issues including from what, if any, date before 11 January 2002 the claimant was in fact suffering from the disease.

3. The appeal on file CI 5271/02 relating to disease A11 is dismissed, as I have not been persuaded there was any material error of law in the tribunal's medical and factual decision that on the balance of probabilities the claimant had not been shown to have been suffering from blanching in the fingers of his hands of the required severity and type to warrant a diagnosis of the disease as prescribed.

4. The claimant is a man now aged 55 who had worked for some 25 years in the mining industry before taking redundancy on the closure of Houghton Main colliery in about 1992. As the years have progressed, he has experienced increasing trouble in his hands and forearms and has made numerous claims for prescribed industrial diseases

A11 vibration white finger, A12 carpal tunnel syndrome, and A7 beat elbow: only the first two of those diseases are relevant to the appeals now before me. Those appeals are against the decisions of the Barnsley appeal tribunal consisting of a legal chairman and specialist medical member sitting on 22 August 2002, when after carrying out their own medical examination and considering all the evidence they found the claimant to be suffering from carpal tunnel syndrome, with a date of onset of 11 January 2002 and an assessed disablement of 6% from 90 days after that date until 31 December 2003, but confirmed the rejection of his claim for vibration white finger on the ground that the evidence about the nature and extent of the whitening he said he suffered was not consistent with the terms of the prescription so as to support a diagnosis of disease A11.

5. The claimant's two main grounds of appeal were that the tribunal wrongly restricted themselves to an artificial "date of onset" for the purposes of his carpal tunnel syndrome by reference to an earlier decision of the Secretary of State on 10 January 2002 turning down a previous claim on the ground that he did not have the disease at all; and that the decision on vibration white finger had been based on insufficient evidence, which he could now show was factually incorrect as he had subsequently been able to obtain a vascular surgeon's report confirming that he had the disease.

6. I directed a combined oral hearing of the two appeals as it appeared to me they raised two potentially arguable issues of law that had not been placed beyond doubt by the previous state of the authorities. These were first whether under the new system of adjudication introduced by the **Social Security Act 1998** the tribunal were in fact precluded, as they assumed, from considering for themselves whether the claimant had really been suffering from carpal tunnel syndrome before the disallowance of the previous claim; and second whether their references to the "evolution" of the whiteness described by the claimant in his fingers as being inconsistent with that typical of the prescribed condition showed they had improperly allowed questions of the origin or *causation* of the disease to affect the medical question of *diagnosis* of whether the claimant was suffering from it at all.

7. At the oral hearing the claimant appeared and presented his case in person, and the Secretary of State was represented by Jeremy Heath of the solicitor's office, Department for Work and Pensions. In accordance with his instructions Mr Heath advanced two main arguments of principle on behalf of the Secretary of State. In answer to the first question he said that under the post-1998 law a tribunal is restricted in its determination of a "date of onset" of any prescribed disease in the same way as under the previous legislation, so that no earlier date can be given than that of a previous decision

refusing a similar claim; and in answer to the second, that questions of how blanching has been *caused* to a person's fingers, and in particular whether it has been induced by vibration, are indeed relevant in determining whether a *diagnosis* of prescribed disease A11 should be made in the case at all. The claimant provided me with written and oral submissions, mainly to clarify various points on the facts and history of his case.

PD A12 appeal: tribunal's jurisdiction as to date of onset

8. The appeal to the tribunal relating to A12 carpal tunnel syndrome was against the rejection by the Secretary of State on 15 May 2002 of the disablement benefit claim for that disease made by the claimant on 6 March 2002. This was not his first such claim: a previous claim he had made for the same disease in 2001 had already been disallowed, by a decision of the Secretary of State given on 10 January 2002. That decision (pages 84-5 of file CI 5270/02) had determined that although prescribed disease A12 was accepted as prescribed and therefore potentially relevant in relation to the claimant's former employment in the mining industry, the claim for benefit was rejected. It said:

> **"From and including 5 July 1948, the claimant has not been suffering from prescribed disease No. A12 nor from any conditions which in their case has resulted therefrom. This decision is made having regard to a report from the medical adviser to whom the question was referred to. The claim for Industrial Injuries Disablement Benefit is therefore disallowed."**

9. I have reproduced the wording exactly as it appears in the printed form of decision signed by the Secretary of State's officer on 10 January 2002. Despite one or two imperfections in the syntax, its meaning is quite clear: the claimant does not get the benefit, because he is not found to have ever had the disease.

10. For one reason or another, the claimant never appealed that decision, which therefore became conclusive for the purposes of the 2001 claim for benefit on which it was made. The issue in the present case is whether it also had any additional effect to restrict what the tribunal were able to decide on the appeal against the later refusal, for similar reasons, of the further claim he made for the same disease on 6 March 2002 (pages 2-10 of this file). The tribunal disagreed with the grounds of refusal and on the basis of the medical member's clinical examination of the claimant decided it was proper to diagnose the presence of disease A12, from which they found he was suffering a loss of faculty and a resulting disablement which they assessed at 6%. However they recorded the "date of onset" of the claimant's disease as 11 January 2002 and no earlier, with the start of the assessment period limited correspondingly: see paragraph 4 above.

11. The tribunal did this because they accepted a submission from the Secretary of State (paragraph 9 on page 1d) in similar terms to that often made, and correctly accepted under the legislation in force before the **Social Security Act 1998**, that if they did diagnose the presence of the disease then whatever might be their own medical view about how long the claimant had really been suffering from it they were prevented from recording a "date of onset" for benefit purposes any earlier than the day after the previous disallowance of his earlier claim. This is clear from their statement of reasons issued to the parties on 11 October 2002 (page 40 of the same file) where they said:

> **"On the history and clinical findings before us we are of the opinion that the appellant is suffering from carpal tunnel syndrome. The date of onset is 11 January 2002. As he was found not to be suffering from PDA12 on a previous claim on 10 January 2002 the principle of res judicata applies so that the date of onset cannot be before 11 January 2002."**

12. That restriction would have been absolutely right under the legislative provisions in force before the Social Security Act 1998, which included specific provision for the determination of factual medical questions of diagnosis, including whether a person had been suffering from a prescribed disease at all down to and including a particular date, and made decisions on such questions final so that they could not be reopened by the making of a subsequent claim for the same disease. See in particular case **CI 6027/99** ***Whalley v. Secretary of State*** [2003] EWCA Civ 166, confirming that as a matter of jurisdiction a tribunal was prevented from deciding that a claimant first began to suffer from a loss of faculty as a result of a particular prescribed disease during a period in relation to which it had already been decided under the pre-Social Security Act 1998 legislation that he did not suffer from the prescribed disease in question at all. The issue I now have to decide is whether that is also the case under the fundamentally altered provisions for adjudication introduced by the 1998 Act.

13. As explained in the numerous decisions Commissioners have been called on to give on this topic under the pre-Social Security Act 1998 legislation (see e.g. the decisions in CI 1605/02, and such cases as CI 759/02), the reason an unappealed decision to the effect that a claimant was not and had not been suffering from a particular prescribed disease at any time down to and including the date of the decision itself became conclusive as regards that question on a later claim was that such a decision was one made under the special provisions then in force for separate determination of "diagnosis" issues for the purposes of industrial injury benefits in disease cases under section 108 **Social Security Contributions and Benefits Act 1992.** The effect of a decision made in accordance with the separate and express code for adjudication and determination of such issues then contained in Part IV Section A, **Social Security**

(Adjudication) Regulations 1995 SI No. 1801 was that it became final as regards the question of diagnosis (i.e. whether the disease was present at all) over the whole period down to its own date, by virtue of sections 58 and 60(1) **Social Security Administration Act 1992** as at that time in force.

14. Once a decision had thus become final under those provisions, the only relevant ways in which the question of any diagnosis of the same disease for the same claimant could be reopened as regards any part of the period covered by it would have been if

(1) it had been appealed, or reviewed (e.g. for error or mistake of fact) under the 1992 Act while it was still in force; or

(2) it had been superseded by a further decision of the Secretary of State (e.g. for error or mistake of fact) under the new provisions in the **Social Security Act 1998** which became applicable to industrial injury and disease cases from 5 July 1999.

Where, in relation to a decision which had been made and become final under the express provisions of the pre-Social Security Act 1998 legislation, none of those things had happened at the time of the decision on a later claim under appeal to a tribunal, there was and is no jurisdiction before or after 5 July 1999 for the later tribunal to reopen any question of diagnosis or presence of the disease for the period already covered by the decision made final and binding by the legislation in force when it was given.

15. However, all of that applies only to medical diagnosis decisions made under the express provisions for the final determination of such issues contained in the *previous* legislation, with which alone the Court of Appeal's decision in ***Whalley*** supra was concerned, though they noted (paragraph 8) that a similar question arose under what overtook it. As noted by the Commissioner in paragraph 14 of case CI 1605/02, the way such medical diagnosis issues (which are and always have been questions of *fact*: **R(I) 18/63** paragraph 8) are dealt with under the 1998 legislation is fundamentally different. All the provisions for medical adjudication and separate determination of such factual issues have been swept away. They have now been relegated to the status of mere incidental findings of fact embodied in or necessary to the *only* type of decision for which Chapter II of Part I of the **Social Security Act 1998** now makes provision in these circumstances, namely a decision by the Secretary of State under section 8(1) on any relevant entitlement to benefit under the claim in question.

16. I respectfully agree with the observations of the Commissioner in paragraph 14 of CI 1605/2002 that in cases, such as the present one, where all of the decisions in question are made under the new regime in the **Social Security Act 1998**, the fact that there is no longer any separate provision for final decision of medical diagnosis questions in their own right must mean that an earlier factual finding on such a question made for the purposes of a decision under the 1998 Act machinery is not in itself a "decision made in accordance with the foregoing provisions of this Chapter" so as to be made final by the terms of section 17(1) of that Act. Instead, it is a "finding of fact or other determination embodied in or necessary to such a decision" which by section 17(2) is made conclusive for the purposes of any later decision falling to be made under the Act *only* to the extent that regulations expressly so provide.

17. In the absence of such express provision, an earlier finding made under the 1998 Act machinery on such a question cannot fall within the modified statutory form of the principle of *res judicata* which now applies to social security decisions under section 17. As section 17(2) shows, the normal principle of "issue estoppel" that applies in civil litigation to prevent parties re-litigating factual issues already judicially decided in proceedings between them is of no application to the social security decision and appeal machinery unless there is some specific regulation that makes it so.

18. There is nothing in the new legislation to make a negative decision on the diagnosis of a prescribed disease binding for the purposes of any subsequent claim. By contrast, the factual question of whether a person has or has not suffered an industrial accident on a particular date is the subject of express provision in section 29(4), by which either a positive *or* a negative decision on that issue becomes conclusive for the purposes of the current or any later claim for industrial injuries benefit in respect of the same accident: but this is not a provision that is made to apply to disease cases. Regulation 12 **Social Security (Decisions and Appeals) Regulations** 1999 SI No. 991 makes provision for the Secretary of State to refer an issue of whether the claimant has a prescribed disease, as well as the extent of any relevant disablement, for medical report or advice; but that regulation contains nothing to make that factual issue the subject of any freestanding "decision" in the same way as under the old legislation or to bring it within section 17(2), and Mr Heath did not argue that it did. On the contrary, the terms of the regulation make a clear distinction between the factual issue referred for medical report or advice and the "decision" in the context of which it arises (in the jargon, the "outcome" decision on the claim) which is the only thing that section 17(1) makes final. The difference can be seen from a comparison of regulation 12 with regulation 10, which *is* a provision that in terms makes a factual determination (in that case, on incapacity for

work) "embodied in or necessary to a decision under Chapter II of Part I of the Act" conclusive under section 17(2) for the purposes of further such decisions.

19. Mr Heath drew my attention to regulation 6 **Social Security (Industrial Injuries) (Prescribed Diseases) Regulations** 1985 SI No. 967, by which if a person is found to have been suffering from a prescribed disease a date must be determined as the "date of onset" on which that disease is to be treated as having developed, both for the purposes of the first claim and for those of any subsequent claim in respect of the same disease suffered by the same person. Where this applies, it is another example of a regulation that within the terms of section 17(2) makes an earlier factual determination of a particular issue conclusive so that it cannot be reopened and revisited on a later claim in respect of the same disease.

20. However, the fixing of a conclusive date of onset under that regulation can quite plainly apply *only* in the circumstances described in the immediately preceding regulation 5 which introduces it, which are that

> **"If on a claim for benefit ... in respect of a prescribed disease a person is found to be or to have been suffering from the disease ...".**

In other words, it can apply only where there is a *positive* decision on a question of diagnosis, to the effect that the claimant has or has had the disease. Where the decision is a negative one, so that the claimant is *not* "found to be or to have been suffering from the disease" at all, regulations 5 and 6 simply never begin to operate. That in my judgment is quite clear from what the regulations plainly say and I must reject Mr Heath's argument that I should extend them by implication to the converse situation with which they do not deal at all, so as to create the idea of a "negative date of onset" affecting all future claims when a person is found not to be suffering from the disease on the first claim made. Unlike section 29(4) of the 1998 Act where a person is found not to have suffered an industrial accident, that is simply not a situation with which the regulations deal.

21. Mr Heath conceded on behalf of the Secretary of State that if I was unable to construe regulation 6 of the prescribed disease regulations in the way he urged, there was no other relevant regulation about the effect of a negative finding on diagnosis that could bring such a finding within section 17(2) so as to make it conclusive for the purposes of any decision on a further claim; and he also conceded, entirely rightly in my view, that under the 1998 Act machinery such an issue is only the subject of a factual finding within section 17(2), not a decision to be made in its own right so as to fall within section 17(1).

22. It must in my judgment follow that under the 1998 legislation the conclusion of the Commissioner already referred to in CI 1605/02 paragraph 14 is right, and a previous finding under that legislation that a person was not suffering from a particular disease at or down to a particular date is now of no binding force for the purposes of any later claim. Whether that change from the established and carefully constructed machinery under the previous legislation was a wise one to make, or even an intended one, may be open to debate, but there is no doubt in my judgment that this is what has been done.

23. It follows that the tribunal dealing with the appeal on the carpal tunnel syndrome claim in this case on 22 August 2002 misdirected themselves in thinking they were precluded from considering as an entirely fresh question whether the prescribed disease A12 they diagnosed actually had an earlier date of onset than 11 January 2002, and the case must be remitted to the same or another tribunal for the diagnosis and disablement issues arising out of the claim to be reconsidered and redetermined.

PD A11 appeal: correct approach to diagnosis of "blanching"

24. In the separate appeal against the tribunal's decision confirming the rejection of the claim for prescribed disease A11 vibration white finger, the facts were that neither the departmental medical adviser who examined the claimant on 9 May 2002 nor the tribunal themselves who carried out their own clinical examination at the hearing on 22 August 2002 were able to demonstrate or observe *any* blanching of the claimant's fingers, of the kind to bring his condition within the terms of the prescription. This is defined (so far as relevant to the claimant) in paragraph A11 in the first column in Part I of Schedule 1 to the Prescribed Diseases regulations as follows:

> **"A11. Episodic blanching, occurring throughout the year, affecting the middle or proximal phalanges or in the case of a thumb the proximal phalanx, of –**
>
> **(a) in the case of a person with five fingers (including thumb) on one hand, any three of those fingers ...**
>
> **(vibration white finger)."**

25. The inability to produce objective clinical signs was not unusual, as one of the problems with this condition (also variously described as "Raynaud's phenomenon" and "Hand-arm vibration syndrome") noted by the Industrial Injuries Advisory Council in the numerous inquiry reports in which a prescription has been considered is that there is no simple and foolproof clinical test. Even though the disease may actually be present, objective signs of it cannot be relied upon to show themselves during any particular

clinical examination: see the reports of 1954 (Cmd 9347), 1970 (Cmnd 4430), 1975 (Cmnd 5965), 1981 (Cmnd 8350), and 1995 (Cm 2844). Diagnosis must therefore often be a matter of taking from the claimant himself a careful history and description of the nature of his symptoms, and comparing those with what the clinician, and medical science generally, knows of the type of phenomena that fall within the medically understood and intended meaning of the term "episodic blanching" as used in the prescription.

26. There is in my judgment no doubt that the white finger condition intended to fall within that term is a medical condition of spasm or constriction of the blood vessels inhibiting the supply to the fingers affected, and is not merely the kind of momentary whiteness anyone can induce for example by gripping or pressing one's hand against some cold hard piece of metal for a minute or so. That much I take to be beyond dispute. The question that was argued before me by Mr Heath was whether it is necessary for the purposes of diagnosis of the disease, as prescribed in the terms above, for a tribunal to be satisfied not only that the extent of such "blanching" required is in fact suffered by the claimant episodically on a year-round basis, but also this has been caused by past exposure to vibration, in view of the inclusion of the final three words "(vibration white finger)" in the description of the condition itself in the first column of the Schedule.

27. He invited me to hold that that was the effect of the wording of the prescription, following what had been said by the Commissioner in paragraph 14 of case CI 803/02 to that effect:

> **"It is not simply blanching per se: it is VWF or blanching caused by vibrationary tools. It is not necessary to show that a claimant has used those tools in his occupation, merely that he has blanching which has been induced by vibration."**

28. Thus in effect the question of what *caused* the symptoms described is imported into the diagnosis of the condition itself for the purposes of the prescription of disease A11, in the same way as with certain other prescriptions in the same schedule, for example diseases A7, D4 and D7 where the cause is overtly made part of the diagnosis of the disease itself, by the use of the express words

> **"A7 Bursitis ... due to severe ... external friction or pressure ...**
>
> **D4 Allergic rhinitis which is due to exposure to any of the following agents ...**
>
> **D7 Asthma which is due to exposure to any of the following agents ..."**

and so forth. On that footing there can be no doubt that the tribunal would have been correct in law in allowing questions of the origin and development of the claimant's condition, or as they put it the "evolution", to influence their decision on whether the disease as prescribed was present at all, since even if this meant they had been looking for a vibration-induced cause they were not only entitled but bound to do so.

29. The alternative interpretation of the wording of the prescription for disease A11 and in particular whether what causes the whiteness in the fingers plays any part in the diagnosis of the condition as prescribed is that set out in paragraph 16 of a different Commissioner's decision in case **CI 4582/02** where he said:

> **"First, I have no doubt that in deciding the diagnosis question the cause of the condition is irrelevant. It is irrelevant at that stage whether the cause was the use of vibrating tools at work or even exposure to vibration from any source at all. Thus cases of primary Raynaud's disease and of secondary Raynaud's phenomenon ... not arising from the effects of vibration transmitted through the hands will fall within the diagnosis if sufficient fingers are affected episodically throughout the year. I reject the submission for the Secretary of State that the words 'vibration white finger' in brackets at the end of the first column of paragraph A11 of Schedule 1 to the Prescribed Disease regulations by inference create a test as part of the diagnosis question of a causal connection with exposure to vibration transmitted through the hands. In my view those words do no more than supply a convenient label for the prescribed disease ... For the cause of a disease to be part of the diagnosis question there must be an explicit link in the appropriate paragraph in the first column as there is for instance for occupational deafness (A10), allergic rhinitis (D4) and occupational asthma (D7). In the ordinary case, of which A11 is one, the necessity for an occupational connection comes from the overall condition in section 108(1) of the Contributions and Benefits Act, subject to the presumption in regulation 4(1) of the Prescribed Diseases Regulations."**

30. By regulation 4(1) there referred to, where a person has developed a disease prescribed in relation to him in Part I of Schedule 1 to the regulations, then with certain exceptions none of which applies to disease A11 that disease shall, unless the contrary is proved, be presumed to be due to the nature of his employed earner's employment if that employment was in any occupation set against the disease in the second column and he was so employed within a specified time before the date it is treated for benefit purposes as having developed. Thus someone like the claimant, whose occupation had involved the use of hand-held powered percussive tools in mining so as to fall within the second column set against paragraph A11 in the Schedule, is entitled to the benefit of that presumption in determining for the purposes of any entitlement to benefit under section 108 of the Contributions and Benefits Act whether the prescribed disease he has been diagnosed as suffering also meets the further essential condition that it was due to the nature of his employment.

31. With the particular difficulties of diagnosis already noted above in relation to the vibration white finger condition, it would bear particularly hard on claimants to be

deprived of the benefit of this presumption by having in effect to prove affirmatively that any blanching from which they were suffering had actually been caused by the vibration from the power tools they had been required to use at work before they could get a diagnosis of the disease at all, which is what the practical effect would be if the approach in case **CI 803/02** were right, and that of the Commissioner in **CI 4582/02** were wrong.

32. In my judgment however that is not the effect, and I have no doubt that the approach of the Commissioner in the latter case was correct and is to be preferred. I reach that conclusion for two separate reasons, each sufficient by itself. In the first place, the parenthetical addition of the words "vibration white finger" after the conditions that have to be satisfied in order to establish a diagnosis of prescribed disease A11 is quite different from the wording used elsewhere in the same Schedule to impose additional conditions about the cause of the disease as part of the diagnosis itself. Where it is a requirement of the diagnosis that the disease should be "due to" exposure to a particular substance or some other causative factor, the Schedule says so explicitly. I find no reason whatever to infer that in paragraph A11 the intention was to introduce a similar condition that the blanching must be "due to exposure to vibration" though without saying so, and a consideration of the Schedule as a whole strongly indicates the opposite.

33. Secondly, an examination of the Industrial Injuries Advisory Council report in 1981 which led to the introduction of the prescription of disease A11 (Cmnd 8350) leads to the clear conclusion that the way the prescription is worded, and in particular the nature and extent of the blanching required for the diagnosis, were premised on it being a safe assumption that *if* a genuine medical condition of blanching was present to the degree of severity stipulated, it would be almost bound to be the vibration-induced form of the condition to which the "vibration white finger" label could conveniently be applied, leaving the very small number of cases where an individual's condition met the criteria for diagnosis but was in fact due to constitutional or other causes to be dealt with by the Secretary of State's ability to identify them as the non-occupational form by displacing the presumption.

34. The following extracts from the 1981 report make this clear:

> **"White finger**
>
> **10. White finger is the common name for the well known phenomenon of transient attacks of blanching of the fingers. Medically it is described as episodic digital ischaemia or Raynaud's phenomenon. Three categories of the condition are recognised: primary white finger, secondary white finger, and vibration white finger.**
>
> **11. Primary or constitutional white finger is quite common in otherwise normal healthy adults ... the condition presents as transient attacks of tingling, numbness and blanching**

of one or more fingers or the extremities of fingers ... the episodes are usually brought on by exposure of the hands to cold.

12. Secondary white finger – white finger associated with underlying disease – is much less common. It is met with in a number of pathological conditions ...

13. Vibration white finger is the occupational form of the condition, brought on by the use of vibratory tools. It has been recognised since 1911 when Loriga in Italy reported cases to have arisen from the use of pneumatic tools in mining. Since then, there have been many further publications on the subject. In the early stages of VWF the attacks occur only in the winter and there is no interference with work or with domestic or social activities. In the more advanced stages of the condition the attacks occur in summer as well as in winter, there is extensive blanching of the fingers and both work and leisure pursuits are affected.

Diagnosis

14. Two question arise in relation to the diagnosis of VWF for the purpose of determining industrial injuries claims. These are:

(i) Does the claimant in fact have white finger?

(ii) If so, is the white finger occupationally caused?

In demonstrating the presence of white finger, the principal difficulty arises from the intermittent nature of the condition for, especially in its early stages, it cannot be made to appear with any reliability in the course of a medical examination. From the evidence we considered, we think that there is no single objective clinical test to confirm its presence. But we were told that, in the severer forms, it is sometimes possible to provoke the condition by comparatively simple means such as getting the patient to hold his hands under cold water for a few minutes. An examination on these lines, combined with careful history-taking, should, it was put to us, usually suffice to diagnose the presence of the condition in its more advanced stages.

15. When it comes to deciding whether white finger is constitutional or is occupationally caused, again evidence agreed that there is no objective means of resolving this problem. The taking of a full medical and occupational history is all-important. It was suggested to us that in most cases it should be possible for a history of exposure to vibration and of symptoms of VWF to be corroborated by the evidence of people at work. History-taking can, and should, be backed up by tests and examinations to eliminate the possible causes of secondary white finger referred to in paragraph 12 above. We were told that, if only the more severe stages of VWF were to be prescribed, most cases of primary white finger would be automatically excluded, since it is comparatively rare for such severe forms to occur without an occupational element or evidence of underlying disease. In these severe cases it is also likely that hospital case notes would be available and these should be used to help in decisions on diagnosis.

Definition of occupational cover

16. The balance of the evidence we received was strongly in favour of prescription being restricted in terms of either:

i. Vibration exposure

ii. Certain specified tools or occupations.

We felt that i. would be very difficult to administer because there is as yet no standard form of measuring vibration and because other factors, e.g. design of the particular tools, how the tool is held, the material being worked on, influence the nature of the effects of

vibratory tools. We therefore considered that any restrictions on prescription should be on the lines of ii. and that, in order to concentrate on those people exposed to greatest risks of VWF, prescription should be in terms of the use of certain specified tools in certain specified occupations. ...

The case for prescription

21. The evidence we received left us in no doubt that some vibratory tools do cause VWF. Furthermore, we were presented with more definite evidence than was available on the previous occasions on which the Council had investigated this condition that VWF produces a significant degree of disablement in some cases – though by no means all, or even most. We were also aware that most EC countries now include VWF in their lists of compensatable occupational diseases.

22. The weight of the evidence led us to conclude that the condition should be prescribed so long as the attendant problems could be minimised. The most important of these seemed to be diagnosing the presence of white finger (for which, as we have said, there is still no objective clinical test) and distinguishing its occupational from its non-occupational form. And there was the further difficulty of drawing occupational cover so as to exclude as many as possible of those whose condition is constitutional rather than work-caused whilst still including those whose VWF is genuinely occupational in origin.

23. After consideration we concluded that the best way to overcome these difficulties would be to recommend that the terms of prescription should be framed so as to cover the more severe stages of the condition only and be restricted to a list of particular tools used in particular processes, ... The advantages of this approach in our view are:

i. Benefit will be concentrated on those with the most significant disability;

ii. It will be relatively easy to be sure of the presence of white finger in its severe forms, so long as appropriate specialists carry out the initial examinations;

iii. The severe forms are very unlikely to be of the primary type, thus diagnosis will be made easier. ...

Terms of Prescription

24. It is therefore suggested that prescription be on the lines of:

Description of disease or injury

Episodic blanching of at least the two distal phalanges of three or more fingers of one hand occurring throughout the year (Vibration White Finger) ..."

35. The Council summarised their conclusions as follows:

"31. i. Vibration white finger (VWF) should be prescribed for industrial injuries purposes. But, because of the difficulties of diagnosing white finger (particularly in its early stages) and of separating occupational from non-occupational cases and because of its trivial effects in the early stages, only the more severe forms should be covered. .. The condition should therefore be prescribed in the terms set out in paragraph 24 ...

iii. Where a worker develops VWF of the severity prescribed whilst working in one of the prescribed occupations or shortly thereafter, it should be presumed that the condition is due to the nature of his employment."

36. The Council's recommended terms for the diagnosis of the new prescribed disease were substantially adopted in the regulations that followed, with further wording added (not material for the present purpose) to adapt the "three or more fingers" condition to people who had lost more than one finger on either hand.

37. In my judgment the Council's report and recommendation, and the wording of the prescription as thus proposed and implemented, are entirely consistent with it being contemplated and intended that *if* the clinical condition of blanching in the severe degree required by the prescription was in fact found to be present, that would establish a case of the "more advanced" stage condition, typical of its vibration-induced occupational form, to which the label "vibration white finger" would be appropriate. They are inconsistent with an additional requirement to demonstrate separately as part of the *diagnosis* of that advanced-stage condition that it should actually have been caused by vibration or the use of particular tools: see in particular the separation in paragraph 14 of the report of the presence of white finger from its cause, and the express rejection in paragraph 16 of the idea of limiting the prescription in terms of vibration exposure.

38. For those reasons, I respectfully agree with the Commissioner's conclusion in **CI 4582/02** paragraph 16 and follow him in holding that there is no separate question of cause or vibration exposure to be addressed in assessing whether the required nature and degree of severe episodic blanching is or has been present to support a diagnosis of prescribed disease A11. Such questions may of course still require to be addressed in any case where there is doubt whether the particular claimant's condition is occupational or non-occupational in origin, but only as part of considering on the facts of the individual case whether the presumption in regulation 4 that the disease is due to the nature of his or her employment is displaced.

39. The way the tribunal approached the question of the diagnosis is apparent from their separate statement of reasons on this appeal issued on 3 October 2002, at page 83 of file **CI 5271/02**. They recorded that on 9 May 2002 the claimant had been examined by the departmental medical adviser (Dr Pascoe) to whom he had said that the fingers of both his hands went white to the second knuckles, which he first noticed in 1985 when it had been the same as it was in 2002. They referred to another specialist medical report by Dr Nagpal in connection with his claim against his former employers, in which he had told the doctor that he suffered whiteness of the first three fingers of each hand for their full lengths, first noticing the whiteness in 1985. The tribunal noted however that "the report does not deal with the evolution of the colour changes" and they then continued:

> **"At the hearing today the appellant has told us that he first noticed whiteness of the fingers in 1985. The first three fingers of each hand were affected. The whiteness started at the tips of each finger and over a period of about 20 minutes spread down to the second knuckle. The whiteness had remained the same after that.**
>
> **We have considered all the scheduled evidence and the evidence of the appellant today. We are of the opinion that, on balance of probabilities, the appellant is not suffering from PDA11.**
>
> **The evolution of PDA11 is a gradual one with the whiteness affecting more fingers and more of each affected finger as time passes and exposure to vibration continues. The simultaneous blanching of the first three fingers of each hand down to the second knuckle of each finger from the date of onset to the present time as described by the appellant to Dr Pascoe and to the tribunal is not, therefore, consistent with the evolution of PDA11. Dr Nagpal's report does not comment on the evolution. The existence of whiteness of all the affected fingers to the full extent from the date of onset is, therefore, to be interpreted anatomically as meaning that there is unlikely to be blanching which *[sic]* the terms of the prescription".**

40. The question in this appeal is therefore whether the reasoning of the tribunal shows them to have incorrectly allowed questions of what caused the claimant's condition to have affected their decision on the diagnosis of prescribed disease A11. Such a question of diagnosis is always a question of fact (**R(I) 18/63** paragraph 8, already cited) and, as rightly emphasised by the Commissioner in case CI 4582/02 paragraph 17, is one for the specialist medical judgment of the tribunal:

> **"What is blanching in any particular case must be a matter for the medical expertise and experience of the medical advisers who carry out examinations and medically qualified panel members of appeal tribunals."**

In particular, whether the whiteness a claimant says he suffers in his fingers is of the required type and severity to amount to "episodic blanching" for the purposes of the prescription is for the tribunal to determine as a matter of medical judgment, and not a Commissioner to dictate.

41. Each tribunal's statement of reasons must of course be judged in its own context and although the Commissioner in CI 4582/02 found the reasoning before him in that case to be inadequate, I have not been satisfied that the tribunal's reasoning in the present case shows they misdirected themselves about the requirements for diagnosis, or improperly allowed causative questions to affect their assessment of whether the prescribed clinical condition and degree of "blanching" were present. It seems to me that on a fair reading of their references to their doubts about whether the evolution described by the claimant was consistent with what could be accepted as blanching within the terms of the prescription, what the tribunal were quite properly seeking to address was whether the *type* of whiteness he was describing was shown to their satisfaction to be consistent with their own medical assessment and understanding of the severe type of vasospasm or vaso-constricted condition amounting to true clinical "blanching" for the

purposes of the prescription. In a case where there was no objective clinical evidence to assist the tribunal from the medical adviser's report or their own examination, so they were entirely dependent on the history and description given by the claimant himself of his vascular symptoms, the detailed comparison of that description with their own medical knowledge and experience of the type of whiteness within the prescription was of course all-important. Whether the whiteness of sudden onset he described was indeed of that type, or whether his description fell short of satisfying them on the balance of probabilities that he had really been suffering from the kind of severe and spontaneous episodic interruption of the blood supply to his fingers that constitutes the medical condition of episodic blanching as prescribed, were medical matters for them to determine.

42. Given the evidence to which they referred, the tribunal's conclusion cannot I think be described as perverse or unreasonable, and their reasons for not being satisfied the whiteness the claimant described as affecting his fingers was of a nature to constitute the required clinical condition of "blanching" are expressed sufficiently clearly. The claimant had not asked them to adjourn the proceedings to give him a chance of obtaining yet further medical evidence, and I do not think they can be criticised for not doing so even though he told them he was waiting to see a vascular surgeon.

43. Nor of course can it amount to an error of law that their decision was unable to take account of the contents of the surgeon's report only produced subsequently. If the claimant is now advised that the more up-to-date medical evidence is likely to make a material difference to a diagnosis of prescribed disease A11 there is of course nothing to prevent his making a fresh claim on that basis, and in view of my decision in his favour on the first appeal there will now be no bar to his being considered for an earlier date of onset in relation to vibration white finger if this should be diagnosed on a later claim.

44. For those reasons, the appeal on the first case relating to carpal tunnel syndrome is allowed in the way I have indicated and that on the second one relating to vibration white finger is dismissed.

(Signed)

P L Howell
Commissioner
29 March 2004