Bulletin 174

CI/1720/2001

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the Barnsley appeal tribunal dated 14 February 2001.

REASONS

2. I held an oral hearing of this appeal. The hearing took place on two separate days. The claimant was represented by Mr David Douglass of the National Union of Mineworkers. The Secretary of State was represented by Ms Deborah Haywood of the Office of the Solicitor to the Department of Health and the Department for Work and Pensions.

3. The claimant is a former miner who worked underground as a development worker from 1979 to 1990. He claimed disablement benefit in respect of prescribed disease A11 on 6 October 1998. In paragraph A11 of Schedule 1 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, the disease is prescribed in the following terms:

> "Episodic blanching, occurring throughout the year, affecting the middle or proximal phalanges or in the case of a thumb the proximal phalanx, of –
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> (a) in the case of a person with 5 fingers (including thumbs) on one hand, any 3 of those fingers, ..."

The claimant was referred for a medical examination. On 22 February 1999, the medical adviser examined the claimant and recorded a detailed history. He or she ended the report with the following remarks:

> "Occupational exposure to vibrating tools.
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> "No history of blanching. Therefore it is concluded that customer is not suffering from PD A11 as prescribed."

The adjudication officer adopted that opinion, decided that the claimant was not suffering from the prescribed disease and disallowed the claim. The claimant appealed to an adjudicating medical authority, by way of a letter from Mr Douglass stating that the claimant "suffers all the classic symptoms of VWF, white fingers down to the last knuckle, loss of dexterity, loss of grip, etc." The Social Security Act 1998 then came into force and the appeal was treated as an application for supersession, under transitional regulations. The application resulted in no change being made to the adjudication officer's decision, a result that must now be interpreted as a supersession "at the same rate". The claimant appealed on a form completed by Mr Douglass who stated that the claimant "has all the classic symptoms of VWF; his fingers are white down to the last knuckle, winter and summer, and from about ten years before he finished". There was produced a report from the Health and Safety Laboratory in Sheffield, made in connection with a claim for compensation made by

the claimant against his former employers. That report, dated 30 November 1999, concluded with the opinion that the claimant had hand/arm vibration syndrome, with both the sensorineural and vascular components being severe and causing the claimant significant incapacity. A diagram showed blanching on all three phalanges of the first, middle and ring fingers of both hands, but not on the little finger or thumbs.

4. A tribunal dismissed the claimant's appeal on 7 March 2000. The claimant appealed to a Commissioner. The appeal was supported by the Secretary of State on the grounds that the tribunal had erred in confirming the adjudication officer's decision which had not been in respect of any particular period and had not included any consideration of the claimant suffering sequelae and also on the ground that the tribunal had given inadequate reasons for their decision, in the light of the conflicting evidence. The Secretary of State also submitted that the case should be referred to another tribunal. Given the Secretary of State's approach to the facts of this case, it is not clear to me why he did not suggest that the Commissioner should give a decision to the same effect as the tribunal's, because the identified errors were of a fairly technical, if not pedantic, nature. The Commissioner might have declined such a submission on the ground that the case should be considered afresh by a tribunal with a doctor among its members, but at least he would have had a realistic choice. Be that as it may, the Commissioner allowed the appeal (CI/2104/00) and referred the case to another tribunal.

5. Meanwhile, the claimant had obtained a medical report from a consultant vascular surgeon, Mr R J Cushieri FRCS. He had before him the report of 30 November 1999 and he examined the claimant and recorded a history. He concluded that "on the balance of probability" the claimant was suffering from hand/arm vibration syndrome due to exposure to hand-held vibratory tools, with both cold induced episodic whiteness and symptoms of bilateral carpal tunnel syndrome. His diagram showed blanching of the distal and middle phalanges of all four fingers of both hands. There was nothing written in the report as to the extent of the blanching.

6. The claimant had also made a claim for disablement benefit in respect of prescribed disease A12, carpal tunnel syndrome. On 2 May 1999, disablement was assessed at 5% from 19 April 1993 to 18 April 2001. The claimant appears to have applied for supersession of that decision. He was referred for medical examination and, on 7 February 2000, the medical adviser expressed the view that the claimant was suffering from neither prescribed disease A11 nor A12. The Secretary of State adopted that opinion. The claimant appealed and, on 7 December 2000, the tribunal allowed his appeal in respect of prescribed disease A12, although that decision did not result in any benefit being paid to the claimant. I am not directly concerned with that decision. What is material is that the claimant gave to the tribunal a history and he is recorded as having said:

> "I get white patches on the fingers. I get whiteness around my wrists. My hands are all white. I get attacks of whiteness every day in winter."

7. All that evidence was before the tribunal who sat on 14 February 2001 to hear the case remitted by the Commissioner. The tribunal took yet another history from the claimant. He told them that the symptoms had started at the tips of his fingers and had

gradually developed "so by 1990 it had spread to the bottoms". They dismissed his appeal. Having set out the background, the chairman gave the following reasons:

> "We have considered the whole matter afresh.
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> "It is true that the Appellant did not mention blanching in his claim form or to the examining doctor and we think this important. This is because he completed the claim form and saw the doctor before he became involved with an experienced representative. It was only when his representative became involved that it was argued that the reason why the Appellant did not mention the blanching was that it was self evident from the description of the prescribed disease. We have talked to the Appellant about this today. However the letter of appeal in which this argument was advanced was actually written by the representative himself and not by the Appellant. Indeed on questioning it appears that the information given in that letter of appeal was incorrect. We have noted it above. It clearly states that the Appellant had the classic symptoms of Vibration White Finger in that his fingers went white down to the last knuckle both winter and summer from about ten years before he finished (work). We cannot accept that letter of appeal was written in consultation with the Appellant who has told us today that his finger in fact only went white at the ends in the beginning and that the whiteness did not spread to the bottom of the fingers until the end of his employment in 1990. This is a contradiction of what is written in that letter of appeal. We have put to the representative that he wrote the letter of appeal with[out] talking to his client about it but he has denied it and states that it is merely a mistake. However we do not accept that. The argument is therefore that of the representative and not of the Appellant and we view it accordingly. Indeed it is not the first time that we have heard this argument advanced in cases where claims have been refused on the grounds that the Appellant did not describe any blanching.
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> "We next come to the report of the Health and Safety Executive which is with the papers. We accept that the doctor there accepted that the Appellant had both the sensorineural and vascular components of Hand Arm Vibration Syndrome. However that report would be largely based upon the history given by the Appellant. No cold provocation test was carried out for very good reasons and the report itself makes the point that (Page 34) the interpretation of the cold provocation test is a very important aspect in arriving at a vascular staging. It is the vascular staging which is important for the purposes of PDA11. We prefer the opinion of the examining doctor who based his opinion on the history given to the Appellant at the outset which did not describe any blanching and we have dealt with that above.
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> "Next we come to the report of Mr Cushieri, the Consultant Vascular Surgeon. We weigh this heavily because of course Mr Cushieri is indeed a consultant. However much of what he decides is again based on history given by the Appellant which is of cold induced blanching. This report illustrates inconsistencies in the Appellant's evidence. We have put to [the claimant] the diagram produced by Mr Cushieri as to the extent of whiteness is completely

different from the diagram drawn by the doctor for the Health and Safety Executive in that different fingers are involved and the extent of blanching is different. The Appellant had not been able to say why this is the case. However diagrams are based on what the Appellant tells a doctor and clearly a different history has been given to each. The opinion of Mr Cushieri is not firm. He states "[the claimant] appears to suffering from Cold Induced Episodic Whiteness". He did not carry out a cold provocation test either.

"We have now had the benefit of seeing the report of the examining doctor dated 7 February 2000 in connection with his claim for PDA12. In the statement given to that doctor the Appellant describes a completely different pattern of blanching. He is quite clear that he has white patches on his hands and "around my wrists". Also, he states that "my hands are all white". If indeed that is a true description of the blanching of his hands then it militates against a diagnosis of PDA11. It is quite clear that the vascular problems occur much higher up the hand than would be the case with PDA11.

"We have put to [the claimant] why he gave this different statement in connection with his A12 claim and he has stated that it was a different prescribed disease.

"On balance of probabilities therefore we do not consider that he has discharged onus of proving that on balance of probabilities he has suffered from PDA11. We think that the statement given in his claim form and to the examining doctor were more likely to have been correct that the statement subsequently made to both Mr Cushieri and the DTI doctor which were at a time when he was aware that blanching was a requirement of PDA11. In addition there are inconsistencies in his evidence with different descriptions of whiteness and the extent of it being given to the various doctors and certainly the description given in connection with A12 claim rule out the diagnosis of PDA11.

"For all these reasons we decided that the Appellant is not suffering from this prescribed disease."

The claimant now appeals with the leave of the tribunal chairman.

8. The first ground of Mr Douglass' application to the chairman for leave to appeal was that the Secretary of State's representative had raised the inconsistency between the letter of appeal drafted by him and the claimant's evidence to the tribunal at a late stage in the hearing, that the tribunal had expressed annoyance at the error and that that had "prejudiced the objectiveness of the tribunal's judgment". After the appeal had been lodged, a Commissioner asked for the chairman's comments. She said:

"I granted leave to appeal after much consideration of the grounds of appeal. There was some frank discussion with the representative at the end of the hearing about the letter of appeal and who had written it. I dealt with that in the statement of reasons but it may be that the appellant feels that he was

prejudiced by the view taken by the Tribunal of the role of his representative and for that reason [I] granted leave.

"There was no new evidence produced by the Presenting Officer at the hearing. The letter of appeal was always with the bundle and was merely referred to. It seemed to the Tribunal that it was important to establish who had written it for all the reasons given in the statement of reasons."

While I fully understand why the tribunal chairman granted leave to appeal – because it is desirable that when this sort of allegation is made that it should be seen to be considered by an independent appellate body – I do not consider that there is anything in this point of Mr Douglass'. He conceded that the letter of appeal had been in the original bundle of documents so that the presenting officer was perfectly entitled to point to the inconsistency between that and the claimant's other statements. The tribunal were entitled to make it clear to Mr Douglass that it was not proper for a representative to make assertions of fact without having any evidence from the claimant to support them, particularly as they considered that the assertion had been made without Mr Douglass having any instructions at all as to the extent of the blanching of the claimant's fingers.

9. Mr Douglass' explanation to me, and also to the tribunal, was that he did have instructions from the claimant. He said that he had had a brief and informal conversation with the claimant on an earlier date and had intended to base his letter on that conversation but that his understanding of the extent of the blanching of the claimant's fingers was wrong. If that is so, either the claimant gave a very different account from that he has given since, or else Mr Douglass' understanding was completely different from what he was told. Mr Douglass himself says that the first of those explanations is not correct. Given the importance of the assertions of fact being made, the second explanation seems to me to imply a degree of carelessness that is scarcely less reprehensible in a representative than making an assertion based on no instructions at all. It is important for a representative to be scrupulously accurate in any assertions of fact. If he has doubts as to what his client's instructions are, he should not rashly make assertions in the hope that his client's evidence will be consistent with them. It is difficult to see how Mr Douglass can have been sufficiently certain in his understanding to justify the terms in which he wrote and yet have been so inaccurate. It is wrong to mislead a tribunal, even when it is not actually dishonest. Mistakes can have adverse consequences for claimants. If the representative's version of the facts is different from the claimant's, there is a risk that the claimant's credibility will be undermined by the apparent inconsistency because it is likely to be thought that the representative was acting on instructions and that the claimant's own statements have been inconsistent. Also, once a representative has been found by a tribunal to be unreliable, he loses much of his effectiveness in other cases and it may take some time to re-establish a tribunal's confidence in him.

10. For the purpose of determining the claimant's appeal, it did not really matter whether Mr Douglass had made an assertion without instructions, as the tribunal believed, or he had made it on the basis of a mistake as to what his instructions were, as he had claimed before the tribunal. In either event, his assertion was agreed to be

inaccurate and had to be ignored. That is what the tribunal did. They considered the implications of the other inconsistencies in the claimant's evidence.

11. I turn then to Mr Douglass' main complaint which is that the tribunal took account of the fact that the claimant did not mention blanching in his claim form or when examined by the medical adviser. Mr Douglass argued that the claim form, which was a general form applicable for all industrial diseases, did not ask specifically about blanching and that a claimant might well assume that it was obvious from the fact that he was claiming in respect of a disease known as "vibration white finger" or simply "white finger" that he was claiming to have fingers that went white. Having read the notes taken by the medical adviser, which did not suggest that the claimant had been asked during his examination about blanching, I raised the question whether it was deliberate policy not to ask questions about blanching and then to decide that there was no blanching if the claimant did not mention it spontaneously. I adjourned the hearing to enable Ms Haywood to take instructions on the point.

12. In advance of the second hearing, Miss Haywood placed before me a minute from Dr Susan Reed BSc MB ChB DipOccMed DDAM of the Corporate Medical Group of the Department for Work and Pensions. Dr Reed makes the point that in medical history taking doctors do not ask closed questions save when clarifying what a patient has said. I do not doubt that that is so. Lawyers endeavouring to elicit the truth use the same approach. I agree with her that avoiding closed questions can set a person at ease so that he or she is more accurate and gives fuller answers than might be the case under interrogation. I also accept that use of technical language by a questioner may be unhelpful and that asking closed questions can lead to a claimant giving inaccurate answers because the question may indicate that there is a "correct" answer.

13. Dr Reed goes on to state:

> "5. Thus, in the case of white finger, the correct medical approach is not to ask direct questions such as 'do your fingers blanch ?' This is a fundamental factor in medical history taking, and is part of the training given to Medical Services' doctors. One would not ask direct questions in order to diagnose other diseases, including prescribed diseases.
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> 6. The whiteness of white finger is so outwith the normal experience that those who genuinely have it will mention it. It is not the paleness that one gets when one presses fingers on a glass for example, it is an intense whiteness due to the cessation of blood flow to the digits involved due to constriction of the blood vessels, thereby not allowing any blood to flow through them. The onset of an actual attack is rapid, and on recovery, (often speeded up by warming the hands, though it will occur spontaneously in a few minutes, otherwise the fingers would develop gangrene) follows a standard pattern of recovery, (see para 3) which again, if the person actually has the condition, it is so dramatic, they will describe it without prompting. Thus it is correct for a doctor to put great significance on a patient's failure to mention the sequence of events that are known to occur in a genuine case of white finger, and does lead a clinician to the conclusion that the patient does not have the disease."

14. I agree that asking the blunt question "do your fingers blanch ?" would plainly be inappropriate, both because the word "blanch" may not be familiar to the claimant and because merely asking the question in that way suggests that the "correct" answer is "yes". I am also quite prepared to accept that the blanching found with vibration white finger is such that a failure to mention it when asked generally about symptoms would be a matter of "great significance". However, I do not accept that such a failure *necessarily* leads to the conclusion that there is no blanching. Not stating that there is blanching is not the same as stating that there is no blanching. No doubt most people suffering from vibration white finger would mention the blanching but I accept Mr Douglass' submission that it is quite possible that a claimant who is asked in general terms about symptoms may concentrate on those producing practical effects, such as discomfort and an inability to grip small objects, rather than appearance, particularly when the mere fact he is claiming to have vibration white finger may be taken to imply an assertion that his fingers go white.

15. The Secretary of State is under a duty to investigate claims and relies on medical advisers where a medical investigation is required. The question whether or not there is blanching is central to the question whether or not a claimant is suffering from prescribed disease A11 and merely asking general questions about symptoms is not an adequate investigation. Medical advisers are quite entitled to wait and see whether a claimant mentions blanching, or a lack of it, spontaneously but, if he does not, the medical adviser should ask as open a question as possible to encourage the claimant to describe the appearance of his fingers when he experiences such other symptoms as have been described. If no, or insufficient, blanching is mentioned, the claimant's claim will fail. If the claimant mentions sufficient blanching to satisfy the statutory prescription, the medical adviser will have to consider whether to accept the claimant's statement, having regard to the failure to mention the blanching when asked in more general terms about his symptoms, but also taking into account exactly what the claimant eventually said when asked about the appearance of his fingers. Diagnosis of vibration white finger depends very much on the history given by the claimant because it is difficult, if not impossible, to apply tests that produce clear evidence to verify what is said by the claimant. Those advising and adjudicating on claims must resist the temptation to give undue weight to matters that may suggest, but do not conclusively prove, that the claimant's account is not correct. On the other hand, they are not required to ignore those matters. They must keep open minds and have regard to all the evidence.

16. In the present case, it seems to me that the medical adviser ought to have ascertained whether the claimant had anything to say as to the appearance of his fingers. However, his or her failure to do so does not invalidate the tribunal's decision. By the time the case got to the tribunal, the claimant had stated that his fingers did go white. The problem was that he had made that assertion in different ways and the tribunal had to consider which, if any, of the statements were accurate. In considering that question, the tribunal were entitled to regard it as being significant that the claimant did not mention blanching to the medical adviser. They plainly shared Dr Reed's view that it would be improbable that a person suffering from vibration white finger would not have mentioned the blanching. I do not accept Mr Douglass' submission that they were not entitled to have regard to that failure at all. It

would, on the other hand, have been an error of law to regard it as being, in itself, conclusive regardless of any other evidence because, logically, it was not. However, they did not regard it as conclusive. They considered the other evidence, but the scepticism induced by the failure to mention blanching until Mr Douglass became involved in the case and explained its significance caused them to discount the evidence of the Health and Safety Executive report and Mr Cushieri. They referred to inconsistencies in that evidence. Inconsistencies can arise for a number of reasons, including the different ways in which histories are elicited and recorded by doctors and the fact that symptoms may not always manifest themselves in the same way, but one cause of inconsistency is that the claimant is not giving a true account of symptoms and the tribunal were entitled to regard that as a possibility. What plainly carried a considerable amount of weight in the tribunal's minds was the history given by the claimant in connection with his claim in respect of prescribed disease A12, which was not only different from the other recorded histories but was also atypical of a history associated with prescribed disease A11, if not entirely inconsistent with the statutory terms in which that disease is prescribed. Most importantly, the claimant's explanation for the difference between that history and the other histories was unsatisfactory. The fact that the claim was in respect of a different disease was not a reason for giving a different account of symptoms. I accept Ms Haywood's submission that the tribunal, who had the advantage of hearing the claimant give oral evidence, were entitled to regard the histories of blanching given in respect of prescribed disease A11 as being unreliable and to reach the conclusion that the claimant had not suffered from prescribed disease A11.

17. They were certainly not bound to reach that conclusion and Mr Douglass raised advanced powerful arguments for a different conclusion. However, an appeal to a Commissioner lies only on a point of law and I therefore cannot interfere with the tribunal's finding that the claimant had not suffered from prescribed disease A11, which was a finding of fact, unless they erred in law. I do not consider that they did err in law.

18. In reaching this conclusion I have not overlooked the fact that some of the same criticisms can be made of the tribunal's decision as were made of the decision given on 7 March 2000. The final sentence of the tribunal's decision, like the decision of the adjudication officer, is expressed in the present tense and does not refer to a particular period. However, neither party has made any complaint about that issue and it seems perfectly obvious that the tribunal were of the view that the claimant had never suffered from prescribed disease A11 at any time. That being so, no question of sequelae could arise. Thus, the tribunal's infelicitous use of language is of no significance.

M. ROWLAND
Commissioner
31 October 2002