MP-v-Department for Communities (PIP) [2019] NICom 55

Decision No: C13/18-19(PIP)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENC PAYMENT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 10 April 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 10 April 2017 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

2. I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. An appeal tribunal which has a Medically Qualified Panel Member is best placed to assess medical evidence and address medical issues arising in an appeal. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.

3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.

4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of her entitlement to Personal Independence Payment (PIP) remains to be determined by another appeal tribunal. In accordance with the guidance set out below,

the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

The issue arising in this appeal

5. The Department for Communities (and its predecessor the Department for Social Development) is responsible for the administration of social security benefits in Northern Ireland. As part of the decision-making process with respect to certain benefits, mainly Employment and Support Allowance (ESA), Industrial Injuries Disablement Benefit (IIDB), Disability Living Allowance (DLA) and the benefit at issue in the present appeal, PIP, the Department may arrange for the claimant to attend a medical examination, assessment or what is now known as a face to face consultation. Indeed certain of the substantive rules of entitlement to benefits impose a requirement on claimants to attend such assessments.

6. The Department has contracted the assessment process in respect of certain benefits to external providers. In the case of PIP the external provider is Capita. Capita becomes involved after the claim process to PIP has commenced and a claim has been received in the Department. The claimant, as part of the claim process will complete a form ('PIP2') providing details of their specific illness or disability and how it affects them on a day-to-day basis. When received in the Department, the 'PIP2' form is then reviewed by a Capita Disability Assessor who will decide whether an assessment or face-to-face consultation is required. The Law Centre reports that in approximately 85% of cases a face-to-face consultation is recommended. The consultation usually takes place in one of Capita's assessment centres.

7. A report of the consultation is then passed back to the Department for consideration by a decision-maker as part of the decision-making process in respect of the claim. If the decision on the claim is appealed by the claimant, the report of the assessment or face-to-face consultation undertaken by the Capita Disability Assessor is included in the appeal submission which is sent to the Appeals Service (TAS) and is eventually made available to the appeal tribunal.

8. What has now emerged is that the Capita assessment process and individual claimant reports is subject to a review or audit procedure which is described in greater detail below. One unfortunate consequence of a description of a policy or process is that it has made this decision somewhat lengthy. One of the effects of the audit procedure is that a report of an assessment conducted by a Disability Assessor in respect of an individual claimant may be the subject of an audit and amendment before it is returned to the Department. That is what happened in the instant case. I observe, at this stage, that the amendment to the report in the instant case was to the advantage of the appellant, involving the replacement of a non-scoring descriptor with a scoring descriptor. I say that because it is representative that the audit process is not always adverse to the claimant/appellant. Finally, the report which is seen by

the appeal tribunal is the audited and amended version and not the original which is not seen by the appeal tribunal. Once again, that is what happened in this case.

9. This decision assesses the effect of the audit process on the assessment of evidence by an appeal tribunal in appeals involving entitlement to PIP.

Background

10. On 2 November 2016 a decision maker of the Department decided that the appellant was entitled to the standard rate of the daily living component of PIP from and including 7 December 2016 but was not entitled to the mobility component of PIP from and including 7 December 2016. Following a request to that effect the decision dated 2 November 2016 was reconsidered on 20 December 2016 but was not changed. An appeal against the decision dated 2 November 2016 was received in the Department on 12 January 2017.

11. The appeal tribunal hearing took place on 10 April 2017. The appellant was present, was accompanied by her husband and was represented by Mr McCloskey of, at that stage, the Citizens Advice organisation. The appeal tribunal allowed the appeal in part, making an award of entitlement to the enhanced rate of the daily living component of PIP from 7 December 2016 to 6 December 2020 but confirming the disallowance of entitlement to the mobility component of PIP from and including 7 December 2016.

12. On 3 November 2017 an application for leave to appeal to the Social Security Commissioner was received in TAS. In this application, the appellant was, once again, represented by Mr McCloskey but now of the Law Centre (Northern Ireland). On 6 November 2017 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

13. On 18 December 2017 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 25 January 2018 observations on the application were requested from Decision Making Services (DMS). In written observations dated 15 February 2018, Mr Arthurs, for DMS, supported the application on certain of the grounds advanced on behalf of the appellant.

14. Written observations were shared with the appellant and Mr McCloskey on 25 February 2018. Written observations in reply were received from Mr McCloskey on 2 March 2018 and were shared with Mr Arthurs on 13 March 2018.

15. The file became part of my workload in late June 2018. On 12 September 2018 I granted leave to appeal giving, as reason, that the

grounds of appeal were arguable. On the same date I directed an oral hearing of the appeal.

16. The appeal was first listed for oral hearing on 23 October 2018. On 24 September 2018 an application for postponement of the oral hearing was received from Mr McCloskey. The postponement application was granted by me on the same date. The appeal was re-listed for oral hearing 6 November 2018 but had to be postponed again due to an unexpected judicial commitment on my part on the same date.

17. The substantive oral hearing of the appeal took place on 4 December 2018. The appellant was not present but was represented by Mr McCloskey. The Department was represented by Mr Arthurs. Gratitude is extended to both representatives for their detailed and constructive observations, comments and suggestions.

18. At the oral hearing Mr McCloskey agreed to provide details of the appellant's benefit status. In e-mail correspondence dated 13 December 2018, he confirmed that the appellant had an entitlement to the enhanced rate of the daily living component of PIP from 7 December 2016 to 6 December 2020.

19. At the oral hearing Mr McCloskey also agreed to provide further information about certain issues which had been raised by the appeal. Written correspondence and additional documentation to that effect were received in the office on 21 December 2018 and were shared with Mr Arthurs on 4 January 2019. Written correspondence in reply was received form Mr Arthurs on 30 January 2019 which was shared with Mr McCloskey on 5 February 2019. Further correspondence was received from Mr McCloskey on 19 February 2019 which was shared with Mr Arthurs on 12 March 2019.

Errors of law

20. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?

21. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

> "(i) making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …

Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

Two preliminary grounds of appeal

22. Mr McCloskey has raised three grounds of appeal on behalf of the appellant. The first two of those are as follows:

(i) the appeal tribunal erred in law as it failed to provide adequate reasons for its decision in relation to entitlement to the mobility component of PIP; and

(ii) the appeal tribunal erred in failing to provide adequate reasons for the decision not to adjourn in the case.

23. In relation to ground (i), Mr McCloskey made the following submissions:

'The mobility reasons contain 4 substantive paragraphs. The first relates to the history of DLA claim and notes that there was no mobility component. The second paragraph outlines the claim date, the conditions, that an assessment took place and based on all the evidence the decision maker awarded standard rate of daily living. The third substantive paragraph considers car use as the apparent reason that Activity 1 of the mobility component was not applicable. The final substantive paragraph includes a determination that the appellant can walk more than 50 but less than 200 metres. The only reasoning provided was that she walked into court today and was observed by court staff and Panel Members conducting this exercise.

It is submitted that if the tribunal has taken any evidence from court staff in relation to (the appellant's) appeal, such evidence should be given before the tribunal to allow the witness's evidence to be heard by the parties to the appeal and to allow further questioning by the parties. It is submitted that if the tribunal has taken evidence from court staff outside of the tribunal setting and has not put this evidence to the appellant for her response, then this is an error of law.

We would submit that this issue was considered in C22/06-07(DLA) (paragraph 6) in which it was held:

Failure to put Observations for Comment

6. Although the matter has not been raised by the parties, I note that the tribunal relied, in refusing entitlement to the higher rate mobility component of disability living allowance (DLA), on the following observations made by itself:

> "Twice on getting up before the Tribunal, she rose quickly and walked confidently to the door and out of same, on one occasion bending quickly to lift her crutch".

There is no indication from the record of proceedings that these observations were put to the claimant for her comment. There is no obligation on a tribunal to accept a response that might have been made to such observations, but it must take it into consideration and briefly explain to her why it has made the findings it has, having regard both to its observations and her explanation.

It is submitted that there has been a breach of the rules of natural justice because the parties were denied an opportunity to comment on and address the apparent evidence of court staff and panel members. Given the importance of the observations to the decision as demonstrated by its reference in the reasons it is important to give the appellant an opportunity to respond especially given Regulation 4 and Regulation 7 of the PIP Regulations (NI) 2016. R1/01(IB)(T) held:

A Tribunal which is going to base its decision, or an important part of its decision, on what it has seen should usually put its observations to the claimant and thereby give him an opportunity to comment. It will then be for the Tribunal to accept or reject the comments. Whether or

not this is necessary will depend in a large measure on whether the Tribunal's observations raise a new issue or constitute fresh evidence or whether they merely confirm existing evidence (paragraph 13).

In addition, it is submitted that the tribunal has failed to satisfy itself that her walking ability as demonstrated on the day of the hearing was the same as it was when the original decision was made on her claim to PIP. Further the tribunal has failed to explain how it considered variability in her condition despite it being raised in (the appellant's) oral evidence and in her original claim form. It is also submitted that the tribunal has failed to expressly consider her ability to perform the activities listed in activity 12 safely, to an acceptable standard, repeatedly and within a reasonable time period as required by regulation 4(3) of the PIP Regulations (NI) 2016. Noting the observations of the appellant walking into the court without taking the opportunity to note observations regarding the time period and the standard of walking further lessens the weight to be attributed to this evidence.'

24. In response to this ground of appeal, Mr Arthurs made the following submissions:

> 'I would now agree with Mr McCloskey that the tribunal should have put its observations of (the appellant's) walking ability to her for comment and would cite R3/01(IB)T in support of this. It is also my submission that the tribunal failed in their inquisitorial role by failing to seek answers relating to the contended variability of the Mrs Patterson's conditions and her functional limitations when she was having 'good/bad' days.'

25. I have no hesitation in accepting that the decision of the appeal tribunal is in error of law on the basis of this submitted ground. The jurisprudence with respect to reliance by an appeal tribunal on its ocular observations is unambiguous and has been reinforced on a number of occasions. Applying that jurisprudence to the instant case, it is axiomatic that there has been a clear breach of the rules of natural justice.

26. I would add the following. In the statement of reasons for the appeal tribunal's decision the following is recorded:

> 'She walked into the court today and was observed by court staff and Panel Members conducting this exercise.'

27. I have noted that the appeal tribunal hearing took place in a court building where the routine judicial business is that of the court and not

the tribunal. I do not know whether there were court proceedings taking place on that date as well as the appeal tribunal hearing. I also do not know who were the 'court staff' referred to in the extract from the appeal tribunal's statement of reasons set out above. The appeal tribunal will have had a discrete tribunal clerk employed by the Appeals Service. The appeal tribunal may have been referring to the tribunal clerk when it mentioned 'court staff'. Equally, though it may be a reference to the wider group of court venue staff employed by the Norther Ireland Courts and Tribunals Service. That is, however, conjecture on my part. The wider and more fundamental point is that the reference to the observations by the court of the appellant walking into the 'court' today is reflective of validation or reinforcement of the appeal tribunal's own ocular observations.

28. .Further, and more significantly, the uninformed reader of the appeal tribunal's statement might be given the inappropriate impression that 'court' or tribunal staff are permitted to make observations of appellants and that such observations might be relied on by an appeal tribunal to reinforce their own.

29. In relation to preliminary ground (ii), Mr McCloskey made the following submissions:

> 'I provided representation at this case and applied for an adjournment of the appeal hearing. This was on the basis that, like a number of PIP cases, there were indications that the medical report prepared by the Department's contracted assessment provider had been audited or amended.
>
> The adjournment request is noted in the record of proceedings and the reasons for refusal are also outlined in the record. In giving reasons for doing so, it expressed concern that her representative had not given notice to the respondent in regard to these issues in this case. The tribunal stated that the representative should have given notice to the respondent instead of ambushing them on the day of the hearing. Although other reasons were given for the refusal of the adjournment, it is clear that this perceived ambushing and lack of notice to the Department was one reason why the adjournment was refused.
>
> As the reasons and the record of proceedings are blurred it is unclear what discussion existed regarding this perceived ambush. It is my evidence that this matter was not raised with the parties and had it been raised both the representative and presenting officer could have addressed these concerns with documentary evidence

showing that DfC had confirmed it had been put on notice in a letter dated 29 March 2018.

There was no factual basis for the assumed ambush and it was in fact contrary to the interests of justice to proceed.'

30. In response to this ground of appeal, Mr Arthurs made the following submissions:

> 'The tribunal refused to allow an adjournment, believing this was an attempt to stall proceedings by the appellant's representative. They noted this in their reasons but there is no indication their thoughts were put to the appellant/representative for response. By failing to raise their concerns with the appellant and representative the tribunal have failed to allow a response and have therefore erred in law.'

31. In the record of proceedings for the appeal tribunal hearing, the following is recorded:

> 'Mr McCloskey introduced a request for an adjournment on the basis that he considered that the interest of justice were not best served by proceeding.
>
> When invited to elaborate, he considered that this Appeal suffered in common with a number of others, regarding an amendment to the Disability Assessor's report. In that context he wanted an adjournment so that discovery could be given of any changes made, what quality issues arose requiring any amendments to be made, who made the amendments, why, when, how and the justification for the same. He had not placed the respondent on notice in regards to the specifics of this case. We consider he should have done so, rather than potentially wasting time and cost, by ambushing the respondent today. It was a matter for the respondent. Similar issues have been raised in regard to other Appeals and these are being dealt with by the administration within the Department, Capita and his office. We were satisfied that there is no direction from any source indicating that matter should be adjourned for this reason. We were satisfied that the Panel were properly trained in regard to reviewing Appeals under Personal Independence Payment. The Legally Qualified Member was satisfied that the General Practitioner notes and records were full and complete and that Mr McCloskey had had the opportunity for reviewing them with his client and noting material inconsistencies arose or were identified by Mr McCloskey. The interests

> of justice, it was concluded required that the Appeal proceed. Any remedy that may arise can only do so after this Appeal either in this or in a different arena.
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> Mr McCloskey exhibited a letter regarding other claims. We are satisfied that these claims were not within the province of this Appeal arena and further determined that the Appeal should proceed as it was in the interest of justice to do so.'

32. I am of the view that there is a degree of merit to this ground of appeal. On the face of it, the narrative concerning the adjournment application is comprehensive and appears to reflect a detailed discussion as to the reasons behind the adjournment request and an outline to the parties of the appeal tribunal's reasoning for considering a refusal of the application. In retrospect, however, and while set out in the record of proceedings, the account is, in my view, more likely to reflect that appeal tribunal's reasons for the refusal of the application recorded post-appeal.

33. I say that because the appeal tribunal has placed an emphasis on the failure by Mr McCloskey to put the Department on notice, in advance of the appeal tribunal hearing that he intended to make an adjournment request and the reasons for that request. The appeal tribunal thought that he could and should have raised the issue in advance, thereby saving time and cost and, more significantly, should not have sought to 'ambush' the Department. It is the case, however, that Mr McCloskey did raise the issue of the potential amendment of the healthcare professional's report with the Department well in advance of the oral hearing of the appeal by way of correspondence to the Department dated 17 February 2017. He had received a holding reply but not the answers to the specific queries which he wished to raise. Far from being 'ambushed' the Department was, in fact, on notice. Mr McCloskey is an experienced appeal tribunal representative. I am certain that had there been any discussion at the oral hearing of the appeal of a failure to notify the Department of his concerns about the healthcare professional's report then he would have interjected with a response about the earlier exchange of correspondence on the issue. Further, there was a Departmental Presenting Officer at the oral hearing of the appeal and there is no indication that the appeal tribunal raised the issue with her or asked for a response to the application for an adjournment.

34. For these reasons, I am satisfied that the appeal tribunal has committed or permitted a procedural irregularity capable of making a material difference to the outcome or fairness of the proceedings.

The substantive ground of appeal

35. Having found, for the reasons set out above, that the decision of the appeal tribunal is in error of law on the basis of both preliminary grounds of appeal, I do not have to consider the third and more substantive

ground of appeal. That would, however, do an injustice to the industry of Mr McCloskey and Mr Arthurs in making submissions on that issue. Further, it is imperative that guidance is given to appeal tribunals on the practice and procedure to be adopted when faced with the questions which arise.

36. In his Case Summary, Mr McCloskey made the following submissions:

> 'The tribunal states that "*it was difficult to see how the report could not carry significant weight in the absence of any information or complaint of contrary*". As noted above, concern had been raised about the report and those concerns were not adequately addressed by the tribunal. It is therefore submitted that the tribunal has erred in law.
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> In relation to Activity 12 the Peer Review Audit indicates that it was:
>
> *Clinically improbable advice such that the descriptor choice is highly unlikely but would not lead to a wrong award or major error in duration if left unchanged.*
>
> *Activity 12- please probe further regarding exact distance claimant mobilises e.g. from car to work place? Time taken and pace? This would ensure STAR is fully addressed. You have justified 12b however selected descriptor 12a. (click error). Please amend, 12B is reasonable based on the overall evidence.*
>
> The audit identified the need to probe further in relation to mobilising including the need for findings in relation to time taken and pace. It is submitted that this is an issue raised at paragraph 3.6 above and the tribunal could have been on greater notice to address this issue given the deficiency in the report identified at audit. It was an equality of arms issue to proceed without consideration of evidence available to DfC/Capita which was potentially relevant to the weighing of evidence. Hindsight also demonstrates that it was material in fact as the audit document identified material quality issues with the assessment.
>
> There is very clearly an equality of arms issue that evidence can be assessed for quality and that the issues identified are not being shared with the adjudicating authority tasked with attributing weight to this evidence. Reports can be amended weeks after the face to face assessment and on occasion amendments can be made by a different healthcare professional. It should be for the

> tribunal to review and determine if this information is material to the weight to be attributed to this piece of evidence.'

37. The 'report' referred to in the first paragraph of this extract is the report of an examination conducted by a healthcare professional in connection with the decision-making process giving rise to the decision under appeal. The 'Peer Review Audit' referred to in the second paragraph is the audit of the report of the examination by the healthcare professional.

38. Mr McCloskey referred to the decision of the late Commissioner Williams in *CDLA/4127/2003* and Upper Tribunal Judge Gray in *PF v Secretary of State for Work and Pensions (ESA)* ([2013] UKUT 0634 (AAC), ('*PF*'), both discussed in more detail below, and added:

> 'Given the widespread nature of the audit system it is submitted that the tribunal should not proceed in ignorance of maters that may be material to the outcome. To do so would, as in this case, restrict the appellant's access to a fair hearing.
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> In addition to audits, in particular cases Clinical Governance Reports conducted by Capita and Health Assessment Adviser reports conducted by DfC provide further information which is relevant to the weighing of the assessment report. It is essential that the tribunal has access to all of the potentially material evidence and evidence does not exist which is being withheld from the parties.'

39. In response, Mr Arthurs made the following submissions:

> 'The tribunal chairman, in relation to the medical assessor's report, noted that *"it was difficult to see how the report could carry any significant weight in the absence of any information or complaint of contrary."* This comment does not take consideration of the appellant's letter of 17 February 2017 where she noted her concerns, however this letter was not presented at the hearing as evidence. Yet it is still my belief that the tribunal could have made further enquiries through its inquisitorial role and, in failing to do so, has erred in law.
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> With regards to the auditing of reports, in his letter of 28 February 2018 Mr McCloskey has referred to the fact that (the appellant's) assessment report was in fact audited and quotes an excerpt from a response he got from Capita which endorses this. If that is indeed the case then it is evident that this information was not before the tribunal. That aside I would point out from the response

> noted by Mr McCloskey that there was only one amendment made and that resulted in (the appellant) being awarded 4 points for mobility descriptor 1(b) as opposed to a score of 0 points for descriptor 1(a). The nett result of this made no material difference to the overall outcome of the mobility component.
>
> I have now been advised that all responses from Capita will now include whether a report has been audited and if so, all Capita documentation and copies of previous reports are sent to the Department. In addition to this, I have attached a copy of the audit process explanatory note which now goes into each appeal where the assessment has been audited.'

The audit process

40. During the course of the proceedings before me, I asked Mr McCloskey and Mr Arthurs to provide further details of the audit process. Both representatives have been assiduous in their forensic analysis of that system and have provided detailed information which has been of great assistance to me. I concentrate below on the narrative provided by Mr Arthurs on behalf of the Department. In so doing I do not wish to do a disservice to the diligence of Mr McCloskey. It is the case that the comprehension of both representatives of the mechanic of the audit process is largely parallel. I address further observations made by Mr McCloskey below.

41. In correspondence dated 30 January 2019, Mr Arthurs set out the following background to the audit process:

> 'Chief Commissioner Mullan held a hearing for this case on 4 December 2018 but, due to issues raised by Mr McCloskey of Law Centre (NI), this hearing was adjourned for further details to be provided in relation to the audit process involved relating to medical assessments carried out by Capita.
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> **Capita's Audit Process**
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> Capita performs several audits as part of its basic internal quality assurance procedures, these are:
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> - Approval related audits for trainees;
> - New entrant audits for recently approved Disability Assessors (DA's);
> - Rolling audits; and
> - Targeted audits

In addition to this the Department requires that the provider provide an additional 'Lot-wide audit' which is a random sample of reports from each contract 'Lot', with Northern Ireland being Lot 4. These cases may have already been subject to one of Capita's internal audit procedures, meaning a case has the potential to be audited twice.

Section 3.4.1 to 3.4.16 of the 'PIP Assessment Guide, Part Three, Health Professional Performance (No. 2017)' (**Exhibit 1 enclosed**) provides further details of the above audits.

In addition to these there are further audits performed by Capita and the Department, which will be discussed below.

Clinical Governance Reviews

These are generated by complaints and are referred to the Clinical Governance Team (CGT) by Capita's customer relations team, as well as Business Assurance and Capita's SMT/Executive. These reviews are conducted by Senior Clinicians within Capita's CGT. The individual tasked with the review will complete a full overview of the case (**Exhibit 2, relevant forms attached**) since it entered the Capita PIP process. In these instances the individual is tasked with determining if the case was correct, therefore ensuring the process was commenced appropriately, then advising whether the outcome of the report is clinically reasonable when considering the evidence available at the time of the assessment. The outcome of this review will help determine the response to the complaint, but the Department are not provided any iterations of the report other than those provided by the standard closure process.

The CGT will only review cases in exceptional circumstances upon request. Such requests usually originate in instances where there is a high degree of sensitivity relating to the case and/or instances where there is a risk of harm or reputational damage. For example – in press cases, serious complaints/allegations.

Unlike the audit/quality assurance process(es) which provide a systematic framework to audit/review cases at scale, there is no systematic or industrial Clinical Governance Review process. The CGT is made up of senior clinicians and their views will only be sought in rare

instances (on a case by case bases) where/when their expertise is required.

Although (the appellant's) case was subject to a complaint relating to the audit process this case was not escalated to the level required for a Clinical Governance Review; this has been confirmed by Capita's CGT.

Health Assessment Advisor Reports

The Health Assessment Advisor (HAA) is the Department's means of providing a quality audit of the provider's output, identifying any areas of concern and ensuring these are addressed fully by the service provider (SP) and providing robust challenge until the provider's performance meets the required standard.

The HAA has the additional responsibilities and duties:

- Compete an annual quality audit of a sample of professional reports to confirm the quality of the SP's Quality Audit system;
- Attending the monthly/quarterly Performance Meetings with the SP's to discuss issues, quality and trends and ensure that these are resolved;
- Drafting reports for management on the outcome of quality audits, including developing and agreeing plans to support improvement as required;
- Professional leadership of research on public health related issues arising from the health assessment undertaken by the provider. This work may be undertaken both within the Department and in conjunction with other Departments;
- Working with the provider to develop a suite of professional management information reports; and
- Contribute to any external reviews of health and disability services including support for the implementation of recommendations.

The HAA will also provide training material and guidance for Health Care Professionals (HCP's) and will work with the provider to identify training needs. The HAA will agree the timescale and methodology of training audits and will work with SP's to identify training needs. They are also required to approve the provider's annual reports on the results of audits.

In conjunction with the Commercial and Operational Managers the HAA will be responsible for auditing of complaints responded to by the provider's and raising any

areas of concern with regards to the professional aspects of the complaint with the provider. The HAA will also be responsible for dealing with and responding to complaints in respect of Health and Disability assessments.'

42. Mr Arthurs indicated that 'PIP Assessment Guide, Part Three, Health Professional Performance', which he had attached to his written submission, provides further details of the specifics of the audit process. For the purposes of this case, the sections which are relevant are as follows:

'**3.4 Quality audit**

3.4.1 Audit processes are in place for auditing the quality of assessments through:

- DWP lot-wide audit (random sample); and
- The provider – approval-related audit (trainee)

3.4.2 Audit has a central role in ensuring that decisions on benefit entitlement, taken by DWP, are correct. It supports this by confirming that independent HP advice complies with the required standards and that it is clear and medically reasonable. It also provides assurance that any approach to assessment and opinion given is consistent so that, irrespective of where or by whom the assessment is carried out, claimants with conditions that have the same functional effect will ultimately receive the same benefit outcome.

3.4.3 Assessment reports subject to audit will be examined and graded 'Acceptable', 'Acceptable: HP Learning Required', 'Acceptable: Report Amendment Required' and 'Unacceptable' in accordance with the quality audit criteria in section 3.5.

3.4.4 More detailed guidance on how reports should be audited and the criteria to be used are set out in section 3.5.3.

3.4.5 The Department also recommends that providers undertake additional audit activity to ensure quality standards are being met, including:

- New entrant audit (recently approved)
- Rolling audit
- Targeted audit

Lot-wide audit

3.4.6 The DWP Independent Audit Team carries out lot-wide audit, which is an audit of a controlled random sample from across each contract Lot, feeding in to routine performance reporting for DWP.

3.4.7 The sample should include terminal illness, paper-based review and consultation outputs. Forms PA5 and PA6 (supplementary advice) are not included in the lot-wide sample.

3.4.8 The lot-wide audit sample size must be selected using the Lancaster model which has been designed in conjunction with DWP analysts. The model produces an appropriate sample size to specified margins of error. The model and guidance on its use have been supplied to providers separately.

3.4.9 During 2016, providers' targets will move to:

- 3% or less 'unacceptable' reports; and
- a minimum of 85% of reports must be assessed as 'acceptable' or 'acceptable: HP learning required'

Approval-related audit

3.4.10 During stage 4 of the HP approval process HPs should be subject to 100% audit to ensure that they are consistently able to apply the competence standards (see 1.37).

New entrant audit

3.4.11 Once an HP has been approved, the Department recommends that they continue to be subject to regular audit until the provider is satisfied that consolidation of skills has been achieved. The frequency and volume of monitoring should be determined by providers.

Rolling audit

3.4.12 Rolling audit is an audit of the work of each HP on a regular basis to assess the quality of their

work on a continuing basis, ensure maintenance of standards and for on-going approval.

3.4.13 The Department recommends that providers ensure that an appropriate proportion of a HP's assessments are subject to audit in every 3-month period. The number of cases that will need to be subject to rolling audit may be affected by the number of examples of that HP's work which have formed part of other audit activity – for example, cases selected as part of the lot-wide audit. Some HPs will not need rolling audit at all because they are regularly audited in random or targeted audit activity.

Targeted audit

3.4.14 Targeted audit is audit activity triggered where a quality, rework or complaint issue has been identified to establish whether there is evidence of an on-going problem or where it is felt that auditing should be carried out to ensure the required standards are met.

3.4.15 Targeted audit is carried out at the discretion of providers or at the request of DWP – for example, where rework volumes are significantly high indicating problems with quality, or where successful appeals indicate that the evidence was insufficient.

Experience of auditors

3.4.16 Providers should put in place processes to ensure that individuals carrying out audit activity are approved HPs and have the requisite skills, knowledge and experience to carry out their roles. Where possible, they should have been carrying out PIP assessments for a minimum of 12 months.

Live cases

3.4.17 Unless there are extenuating circumstances, audit activity should be carried out while cases are 'live' and before they are submitted to DWP. As such all audit activity should be carried out swiftly to avoid delay to the case.

3.4.18 If a case is identified as requiring amendment after it has been returned to DWP, as the advice may be misleading, contact should be made with the relevant CM.

Feedback

3.4.19 Providers should put in place processes to ensure that appropriate feedback is given to HPs as a result of auditing.

Alteration of acceptable report amendment required and unacceptable reports

3.4.20 Where assessments have been graded as 'acceptable: report amendment required' or 'unacceptable', remedial activity should be taken before the case is submitted to DWP. Where possible, this activity should be taken by the HP who carried out the original assessment.

3.4.21 Any changes made to forms should be justified, signed and dated. It should be made clear that any changes are made as a result of audit activity.

3.4.22 Where necessary a new report form should be completed.

Maintaining records

3.4.23 Providers should keep records of all audit activity described in this section, including iterations of all audited reports. These records should be retained for a minimum period of 2 years.'

43. It is clear that the 'PIP Assessment Guide' including 'Part Three, Health Professional Performance' is a Department for Work and Pensions document which is being used by the Department for Communities for parallel purposes in Northern Ireland. In his submission of 30 January 2019, Mr Arthurs had noted that '…the Department requires that the provider provide an additional 'Lot-wide audit' which is a random sample of reports from each contract 'Lot', with Northern Ireland being Lot 4.' Details of the 'Lot-wide audit' process are set out 'PIP Assessment Guide Part Three, Health Professional Performance'.

44. Part 5 of the 'PIP Assessment Guide Part Three, Health Professional Performance' is headed 'Quality Audit Criteria'. It is noted that reports should be audited in the following four areas:

- opinion
- information gathering
- further evidence
- process

45. Specific criteria are set out for each of the four grades and how each potentially applicable grade should be applied.

46. Part 6 of the 'PIP Assessment Guide Part Three, Health Professional Performance' is headed 'Rework'. Paragraphs 3.6.1 to 3.6.5 are as follows:

> '3.6.1 Where the Department considers that assessment reports are not fit for purpose it may return them to providers for rework, which will be carried out at their expense.
>
> 3.6.2 The criteria are that reports will be:
>
> 1. fair and impartial
> 2. legible and concise
> 3. in accordance with relevant legislation
> 4. comprehensive, clearly explaining the medical issues raised, fully clarifying any contradictions in evidence
> 5. in plain English and free of medical jargon and unexplained medical abbreviations
> 6. presented clearly
> 7. complete, with answers to all questions raised by the Department
>
> 3.6.3 Providers should develop procedures for accepting, recording and dealing with rework quickly and effectively.
>
> **Rework action**
>
> 3.6.4 The action to be taken in relation to rework will vary on a case-by-case basis. Wherever possible, cases should be discussed with the original HP or referred back to them for further action to be taken.
>
> 3.6.5 In some cases it may be necessary for an additional face-to-face consultation to be carried out, either with the original HP or a different HP. The impact of any such consultations on claimants should be considered when making the decision to carry out a repeat consultation. Where possible, further consultations should be avoided so as not to place extra burdens on claimants. However,

this should not compromise the quality of the advice to DWP.'

47. I set out in more detail below the procedures which have been adopted within the Department since July 2017 with respect to appeals against adverse PIP decisions. In his Case Summary, and as was noted above, Mr Arthurs noted that he had been advised that:

> '… all responses from Capita will now include whether a report has been audited and if so, all Capita documentation and copies of previous reports are sent to the Department. In addition to this, I have attached a copy of the audit process explanatory note which now goes into each appeal where the assessment has been audited.'

48. By 'appeal' in the final sentence of the extract, I am assuming that Mr Arthurs means that the explanatory note is included within the appeal submission prepared for the appeal tribunal hearing and sent to TAS.

49. The audit process explanatory note is in the following terms:

> '**Audit Process Explanatory Note**
>
> The Integrated Quality Audit process followed by Capita is a contractual requirement and a key component of our quality management regime, designed to ensure that the reports produced by Disability Assessors (Das) are of a high quality, consistent and evidenced.
>
> These reports are designed to support Case Managers in the Department for Communities in making decisions on benefit entitlement to Personal Independence Payment. These reports should not simply be a record of the personal opinion of the person making the claim - or the DA carrying out the assessment - but rather a carefully considered, evidenced and justified set of advice, reflecting all the evidence available to the DA and reflecting the assessment criteria set by the Department. The evidence used could include information contained within the PIP Part 2; any evidence provided from a healthcare professional or other party involved in supporting the claimant; or any examination findings or observations from the consultation itself.
>
> Capita are required to audit all their Das on a regular basis, with more intensive audit for those who have just joined the business or were any concerns exist around quality. The reports are required to be audited, they will be considered by a specially trained and approved auditor

DA, who must not be the DA who carried out the examination.

Audits are carried out using criteria set out by the Department, examining issues such as how the report is presented; whether the right processes were followed; how the consultation was carried out and the information gathered; and whether the medical reasoning is robust. Every report audited will receive a grade as per the audit criteria, with relevant feedback being passed to the examining DA, to help their ongoing development.

Audits may also identify problems with reports that require corrective action before the report can be submitted to the Department. The Case Manager will only receive the final report, after any such audit amendments.

Where reports require amendment, the standard process is that the report is returned to the examining DA for them to reconsider following the audit feedback. No amendments should be suggested to the clinical history or examination findings sections, which must reflect the discussion and findings during the consultation. Instead they should focus on the "Opinion" section, ensuring that the overall advice given is consistent, evidence-based and medically reasoned.

Amendments are only not made by the examining DA where that individual has left the business or is unavailable in the long term. In such cases the auditor will update the assessment report highlighting any amendments in order to provide a consistent robust justification to the Case Manager for them to consider.'

50. There are several features of the audit process which are immediately apparent from the description of that system set out by Mr Arthurs in his further submission, the audit process explanatory note and the further detail of the 'PIP Assessment Guide Part Three, Health Professional Performance'.

51. There are four identifiable categories of audit processes as follows:

- A contractually-required Capita audit process as part of its internal quality assurance procedures.

- Clinical Governance Reviews (CGRs) also conducted internally by Capita usually generated by complaints although not every case which was subject to a complaint is escalated to such a review.

- An internal Departmental 'Lot-wide' audit process which involves the audit of a controlled random sample from across a 'Lot' area one of which is Northern Ireland.

- Health Assessment Advisory Reports (HAA) which are, primarily, the Department's method of undertaking a quality audit of a provider of services' (such as Capita) output.

52. The internal contractually-required Capita audit process involves a number of different audits including approval related audits for trainees, new entrant audits for recently approved Disability Assessors, rolling audits and targeted audits. Audits conducted internally by Capita as part of its internal audit process are, unless there are extenuating circumstances, carried out while cases are 'live' and before they have been submitted to the Department. Such audits are graded according to specific criteria and are conducted by more experienced Disability Assessors. Audits may identify issues with a specific report which require corrective action by the Disability Assessor before the report is released to the Department. Corrective action usually involves the report being sent back to the original examining Disability Assessor. Corrective action should not involve amendment to the clinical findings or examination findings section of the report but should be restricted to the 'Opinion' section of that report. Corrective action may be conducted by a different Disability Assessor, other than the examining Disability Assessor, in certain exceptional circumstances.

53. After the case has been submitted to the Department, where it considers that the assessment reports are, as was noted above, not fit for purpose, the reports may be returned to a provider, such as Capita, for 'rework'. The 'PIP Assessment Guide Part Three, Health Professional Performance' envisages that the type of rework action needed will vary on a case-by-case basis. It is anticipated, however, that wherever possible cases should be discussed with the original examining Disability Assessor or referred back to that Disability Assessor for further action to be taken. In some cases it may be necessary for an additional face-to-face consultation to be carried out, either with the original Disability Assessor or a different Disability Assessor.

54. It is possible for an individual claimant's case to be the subject of both the internal contractually-required Capita audit process and the internal Departmental 'Lot-wide' audit process. In such circumstances the audits will take place before the case is submitted to the Department. From the descriptions given above, I cannot see why any such case might not also be subject to a CGR or HAA.

The position since July 2017

55. In his further submission dated 30 January 2019, Mr Arthurs stated the following:

‘**Audit case and Appeals**

On 6 September 2018 the Department issued a bulletin outlining the processes to follow when a PIP decision has been appealed and the assessment report has been subject to the following:

- Rework;
- ACORNS; or
- Audit.

This process was originally incepted in July 2017. At this point report iterations were presented in a proforma (with data being keyed into a stencil) and were accompanied by a summary report drafted by a health professional which explained the changes between report iterations. From September 2018 onwards, the summary report was no longer provided. From January 2018 the process has been operated in its current format with screen shots of raw data from Capita CRM system.

A copy of this bulletin has been included as **Exhibit 3** and provides full details of the above, however I will provide a brief summary below.

REWORK

This is when a case has been returned to Capita with a query in relation to the content of the assessment report, Capita will provide the Department with a reworked report detailing their findings.

ACORNS

In instances where the original assessor is unable to finalise a report they have started (for reasons including, but not limited to, long term illness or no longer employed by the provider) a second DA will be asked to finalise this report providing there is sufficient information to do so. If there is insufficient information to do so a further assessment will be organised. In these cases Capita have agreed to provide a summary of the reasons why the report was completed by an alternative assessor.

AUDIT

Capita have agreed that any case subject to an appeal which was also subject to an audit will have all relevant information made available, to include screen shots (**Exhibit 4**) and previous versions of the audited report

(**Exhibit 5**) will be included in the response. Procedures are in place regarding unaudited reports also to make the relevant parties aware it has not been audited.

Further information on each of the above can be found in **Exhibit 3**.'

Relevant jurisprudence

56. As was noted above in his Case Summary, Mr McCloskey made reference to the decisions in *CDLA/4127/2003* and *PF*. In the former case the claimant to Disability Living Allowance (DLA) was examined on behalf of the Secretary of State by a person who was then known as an Examining Medical Practitioner (EMP). A report of the examination was prepared by the EMP who was then asked to alter it by a doctor who stated that he was acting on behalf of the decision maker. The alterations were made and the report was relied on by the decision maker to deny entitlement to DLA. On appeal to an appeal tribunal, the disentitlement decision was confirmed with the appeal tribunal placing reliance on the report of the examination conducted by the EMP without commenting on the alterations. Commissioner Williams stated, at paragraphs 16 to 20:

'*Altering an official medical report*

16 There are broader problems with the Department's medical evidence and with the way the tribunal failed to appraise it critically. As Lady Hale reminded us very recently in the leading judgment in *Kerr v Department for Social Development (Northern Ireland)* in the House of Lords [2004] UKHL 23, paragraph 14: "the position of the department is not to be regarded as adverse to that of the claimant". But in this case a SEMA doctor, who said that he was acting for the Decision Maker (or Secretary of State, or department) expressly invited the examining medical practitioner to change his report in a specific way to remove evidence and opinions supporting the claimant's claim, and the report was altered in that way.

17 The Secretary of State is entitled to arrange for and rely on whatever medical evidence Parliament authorises and he thinks fit. But a tribunal must be fair as between the Secretary of State and the claimant. In particular, the tribunal must ensure an "equality of arms". It should be alert about circumstances when the Secretary of State can seek clarification of an "independent" report when a claimant cannot take the same action. In particular, it should remember that the Secretary of State has had a chance in a case like this to get the report altered before the claimant even sees it.

The only chance that the claimant has to get a similar change made is at the tribunal hearing, or by direction of the tribunal. As Lady Hale again reminded us about tribunals in *Kerr*, "the process is inquisitorial, not adversarial". That, as the decision in *Kerr* emphasises, means inquisitorial in a case like this of the Department and the examining medical practitioner as much as of the claimant and the general practitioner.

18 Far from the neutral approach noted by Lady Hale, the Secretary of State appears on the face of these papers to be behind an attempt to change the medical evidence against the interests of the claimant. I raised this issue directly with the Secretary of State's representative in a series of questions. I was offered answers to those questions from Dr Roger Thomas, Disability Living Allowance Medical Policy Manager of the Corporate Medical Group of the Department. Dr Thomas is or was the medical secretary to the Disability Living Allowance Advisory Board. The questions and answers on this point are:

> *"Does the Secretary of State consider that the actions taken in this case in and following the letter of 22.1.03 were correctly taken in so far as they were taken to "greatly assist the Decision Maker"? Does the Secretary of State consider that it is appropriate in this context for another person to suggest not only that the examining medical practitioner reconsider her or his report but also how he or she should do that?"*

Dr Thomas' reply is:

> "*The Letter dated 22/01/03*
>
> *This letter is on a standard form used by Medical Service where clarification is needed. The contract [with the Department] does not specify that this form should be used for "rework" cases. The rework process was correctly applied.*
>
> *The decision-maker required clarification of the report as she considered that there were inconsistencies. The "rework" was correctly applied in order to assist the decision-*

maker's understanding of the doctor's opinion.

The rework process serves a number of purposes:

- *It clarifies the report for the decision-maker*
- *May identify a training need for the examining medical practitioner*
- *Enables the full time doctor to give feedback to the examining medical practitioner*

In this case I consider it appropriate for the full time doctor to point out the inadequacies/contradictions in the report. However he has gone too far in suggesting how the report should be amended."

19 It is standard procedure for tribunals to rely on SEMA (now Atos Origin, following its acquisition of the Department's contract from SchlumbergerSema) medical reports without the doctors who make them being called as witnesses or being subject to any other form of questioning by claimants or tribunals. Expert views such as this – and certainly changed expert views with which one party disagrees - could in other courts and tribunals expose the expert to a summons to give evidence under cross-examination on exactly what his or her findings and opinion were. Appeal tribunals have that power, and perhaps they should use it where necessary to ensure fairness. But this is not the most effective or efficient way of handling most challenged medical reports, not least because the tribunals have medical members. One obvious answer is to use that medical expertise and for the tribunal to make its own findings rather than to rely on inconsistent or doubtful official evidence. Another is to seek further evidence either from the Department and the doctors that advise it or from elsewhere, such as the specialist referred to in this case. Another response more robust tribunals use is to ignore a compromised examining medical practitioner report entirely and look only at the other evidence. Whatever approach it takes, the tribunal must be not only efficient and effective but also fair. In cases like this it must, in Article 6 terms, equalise the arms.

20 This tribunal failed to notice another problem. It noted that the general practitioner did not sign his report,

but paid no attention to the signature on the examining medical practitioner report. At the end of every DLA140 is a declaration. The examining medical practitioner declares that "to the best of my knowledge and belief the information given following my examination is correct". This was signed by Dr Lisk on 11 January 2003. It was not re-signed or in any way corrected on 24 January 2003. I have seen several cases in which examining medical practitioners and approved doctors have altered reports at the request of others after the declaration has been signed, and others altered by third parties. In none have I seen any amendment or addition to the formal declaration at the end of the report. That must call the evidential value of the alterations, and perhaps the entire report, into question. The Secretary of State, claimants and tribunals are all entitled to rely on declarations meaning what they say. Actions like those in this case make a mockery of such declarations, and undermine the reliability of the documents to which they are attached. To put it at its simplest, we are told by a professional doctor that on the date of the examination and signature the report is prepared "to the best of my knowledge and belief". We are then told that the doctor was wrong in so declaring, but not to anyone's best knowledge or belief. What is to be believed?'

57. In *PF*, the appellant had been examined by a healthcare profession, a registered physiotherapist, as part of a decision-making process in connection with entitlement to ESA. At paragraph 15 of her decision, Upper Tribunal Judge Gray said the following:

> 'There is one further matter, which the new FTT will need to consider. The appellant argues that the examination carried out by the registered physiotherapist was cursory, and the report of little worth. She goes into considerable detail, but I think one matter in particular that she makes is worthy of note at this stage. She says that the report refers to a Mrs W. I did not see that in the report, and it seems to me possible that the report has been reworked. The Secretary of State will need to clarify that, and if it has, produced the original version for the fresh tribunal. It will be a matter for the FTT to decide what evidential value the place on this report, bearing in mind the matters which to I have already alluded, but that may be a feature which is of concern. There is an audio recording of the examination, and the submission of the Secretary of State makes it clear that this could be obtained from ATOS if it was required. I certainly did not need to listen to it for the purposes of this decision. I was not evaluating that report in the context of other evidence order to make factual

findings. Listening to the recording was clearly of value however to the decision maker who revised the original decision. At page 91 they write this *"due to the ability to actually hear the recording, the severity of her problems have not been emphasised sufficiently."* The FTT will need to make its own decision as to whether the recording will be of any practical assistance to them in their evaluation. This is possibly a matter which could be considered by a DT J prior to any hearing.'

58. In *AG v Secretary of State for Work and Pensions* ([2009] UKUT 127 (AAC)), ('*AG*'), a decision maker superseded an earlier decision of the Secretary of State and which had decided that the claimant was not capable of work. The supersession decision went on to decide that the claimant could no longer be treated as incapable of work. The decision maker relied on a report of an examination conducted by an EMP and the decision maker made reference to the fact that 'the original medical report dated 4 March 2008 was returned for rework on two occasions as the decision maker had some queries which required clarification by Medical Services.' While the examination had been conducted by one named EMP it had been signed by someone else. On appeal, an appeal tribunal confirmed the decision of the Secretary of State stating in the reasons for its decision that it relied on the EMP report.

59. On further appeal to the Upper Tribunal, UT Judge Wikeley stated the following, at paragraphs 13 to 18:

> '13. … However, the tribunal's decision to rely on the second IB85 medical report from 2008 in these terms was flawed.
>
> 14. First, as the appellant's representative points out, paragraph 8 is the sort of "formulaic endorsement of the examining medical practitioner's report" that the former Social Security Commissioners regularly warned against (see e.g. unreported decision CIB/3074/2003). It is true, of course, that the tribunal in the present case made its own independent findings about the credibility – or rather lack of it – to be attached to the appellant's own evidence. To that extent the decision to dismiss the appeal could have been justified without reference to the EMP report and its standing.
>
> 15. Secondly, however, this merely raises a further problem with the tribunal's (assumed) reliance on the 2008 IB85 medical report. As indicated above, the appellant and both his representatives had taken issue with the validity of the second report. Those (on the face of it perfectly valid) questions were simply not addressed by the tribunal. It was as though there had been no

challenge to the apparently combined report of Dr Mangrolia and Dr Mehta.

16. When giving permission to appeal I referred to the observations of Mr Commissioner (now Judge) Howell QC in CIB/511/2005 on the computerised medical examination report now used in incapacity cases (at paragraph 3, original emphasis).

> "The use of this system, in which statements or phrases appear to be capable of being produced mechanically without necessarily representing actual wording chosen and typed in by the examining doctor, obviously carries an increased risk of accidental discrepancies or mistakes remaining undetected in the final product. Tribunals ought in my view to take particular care to satisfy themselves that reports presented to them in this form really do represent considered clinical findings and opinions by the individual doctor whose name they bear, based on what actually appeared on examination of the particular claimant. Tribunals who fail to identify and deal with apparent discrepancies such as those shown up here run an obvious risk that their own consideration of the case may be criticised as insufficient, especially if standard phrases such as the wording this one used - **"The Tribunal preferred the evidence of the medical advisor which was based on clinical examination and findings."** - are given as the reason for rejecting the claimant's own account of his disabilities."

17. The actual point at issue in CIB/511/2005 may have been rather different in that in that case there were what were described as (unspecified) "apparent discrepancies and inconsistencies" in the IB85 report (but presumably following an examination conducted by, and a report signed by, the same doctor). However, Mr Commissioner Howell QC's warning that "Tribunals ought in my view to take particular care to satisfy themselves that reports presented to them in this form really do represent considered clinical findings and opinions by the individual doctor whose name they bear, based on what actually appeared on examination of the particular

> claimant" appears to me to be of more general application.
>
> 18. In the present case the tribunal had before it an IB85 based on an examination carried out by Dr Mangrolia in March 2008 but signed off by Dr Mehta in June 2008. It had no evidence before it as to the nature of the "reworking" which had been carried out. It was incumbent on the tribunal at the very least to adjourn to obtain a full explanation of that process, given the challenge that had been made to the status of the report. Its failure to do so and its purported reliance on the 2008 IB85 report amounted to an error of law.'

60. In *GB v Secretary of State for Work and Pensions* ([2019] UKUT 120 (AAC)), (*GB*), the appellant had an award of entitlement to Industrial Injuries Disablement Benefit (IIDB). On 3 November 2017 and following an examination by a registered medical practitioner, Dr O'Hanlon, the respondent superseded the decision which gave rise to benefit entitlement which was disallowed from and including 22 November 2017. The appellant requested a reconsideration of the respondent's decision, but on 13 February 2018 the respondent refused to revise the decision. The Respondent made clear that the decision was based on the advice given by Dr O'Hanlon.

61. The appellant appealed to an appeal tribunal which proceeded by way of oral hearing. The appeal tribunal disallowed the appeal. The appeal was brought on a variety of bases including that the respondent had not provided any information in response to the appellant's request for disclosure of what had occurred at a meeting between Dr O'Hanlon and the 'Wembley Lead'. On the final page of her assessment, Dr O'Hanlon wrote this next to the box on which she gave the 'date of examination' as 26 September 2017 and the 'date of completion' as 29 September 2017:

> 'Part 9 completed on 29/09/2017 after case discussion with Wembley Lead. I was not available for case completion 27 + 28/09'

62. The appellant submitted that this comment shows that there was some discussion of his case between Dr O'Hanlon and one or more other persons and that this discussion took place at some point after he met Dr O'Hanlon on 26 September and before she completed Part 9 of her report (the statement of her findings) on 29 September. In his decision, Deputy Upper Tribunal Judge ('DTJ') Gullick accepted that submission but also noted that what was not clear was with whom Dr O'Hanlon discussed matters, for what reasons, what was discussed and what impact, if any, that had on Dr O'Hanlon's conclusions. DTJ Gullick also noted that it was clear that the First-tier Tribunal ('FTT') was aware of the issue but took the view that the issues which it had to determine were unlikely to be clarified by such evidence. He stated, at paragraph 22:

> ‘That might have been the case; however the primary issue as it appears to me is not what such evidence might or might not have shown, but whether as a matter of fairness the Appellant was entitled to know for what purpose and with what effect the discussions between Dr O’Hanlon and the “Wembley Lead” had taken place. That is a different question. The Respondent in her submissions dismisses this point as being “of no relevance” (paragraph 6 at page 189). I reject that submission. There is clear authority to the contrary.’

63. That authority was the decisions in *CDLA/4127/2003* and *AG* which were reviewed by him in paragraphs 23 to 25. He added the following in paragraphs 26 to 31:

> ‘26. Having regard to these authorities, in my judgment purely as a matter of fairness to the Appellant, the FTT ought to have adjourned the hearing and required the Respondent to provide a full explanation of the process followed by Dr O’Hanlon in compiling her assessment, including the involvement of the “Wembley Lead”. The FTT in considering that such evidence was unlikely to affect the substance of its decision did not address the issue of whether proceeding in the absence of such evidence was fair to the Appellant. In my judgment, it was not. I do not consider that the FTT having recorded that the Appellant ‘understood’ the point being made to him in this regard as sufficient to validate the FTT’s decision to proceed. The FTT had not put the point to the Appellant in terms of procedural fairness but rather in terms of what the content of such evidence might be and its impact on the FTT’s ultimate decision. In any event, the FTT’s inquisitorial function in an appeal of this sort, with an unrepresented appellant, required it go further than it did.
>
> 27. Bearing that issue in mind, I turn to the issue of materiality. It is right to point out that nowhere in its findings of fact (paragraphs 14-28, pages 152-154) did the FTT refer to or rely on the content of Dr O’Hanlon’s assessment although it did not state expressly that it had entirely disregarded that assessment. In the decision refusing permission to appeal, the FTT judge stated that the FTT’s findings had been based on the evidence from the Appellant and his doctors and that they “did not depend on the findings of the assessor [i.e. Dr O’Hanlon]”.

28. In those circumstances it might be said that the error of law identified above cannot have been material to the outcome before the FTT. I do not however accept that. Firstly, the issue is primarily one of fairness to the Appellant. Secondly, even if the issue is whether the further material sought by the Appellant might have made a difference to the decision of the FTT, I bear in mind that the nature and content of the discussion that took place between Dr O'Hanlon and the "Wembley Lead" has still not, even now, been disclosed. Nor indeed have the medical qualifications, if any, of the "Wembley Lead".

29. In connection with that second issue, it is possible – no more than that – that the discussion with the "Wembley Lead" influenced the content of Dr O'Hanlon's assessment. It is also possible – again, no more than that – that the content of the discussion might, had the FTT known about it, have affected the FTT's decision as well. For example, if Dr O'Hanlon's provisional opinion following her assessment had been in accordance with that of Mr Mackay but had changed after her discussion with the "Wembley Lead", then that might have influenced the conclusions that the FTT reached. However, these are no more than possibilities, indeed they can be no more than speculation, because the Respondent has not provided the relevant information either to the Appellant or to the FTT or to this Tribunal. It is in my judgment clear on the evidence that I have before me that the FTT's error in failing to adjourn to obtain that further information was a material error because it might have made a difference to the outcome irrespective of the issue of fairness to which I have already referred.

30. It is in my view most regrettable that the Respondent has at no stage supplied any of this information. The Respondent's submission that this issue is simply irrelevant is incorrect. As the decisions that I have set out above make clear, it is important for appellants and tribunals to be able to satisfy themselves that assessments such as those conducted on this Appellant by Dr O'Hanlon represent the individual clinical judgment of the professional concerned. Where there is reason to believe this is not the case then a full explanation ought to be provided to enable an appellant and any tribunal to understand what input, if any, any other person has had into the assessment.

31. It might well have been the case, had the Respondent provided a sufficient explanation even before this Tribunal to the concerns raised by the Appellant, that I would have

been in a position to re-make the decision under appeal. However, the Respondent has provided no such explanation and I am not in any such position. Accordingly, the appeal will have to be re-heard by another panel of the FTT.'

Analysis

64. The principles which emerge from the jurisprudence set out above are consistent and unambiguous:

(i) The Department is under a duty to co-operate with the appeal tribunal. To the extract cited by the late Commissioner Williams from the speech of Baroness Hale in *Kerr v Department for Social Development (Northern Ireland)* ('*Kerr*'), I would add the following in paragraphs 62 and 63:

'62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.

63. If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision CIS/5321/1998,

> "a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn." The same should apply to information which the department can reasonably be expected to discover for itself.'

(ii) There is a duty on decision-making authorities, including appeal tribunals, to be fair between the Department and the claimant/

appellant. In this respect, the appeal tribunal must ensure an 'equality of arms'.

(iii) The Department is entitled to arrange for or adduce and rely on whatever evidence it wishes. An appeal tribunal must not, however, be misled as to the provenance of particular evidence on which the Department relies.

(iv) An appeal tribunal must be alert to the general circumstances in which the Department may seek clarification of a report of an assessment which has been conducted on its behalf. That requirement is mandated by the fact that the Department has an opportunity to audit and, where it deems it appropriate, amend or alter the report and that the Department may carry out audits and amendments before that claimant/appellant ever gets to see the report.

(v) It is rare for the contents of a report relied upon by the Department to be the subject of the same robust challenge in the appeal tribunal setting as takes places in the courts, namely, the attendance by the author of the report as an expert witness at the tribunal hearing and the possibility of being subject to cross-examination about the report's findings and conclusions.

(vi) The appeal tribunal ethos is contrary to the formality of witness summons and witness cross-examination and it is not an effective or efficient method of addressing challenges to the contents of reports of assessment relied on by the Department. Nonetheless, the appeal tribunal can test the validity of a challenged report through a rigorous assessment of it, as part of the overall evidence which is before the appeal tribunal and, in particular, using its own medical expertise as part of the evidential assessment process.

(vii) Where, at the appeal tribunal hearing, there is a challenge to the validity of a report of an assessment which is relied on by the Department and which involves an assertion that the report, as originally prepared, has been the subject of audit and/or amendment by the assessment provider, and the appeal tribunal has no additional evidence to confirm or contradict that assertion, then there will usually be a requirement on the appeal tribunal to adjourn to investigate the matter further. Given that the Department has stated (and I say more about this statement below) that the issue of ignorance of audit and/or amendment of an assessment report should not be an issue going forward nor should the provision and availability of all documentation relevant to the audit process where that has taken place.

(viii) The issue of the disclosure of the audit and possible amendment of a report on which the Department relies is one of fairness to the appellant. To that extent it may not matter that the disclosure may

not make any difference in that the appeal tribunal would not otherwise have relied on the amended report and disallowed the appeal for other reasons.

65. In the instant case, the appeal tribunal was not unaware that the report of the assessment conducted by the Disability Assessor and relied upon by the Department had been amended. As was noted above, Mr McCloskey's application for an adjournment was based on the ground that it was possible that the relevant report had been amended. The appeal tribunal set out that ground in some detail in the record of proceedings for the appeal tribunal hearing. Further, the appeal tribunal made reference to the possibility of amendment of the report in the statement of reasons for the appeal tribunal's decision.

66. Applying the jurisprudence set out above, I am satisfied that the decision of the appeal tribunal is in error of law in failing to make further enquiries as to the possibility that the assessment report relied on by the Department had been the subject of an audit and potential amendment. I have, however, to go on to determine whether the error is material. It is now clear that the audit process and subsequent amendment to the assessor's report was to the appellant's advantage. In the report as originally drafted the Disability Assessor had opined that the appropriate descriptor for activity 1 in Part 3 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016, as amended, ('the 2016 Regulations'), was 1a which attracted a score of 0 points. The amendment to the report – and it was accepted that this was the only amendment to the report – changed the relevant descriptor for activity 1 to 1b which attracted 4 points. While mindful of what was said in GB about the principle of fairness, it could not be said that the error was material in that the further enquiries would only have elicited what the appeal tribunal already knew. My conclusions with respect to materiality of this error do not affect my earlier conclusions with respect to the materiality of the 'ocular observations' error. It is clear that the latter error was material.

67. I would add the following more general remarks.

68. I see no reason why a provider of assessment services to the Department should not be contractually obliged to have an internal audit process. The principle of quality assurance in process and outcome is admirable and the inclusion of quality assurance is protective of public expenditure. Further I also see no reason why the Department should not likewise have its own audit process of the provider's service to it. That, in turn, assures accountability and enhances service to the public. To that extent, the primary systems for audit adopted by Capita and the Department cannot be criticised in general terms.

69. What is more problematic, however, is the practice by the Department of concealing from claimants and appeal tribunals the exact provenance of reports of assessments conducted on its behalf by external providers.

More particularly, the non-disclosure to a claimant and appeal tribunal that an assessment report, as originally prepared and completed by a Disability Assessor, and has then been subject of an audit and potential amendment, impacts on the fairness of the decision-making process and appeal tribunal proceedings, alters the balance of equality of arms and leaves the Department open to the censure that, for the purposes of what was said in *Kerr* that it not co-operating in the adjudication or decision-making process.

70. I take at face value the Department's statement that from the issue of its Bulletin of 6 September 2018 to its decision makers that the Department is now candid in its dealings with appeal tribunals in flagging up whether an assessor's report on which it relies has or has not been audited and where it has been audited and/or amended, supplies to the appeal tribunal copies of all documentation relevant to that process. To that extent, the issue which has arisen in this appeal may eventually dissipate. That does not negate, however, the duty on the appeal tribunal to be careful in its analysis of all that is presented to it. To give an example, the Department has asserted that the audit process should not involve amendments to the clinical findings or examination findings section of the report but should be restricted to the 'Opinion' section of that report. The appeal tribunal should be careful to ensure that that is the case.

71. As was noted above, the Department has asserted that it began to take action from July 2017 in that '… report iterations were presented in a proforma (with data being keyed into a stencil) and were accompanied by a summary report drafted by a health professional which explained the changes between report iterations.' It is not wholly clear to me whether that additional information, summary report and proforma setting out the changes between report iterations would have made their way into appeal tribunal submissions.

72. I add that I have been provided by Mr Arthurs with an example of the materials which will be provided in appeal submissions where the audit process has been conducted. The provision of the assessor's report as originally drafted and the amended version following the audit allows the reader to make comparisons and, thereby to identify the relevant changes. The 'screen shots', which represent the detail of the audit process itself are much more problematic. The copies which I have seen are difficult to read in that the font size is, in places, very small and also difficult to comprehend as there is no specific context for them. I foresee problems for effective comprehension of these materials by individual appellants without representation. Indeed, they may also be challenging for appeal tribunals. I would recommend that the appeal submission should include a summary of the changes which have been made to an assessor's report as part of the audit process to provide the context necessary to understanding the 'screen shot' documentation.

73. Accordingly, it is my view that in all pre-6 September 2018 PIP appeals which remain before appeal tribunals, the appeal tribunal should be alert to the potential for reports of assessments which are before them and which are relied upon by the Department, to have been the subject of the audit and/or amendments process. This does not mandate the adjournment, in general terms, of all such appeals to determine whether audit action has taken place. It may be the case, for example, that the appeal tribunal relies on the contents of the report as it is consistent with other evidence which is before it. Equally, the appeal tribunal may dismiss the weight to be attached to the report because it is contradicted by other evidence available to it. Where, however, there is a direct challenge to the report on the basis of an audit-related amendments or there is a suggestion of such an amendment then the appeal tribunal must apply the principles set out above to deal with that issue. In that regard, an adjournment for the purpose of the provision by the Department of clarification or additional information may, and I emphasise may, be necessary.

74. In appeals in which the Department has relied on the reports of assessments conducted on its behalf by external providers, there are often more general challenges on appeal to aspects of that report. Examples include inaccurate recording of the appellant's statement, cursory approach to an examination, failure to listen to the appellant's evidence and direct challenge to the clinical findings on examination. Appeal tribunals are used to dealing with such challenges and do not require additional guidance on the proper approach to such disputes. To that extent, I emphasise that the principles which are set out in this decision are restricted to challenges related to the derivation of an assessment report and the effect of the audit process on that derivation.

75. Mr McCloskey raised a number of other important issues. He noted that the use of external providers for the preparation of assessment reports is not confined to PIP and extends to other, mainly disability, benefits including ESA. As such parallel issues may arise in appeals in relation to that benefit. I do not have the advantage of the detailed background of the parallel audit process which takes place in connection with assessment reports prepared in connection with claims to ESA. As such, I make no comment about the potential applicability of the principles in this case to ESA decision-making and appeals. That comment will have to await the arrival of an appropriate case in the Office of the Social Security Commissioners. In the most general of terms, however, I see no reason why those principles would not carry across.

76. Mr McCloskey has also made submissions about the hidden problem of undetected problematic assessor reports being used by decision makers to deny entitlement to benefit in cases where such reports are not subject to the audit process and not challenged on appeal by an unsuccessful claimant. He pointed to statistics which had been provided to him following a freedom of information request which demonstrated that, on average, 1 in 20 assessments are found to be unacceptable after a 'Lot-

wide' audit. He asserts that what could be extrapolated from these figures is that there are a significant number of unacceptable reports which are passing through the system which have not been identified at audit. While not underestimating the validity of the point which Mr McCloskey raises, it is an issue which is not for comment upon by a Social Security Commissioner. It remains the case that any appellant may challenge an adverse social security benefit decision on the basis of inadequacies in an assessor report which has been relied on to deny the claim. It is also the case that the issue identified by Mr McCloskey could be raised in other forums.

77. Mr McCloskey raised the issue of delay and its effect on the weight to be attached to an assessor's report in the following context. He noted that it is often the case that an assessor's report is completed and signed on a date different to that on which the examination or face-to-face consultation took place. The delay in the completion of the report may be enhanced when the report is subject to the audit process. I agree with Mr McCloskey that this has the potential to be a factor to be taken account of when assessing the weight to be given to an individual report but much will turn on the individual circumstances of a case.

78. Finally, Mr McCloskey made submissions in connection with the other forms of audit or review noted above, namely CGR and HAA. He asserted that when a CGR or HAA takes place then the information relating to them should also be made available to an appeal tribunal. I make no direction that the Department is under any such duty. It was noted above that a CGR is conducted internally by Capita usually generated by complaints although not every case which was subject to a complaint is escalated to such a review. It is my experience that when a claimant has appealed against an adverse benefit decision and has also raised a complaint about the assessment process then details of the complaint process usually makes their way into the appeal papers primarily because the appellant wishes the appeal tribunal to know about the fact of the complaint. While accepting that the HAA process is related to the audit process in that it is the Department's method of undertaking a quality audit of a provider of services' (such as Capita) output, I cannot see how it has the immediacy to the decision-making and appeal process that details of every conducted HAA has to be disclosed to an appeal tribunal.

79. The decision of the appeal tribunal dated 12 May 2017 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

80. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:

    (i) the decision under appeal is a decision of the Department dated 2 November 2016 in which a decision maker of the Department

decided that the appellant was entitled to the standard rate of the daily living component of PIP from and including 7 December 2016 but was not entitled to the mobility component of PIP from and including 7 December 2016;

(ii) the appellant will wish to consider what was said at paragraph 77 of *C15/08-09 (DLA)* concerning the powers available to the appeal tribunal and the appellant's options in relation to those powers;

(iii) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and

(iv) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed): K Mullan

Chief Commissioner

25 September 2019