EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mr P Phillips	Ministry of Defence Defence Equipment & Support (DE&S)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by video) **ON** 30th September 2021

EMPLOYMENT JUDGE A Richardson

Representation
For the Claimant: Mr M Blitz, Counsel
For the Respondent: Mr N Fetto, Counsel

JUDGMENT

The judgment of the Tribunal is that

(1) The Claimant is disabled by reason of low back pain and sciatica for the purposes of S6 Equality Act 2010.
(2) The Claimant is not disabled for the purpose of S6 Equality Act 2010 by reason of right eye visual defect and arthritis generally.

REASONS

Background and issues

1. The issue before the Tribunal is to determine whether the Claimant is disabled for the purposes of S6 Equality Act 2010 with the conditions of (i) back pain/sciatica; (ii) right eye visual defect: and/or (iii) arthritis (generally).

2. Jurisdictional issues are to be decided at the final hearing.

Evidence and Proceedings

3. I was provided with a bundle of 147 pages with some pages being subsequently substituted with better copies and also additional information regarding an 'End of Treatment Summary'. I heard oral testimony from the Claimant and Ms E Wombwell, Head of Function for the Respondent. Both were cross examined.

Findings of Fact

4. Findings of fact are made on the basis of the evidence before the Tribunal taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. Conflicts of evidence as arose have been resolved on the balance of probabilities. The credibility of witnesses and the consistency of their evidence with surrounding facts and documents has been taken into account.

5. It is to be noted that it is not my function to resolve each and every disputed issue of fact. What follows are the relevant factual findings in relation to the issues set out above.

6. The following findings of fact are made:

6.1 The Respondent accepts the Claimant was disabled at all material times by osteo-arthritis of the knees. The date of commencement of knowledge is accepted as 27th March 2017.

Back pain/sciatica

6.3 The Claimant's medical records show that the first mention of back pain/ low back pain [LBP] / lumbar spine on bending is in November 2010 when the claimant reports to his GP that he has had months of pain to the right of the lumbar spine but can still play golf and football. Examination note stated "*not tender FROM [full range of movement] lumbar spine*" and the GP's comments were that it *'sounds' muscular, suggest tries painkillers, loses [weight] and stops smoking*.'

6.4 A year later in November 2011 the Claimant was involved in a road traffic accident. In December 2011 the GP notes mentions "*LBP, 1 week, comes and goes, severe at times…. Vague about whether it is LB or loin".*

6.5 There is no further entry for back pain issues for just over two years when in January 2014 the notes record *"long [history] low back pain, recent flare especially in car/mornings, see Nov 2010 same symptoms. Occasional paracetamol, thinks sometimes can refer to L posterior leg, no sphincter disturbances, plays football ok. Works office and driving. Sometimes keeps awake."*

6.6 On 6th February 2015 the GP records the claimant reporting a *"flare of low back pain"* and gives the Claimant advice which is not recorded.

6.7 There is no further entry regarding any back condition until 8th March 2017 when the Claimant's GP records that the Claimant complained of localised low back pain with spasms for the last 4 – 5 months which he blames on being off work and spending six months on the sofa [pending a disciplinary issue subsequently resolved. The notes record *"variable pain down the left leg to just below the knee, being stiff in the morning, eased by movement, all slowly getting better by mobilising. … not taking analgesia. Now addressing work about this. As feels it is a work related injury."* For the first time in the notes the GP refers to sciatica as well as back pain. The Claimant was signed off work for two months with a fit note diagnosis of "*back pain, sciatica*".

6.8 The Claimant was referred to an OH referral on 27th March 2017. The OH assessor noted that the Claimant was off work due to back pain and his knee operation. It was noted that symptoms had begun in February 2017 and that the GP had diagnosed sciatica. The summary of the report under 'Outlook' is that back pain is not generally caused by a serious disease and in most cases gets better with recovery periods varying, depending on the cause. Back pain lasting beyond 12 weeks which has not responded to manual therapy should be assessed further.

6.9 At that point the OH assessor was of the opinion that the Claimant was unlikely to be considered disabled because the back condition had not had a substantial impact on the Claimant's activities of daily living for longer than 12 months. Advice was given on ways to avoid discomfort and promote recovery such as moving regularly from desk work, change in posture

6.10 The Claimant's GP recommended a phased return to work over a period of 5 weeks.

6.11 On 25th April 2017 a work station assessment was undertaken. The report refers to back pain and sciatica mainly affecting the Claimant's right side. It comments that "*Initially [the Claimant] was off with work related issues which I believe have not been resolved. Whilst absent he developed sciatica and had left knee surgery in March due to underlying osteoarthritis that affects both knees*". Advice as given again on the importance of good posture and physical 'micro' breaks from sitting at a desk to relieve any discomfort in the lower back.

6.12 The Claimant's GP signed the Claimant off work with a diagnosis of *knee surgery, stress at work, sciatica* on 8th May 2017 for about 5 weeks.

6.13 The Claimant completed a Reasonable Adjustments Service Team referral form on about 10th October 2017 in which he states "*I have lower back pain and tightness, I undertake regular exercises and apply heat to relieve as*

much of my pain symptoms as I can but does not rid it completely."

6.14 On 20th February 2018 the Claimant experienced yet another road traffic accident as a result of which he sustained whiplash injuries. His GP record notes that the Claimant's neck had stiffened since, with "*reduced ROM neck, arm OK, looks well. Advice only."*

6.15 The Claimant commenced physiotherapy treatment on 23rd February 2018. His treatment appointments were approximately three sessions of physio per month on going for the next year until 20th May 2019.

6.16 On 21st May 2018 in a telephone consultation with his GP the Claimant explains that he needs a GP letter to obtain reasonable adjustments at work. The GP issued a fit note for an indefinite period with the diagnosis of neck, shoulder and knee pain, anxiety, visual problem.

6.16 On 11th June 2018 the NHS physio refers to sciatica. Neck and shoulder pain and knee pain with visual problems. The Claimant was referred to the Clinical/spinal Assessment & Treatment Service (the Sirona clinic at the NHS) in June 2018. The assessor wrote to the Claimant's GP and commented largely about the Claimant's difficulties with his left and right knees. He also commented that the Claimant had some night pain in the shoulder, neck and back rather than his knee following the road traffic accident. A further referral was for the shoulder in six months.

6.17 On 7th August 2018 the Clinical Spinal assessment & Treatment Services (Sirona Clinic) reported on a further assessment of the Claimant's condition. It reports that the Claimant's main problem was pain in the right shoulder when lifting overhead. It related this to the road traffic accident on 20th February 2018. The Claimant had visited his GP a few days later. There had been no bruising. The GP had given advice and the claimant had been seen in March 2018 by the insurance company physio therapist. This had not improved the condition. The assessor records that the Claimant was struggling to sleep because of back and shoulder and some pain was felt lying on the shoulder. The Claimant was examined and the comment at the conclusion of the report is "*likely subacromial pain – associated cervical spine symptoms – prolonged symptoms previously non responsive to physio."* The assessor suggested referral to physio and a review after the results of an MRI scan had been received.

6.18 On 19th July 2018 a work place assessment was undertaken and recommendations made regarding ergonomic equipment for the claimant's work place.

6.19 On 7th August 2018 The Sirona clinic reported to the Claimant's GP that the Claimant had right shoulder pain when lifting overhead, lateral shoulder pain radiating to elbow and some shoulder blade pain. The letter referred to the RTA

on 20th February 2017 and recounted the treatment since March 2018 with no improvement with physio and exercises. The Claimant was described as struggling to sleep because back and shoulder and some pain lying on shoulder. A rotator cuff injury was diagnosed. A further assessment was suggested after an MRI scan.

6.20 On 20th September 2018 the Sirona Clinic assessed the Claimant's right knee and right shoulder pain and suggest an MRI for the right shoulder.

6.21 On 27th February 2019 the Claimant attended his GP's surgery and complained of a cough and of aches and pains since December 2018. The notes record that the Claimant experienced shortness of breath on exertion, fatigue, some restriction in walking quickly, and was painless other than his joints.

6.22 On 13th May 2019 the Claimant again attended his GP's surgery and complained of low back pain which he had been experienced about one month since starting work. The pain referred to the upper leg at times. He felt too locked up to do the exercises given for a previous episode. The claimant said he was uncomfortable at night and had taken codeine occasionally for pain relief. The GP recommended physio therapy which the Claimant said he would arrange privately.

6.23 On 13th May and 29th May 2019 the Claimant's GP diagnosed low back pain and sciatica, prescribing pain killers. The Claimant was signed off work from 29th May 2019 with low back pain.

6.24 From 20th May 2019 the Claimant underwent a chiropractic assessment on 11 occasions until 10th September 2019 inclusive.

6.25 The chiropractic notes for 20th May 2019 refer to *"LBP on the left side from left thigh to knee, tingling in left foot and knee, cramping in the left leg, worse getting out of bed during the night or mornings. [Aggravated] by turning in bed lifting bending sitting driving."*

6.26 The notes also record *"onset 9/5/19 lifting palettes at work – sudden onset twisting to left with the weight, l. sided mainly. Helped with activity/ movement."*

6.27 The notes refer to complaint history as "*No major [history] but mild low backpain at the end of March this year 2 – 3 d duration after unpacking laptop bags. 2018 LBP after RTA"* . The assessment by the chiropractor refers to stiffness in gluteal muscles and the muscles supporting the spine and two possible diagnoses - a lumbar sprain or strain or the potential of a low lumbar disc bulge.

6.28 On 6th June 2019 the notes state that the claimant has made progress, joined a gym and reported that his consultant had recommended further x-rays of R shoulder and neck and possibly knees.

6.29 On 24th July 2019 the chiropractic notes record the Claimant presenting with "R sided neck pain, R shoulder pain, rotator cuff pain, right sided low back pain TL junction radiating down right post thigh to knee Left LBP left SI joint and l/s region. The history of the complaint is attributed to the road traffic accident the claimant had experienced in 2018.

6.30 By 2nd August 2019 the Claimant is reporting to the chiropractor that he is *"still suffering in the LB and R shoulder. Shooting pains in Left leg and now right leg, worse walking upstairs/hill. Tried gym/swimming etc."* By 6th August 2019 improved is recorded by 9th August 2019 the chiropractor's notes state *"doing well, much improved, still pain in L foot."*

6.31 By 12th August 2019 the chiropractic notes record that the sciatica is still there but the chiropractor has done a good job so far.

6.32 At 19th August 2019 the notes record that *"neck much better Tx [treatment/therapy] good left sciatica persistent and left LBP cramp in hamstring and foot numbness".*

6.33 On 10th September 2019 the chiropractic treatment stopped.

6.34 On 12th September 2019 the Claimant's GP at the Claimant's request wrote a letter 'To Whom It May Concern' to support his request to the respondent for adjustments to his work place. The letter refers to *'a long history of back pain'* with no further information about the condition or its treatment.

Right eye visual defect

6.34 The Claimant experienced a sudden onset of diplopia (double vision) in July 2009. The underlying cause was not identified by the Claimant's consultant at the Bristol Eye Hospital although treatment with steroids resolved the condition at least initially and by October 2009 the Claimant felt things were 'back to normal'. The consultant stated in a letter that as no underlying cause had been found, it was a possibility that the situation could recur in the future.

6.35 In April 2011 the medical records show that the Claimant was getting a recurrent of dipoplia when using a computer screen, and also proptosis (bulging of eye). The medical notes largely focus on the Claimant's propensity to suffer from migraines and the subsequent visual disturbance resulting from Migraines. Migraines are not a condition in consideration in these proceedings. There is little information in the medical notes relating to dipoplia/visual disturbances until December 2016 when an Occupational Health report recites what the OH

assessor was told by the Claimant: *"[the Claimant] has also had a bleed in his left eye in the past, he feels this is linked to his condition of migraine and he can have an increase in the number of Migraines he has if he has eye strain. In work he has indicated to me he can access a larger screen which has been beneficial."*

6.36 The OH report confirmed an assessment which had been discussed with the Claimant. The report states: "*his eye condition is not likely to impact on future attendance.* When advising on disability, the OH report stated "*His migraines are not likely to be covered as he is not requiring specific medication for this condition and his activities of daily living are not affect in the long term. His eye condition is also unlikely to be covered as it is not having a significant impact on activities of daily living."*

6.37 The Claimant's evidence that his eye disturbances worsened from 2011 and he lived with the condition because he was aware that the NHS and his GP were unable to provide any effective treatment. On 25th April 2017 an OH assessment refers to the Claimant correcting a right eye visual defect by wearing glasses. There is no mention of eye disturbance or dipoplia in the Claimant's application for reasonable adjustments made on 10th October 2017.

6.38 On 11th June 2018 the Claimant's GP issued a Fit note for an indefinite period on which "*visual problems*" is referred to, together with neck, shoulder and knee pain. The GP's notes do not make any comment about visual problems or other conditions except that the Claimant is having continuing problems with management at work and that he feels unable to work at present unless various criteria are met ….
The Claimant has throughout used spectacles to assist him with screen use.

Arthritis generally

6.39 It is accepted by the Respondent that the Claimant has osteoarthritis in his knees. Whilst there are references to shoulder and neck pain there is no reference to arthritis generally in the Claimant's GP records. The references to shoulder and neck pain are related to the aftermath of a road traffic accident.

Submissions

7. I was provided with written submissions from both Counsel for which I am grateful. I heard oral submissions and have read and re-read both the written submissions and my notes of the oral submissions, all of which I have taken into account in my conclusions.

The Law

8. The Equality Act 2010 s.6(1) states: "a person (P) has a disability if P has

a physical or mental impairment, and the impairment has a substantial and long term adverse effect on his ability to carry out normal day-do-day activities".

9. The Tribunal must ask and answer four questions: (i) did the claimant have a mental and/or physical impairment; (ii) did the impairment affect the claimant's ability to carry out normal day-today activities; (iii) was the adverse effect substantial; and (iv) was the adverse effect long term?

10. The Equality Act 2010 Guidance states: "in general, the day-to-day activities are things people do on a regular basis, and examples include shopping, reading and writing, having a conversation or using a telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities" (Paragraph D3)

11. In **Aderemi v London and South Eastern Railway Ltd [2013] ICR 591**, the EAT commented on the definition of 'substantial' stating that *'the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial, but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.'*

12. The effect of an impairment is long term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. If it is likely to recur it is to be treated as continuing (paragraph 2 of Sch 1 Equality Act 2010.

13. The cumulative effect of related impairments should be taken in account when determining whether the person has experienced a long term effect for the purposes of meeting the definition of a disabled person. Separate unrelated conditions are not to be aggregated.

14. Regard must be given to the medical evidence to the extent it is available and other evidence before the Tribunal and then to draw a conclusion on whether the claimant was a disabled person at the relevant time.

15. The relevant authority on the meaning of the word "likely" referred to in Schedule 1 at paragraph 2(1)(b) above is "could well happen" as determined by in **SCA Packaging Limited –v- Boyle 2009 ICR 1056.**

Conclusions

16. I found the Claimant inclined to exaggeration in his witness statement when describing the effect of the various conditions on his ability to carry out day to day tasks. That is not to say that I do not accept any of his evidence, but I treat some of his descriptions of the effect of his various conditions with care. I

did not find the Claimant dishonest in his evidence but careless, making claims at times which were not supported by the documentary medical evidence.

Backpain and Sciatica

17. The Claimant states in his witness statement that he was diagnosed with back pain and sciatica in November 2011 and January 2014. This is not a true statement. There is reference to back pain in 2010, 2011 and 2014 in the GP notes. The Claimant had a road traffic accident in 2011 and suffered as a result some back/low back pain. In 2014 the claimant despite telling his GP that he has a long history of low back pain was nevertheless recorded as being able to play football and to drive. On each occasion, advice was given by the GP; nothing further arises in the medical notes until 8th March 2017.

18. The Claimant has described in paragraphs 8 and 9 of his witness statement the effect of back pain and sciatica on his day to day activities as follows:

> *"8.A long history of back pain and sciatica – which causes pain down my leg - has meant that my day to day activities are substantially affected – such as dressing, undressing, personal care, driving, walking, sitting, standing, performing office duties, gardening, social interaction with family, or recreation, or household duties e.g. cleaning, cooking or gardening are substantially adversely effected. I cannot stay in the same position for very long and I need to keep moving / shifting position every 10-15 minutes to try and ease the pain.*
>
> *9. The substantial effects of pain and substantial functional restrictions on carrying out day to day activities are not just frustratingly frustrated but are also protracted and cumulatively debilitating. This provokes stress, is tiring both physically and mentally and creates a vicious circle e.g. when factoring in substantial sleep deprivation from intrusive pain and adverse discomfort from just not having a comfortable sleep position – which adversely effects concentration levels and cognitive ability and mood when trying to engage on day to day."*

19. The medical evidence does not reflect the seriousness of the effects of low back pain and sciatica on the Claimant's day to day life which the Claimant says in his witness statement he has suffered since 2010 on a daily basis. He was not 'diagnosed' with sciatica until early March 2017. The pain caused by sciatica and low back pain would have caused the Claimant difficulty in day to day activities as he has described, at the times when the condition flared up, however the documentary evidence does not support the statements at paragraphs 8 and 9 above.

20. The Claimant has taken considerable steps to alleviate the pain of flare ups of low back pain, using over the counter analgesics, the application of heat,

exercise, physiotherapy and chiropractic interventions. After sciatica first being mentioned in the GP notes in early March 2017, during 2017 and 2018 the medical documentary evidence is peppered with references to low back pain and sciatica.

21. There is a period of about 8 – 9 months between August 2018 and May 2019 when the GP medical records make no reference to back pain/sciatica although the Claimant was undergoing physiotherapy during that period. The Claimant's witness statement paragraphs 8 and 9 cannot be applied to this 8 – 9 month period with any confidence in the absence of a more specific time line and in view of the fact that the witness statement makes false reference to an earlier date of diagnosis. There was not in fact any detailed potential diagnosis of the reason for back pain until 20th May 2019.

22. On 20th May 2019 the Chiropractic notes of the first assessment of the claimant by the chiropractor refers to *"no major [history] but mild low back pain at the end of March this year 2 – 3 [days] duration after unpacking laptop bags and a reference to low back pain after the road traffic accident."*

23. The evidence therefore paints a very mixed, inconsistent picture of the degree to which the Claimant was affected by low back pain and sciatica in his day to day activities. The assessment on 20th May 2019 suggests that there was no major history of back pain and that there had been a flare up in March 2019 for 2 – 3 days duration. The final entries regarding low back pain and sciatica in the chiropractic notes are at 2nd August 2019 when the situation is much improved; on 9th August 2019 the notes state "*doing well, much improved still pain in L foot"*; 12th August 2019 which says that sciatica is still there but the chiropractor has done a good job so far; and on 19th August 2019 when the notes say that the treatment had been beneficial, but "*left sciatica persistent and left low back pain cramp in hamstring and foot numbness".*

24. The difficulty which the available evidence presents is the lack of focussed and accurate evidence about the Claimant's ability to do day to day tasks during the period 2017 – 2019. The GP notes refer simply to low back pain with no indication of the extent it affects the Claimant on a day to day basis. There are very occasional references to not being able to sleep but this is mixed with the effect of shoulder pain and the use of codeine 'sometimes'.

25. The Claimant relies heavily on the conduct of the Respondent between March 2017 and June 2018 in making adjustments to the Claimant's work place as support for this claim of disability. I find that it cannot be implied that the Respondent's conduct in ensuring a safe working environment is an acknowledgment of the Claimant being disabled.

26. The Claimant has self managed his condition through physio therapy and chiropractic treatment, exercise, head pads, pain killing medication. I also note

that the alleviation of symptoms by treatment or medication are not to be taken into account when assessing disability.

27. I step back and look at the evidence as a whole. Applying the law to the facts with an application of common sense, the Claimant's condition of back pain/sciatica has been a grumbling, recurring issue for the Claimant since early 2017. It can be deduced from the notes that there are periods when the Claimant is able to manage, alleviate and live with reduced, or subdued, low back pain substantially affecting his day to day life and there are periods where the condition flares up and it has a severe impact. Overall the sheer number and frequency of entries in the medical evidence referring to low back pain/sciatica cannot be ignored. Nor can the lengthy period of time be ignored, over which the Claimant has visited and complained to his GP, had physiotherapy which had little long term effect and chiropractic which had some beneficial effect. The evidence strongly suggests that the Claimant has an underlying condition in his back which over three years has not been resolved.

28. In the circumstances, the Claimant clearly has a physical impairment, as confirmed by the chiropractor's range of diagnoses. The effect of low back pain/sciatica on the Claimant over periods of successive months interspersed with flare ups cannot be said to be trivial or minor. Chronic back pain is debilitating. The medical records indicate that the condition is chronic. The flare ups are a recurring situation. The effect of the back/pain sciatica despite medication and treatment, did, and does affect the Claimant's ability to carry out normal day to day activities especially during flare ups of the symptoms. The effect has been long term being a condition with which the Claimant has to contend with since about March 2017. The definition of disability has therefore been met.

Right eye visual defect

29. The incident of dipoplia in 2009 was resolved and has not recurred although it was noted that it could recur. The dipoplia incident was short term and not of itself a disability. In 2011 there is a reference to dipoplia and also bulging of the eye in the GP notes. That was also resolved. In 2016 an OH report refers to the Claimant having migraines caused by eye strain. The OH assessor states that the Claimant's eye condition was not having a significant impact on daily activities.

30. In April 2017 an OH assessment confirms that the Claimant's right eye visual defect was corrected by wearing spectacles. In October 2017 the Claimants application for reasonable adjustments at work does not refer to any visual disturbance or dipoplia. The GP notes in June 2017 provide no information about visual problems.

31. The Claimant has above average eyesight according to his consultant in

2009. He wears corrective spectacles. The Claimant asserts in his witness statement at paragraphs 15 – 19 that he has a long history of migraines, eye strain and visual distortions which have increased since 2011. He makes a broad statement that visual disturbances have affected his concentration, reading, driving, recreation and ability to do screen based work.

32. This claim is not supported by any medical evidence. The Claimant could have provided an ophthalmic report to support his claims but did not. The fact that Respondent made adjustments for the Claimant to do display screen work is not confirmation of disability. The Claimant has provided no evidence of an underlying health issue with his eyes. The consultant's comment that dipoplia could return, has fortunately not been the case. The Claimant has asserted that his migraines are connected to the dipoplia. Whilst I take judicial notice that migraines can cause visual disturbances, migraine head aches are not under consideration as a disability in this matter. The Claimant has failed to discharge the burden of proof that any visual disturbances he experiences are a physical impairment which have a substantial, long term adverse effect on his ability to carry out day to day tasks and in particular there is no evidence that he has right eye visual disturbance which satisfies S6 EqA 2010.

Arthritis generally

33. Whilst it is the case that the Claimant has osteo arthritis of the knees (which is not disputed) and as a result of a road traffic accident the Claimant suffered neck and shoulder pain, there is no evidence of arthritis generally being diagnosed in the medical evidence. The Claimant's witness statement makes a false claim that he was diagnosed with arthritis in 2011 and chronic arthritis in 2018. This is yet the third occasion on which the Claimant has been careless about making claims not supported by the documentation.

34. The Claimant has experienced neck and shoulder pain and this is documented in the medical notes. There is also reference on occasions to elbow and wrist symptoms.

35. References are made in June 2017 in the Posturite report to providing a more *"comfortable and relaxed position for the shoulders arms wrists and hands*" when typing, and in the Claimant's application for adjustments to his work place in October 2017 where mention is made of suffering from *"general neck and shoulder tension, with symptoms worsening when using a computer*" and that he experienced "*clicking in his left elbow, especially when using a computer*".

36. Following a road traffic accident in February 2018 the Claimant commenced physiotherapy for not only neck and shoulders but also his back and knees. In mid April 2018 the Chiropractor notes record that the claimant had been to Florida and done lots of walking but left neck and shoulder had been more problematic.

37. The physio notes for 18th May 2018 record that the claimant had *"pain in the right neck/shoulder, into bicep which was aggravated by pushing off the right arm, sharp pain when driving".* The claimant's goals were to play badminton, golf, and football, to lift his children comfortably and to go on holiday and be mobile.

38. The Claimant stated in the second application for adjustments in June 2018 that his neck and shoulder symptoms were worsening. The Fit note that month records that the Claimant was signed off inter alia with neck, shoulder and knee pain.

39. In August 2019 the chiropractor notes record that the neck is much better and that there is an improvement in all areas.

40. In August/September 2018 the Sirona clinic refer to right shoulder pain when lifting overhead and that the Claimant believes the cause is a rotator cuff injury. X rays reveal no gross degenerative changes and a condition of os acromial is ruled out. The Claimant was recommended to undergo an MRI scan on his right shoulder. There is no evidence that he did undergo an MRI scan on his right shoulder or what the outcome was.

41. The Claimant's witness statement provides very little information of value. He refers to having arthritis in his neck shoulder wrist and elbow with restrictive movement on his right side. That is self diagnosed. He states at paragraph 25 that he suffers with chronic pain and has serious mobility issues as a result which causes him to experience substantial difficulty with dressing, undressing, personal care, driving, walking, sitting or standing. He states also that the pain has an impact on his concentration mood, sleep and cognitive function. This is similar language to the description of the impact of low back pain/sciatica on the Claimant's day to day activities. The impression is given that he experiences these substantial effects constantly, permanently. The Claimant states that the condition will worsen but there is no medical evidence to support that statement.

42. There are references to pain when lifting overhead, and to some discomfort sleeping which is medicated. There is nothing in the documentary evidence which comes close to supporting claims to the extent of severity that the claimant alleges over the period he asserts he has been suffering from arthritis. His witness statement is not reliable and it is in any event not sufficiently detailed to be of evidential value in respect of 'arthritis generally'.

43. Whilst it is not imperative that there should be a diagnosis, the claimant has chosen a diagnosis of 'arthritis generally' which he illustrates by reference to neck and shoulder pain without any clinician's diagnosis of arthritis. There is insufficient evidence to support the claim of arthritis generally or that the Claimant's intermittent neck and shoulder pain following the road traffic accident

in 2018 is caused by arthritis rather than being a soft tissue injuries. The Claimant has failed to discharge the burden of proof with regard to arthritis generally.

Employment A Judge Richardson
Date: 15 November 2021

Judgment sent to Parties: 23 November 2021

For the Tribunal Office