IN THE UPPER TRIBUNAL **Case Nos.** CAF/1961/2015
ADMINISTRATIVE APPEALS CHAMBER CAF/1962/2015

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeals are dismissed.

REASONS FOR DECISION

1. The claimant appeals, with my permission, against decisions of the First-tier Tribunal dated 19 March 2015 dismissing his appeals against decisions of the Secretary of State dated 1 February 2012 and 15 August 2014 making interim long-term assessments of the extent of the claimant's disability in respect of a chronic knee condition – the conditions accepted as attributable to service were injury to right knee, chondromalacia right patella and menisectomies right knee – at 40% from, respectively, 8 August 2011 and 27 May 2014. Neither party has sought an oral hearing.

2. The claimant's injuries were caused during his service as a regular soldier in the Army, which ended prematurely in 1969 when he was found permanently unfit for Army service. When he was discharged, he was awarded a disablement pension based on an assessment of disablement of 20%. The precise sequence of the early assessments and awards is not entirely clear from the documents before me but a long term interim assessment of 20% was made in 1972 and was maintained in 1998. The claimant applied for another review in 2011 and the assessment was increased to 40% by virtue of the decision of 1 February 2012 because there had been significant deterioration in his condition since 1998. The claimant appealed. The first two decisions of the First-tier Tribunal dismissing appeals from that decision were set aside by the Upper Tribunal (on files CAF/3077/2012 and CAF/2768/2014) and the case was remitted for hearing for a third time. Meanwhile, a further application for review in 2014 had resulted in the assessment of 40% being maintained on 15 August 2014. The claimant also appealed against that decision and that appeal was heard with the remitted appeal.

3. The claimant's case before the First-tier Tribunal was that the assessments of 40% were too low. He contended that assessments of at least 60% would be more appropriate. The hearing took place on 19 March 2015 in the claimant's absence, because he lived abroad. However, he was represented by the Royal British Legion and his son, who happened to be a student in England, appeared as a witness. The First-tier Tribunal dismissed his appeals and it is against those decisions that the present appeal is brought.

4. The claimant raised a very large number of grounds of appeal in his application to the First-tier Tribunal for permission to appeal, but he pursued only two in his application to the Upper Tribunal, perhaps because, in refusing the application to the First-tier Tribunal, the Chamber President of the War Pensions and Armed Forces Compensation Chamber gave a particularly detailed decision explaining why she considered that none of the grounds advanced in the application

raised an arguable point of law. Although I did not formally limit the scope of the appeal, I indicated when I granted permission to appeal that I was not satisfied that either of the claimant's present grounds was made out.

5. First, he submitted that the proceedings before the First-tier Tribunal were unfairly conducted because of the number and nature of the questions put to his son. I reject that ground and simply adopt the reasons given by the Chamber President in paragraph 11 of her refusal of permission to appeal for finding that no error of law was raised by that ground.

6. Secondly, he argued that the presiding judge should not have heard his appeals. He had argued in his written submissions to the First-tier Tribunal that he, as a person with a damaged limb, was in a worse and more painful position than a person who had had such a limb amputated. It seems to have become apparent at the hearing that the presiding judge had herself had precisely the same operation as the claimant had been advised to have but it had not been a success and she had had to have the limb amputated. The claimant argues that, because she had had a limb amputated, she would be biased, or appear to be biased, because "she would normally be a 40% disabled person asked to judge somebody who is not an amputee but is asking for a higher award". That argument is untenable. It might be thought that the judge would have had valuable experience upon which to base her consideration of the claimant's argument. That might have been favourable to the claimant or it might not: a fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility of bias merely because the judge had relevant personal experience.

7. However, it is important that, if views are formed in the light of personal experience, the parties are given an opportunity to comment on them. It may well be that that is how it became apparent to the claimant's representative and son how similar the judge's experience was to the claimant's. The claimant says that there are nonetheless some matters mentioned in the reasons for decision that were not mentioned at the hearing and he says that these contradict the opinion of the orthopaedic surgeon who examined him abroad. He refers to the First-tier Tribunal saying that he should swim for exercise whereas the surgeon had said that he could not do physical exercise and to the First-tier Tribunal saying that he could drive an adapted car in 2014, whereas the surgeon said in 2013 that he could not drive. These, the claimant submits, are examples of the judge making assumptions based on her own experience.

8. I do not accept this argument in the circumstances of this case. Firstly, the surgeon's views and those of the claimant himself were before the First-tier Tribunal, which was not bound by them. (Indeed, the First-tier Tribunal expressed in paragraph 62 of the statement of reasons its general agreement with the surgeon's reports and its decision did not necessarily involve disagreement it. The surgeon had not specifically commented on the claimant's ability to swim and, in relation to driving, it was common ground that the claimant had been able to drive an automatic car in 2011 and the surgeon did not refer in his 2013 report specifically to the question whether the claimant could drive a car that was adapted and automatic.) Secondly, the decision was made by all three members of the panel and not just by

the presiding judge. One of the members of the panel was a doctor, albeit not an orthopaedic surgeon. Thirdly, it is quite clear both from the panel members' notes of the hearing and from the statement of reasons itself that both the possibility of the claimant swimming and of him driving an automatic car were raised with the claimant's son while he was giving evidence in the presence of the claimant's representative. I accept that the claimant's son's ability to answer the questions might not have been as good as the claimant's but, given that the claimant was not present at the hearing but had addressed the issues in written submissions, the First-tier Tribunal acted perfectly fairly. There was no breach of the rules of natural justice.

9. The claimant plainly disagrees with the First-tier Tribunal's decisions. As is usual in assessment appeals, there were two broad issues to be considered by the First-tier Tribunal. The first was the question of fact as to what the practical effects of the accepted conditions actually were at the dates of the Secretary of State's decisions. The second was the question of judgement as to what assessment, expressed in terms of a percentage, was appropriate for the purposes of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 (SI 2006/606) in the light of the practical disablement from which the claimant suffered at each date and the terms of the Order. The claimant's disagreement encompasses both elements of the decisions.

10. However, such questions of fact and judgement are very much matters for the Secretary of State and, on appeal, the First-tier Tribunal. An appeal to the Upper Tribunal lies only on a point of law and so, in the absence of an error of law, the Upper Tribunal is not entitled to interfere with the findings of fact and exercise of judgement of the First-tier Tribunal.

11. In relation to the findings of fact as to the extent of the claimant's practical disablement at each of the material dates, the First-tier Tribunal's decision is, in my judgement, unassailable. I can see no error of law. The statement of reasons is more than adequate as a document showing that the First-tier Tribunal considered the relevant evidence, made clear findings that it was entitled to make in the light of that evidence and had good reasons for those findings.

12. It was in relation to the fixing of the percentage for the purposes of the 2006 Order that I granted permission to appeal. I said –

> "4. It seems to me that assessing disablement requires some consideration of the degrees of disablement prescribed in Part V of Schedule 1 to the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 (SI 2006/616), whereas the First-tier Tribunal seems to have concentrated on the extent to which the claimant could manage the activities mentioned in paragraph 63 of the statement of reasons and has not mentioned the Schedule. Obviously, the extent to which the claimant can carry out such activities may be relevant to the assessment of disablement but a profoundly deaf person might be able to drive a car, travel by taxi, hold down employment, go shopping and go swimming and yet would be entitled to an assessment at 100% on the ground of "absolute deafness". Thus, an

assessment at 100% does not require practical total disablement and it is arguable that, notwithstanding its experience, the First-tier Tribunal lost sight of the need to compare the claimant's disability with those of people with prescribed degrees of disablement. Moreover, as the claimant has submitted, a person with a painful limb may be more disabled, at least in some respects, than a person who had had the limb amputated.

5. Given the history of this case and the relative detail of the First-tier Tribunal's findings of fact, this may be a case where, if the claimant's appeal were to be allowed and one or both of the decisions of the First-tier Tribunal were to be set aside, the Upper Tribunal would be able to substitute its own assessment(s) rather than remitting the case(s) to the First-tier Tribunal. It would therefore be helpful if both parties were to suggest what the appropriate degree of disablement is on the basis of those findings or, alternatively, to suggest in what respects the findings are not adequate for the purpose of making an assessment.

6. Both in considering whether the assessments are unreasonably low and in considering, if necessary, what assessment(s) should be substituted, I would be greatly assisted by any guidance or framework that is used by the Secretary of State's medical advisors when certifying degrees of disablement in the light of findings recorded in an examination report in a case where no degree of disablement is prescribed. I therefore ask the Secretary of State to attach to his response to this appeal any such guidance, framework or similar document that exists."

13. The appeal is resisted in a short submission on behalf of the Secretary of State, in which it is argued that, because the claimant is not an amputee with an injury within the scope of Part V of Schedule 1 to the 2006 Order, article 42(6) of the Order did not apply and it was unnecessary for the First-tier Tribunal to refer to Part V of the Schedule. It is further submitted that the First-tier Tribunal approached the case correctly in the light of article 42(2) – which I accept it accurately summarised in paragraph 12 of its statement of reasons – and there is appended to the submission a "Medical Comment" by Dr Anne Braidwood CBE, the medical adviser to the Deputy Chief of Defence Staff (Personnel), which is effectively a more detailed submission in support of the First-tier Tribunal's decision. She, in turn, appends to her Medical Comment a desk aid for medical advisers (MPM200), updated in February 2015, and a report dated March 2015 by the Independent Medical Expert Group (established in 2010 to provide medical and scientific advice on the Armed Forces Compensation Scheme) of which she is a member. No further internal guidance was provided.

14. The claimant has replied to the Secretary of State's submission and Dr Braidwood's Medical Comment. In his reply, he said that he had been trying to obtain from the Ministry of Defence a document written by Dr Braidwood that had been before the Administrative Court in *Secretary of State for Defence v Rusling* [2003] EWHC 1359 (QB). He said that he had been advised that it was not available for the public to see. The relevant documents that were mentioned in paragraph [13] of *Rusling* are the *War Pensions Medical Advisers Instructions and Procedures*

Manual (2000) and a document known as *MPM57A*. After some rather odd correspondence in the course of which the Ministry of Defence appears to have said that the *Manual* was defunct and that it no longer had a copy, despite the fact that it had sent the claimant a hard copy two days earlier, electronic copies of both documents were eventually sent by the Ministry of Defence to the claimant together with an electronic copy of the *Veterans Agency Medical Adjudication Guidance*. *MPM57A* is the *Veterans Agency Medical Handbook*. These documents may now all be found on the Government website.

15. Neither party has drawn those documents to my attention but I have looked at them. Their contents are not terribly surprising, being similar to documents used for years in relation to the similar industrial injuries scheme: see for instance the *Handbook for Industrial Injuries Medical Boards* (HMSO, 1970), which included suggested assessments for ankyloses, deafness and defective vision that are identical to, or almost identical to, those on the desk aid produced in the present case. The desk aid also includes suggested assessments for psychiatric disorders. The documents that were sent to the claimant and are now on the website were published between 2000 and 2003 and are said to be no longer in use. Presumably there are some current equivalents in addition to the "Synopses of Causation" that are also on the website but I will assume that there is nothing in them that could be of any assistance in the present case. Why the Ministry of Defence considers that these types of documents should not be routinely published in the way that similar guidance to social security decision-makers is published by the Department for Work and Pensions I have no idea. Quite apart from the interests of claimants and their representatives, it does not seem to be in the Ministry's own interests that the generally coherent background to its decision-making should not be understood by the world at large and, in particular, by tribunals who have to consider the correctness of individual decisions. Public scrutiny might encourage improvement where that is necessary but, for the most part, the guidance that has now been published is uncontroversial and awareness of it is likely to be helpful to all concerned, although I do not need to refer to the documents in detail in this case in the light of Dr Braidwood's Medical Comment which addresses more directly the facts of this particular case.

16. The facts found by the First-tier Tribunal are set out at paragraphs 48 to 50 of the statement of reasons –

> "48. The Appellant was 65 years of age at the time of the hearing. He had served in the Army from 18th March 1966 to 3rd November 1969 when he was medically discharged as a consequence of a knee injury. He subsequently worked as a Textile Consultant which involved substantial amount of foreign travel. He stopped work in 2008 when he gave up work due to the problems with his right knee.
>
> 49. At the time of the decision in February 2012:
>
> - He could walk 200 metres before he needed to stop or suffered severe discomfort;
> - He sometimes used a stick when walking;
> - He did not need the assistance of another person to walk;

- He found going up and down stairs difficult but managed to do this himself with the aid of a stick;
- He found it difficult to put on shoes and socks on the right and needed to use a long handled shoe horn or assistance from his family;
- He would have been able to drive an adapted automatic car, using his left foot;
- He would have been able to carry out a sedentary office job as long as this did not involve significant walking or standing and allowed him the opportunity to move around from time to time;
- He would have been able to swim and it is probable that this would have improved the condition of his right knee;
- He had taken some anti-inflammatory medication prescribed by his GP but had not had any physiotherapy or hydrotherapy or other treatment and had not been referred to an Orthopaedic specialist;
- He could not squat, run, cycle or take part in sport;
- The muscle wasting in his right thigh had increased from 2cm in 1998 to 2.5cm in December 2011:
- No abnormality was present in his left or right hip, left leg or back in December 2011 and the tone and power in both legs was normal;
- The Appellant would have been able to travel around and to go shopping using suitable aids;
- He was no longer able to play bowls or to go dancing with his wife and could not play sports, walk the dog or cut the lawn and look after the garden.

50. At the time of the decision on 15th August 2014:
    - The condition of his right knee had deteriorated with the flexion contracture now being 20 degrees;
    - He could walk 50 metres before he needed to stop or suffered severe discomfort;
    - He used a stick when walking;
    - He did not need the assistance of another person to walk;
    - He found going up and downstairs difficult but managed to do this himself with the aid of a stick;
    - He found it difficult to put on shoes and socks on the right and needed to have assistance from his family;
    - He would have been able to drive an adapted automatic car, using his left foot;
    - He would have been able to carry out a sedentary office job as long as this did not involve significant walking or standing and allowed him the opportunity to move around from time to time;
    - He would have been able to swim and it is probable that this would have improved the condition of his right knee;
    - He had occasionally taken some anti-inflammatory medication and Paracetamol prescribed by his OP but had not had any physiotherapy or hydrotherapy or other treatment and had not

been referred to an Orthopaedic specialist, only having seen an Orthopaedic Specialist in connection with the War Pension claims;

- He could not squat, run, cycle or take part in sport;
- The muscle wasting in his thigh had increased from 2.5cm in December 2011 to 3cm in November 2013;
- No abnormality was present in his left or right hip, left leg or back in November 2013 and the tone and power in both legs was normal;
- The Appellant would have been able to travel around and to go shopping using suitable aids;
- He was no longer able to play bowls or to go dancing with his wife and could not play sports, walk the dog or cut the lawn and look after the garden."

17. I need not set out all of the First-tier Tribunal's reasons for making those findings and rejecting the arguments advanced by, and on behalf of, the claimant as to the practical extent of his disablement, but I should set out the last paragraph of those reasons (to which I referred in my Direction above) and also the reasons for rejecting the submission that 40% was too low an assessment –

> "63. The Tribunal noted the list of functional limitations referred to by the Appellant in his application for permission to appeal in July 2012. The Tribunal did not accept all the functional limitations set out by the Appellant at that time:
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> a) Travelling around — the Tribunal concluded that the Appellant could walk 200 metres as at February 2012 for the reasons stated above. The Appellant: could drive an automatic vehicle in 2011 and would have been able to have an automatic car adapted to allow him to operate the foot pedals with his left leg. The Tribunal therefore considered that he had the ability to drive in February 2012, August 2014 and at the date of the hearing in March 2015. Furthermore the Tribunal noted the evidence from his son that the Appellant could get down the stairs and walk 40 metres to a taxi in February 2012 which would give another way of travelling to different places. In relation to travel to and from the UK and within the UK it would have been possible for the Appellant to arrange assistance when travelling by air and rail. The Tribunal therefore rejected the suggestion that the Appellant could not travel around;
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> b) The Tribunal also considered this to be the case in August 2014 as the Appellant still retained the ability to travel by taxi, could walk 50 metres and in the view of the Tribunal could drive an automatic car;
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> c) Work in a normal job — the Tribunal accepted that the Appellant would have difficulty in carrying out his previous employment. The Tribunal did not, however, consider that office based work would be precluded on the basis of a problem with one knee as long as the Appellant had the ability to get up on occasions and as long as the job did not involve substantial walking. The Tribunal therefore rejected the suggestion that the Appellant was totally precluded from employment in February 2012 or August 2014;
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> d) Going Shopping — the Appellant retained the ability to walk 200 metres

with a stick in February 2012, could drive and use a taxi. The Tribunal considered that this would allow him to do some shopping. In addition if a wheelchair or mobility scooter was used for longer distances, this would allow the Appellant to do more extensive shopping. The Tribunal accepted that shopping would be more difficult in August 2014 as the Appellant's walking ability had reduced to 50 metres. The Tribunal, however, still considered that the Appellant would be able to do some limited shopping and more extensive shopping if appropriate aids were used;

e) Driving — see comments above. The Tribunal concluded that the Appellant retained the ability to drive an automatic vehicle as there was no medical evidence confirming abnormality in his other leg;

f) Swimming — no good reason was given as to why the Appellant would not be able to go swimming, particularly in 2012 when it was suggested that his need for assistance with dressing was much more limited. Indeed the Tribunal considered that swimming was likely to be beneficial for the Appellant as it would allow him to exercise without the need to weight bear. In view of the fact that the Appellant reported assistance with putting on socks and shoes in August 2014 the Tribunal considered it probable that he would have needed accompanying to go swimming by that date. The Tribunal, however, considered that it would still be beneficial to the Appellant to go swimming and that he retained the ability to exercise in water; the Tribunal considered the suggestion from the Appellant's son that he might drown to be without foundation;

g) Socialising — the Tribunal accepted that the Appellant would not be able to take his wife dancing or to play sport as he did before. They did not, however, accept that this would prevent the Appellant socialising in February 2012 or August 2014 [in] view of their conclusions above about his ability to drive/ take a taxi.

64. Taking into account all the matters set out above the Tribunal considered that it was appropriate to increase the assessment from 20% in February 2012. They considered that 40% was a generous assessment but not outside the range of what would be a reasonable award. They therefore did not consider that there were grounds to reduce this assessment. For the reasons stated above they were not persuaded that an assessment of more than 40% was reasonable.

65. The Tribunal did take account of the fact that the Appellant's condition had deteriorated by August 2014 with slightly more restricted movement and a reduced walking ability. They did not, however accept that this greatly increased the functional limitations of the Appellant and noted that he continued to receive minimal treatment for his knee with less medication apparently being taken in November 2013 than in December 2011. Taking into account the points set out above they did not consider that the deterioration was sufficient to increase the assessment to 50%. They therefore concluded that a long term assessment of 40% remained reasonable."

18. The statutory provisions relating to the assessment of disablement are to be found in article 42 of, and Schedule 1 to, the 2006 Order. So far as is material, article 42 provides –

> "**42.**—(1) The following provisions of this article shall apply for the purposes of the assessment of the degree of the disablement of a member of the armed forces due to service before 6th April 2005.
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> (2) Subject to the following provisions of this article—
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> (a) the degree of the disablement due to service of a member of the armed forces shall be assessed by making a comparison between the condition of the member as so disabled and the condition of a normal healthy person of the same age and sex, without taking into account the earning capacity of the member in his disabled condition in his own or any other specific trade or occupation, and without taking into account the effect of any individual factors or extraneous circumstances;
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> (b) for the purpose of assessing the degree of disablement due to an injury which existed before or arose during service and has been and remains aggravated thereby—
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> (i) in assessing the degree of disablement existing at the date of the termination of the service of the member, account shall be taken of the total disablement due to that injury and existing at that date, and
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> (ii) in assessing the degree of disablement existing at any date subsequent to the date of the termination of his service, any increase in the degree of disablement which has occurred since the said date of termination shall only be taken into account in so far as that increase is due to the aggravation by service of that injury;
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> (c) where such disablement is due to more than one injury, a composite assessment of the degree of disablement shall be made by reference to the combined effect of all such injuries;
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> (d) the degree of disablement shall be assessed on an interim basis unless the member's condition permits a final assessment of the extent, if any, of that disablement.
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> …
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> (5) The degree of disablement assessed under the foregoing provisions of this article shall be certified by way of a percentage, total disablement being represented by 100 per cent (which shall be the maximum assessment) and a lesser degree being represented by such percentage as bears to 100 per cent the same proportion as the lesser degree of disablement bears to total disablement, so however that a degree of disablement of 20 per cent or more shall be certified at a percentage which is a multiple of 10, and a degree of disablement which is less than 20 per cent shall, except in a case to which Table 1 of Part III of Schedule 1 applies, be certified in a manner suitable for the purposes of Table 2 of Part III of that Schedule.
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> (6) Where a disablement is due to an injury specified in Part V of Schedule 1 or is a disablement so specified, and, in either case, has reached a settled condition, the degree of that disablement shall, in the absence of any special

features, be certified for the purposes of this article at the percentage specified in that Part as appropriate to that injury or to that disablement.

…

(14) The degree of disablement certified under this article shall be the degree of disablement for the purposes of any award made under this Order."

19. Part V of Schedule 1 is in the form of a table.

PART V

ASSESSMENT OF DISABLEMENT CAUSED BY SPECIFIED INJURIES AND OF CERTAIN OTHER DISABLEMENTS

Description of Injury	***Assessment***
Amputation Cases – Upper Limbs	*per cent*
Loss of both hands or amputation at higher sites	100
Forequarter amputation	100
Amputation through shoulder joint	90
Amputation below shoulder with stump less than 20.5 centimetres from tip of acromion	80
Amputation from 20.5 centimetres from tip of acromion to less than 11.5 centimetres below tip of olecranon	70
Amputation from 11.5 centimetres below tip of olecranon	60
Loss of thumb	30
Loss of thumb and its metacarpal bone	40
Loss of 4 fingers	50
Loss of 3 fingers	30
Loss of 2 fingers	20
Loss of terminal phalanx of thumb	20
Amputation Cases – Lower Limbs	*per cent*
Double amputation through thigh, or through thigh on one side and loss of other foot, or double amputation below thigh to 13 centimetres below knee	100
Double amputation through leg lower than 13 centimetres below knee	100
Amputation of one leg lower than 13 centimetres below knee and loss of other foot	100
Amputation of both feet resulting in endbearing stumps	90
Amputation through both feet proximal to the metatarso-phalangeal joint	80
Loss of all toes of both feet through the metatarso-phalangeal joint	40
Loss of all toes of both feet proximal interphalangeal joint	30
Loss of all toes of both feet distal to the	20

proximal interphalangeal joint	
Hindquarter amputation	100
Amputation through hip joint	90
Amputation below hip with stump not exceeding 13 centimetres in length measured from tip of great trochanter	80
Amputation below hip and above knee with stump exceeding 13 centimetres in length measured from tip of great trochanter, or at knee not resulting in end-bearing stump	70
Amputation at knee resulting in end-bearing stump, or below knee with stump not exceeding 9 centimetres	60
Amputation below knee with stump exceeding 9 centimetres but not exceeding 13 centimetres	50
Amputation below knee with stump exceeding 13 centimetres	40
Amputation of one foot resulting in end-bearing stump	30
Amputation through one foot proximal to the metatarso-phalangeal joint	30
Loss of all toes of one foot proximal to the proximal interphalangeal joint, including amputations through the metatarso-phalangeal joint.	20
Other Specific Injuries	*per cent*
Loss of a hand and a foot	100
Loss of one eye, without complications, the other being normal	40
Loss of vision of one eye, without complications or disfigurement of the eyeball, the other being normal	30
Loss of sight	100
Other Disablements	*per cent*
Very severe facial disfigurement	100
Absolute deafness	100
Mesothelioma	100

Note:– Where the scheduled assessment for a specified injury involving multiple losses differs from the sum of the assessments for the separate injuries, the former is the appropriate assessment.

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20. In her Medical Comment, Dr Braidwood explains how the legislation is applied by the Secretary of State. So far as is material, she says –

"3. The purpose of assessment in war pensions is to provide equitable and consistent outcomes in terms of compensation awards made and reflecting the very broad spectrum of injuries, including wounds and diseases, which the War Pensions Scheme is able to consider and accept. *There is also a need in a public no fault jurisdiction to maintain vertical and horizontal equity.* By vertical equity we mean that for a category such as hearing loss more severely disabling disorders will attract higher awards and similarly for horizontal equity disablements affecting the different body systems with very different disabling effects are treated equitably.

…

6. The war pensions legislation also includes a list of statutory scheduled assessments (SSA). These are important for their own sake and must apply where a claimed disablement and underlying injury precisely meet the description. *They are also important in acting as sign posts for all other assessments in the Scheme.* These features reflect the antiquity of the Scheme and its early focus on combat related trauma. The statutory scheduled assessments were reviewed by the Hancock Committee in 1947 and the McCorquodale Committee in 1966. On both occasions they were found to be sound.

7. The medically certified level of assessment does not have a medical purpose in the sense of informing the need or extent of rehabilitation etc. but is a surrogate measure for award to be paid. The maximum assessment is 100% and this may derive from multiple accepted conditions where a combined assessment will be certified or from a single condition e.g. loss of sight. *The clinical picture and disabling effects of 100% disabled pensioners are therefore very variable and at the individual level an assessment of 100% simply implies that as a result of accepted disorder/s the person meets the minimum disablement to attract the maximum award.*

8. War pensions assessment is not an exact science, tightly regulated or rules based and there is no text book. It includes a large measure of judgment. To meet this, prior to joining, war pension medical advisers must have a proven clinical record and relevant experience. This enables them to be familiar with a range of disorders, their disabling effects and the likely average as well as range of pain and suffering associated with disorders. In line with the requirement not to take into account "...individual factors or extraneous circumstances", it is policy to assume that the claimant will seek appropriate diagnosis, investigation and treatment for disorders. This of course is subject to restriction on account of age or other non-attributable disablement which make operation hazardous or otherwise clinically inadvisable. While there is some flexibility, assessments cannot be certified based solely on claimant history. As far as possible the certifying doctor should seek other objectively verifiable evidence which supports the claimant's history i.e. is consistent with it and can take account of evidence which suggests either under-reporting or exaggeration, both of

which occur."

(My emphases.)

21. I do not consider that there is anything controversial in that analysis. It appears to be consistent with what Judge Jacobs said in *CT v Secretary of State for Defence* [2009] UKUT 167 (AAC) and what I said in *AM v Secretary of State for Defence (WP)* [2013] UKUT 97 (AAC). In any event, I agree with it. In particular, the sentences in paragraphs 3, 6 and 7 that I have emphasised explain why Part V of Schedule 1 was relevant in the present case, notwithstanding that the claimant had not incurred an injury mentioned in the Schedule and notwithstanding the lack of any express provision requiring regard to be had to the Schedule in such cases. There is such an express provision in the similar industrial injuries scheme (see regulation 11(8) of the Social Security (General Benefit) Regulations 1982 (SI 1982/1408)) but the lack of an equivalent provision in article 42 of the 2006 Order cannot reasonably be considered significant because it is inconceivable that the draftsman of the Order had in mind that there should not be the sort of horizontal equity described by Dr Braidwood. Such horizontal equity cannot be achieved other than by having regard to the Schedule in cases to which the Schedule does not actually apply, as Dr Braidwood recognises in paragraph 6 of her Medical Comment when she refers to using the assessments in the Schedule as "sign posts for all other assessments in the Scheme". This is particularly important in light of the point that Dr Braidwood correctly makes in paragraph 7 of her Medical Comment that, notwithstanding the use of the phrase "total disablement" in article 42(5), it is clear from the Schedule that total disablement is not in fact required for an assessment of 100%. Horizontal equity requires that also to be borne in mind in cases where the Schedule does not apply. It follows that there is a risk of under-assessing a claimant if too much weight is placed on what the claimant can do, rather than on what he or she cannot do. This is the point I was making in paragraph 4 of my observations when granting permission to appeal.

22. So, did the First-tier Tribunal make that error in the present case?

23. Although it was bound to have regard to the Schedule in general terms, it did not necessarily err in law in not expressly referring to it. The assessment of disablement under the 2006 Order is an issue that arises in a significant proportion of cases before the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal and it would be unrealistic to think that any judge or member of that Chamber would be ignorant of the Schedule. It might be slightly less unrealistic to think that they sometimes fail to appreciate all its implications, particularly as decisions on assessments of disablement seldom, if ever, contain much in the way of legal reasoning and the Secretary of State's submissions in support of his assessments are usually equally devoid of legal reasoning. Dr Braidwood says –

> "9. In addition to the legislation, a desk aid (attached at Annex 1) is provided to war pensions medical advisers setting out the Statutory Scheduled Assessments (SSA) as well as assessment methods for visual acuity and noise induced hearing loss. Training involves supervised case consideration, discussion and mentoring by the Medical Training Officer as

well as monthly case discussion and group sessions where topics such as difficult cases and categories of case, recent UTT decisions are discussed with the medical advisers as a group."

Unfortunately, the learning and experience that lies behind assessments is not always conveyed to the claimant or the First-tier Tribunal through reasons for assessments, submissions in support of assessments, or, hitherto, the publication of guidance.

24. However, the First-tier Tribunal has its own expertise and the Upper Tribunal should be slow to interfere with its assessments provided it has made clear findings of fact and its decisions do not appear to be aberrant or its reasoning to suggest that it has misapplied the law. As Judge Jacobs said in *CT* when considering the adequacy of reasoning in an assessment case, "[i]n some cases, the facts will speak for themselves and it will not be necessary as a matter of law to say more". That may in practice be true in most assessment cases, unless some specific argument about the appropriate assessment has been advanced and ought to have been addressed by the First-tier Tribunal. In this case, I do not consider that further reasoning was required.

25. Apart from arguing that he was more disabled than the First-tier Tribunal found him to be, the claimant's principal argument in respect of the assessment was to the effect that a person with a painful limb is more disabled than a person who has had an amputation and does not suffer pain and is entitled to an assessment of 40%. It seems to me to be obvious that whether that is so or not depends on the circumstances of the particular cases and in particular the amount of pain from which either person suffers and the extent to which the person who has not had the amputation still has useful function in the limb. In this case, the claimant did still have some useful function in his right leg and could walk to the extent found by the First-tier Tribunal. I accept that some people who had had a leg partially amputated might, with a prosthesis, have been able to walk further and with less pain, but the complete loss of part of a limb and a need to wear a prosthesis cannot be regarded as negligible considerations. There is no general rule such as the claimant suggests.

26. Dr Braidwood submits that the assessments at 40% were reasonable in this case. She says –

> 15. Osteoarthritis (OA) knee is a common chronic disabling condition which may arise secondarily to injury or operative treatment including removal of menisci. This is especially at the dates relevant here where the less disruptive arthroscopic surgery was not yet established. OA is also found in a proportion of the UK population increasing with age and without any obvious trigger. There may be family history or perhaps exposure to heavy manual work over a lifetime. There is no direct relation between symptoms reported and radiographic appearance or joint damage and the disorder is usually investigated to confirm pathology and best practice management e.g. weight reduction, physiotherapy and maintenance of mobility as well as pain killers and anti-inflammatory drugs taken chronically. In time operative intervention,

notably partial or total knee replacement is the operation of choice. Advances in anaesthesiology and operative technique mean the operations are associated with high success rates, especially of pain reduction and increase in function. In the context of war pensions where the claimant has wide gateways to review the Secretary of State can also review and 18 months to two years post surgery the level of disablement is likely to have reduced.

16. Given the SSA and the fact that a below knee amputation is assessed at 40%, medical advisers commonly certify this level of disablement for the more severe levels of arthritis with mobility restriction and at a stage where clinically operative intervention would take place. An assessment above that level may be certified unusually, where operative treatment has been unsuccessful or given rise to complications e.g. infection. In most such cases entitlement will be extended to cover the unexpected occurrence. We note [the claimant's] comments re amputation we are not able to agree that, especially as a person ages, the functional and symptomatic outcome is necessarily as he describes. We attach a copy of the Third IMEG Report March 2015 which looked at the evidence on the progress and consequences of amputations over time. This includes disabling pain of various types and origin as well as increased cardiovascular risk.

27. That the claimant may underestimate the frequency with which amputees suffer pain, as Dr Braidwood submits by reference to the IMEG report, does not seem to me to undermine his argument. The assessment of disablement of those suffering injuries specified in Part V of Schedule 1 is not completely inflexible, because article 42(6) permits a departure if there is a "special feature" and in any event applies the Schedule only if "disablement … has reached a settled condition". In consequence, paragraph 225 of the *Handbook* stated that "When there are complications such as infection or pain the prescribed assessments no longer apply." A higher assessment would apply instead. Thus, the claimant is entitled to argue that the correct comparator for an assessment of 40% is the person with a below-knee amputation and *without* significant disabling pain.

28. However, it does not follow that a person in his position whose mobility is impaired by pain is entitled to a higher assessment. Since it is pain that restricts his mobility, the fact that he suffered from pain was obviously accepted and factored in to the assessments of the First-tier Tribunal and Dr Braidwood's arguments.

29. Some important guidance can be obtained from other provisions in the 2006 Order. Thus, it is the implication of article 20(1)(b)(ii) and (iii), relating to the mobility supplement, that a person with an injury "restricting his leg movements to such an extent that his ability to walk (with any prosthesis or artificial aid) without severe discomfort is of little or no practical use to him" or "restricting by physical pain or breathlessness his ability to walk to such an extent that it is of little or no practical use to him" might have his or her disablement assessed at only 40%, because that is the threshold for entitlement to the mobility supplement. Less compellingly perhaps, it may also be noted that the threshold for unemployability allowance under article 12 is now an assessment of disablement of 60% – except for those with transitional

protection – and the claimant was found by the First-tier Tribunal not to have been unemployable in either 2012 or 2014.

30. Ultimately, I am not persuaded that the assessments of 40% in this case were aberrant so as to justify inferring that the First-tier Tribunal misdirected itself as to the law. Dr Braidwood's submission as to the appropriate assessment is made against the background of both her considerable practical experience and a correct understanding of the law and it does not appear to me to be unreasonable. That is not to say that the First-tier Tribunal could not have made a higher assessment, particularly in the appeal from the 2014 assessment. However, it considered whether the deterioration in the claimant's condition between 2012 and 2014 justified increasing the assessment and it gave a rational reason for maintaining it at 40%.

31. Nor do I consider that the First-tier Tribunal's reasoning in this case suggests that it misapplied the law. When it referred in paragraph 64 of its decision to "all the matters set out above", it was clearly referring to its findings of fact and all its other reasoning from paragraph 48 onwards and not just to what it had said in paragraph 63. Although in its findings and in paragraph 63 it referred to a large number of activities that the claimant could carry out as well as those he could not, that was a necessary part of its reasoning in this case because the claimant had relied on not being able to carry out the activities mentioned in that paragraph as supporting his argument for a higher assessment. The fact that the First-tier Tribunal did not accept that the claimant's life was curtailed to the extent he claimed was therefore an important reasons for rejecting his argument that he was entitled to an assessment of 60%. In the context of this case, that does not suggest that the First-tier Tribunal forgot that actual total disablement is not required for an assessment of 100%. This is supported by the fact that the assessment does not appear aberrant.

32. Accordingly, I am satisfied that the First-tier Tribunal did not err in law in this case. The reason that it rejected the claimant's submission that he was entitled to an assessment of 60% was essentially because it did not accept that he was as disabled as he said he was. That was a finding of fact it was entitled to make and with which, in the absence of any error of law, the Upper Tribunal has no power to interfere. These appeals must therefore be dismissed.

Mark Rowland
29 January 2016