IN THE UPPER TRIBUNAL **Case No:** CAF/4780/2014
ADMINISTRATIVE APPEALS CHAMBER

DECISION BY THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal. Though there are errors of law in the reasons for the First-tier Tribunal's decision, I am not satisfied that I should set the decision aside.

REASONS

Introduction

1. This appeal raises an important issue about the nature and extent of the Medical Adviser's duties when providing a certificate of entitlement and assessment pursuant to Article 43 of The Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 ["the SPO"],

2. I have concluded that the Medical Adviser's duties go far wider than those supposed by the First-tier Tribunal ["the tribunal"] hearing this appeal. Rather than merely considering the claimed condition and the medical evidence in order to decide whether to certify that an award should be made, I find that the Medical Adviser is not restricted to consideration of the claimed conditions alone. All conditions that appear to be raised by the claimed disablement and all evidence should always be considered whether or not these conditions have been expressly referred to in the claim form. If that consideration gives a reason to believe there is a further condition relevant to the claimed disablement for which no claim has been made but which should be investigated further, the Medical Adviser must not ignore that fact.

3. Even though the tribunal found the certificate of entitlement to be defective in two respects, it decided that it was not the Medical Adviser's role to do anything other than consider the claimed condition and the medical evidence before deciding whether to certify an award for the claimed condition. For that reason, it erroneously concluded that there had been no official error in the certificate.

4. There was a further error of law apparent in the tribunal's decision. The appeal concerned itself with the Respondent's decision on 12 September 2007 to refuse to review the commencement date of an award based upon a 100% assessment made by a tribunal on 31 March 2004. The 2004 tribunal's decision was in respect of assessment alone and thus the

tribunal in the present case was wrong in law to conclude (a) that a review of the commencement date of the award could only be carried out if the requirements of Article 44(3) [a relevant change of circumstances] were satisfied and (b) that it was bound by a tribunal decision in April 2002.

5. Though there are clear errors of law in the tribunal's decision, I have decided to exercise my discretion pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 not to set the tribunal's decision aside. I have taken this course as the decision is the only one which a tribunal could rationally have reached on the evidence before it.

Background

6. The background to this matter is somewhat convoluted and what follows is a summary pertinent to this appeal.

7. The Appellant is a former soldier who was discharged from service on 28 July 1999. His initial claim for a war pension was made on 7 February 2000 in respect of the disablement of Post Traumatic Stress Disorder [PTSD]. On 5 December 2000 the Appellant was awarded a war pension assessed at 6-14%. This was on the basis of a certificate of entitlement and assessment dated 1 December 2000 provided by Dr A which recorded that PTSD was attributable to service. The certificate recorded that "*there is no evidence of psychotic illness*".

8. After a series of review applications and appeals, the award was increased such that disablement was assessed at 30% from immediately after discharge, that is, from 29 July 1999. Thereafter the award was increased to 40% with effect from 22 January 2001 [the 2002 decision] and 100% with effect from 12 November 2002 [the 2004 decision].

9. The additional disablement of schizophrenia was determined as attributable to service in July 2002 and thus both the 2002 and 2004 decisions were based on combined assessments of both disablements.

10. On 28 August 2007 the Appellant applied for a review which challenged the commencement date for the 100% assessment, saying that this should have applied from 1998/1999. The Respondent disagreed and the Appellant appealed to a tribunal. This is the decision on review which was appealed to the Pensions Appeal Tribunal ["PAT"] in 2008 and then once more to the First-tier Tribunal, the Upper Tribunal having allowed the Appellant's appeal against the decision of the PAT on 30 January 2012.

11. The PAT heard the appeal on 27 March 2009 and dismissed it, holding that there were no grounds made out under Schedule 3, Article 46 of the SPO 2006 for backdating the 100% assessment to a date earlier than 12

November 2002. Unfortunately the PAT proceeded on the basis that the only decision under scrutiny was the 2004 decision and failed to rule on whether the Respondent ought to have backdated the earlier 40% assessment in the 2002 decision.

12. Since the time of the appeal to the Upper Tribunal, the Appellant has challenged the 2007 review decision on the basis that there was an "official error" in the certificate of entitlement and assessment dated 1 December 2000. Upper Tribunal Judge Pacey had identified this as the key issue in his direction order of 1 June 2011. He noted that the appeal turned on whether the original award in 2000 was based on erroneous medical advice in the certificate from Dr A. This had recorded that there was no evidence of psychotic illness though Upper Tribunal Judge Pacey noted that there was medical evidence within the file which referred to the Appellant suffering from delusions and which it appeared Dr A had not considered.

13. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Pacey on 26 August 2010 and he allowed the appeal on 30 January 2012 on the basis that the PAT had erred in law in failing to consider whether the 2002 decision should have been backdated. The appeal was remitted to the First-tier Tribunal for re-hearing.

The Tribunal Decision

14. The First-tier Tribunal considered the appeal on the papers alone as had been agreed by both parties. On 11 November 2013 it dismissed the appeal, determining that the commencement dates of both the 2002 and 2004 decisions were correct.

15. The tribunal also held that there had been no official error in the original decision by reason of the failure to award for schizophrenia based on the certificate of 1 December 2000. This was despite its findings that Dr A had been incorrect to state that there was no evidence of psychotic illness and that he had failed to consider some of the case notes relevant to the Appellant's mental health when drawing up the certificate of entitlement.

16. The reason the tribunal found there was no official error was because the official error must relate to the claim which had been made. I set out the relevant parts of the tribunal's reasoning in full:
"25. We have reviewed all the evidence that the Veterans Agency had on 1 December 2000. There was sufficient evidence of PTSD to satisfy Dr A on the balance of probabilities that [the Appellant] was suffering from PTSD – the condition for which he had claimed. There was also some evidence to suggest that he might have suffered from personality traits and psychotic symptoms. There was no diagnosis of psychotic illness by a psychiatric specialist.

26. We find that Dr A was incorrect to say that there is no evidence of psychotic illness although we note that he did so in the paragraph in the certificate relating to assessment. We also find that some of the case notes received by the Veterans Agency from St Ann's Hospital on 11 May 2000 were not taken into account by Dr A. We say this because they are not listed on the reverse of the Certificate dated 1 December 2000.

27. Article 34 of SPO 2006 provides that it is a condition precedent to making any award of any pension, allowance or supplement that a claim shall have been made. The exceptions in Article 34(4) and (5) and Article 35 do not apply in this case.

28. The Medical Adviser's duty is to consider the claim that has been made. If he makes a clear and obvious mistake in relation to that then there would be an official error. Where, as in this case, a claim is made in respect of a well recognised condition the Medical Adviser needs to be satisfied on the balance of probabilities that the claimant has the claimed disablement before then considering whether it is attributable to or aggravated by service.

29. We have considered Hogan Lovells contentions in paragraph 4.3 about the argument that a claim had not been made. We do not consider the fact that the Appellant has subsequently been granted an award in respect of schizophrenia which dates from April 2001 is relevant. It arose out of an application for review lodged in January 2001. The difference between the January and April dates is the subject of the concession referred to in paragraph 17 above.

30. The second point made by Hogan Lovells in paragraph 4.3 concerns misdiagnosis. They rely on paragraph 23 of R(AF) 1/08. In view of our findings in paragraphs 25 and 28 above we do not consider that any question of misdiagnosis arises when considering whether there was an official error in the Certificate dated 1 December 2000. We also consider that it is for the treating physician to make the diagnosis. The Medical Adviser considers the claimed condition and the medical evidence to decide whether to certify that an award should be made for the claimed condition.

31. It is important to note that in R(AF) 1/08 PTSD was substituted for Generalised Anxiety Disorder. In this appeal there is no suggestion that [the Appellant] did not suffer from PTSD but the contention is that he also suffered from schizophrenia which he had not claimed. Schizophrenia is a very different mental condition from PTSD and is certainly an "additional impairment of his body or mind" – see paragraph 23 of R(AF) 1/08.

32…

33. Against the background of a claim for PTSD we find that there was no requirement to consider other psychiatric conditions and only limited evidence of a psychotic condition. Thus there was not a clear and obvious mistake which resulted in the decision refusing entitlement (see paragraph 20 of R(AF) 1/07)."

17. The tribunal also dismissed the Appellant's contention that the commencement date of the assessment decision of July 2002 should be backdated. It did so because it held that the Respondent was bound by the decision of the assessment appeal in April 2002 which substituted the tribunal's decision for that of the Respondent in circumstances where the tribunal was said to have taken account of all of the Appellant's psychiatric disablement.

The Appeal to the Upper Tribunal

18. The First-tier Tribunal refused permission to appeal on 1 April 2014. I granted permission to appeal on 3 December 2014. I identified the following arguable issues.

19. First, the tribunal may have erred in holding that there was no official error in the December 2000 certificate and in the original war pension award in circumstances where Dr A's assessment was said to have been based on incomplete medical evidence.

20. Second, the tribunal may have also erred in holding that there was no onus on the Medical Adviser to consider other psychiatric conditions, taking into account the nature of the process followed when considering and determining an application for a war pension. I suggested that that process was consistent with a more active rather than reactive approach to the question of entitlement.

21. Third, the tribunal may have erred in finding that there was limited evidence of a psychotic condition, and hence no clear and obvious mistake on the part of Dr A, without actually addressing what evidence there was and why it was said to be limited and not significant.

22. Fourth, the tribunal had in its directions order dated 12 November 2012 raised the point that the commencement date of the 2002 decision had been set by a decision of the PAT on 12 April 2002. Accordingly the commencement date of the 2002 decision could only now be changed on review pursuant to Article 44(3). That would only be possible if there had been a relevant change of circumstances since the assessment of decision had been made. The tribunal commented that neither party had raised this issue at the hearing and accordingly decided that it did not need to determine this issue. I suggested that this was arguably not the correct way to proceed where the legal basis for resolving this appeal may be in doubt.

23. Finally, I suggested that the tribunal should have considered whether or not to hold an oral hearing even though both parties had agreed to the matter being determined on paper.

24. I held an oral hearing of this appeal on 23 February 2016. The Appellant did not attend, his presence having been excused. Mr Tucker from the Royal British Legion appeared on the Appellant's behalf. Mr Adam Heppinstall of counsel represented the Respondent. I am very grateful to both representatives for their very helpful written and oral submissions.

25. Accompanying Mr Heppinstall's submission was a document entitled "*Medical Comment*" on the medical issues in this case prepared by Anne Braidwood, medical adviser to the Secretary of State. I am grateful for the provision of this material.

The Relevant Legislation and Caselaw

26. Part IV of the SPO is headed "**Claims**" and Article 34 therein is headed "**Making of Claims**". Article 34(1) states that "*it shall be a condition precedent to the making of any award of any pension, allowance or supplement mentioned in paragraph 2 … that the person making the claim shall have (a) completed and signed a form approved by the Secretary of State for the purpose of claiming that pension, allowance or supplement payable under this Order and (b) delivered that form to an appropriate office of the Secretary of state or to an office of an authorised agent*". However Article 35 provides for certain cases where claims are not required, for example, a claim for surviving spouse/civil partner's pension where the service member died whilst serving in the armed forces. In this context Article 35(6) states the following:
"*Where a claim has been made for retired pay or a disablement pension under article 6 on the basis of a particular disablement which is alleged to have been due to an injury which is attributable to or aggravated by service, no separate claim shall be required in respect of any other disablement which appears, upon an examination which is conducted by a medical practitioner before the claim is determined, to have been so attributable or so aggravated whether due to that or another injury*."
Thus, if Airman X claimed on the basis that he had one sort of injury attributable to service and, on examination by the doctor instructed for that purpose, he is also found to have another type of injury attributable to or aggravated by service, Airman X need not make a separate claim as normally required by Article 34(1). That interpretation is consistent with paragraph 55 of MF v Secretary of State for Defence (wP0 [2013] UKUT 491 (AAC).

27. Part V of the SPO is headed "*Adjudication*" and Article 43 therein is entitled "*Certification*". This provides that:
"*Where any matter is required by this Order to be certified, that matter shall be determined –*
[a] where a Tribunal constituted under the War Pensions (Administrative Provisions) Act 1919 or the Pensions Appeal Tribunals Act 1943 or established under the Tribunals, Courts and Enforcement Act 2007 has given a decision on that matter under those Acts, in accordance with that

decision or, if an appeal from that decision is brought under those Acts, in accordance with the decision on that appeal;
[b] where no such decision has been given and the matter involves a medical question –
[i] in accordance with a certificate on that question of a medical officer or board of medical officers appointed or recognised by the Secretary of State,
[ii] In a case where a pension or retired pay was payable in respect of disablement or death before the commencement of the 1914 World War or after 30 September 1921 but before 3 September 1939, if a certificate on that question has been given before 29 July 1996 by a medical officer or a board of medical officers appointed by the Secretary of State for Defence, in accordance with that certificate,
[iii] where it appears to the Secretary of State that the medical question raises a serious doubt or difficulty and he so desires, in accordance with the opinion thereon obtained from one or more of a panel of independent medical experts nominated by the President of the Royal College of Physicians of London, the Royal College of Surgeons of England or the Royal College of Obstetricians and Gynaecologists."

28. Article 43 makes plain that, absent a decision of a tribunal, a medical question may be determined in accordance with a certificate produced by a medical officer or a board of medical officers appointed by the Respondent. Thus medical advisers play a pivotal role on matters of entitlement and assessment under the SPO.

29. Article 46 in Part VI of the SPO is entitled "*Commencing dates of awards*" and provides that Schedule 3 has effect in this regard. Pursuant to paragraph 1(7) of that Schedule, where an award is reviewed as a result of a decision which arose from official error, the reviewed decision shall, as a consequence, take effect from the date of the original decision. Official error is defined in that paragraph as "*an error made by the Secretary of State or any officer of his carrying out functions in connection with war pensions, defence or foreign or commonwealth affairs to which no other person materially contributed, including reliance on erroneous medical advice but excluding any error of law which is only shown to have been an error by virtue of a subsequent decision of a court*".

30. The case of R(AF) 5/07 provided guidance on what would constitute official error in the context of a certificate. Paragraph 20 reads as follows: *"…The question of whether the refusal of an award in 1965 resulted from official error must be decided on the basis of medical knowledge as it was at that time. It will not be sufficient to show merely that there was a misdiagnosis of the appellant's condition. Applying the standards to be expected of a reasonably competent medical practitioner in the light of psychiatric knowledge in 1965, it will be necessary to demonstrate some*

clear and obvious mistake which resulted in the decision refusing entitlement…"

31. Finally, although Article 44(1) of the SPO permits review of a decision accepting or rejecting a claim for pension or the assessment of the degree of disablement at any time on any ground, Article 44(3) provides that any assessment or decision made by the Pensions Appeal Tribunal, or the First-tier Tribunal may be reviewed by the Secretary of State at any time if the Secretary of State is satisfied that there has been a relevant change of circumstances since the assessment or decision was made, including any improvement or deterioration in the disablement in respect of which the assessment was made.

The Arguments of the Parties

32. These can be summarised fairly succinctly. Both parties were in agreement that the key issue to be considered in this appeal was the nature and extent of the Medical Adviser's duties when providing a certificate of entitlement and assessment. Both agreed that the tribunal's belief that diagnosis was a matter for a treating clinician whereas the Medical Adviser's role was only to consider the claimed condition and the medical evidence to decide whether or not to certify that an award should be made was to misunderstand the nature of the Medical Adviser's duties.

33. The Appellant argued that the tribunal's findings underpinning its decision were sound, namely that Dr A's assessment was based on incomplete papers together with a mistaken conclusion that there was no evidence of psychotic illness. Thus the tribunal's conclusion that there was no official error in December 2000 certificate was unsound in the light of its own findings. He invited me to conclude that the error of law was material and to set aside the tribunal's decision and either to remit the matter for re-hearing or to remake the decision myself.

34. The Respondent submitted that, despite the tribunal's mistaken approach to the role of the Medical Adviser, it made the right decision for the wrong reasons. He questioned whether Dr A had not in fact seen all the papers but, in any event, he submitted that Dr A's conclusions were not so obviously wrong as to amount to official error having regard to the test in R(AF) 1/07. He invited me to uphold the tribunal's decision as the error was not material. If I decided that the error of law was material, I should remit this matter to the First-tier Tribunal rather than remake the decision myself.

35. At the hearing both parties agreed that the tribunal was wrong in law to conclude in paragraphs 38-40 that a review of the commencement date of the award could only be carried out if the requirements of Article 44(3) were satisfied. The Respondent's 2007 decision refused to review the

commencement date of the Appellant's award based on 100% assessment made by a tribunal on 31 March 2004. It is clear from the tribunal's decision that this was an assessment appeal pursuant to section 5 of the Pensions Appeal Tribunals Act 1943. Jurisdiction to determine or confirm the commencement date of the award was never before the tribunal in either 2002 or 2004. Thus the Respondent was entitled to review the commencement date of the award in 2007 and was not bound by the requirements of Article 44(3).

Discussion

36. I consider (a) the role of the Medical Adviser; (a) the tribunal's reasoning about Dr A's December 2000 certificate; and (c) whether any error of law on this issue requires me to set aside the tribunal's decision.

The Role of the Medical Adviser

37. Though the Secretary of State is the decision maker, Article 43 gives a prominent role to the Medical Adviser since medical questions requiring certification are determined by the Secretary of State in accordance with the Medical Adviser's certificate. Certification is necessary to secure entitlement [see Articles 40 and 41] and to establish the degree of disablement [Article 42]. The basic condition for an award requires a connection between service and disablement or death. The mere fact that a condition develops in service does not signify that it is caused or worsened by service.

38. Thus the Medical Adviser asked to consider a claim is not restricted to the claimed condition alone. Article 35(6) underscores this as set out in paragraph 27 above. All conditions that appear to the Adviser to be raised by the claimed disablement and evidence – whether or not these conditions have been expressly referred to in the claim form should be considered. The Respondent made the valid point in this context, that Medical Advisers are well used to considering medical evidence against the context of claim forms which, for example, may refer to a condition which is not the correct diagnosis for the claimant's condition or which may omit to refer to a medically recognised condition altogether.

39. The Respondent's position is that a Medical Adviser asked to review a claimant's case should – and in practice, does – always consider the totality of the medical evidence presented to him or her. If that evidence gives a reason to believe that there is a further condition relevant to the claimed disablement for which the claimant has not claimed but which should be investigated further, the Medical Adviser will not ignore that evidence. I find that this formulation accords with the manner in which claims are made under the Scheme and with good clinical practice.

40. What is the practical effect of that duty? The Medical Adviser's responsibility is to consider the claim that has been made. In practice, where consent is given by a claimant to the Respondent for access to the claimant's medical records under the Data Protection Act 1998, that consent extends only to the medical records required to be reviewed to determine the condition as claimed.

41. Thus, where a claim is made for one condition alone and the Medical Adviser takes the view that further closely related condition is also established on the evidence as existing and attributable to service, the claim is likely to be granted in respect of both those conditions. The Respondent submitted that, in such a scenario, it was easy to see how the original claim could be construed as impliedly including the closely related (but medically distinct) further condition and/or that the symptoms expressly complained of required the diagnostic label of that further condition.

42. However different considerations apply where a claim is made for one condition and the medical evidence indicates that there is a further condition likely to be attributable to service but which is completely unconnected to the claimed condition. The Respondent submitted that the Medical Adviser would not treat the claim as impliedly encompassing the second condition and would not consider the second condition as a matter of diagnostic labelling. Instead the certificate issued would relate to the claimed condition alone but the claimant would be separately informed that there was reason to believe s/he may have claim in respect of the second condition and would be advised to make such a claim. In any event, the Respondent stated that any medical evidence and records relating to that second condition would be sought with a further Data Protection consent to cover that material being obtained from the claimant.

43. In summary, the Respondent emphasised that the Medical Adviser does not take a purely reactive role on the basis of the content of the claim form alone. S/he carries out a full review of the overall medical evidence and the existence of other conditions which may be attributable to service is not ignored. The Appellant agreed with that formulation.

44. I accept the above description of the Medical Adviser's role where certification is required by the SPO. The process of verifying a claim requires a claimant to submit him/herself to an examination by a doctor commissioned on behalf of the Respondent. This examination includes both a mental health and a physical health assessment. Its conclusions are written up and the examining doctor gives his/her opinion as to diagnosis and effect on function of all conditions identified. The Medical Adviser uses this examination together with the evidence (service records, medical records etc) in order to determine whether any claimed or closely related condition is attributable to service and if so, the degree

of disablement. Where there are two separate conditions which may be attributable to service but records are available only in relation to one condition, the Medical Adviser sets in train the process described in paragraph 42 above.

45. This entire process is entirely consistent with what I described in my grant of permission as a more active rather than passive approach to entitlement by the Respondent's Medical Advisers.

The Tribunal's Reasoning

46. In this case, I find that the tribunal adopted a misguided approach to the role of the Medical Adviser. Though it quite properly concluded that the Medical Adviser's duty was to consider the claim that had been made [paragraph 26, Statement of Reasons], its formulation of the Medical Adviser's duties in paragraph 30 was overly narrow. Its conclusion in paragraph 33 that, against the background of a claim for PTSD, the Medical Adviser was not required to consider other psychiatric conditions flew in the face of not only the process adopted by the Respondent when verifying a claim but also the duty imposed on the Respondent by Article 35(6) to consider other disabling conditions where no claim had been made.

47. The tribunal's approach was unarguably in error. It allowed it to overlook the effect of its own findings, namely that Dr A had not taken into account some of the case notes from St Ann's Hospital and that he was incorrect to say that there was no evidence of psychotic illness.

48. Furthermore, the tribunal's focus was not where Upper Tribunal Judge Pacey suggested it should have been. His directions order dated 1 June 2011 identified the correct route which the tribunal should have followed. The relevant part of that order reads as follows:
"…In relation to the question of backdating, this turns upon whether the award in 2000 was based on "erroneous medical advice". The advice concerned is the certificate given in December 2000 by Dr A. He found that there was an attributable condition of PTSD and said that "there is no evidence of psychotic illness". It is not sufficient to say that, in the light of the subsequent diagnosis of schizophrenia, Dr A gave erroneous advice. The question is whether on the facts before him his advice was wrong. I remind myself that in R(AF) 5/07 it was said that "it will not be sufficient to show merely that there was a misdiagnosis of the claimant's condition. Applying the standards to be expected of a reasonably competent medical practitioner in the light of psychiatric knowledge [at the time] it will be necessary to demonstrate some clear and obvious mistake…"
Unfortunately at no stage did the tribunal apply this test to the material before it. The reason it found that there was no official error was because it held that the official error must relate to the claim which had been

made, namely PTSD. Other conditions unclaimed for but present which may have been attributable to service could thus, in the tribunal's analysis, be disregarded when considering if there had been official error.

49. For all the above reasons, I find that the tribunal erred in law in its approach to this issue. Even if that is so, I must then consider whether that error is material to the outcome of this appeal.

What Next

50. The Respondent submitted that, notwithstanding the above error of law, the decision reached by the tribunal was the only one which it could rationally have reached on the evidence before it, applying the test for official error set out in Upper Tribunal Judge Pacey's directions. He invited me not to set the tribunal's decision aside but to uphold it.

51. In contrast the Appellant said that the tribunal's decision should be set aside and I was invited either to remake the decision or to remit the matter to the First-tier Tribunal for re-hearing.

52. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 the Upper Tribunal may (but need not) set aside the decision of the First-tier Tribunal where the decision under appeal involved the making of an error on a point of law. This is a discretionary power as section 12(2)(a) makes clear. If the tribunal's decision is set aside, section 12(2)(b) empowers me either to remit the matter to the First-tier Tribunal with direction for its reconsideration or to remake the decision myself.

53. I approach the exercise of my discretion whether or not to set aside the tribunal's decision having regard to the well-established principle that it is the impact of an error of law on the outcome of the proceedings which is key. Errors of law which would have made no difference to the outcome would not justify setting aside the tribunal's decision. Lord Neuberger in Holmes-Moorhouse v Richmond upon Thames London Borough Council [2009] UKHL 7 set out some of the ways in which a decision could survive an error in the tribunal's reasoning: these include (a) where the decision is irrelevant to the outcome; (b) where there is more than one reason for the conclusion and error only undermines one of the reasons; and (c) where the decision is the only one could rationally have been reached [see paragraph 51 of that decision].

54. After careful thought I have come to the conclusion that the tribunal's decision that there was no official error on the certificate of entitlement was the only decision which a tribunal could rationally have reached. In coming to that view I have had in mind the test for official error which the tribunal should have applied but did not.

55. Was Dr A's certification on the facts before him clearly and obviously mistaken, applying the standards of a reasonably competent medical practitioner in the light of psychiatric knowledge at the time? That might be so if he failed to consider relevant medical or other information. In this case the tribunal found that he had not taken into account some of the case notes from St Ann's Hospital as they were not listed on the reverse of the certificate. It is unfortunate that the tribunal did not explain what was of relevance in that material in respect of other possible psychiatric conditions from which the Appellant might have been suffering at the time he left service.

56. I have considered what in that missing material was of relevance and the key relevant document is a letter from a chartered psychologist to the Appellant's doctor dated 28 October 1999. It made reference to the Appellant hearing a voice persistently telling him to harm or kill someone. The psychologist suggested that a psychiatric referral made by the Appellant's GP might be appropriate. The notes of the Appellant's meeting with the psychologist on 28 October 1999 also make reference to a fear of schizophrenia and the Appellant "*seeing black shapes out*". It is however noteworthy that the Appellant was discharged by the chartered psychologist on 11 February 2000 without there being any suggestion that the Appellant at that time continued to suffer from psychotic phenomena such as hearing voices. On the contrary, the Appellant - and to some extent the psychologist as the decision to discharge showed - perceived the severity of his mental health difficulties to be greatly reduced. The records from St Ann's Hospital concluded on 11 February 2000.

57. Though this material was not before Dr A as it post-dated the certificate, the medical records after December 2000 show considerable uncertainty about the cause of the Appellant's mental health problems. I note that in July 2001 there was no diagnosis of schizophrenia despite the Appellant having had low mood and psychotic symptoms and being under the care of the Community Mental Health Team [page 138]. A firm diagnosis of schizophrenic illness was not made until March 2002 [page 166].

58. The Appellant had an undisputed diagnosis of Post Traumatic Stress Disorder which Dr A accepted as attributable to service. However Dr A concluded that there was no evidence of psychotic illness in December 2000. It is important to place that conclusion in the context of the analysis contained in the certificate which reads as follows:
"The diagnostic label is based on the totality of the evidence. Notwithstanding the various psychiatric opinions, on balance of probabilities, the diagnosis is appropriate and sufficient diagnostic criteria are met. He may well have some abnormal personality traits but these make him vulnerable and are not the sole cause of his present problems. Service factors cannot be excluded from the aetiology hence attributable to service. Panic attacks and nightmares are part and parcel. The

evidence shows that he is coming to terms with his psychological problems and has good insight. There is no evidence pf psychotic illness. Subjective and objective distress is greatly diminished and he is functioning well in terms of work, social and personal matters…"

59. Dr Braidwood 's medical comment stated that she believed Dr A's approach represented a reasoned and reasonable medical judgement and the evidence considered was adequate and properly used to inform the findings. Given the undoubted problems in accurately diagnosing mental health disorders, Dr Braidwood thought it highly unlikely that another doctor could have come to a different conclusion and accepted the presence of a psychotic disorder, far less schizophrenia specifically [page 659].

60. Did Dr A discharge the duties of a Medical Adviser described earlier in this decision? Though the Respondent sought to argue that Dr A had in fact seen all the medical records including those from St Ann's Hospital, I was not persuaded by that submission. Dr A carefully recorded on the reverse of his certificate the evidence on which it was based and it is clear to me that he had not seen the relevant St Ann's Hospital records. I do not know why that was since his analysis of the Appellant's mental health difficulties was otherwise insightful and comprehensive. I accept Dr Braidwood's evidence that the fact that Dr A expressly discounted evidence of psychotic illness indicated that he had gone beyond the strict and narrow terms of the Appellant's claim. The reference to psychotic illness was based on medical records in 1997 which recorded a GP opinion that the Appellant had "delusions" about a bomb under a car. I ntoe that the Appellant was seen within a week by a consultant psychiatrist who had previously assessed him. On examination the "delusions" were found to be not the Appellant's beliefs but those of a girlfriend which the appellant had not sought to verify. There was no diagnosis of psychotic illness made at that time or indeed at any time whilst the Appellant remained in service.

61. Accepting the tribunal's finding that Dr A did not take account of some medical records – records which may have been of relevance - I have concluded that the material contained in those records would have made no difference to Dr A's assessment of the Appellant's mental health problems. Nothing in the notes from St Ann's Hospital could have supported a diagnosis of schizophrenia in December 2000 or earlier or indeed formed a basis to suspect the presence of an enduring psychotic illness at those times. Whilst the Appellant had clearly suffered some psychotic symptoms in the past, the presence of these symptoms was not diagnostic of a psychotic illness let alone schizophrenia as illustrated by the subsequent medical history in July 2001.

62. Applying the test set for official error set out in Upper Tribunal Judge Pacey's directions, I have come to the conclusion that this was not made

out. The tribunal's decision was correct. That decision was the only rational decision on all the evidence which a tribunal could have reached.

63. For all the above reasons, I have concluded that the tribunal's decision on the issue of Dr A's Certificate can survive despite the errors of reasoning which supported it and I exercise my discretion not to set aside the tribunal's decision.

Additional Issue: Article 44(3)

64. Both parties were in agreement at the hearing before me that the tribunal had erroneously concluded that a review of the commencement date of the award could only be carried out if there had been a relevant change of circumstances as required by Article 44(3). I accept that submission.

65. The appeal before the tribunal was against the decision of the Secretary of State dated 12 September 2007 which refused to review the commencement date of an award based on a 100% assessment made by a tribunal on 31 March 2004. That tribunal could not have either confirmed or determined the commencement date of the assessment as the appeal before them was confined to assessment issues pursuant to section 5 of the Pensions Appeal Tribunals Act 1943.

66. Jurisdiction to determine or confirm the commencement date of an award is conferred on tribunals by section 5A of the Pension Appeal Tribunals Act. Article 46 and Schedule 3 of the SPO make provisions for the commencement dates of awards. In paragraph 24 of R(AF) 1/08 Upper Tribunal Judge Bano stated that, in cases where entitlement to backdating depends on the valid review of an earlier decision, it may be necessary to consider whether there is any statutory impediment to the exercise of the review power such as that contained in Article 44(3) (namely a relevant change of circumstances which is necessary before there can be a review by the Secretary of State of a tribunal's decision or assessment).

67. In its decision the tribunal concluded in paragraph 38 that there could be no backdating on the grounds of official error because of the assessment appeal heard on 12 April 2002. It stated that this was because the decision took into account all of the Appellant's psychiatric problems "*see the reference to the Secretary of State's decision dated 26 October 2001, the certificate for which made clear that all psychiatric disablement had been accepted*".

68. I have come to the view that the tribunal erred in law in considering itself bound by this decision. First, the appeal was an assessment appeal [page 153] and thus confined to assessment issues alone. Second there is no reference in the tribunal's reasons to a decision by the Secretary of State dated 26 October 2001 in which all psychiatric disablement was

accepted. Third, it is certainly not apparent from the short paragraph outlining the facts found by the tribunal that the tribunal took into account all of the Appellant's psychiatric disablement.

69. In paragraph 39 the tribunal further held that the commencement date was set because of the April 2002 tribunal. That is incorrect for the reasons spelled out above. However the tribunal went on to state rather confusingly that, because neither party had raised the issue of whether Article 44(3) applied, the tribunal did not need to consider it. I find the tribunal's reasoning difficult to follow. It found there was an impediment to backdating by reason of a tribunal decision dated 12 April 2002 but then seemed to suggest that it need not consider that aspect of this appeal as the parties had not done so. I note that the tribunal had itself raised the issue of backdating and the effect of Article 44(3) in its own directions order dated 20 November 2012. Whether or not the parties had addressed this issue, I consider that the tribunal had a responsibility to address it if it thought this issue of jurisdiction was significant.

70. In conclusion the tribunal erred by believing that earlier decisions inhibited it from backdating the commencement of the award for schizophrenia to 29 July 1999. Does this mean that I should set its decision aside? I have concluded that I should not as this error does not affect the outcome in the light of my conclusions about Dr A's certificate.

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71. I did not invite submissions on this issue at the hearing as it seemed to me to be relatively insignificant in comparison to the main ground of appeal. It is not necessary for me to express a view on this issue given my overall conclusions on this appeal.

Conclusion

72. Though the tribunal erred in law on two issues, its decision survives this appeal for the reasons I have given.

Gwynneth Knowles QC
Judge of the Upper Tribunal
11 March 2016.

[signed on original as dated]