

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CAF/3472/2015

Before E A L BANO

Decision: My decision is that the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the tribunal's decision and remit the case for hearing before a differently constituted tribunal.

REASONS FOR DECISION

1. This is an appeal brought with the permission of Judge Lane against the decision of a tribunal sitting on 25 September 2015 upholding an interim assessment of disablement of 6-14% in respect of post traumatic stress disorder, accepted as being due to service. In a submission dated 26 May 2016, the Secretary of State's representative has accepted that the decision of the tribunal was wrong in law for the reason I discuss in paragraphs 9 and 10 below, but has submitted that the tribunal's decision was nevertheless supported by the evidence for the reasons which the tribunal gave.

2. The claimant was an airframe fitter in the Royal Air Force between 9 July 1979 and 4 March 1993, when he was discharged as being below required medical standards. He served in the Falklands during the conflict in 1984 and claims to have been a witness to the immediate aftermath of an accident in which a person whom he had known at university was killed and horrifically mutilated after coming into contact with the blades of a Chinook helicopter. In 1987 and again in 1988 the claimant fortuitously escaped being a passenger on helicopters which crashed with fatal consequences.

3. The claimant was visited by Combat Stress Community Outreach team members on 29 February 2012, 17 February 2012 and 17 April 2012 and underwent an intensive treatment programme for PTSD between February and April 2013. On 15 February 2013 the claimant made a war pension claim in respect of post traumatic stress disorder, which was treated as effective from 15 January 2013. The Falklands incident was initially disputed, but was later accepted after the submission by the claimant of further evidence.

4. The claimant was referred to a regional consultant, who examined him on 16 January 2015. The claimant has encephalitis, Guillain Barre Syndrome and diabetes, which affect his mobility, but in relation to the claimant's mental state the regional consultant reported as follows:

"His sleep is disturbed at least once a week. He becomes restless when dreaming, so much that he has fallen out of bed several times. His girlfriend will wake him, this startles him and he has grabbed her arm. He can go 3 nights without going to bed he stays up drinking tea and watching TV in order to not have nightmares.

His dreams are about the incidents with the Chinook helicopter and he will wake experiencing the smell of burnt flesh. When he wakes he is dazed and anxious. It takes him a while to relax and become familiar with his surroundings. He thinks he is back in a difficult situation.

He startles easily when there is an unexpected sound or a flash of light. He is over vigilant and perceives danger when there is none.

He usually avoids talking about his experiences although he has become better at this since being at Tyrwhitt House.

There were no psychotic features. There were some slight memory disturbances possibly due to the encephalitis.

The diagnosis is Post Traumatic Stress Disorder. (DSM(1V) 309.81)

The differential diagnosis could include depression and personality change related to encephalitis.

The symptoms are disturbed sleep and nightmares. He is anxious and over vigilant.

He has had PTSD since 1984. The same symptoms have been present for some time.

These symptoms have decreased with time and the psychotherapy he received at Tyrwhitt House.

His functioning at present is impaired more by his diabetes and difficult walking than his PTSD. However he still has frequent disturbed nights due to the PTSD. In the past his PTSD has contributed to his marriage breakdown and other relationship problems.”

5. On 10 February 2015 the claimant was assessed as being 6-14% disabled, on the basis of the regional consultant’s report as showing symptoms of disturbed sleep with nightmares, anxiety and hypervigilance. The claimant was notified of that decision on 18 March 2015 and appealed against it on 22 March 2015. A related entitlement appeal lapsed as a result of a more favourable decision, so that the only issue with which the tribunal was concerned was the assessment.

6. In their reasons for dismissing the appeal, the tribunal held:

“8. The Tribunal also has to have regard to other parts of the SPO Regulations. There is no table for the disabling condition that [the claimant] suffers from but, for example, elsewhere it is said that the loss of an index finger should be assessed at 14% and the loss of a whole foot at 30%. It might be thought that the loss of a whole foot is a very serious matter-and, in terms, that the degree of disablement that [the claimant] was claiming. In crude terms, was the extent of [the claimant’s] mental health disability comparable to the loss of an index finger (which has all sorts of implications for pinch grip, fine motor movements etc) or the loss of a whole foot?

9. [The claimant] was claiming under the ‘SPO’ provisions. New regulations are in place for later claims, The Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (‘AFCS’). The ‘AFCS’ regulations set out an extensive set of tables covering a wide range of physical and mental disabilities. For example under ‘AFCS’ the loss of an index finger is, under Table 5 set at Item 32, level 12. Table 3 of the ‘AFCS’ says that a ‘Mental

disorder, which has caused or is expected to cause functional limitation or restriction at 2 years, from which the claimant has made, or is expected to make, a substantial recovery within 5 years' is also set at level 12. The regulations go on to refer to a much higher award of moderate loss of function as meaning an inability to engage in work appropriate to experience. So for 'AFCS' purposes there is a clear comparison between what, in mental health terms, a disability is 'worth' as compared with a mental disability.

10. Of course any Tribunal must be careful not to compare 'apples and pears' and must apply the correct regulations. However it is reasonable to say that Parliament intended that service personnel with similar injuries to be treated broadly the same in compensation terms under the different regulations. There is authority R (I) 2/06 and CI/2553/2001, CI 3758 and 3759/2003 for looking to other sources for guidance when assessing degrees of disability but clearly this must be done with caution.

The facts of this case

11. [The claimant] was born on 25.02.1961. He served in the RAF from 1977 to 1999 when he was invalided out as being below medical standards.

12. [The claimant] served in the Falklands in 1984 when a colleague was killed – giving rise to his current diagnosis.

13. [The claimant] claimed for the present matter on 15.01.13. The decision under appeal was made on 18.03.15. The appeal was made on 25.03.15.

14. The Tribunal adopts the findings of the regional consultant's report dated 19.01.15 found at page 31-32. They are detailed and comprehensive and need not be repeated here. Indeed, having tested the evidence, the Tribunal found that, if anything the report painted a bleaker picture than was actually the case. [The claimant's] mental health is much better than he is prepared to admit to.

Reasons

15. When preferring the evidence of the regional consultant to that of [the claimant] the Tribunal had regard to the following factors.

16. [The claimant's] initial oral evidence was that he could never recall having had a good night's sleep; he watches television but it is only on as a distraction and he cannot concentrate to follow a television programme; he avoids meeting people; cannot handle a telephone conversation and cannot go shopping because it is too stressful. He said he avoids public places and finds public transport difficult and does not drive. While [the claimant] was giving this evidence he became tearful on occasions.

17. On the other hand he last had treatment from Combat Stress some 18 months ago and although he can always contact them should he need to, he has not.

18. [The claimant] became quite animated when asked about matters by the Tribunal and indeed became cheerful. [The claimant] spoke about enjoying a foreign holiday; he does a lot of voluntary work for the RAF Benevolent Association; he organises collections and makes telephone calls; he attends a regular fortnightly get together at his local village hall where guest speakers attend, which he described as 'fantastic'. [The claimant] said that he liked to spend a lot of time learning and undertaking research. [The claimant] said he loved reading and could 'proof read all day'.

19. [The claimant] applied to the Haberdashers' Aske's school in Elstree as an IT technician and had attended for interview. He had not been successful only because he lacked just one piece of knowledge about a particular software programme. However he had been put on the school's list to invigilate exams. [The claimant] agreed that the school was a large one and was not on a public transport route. [The claimant] said that if Haberdashers' rang today he would 'go for it'.

20. Frankly, which was it? Either [the claimant] could not concentrate to follow a television programme and could not travel on public transport – or he could work and travel by public transport to one of the country's most prestigious public schools. The Tribunal was quite sure that [the claimant] was not fantasising or being unduly optimistic about his prospects for work. He was being entirely realistic.

21. The Tribunal concluded that [the claimant], on his own evidence, could and did do much more than he at first claimed to do. If [the claimant] was not misleading the Tribunal then, at the very least, he had a distorted perception of his own obvious capabilities.

22. This is why the Tribunal preferred the findings of the regional consultant, contemporaneous as they were with the date of decision under appeal. If anything, as has been said, [the claimant], at the date of decision, was functioning at a better level. [The claimant] is able to work and in an intellectually demanding job.

23. On that basis, when taking into account the legal tests set out above, the Tribunal concluded that [the claimant] had been correctly assessed. If the Tribunal had to express a view it would say that he was in the low to mid range of 6-14% assessment.

24. This is why the appeal was unsuccessful."

7. Article 42(2) of the Service Pensions Order 2006 ('SPO 2006') requires a comparison to be made of the condition of the claimant and the condition of a normal person of the same age and sex. In *CAF/3198/2012* Judge Levenson defined

'disablement' as an 'impairment of proper functioning of mind or body (whether or not it currently involves any loss of capacity to do things), or a loss of capacity to do things.' In *CT v Secretary of State for Defence* [2009] UKUT 167 (AAC) Judge Jacobs held (at [19]) that the tribunal must assess the claimant's disablement, not the condition or injury. The war pensions scheme does not compensate for pain or suffering as such, and in the case of mental conditions, just as in the case of physical conditions, the decision maker is limited to considering the extent of the impairment of the claimant's mental functions, and any consequent loss of the claimant's ability to perform activities in the way in which they are normally carried out.

8. In carrying out that assessment, the tribunal can and in appropriate cases should have regard to the prescribed assessments in Part V of Schedule 1 to SPO 2006-see the decision of Judge Rowland in *NH v Secretary of State for Defence (WP) and (AFCS)* [2015] UKUT 35 (AAC), of Judge Jacobs in *CT v Secretary of State for Defence* at [23], and the decision of Judge Rowland in *AM v Secretary of State for Defence* [2013] UKUT 097 (AAC) at [23]; and no doubt the same principle applies to the prescribed gratuities for minor injuries in Part III of the Schedule. However, since the conditions listed in Part V of Schedule 1 do not include any mental health conditions; it may be that reference to the prescribed assessments will be of limited value when impaired mental function is in issue.

9. On the other hand, I regard the tribunal's reference to the armed forces compensation scheme as misconceived. The tribunal relied on the similar tariff levels for the AFCS Table 5 Item 32 and Table 3 Item 4 descriptors as justifying an assessment of the claimant's disablement under SPO 2006 at the same level as the prescribed assessment in Part III of Schedule 2 for the loss of an index finger. The tribunal did not make the findings of fact on the extent and likely duration of the loss of the claimant's loss of function needed to decide which descriptor would have applied if the claim had been governed by AFCS 2011, but since the claimant's PTSD had lasted for longer than five years it seems likely that the appropriate descriptor in his case would have been Table 3 Item 3, which is a Level 10 descriptor carrying an award of £27,000.00, or possibly even Table 3 Item 2, which is a Level 8 descriptor carrying an award of £60,000.00.

10. However, I doubt whether it is ever permissible to have regard to the Armed Forces Compensation Scheme tariff when making an assessment of disablement under the war pensions scheme. The war pensions scheme embodies a system of interim awards and review powers which enable the assessment of a claimant's disablement to be changed upwards or downwards to reflect changes in the claimant's condition throughout his or her lifetime, which is one of the reasons why the war pensions scheme was so expensive to administer. The armed forces compensation scheme was intended to mark a completely fresh start and, although the Scheme contains limited review powers, an AFCS award is generally speaking a 'once and for all' award' which takes into account the expected future development of the claimant's condition. Since the AFCS tariff levels are based on the Judicial Studies Board *Guidelines for the Assessment of General Damages in Personal Injury Cases*-see the MoD policy statement of 15 September 2003-the AFCS tariff levels also take into account pain and suffering and other matters which are not directly

related to a claimant's disablement. In company with the Secretary of State's representative, I therefore agree with the Secretary of State's representative that the tribunal erred in law in taking the AFCS 2011 tariff into account in a war pensions assessment case, but unlike the representative I am not confident that this error did not affect the outcome of the appeal. I would therefore allow the appeal for that reason alone.

11. The assessment of disablement in cases where a claimant's mental health is impaired is likely to present greater conceptual and practical challenges than in cases involving physical injury alone. The former Veterans' Agency guidance for Medical Advisers advised doctors to make an assessment of a claimant's highest level of adaptive functioning for at least a few months in the previous year. It divided 'adaptive functioning' into three main areas:

Social relations, including all relations with people, with particular emphasis on family and friends, taking into account the breadth and quality of interpersonal relationships;

Occupational functioning as a worker, student or homemaker; taking into account the amount complexity and quality of work accomplished.

Use of leisure time, taking into account the range and depth of pleasure derived.

In the case of PTSD, the guidance advised that doctors should take account of the fact that PTSD is often amenable to treatment, as appears to have happened in this case.

12. It is of course for the tribunal, as the sole judges of fact, to decide how to analyse the evidence in any particular case, but the guidance summarised above may provide a useful checklist where disablement caused by mental illness is in issue. How does the illness affect the claimant's relations with family and friends? How does it affect the claimant's work as a wage earner or homemaker? How does it affect the claimant's use and enjoyment of his her or her leisure time and hobbies? Those or similar questions may provide a framework for making findings of fact in accordance with the guidance of Judge Jacobs in *CT v Secretary of State for Defence*:

"The tribunal must make findings of fact on the claimant's disablement that are sufficient to to apply [the article 42(2)(a) test]. It must identify the different types of disablement and make findings on their nature, severity and extent. If there is variation, it must make findings on frequency and range of the variation. If there is medication or other treatment, the tribunal must find what affect it has."

13. The basis of the assessment of disablement which was under appeal in this case was the claimant's disturbed sleep with nightmares, anxiety and hypervigilance. The claimant's PTSD originally came under investigation because he was observed by hospital staff to call out in his sleep and to fall out of bed when he was being

treated for another condition-see the regional consultant's report, at page 31. Although the Community Outreach team considered that the claimant was possibly in denial with regard to his mental health problems (see page 21), the tribunal considered that the claimant was exaggerating his sleep problems and regarded the claimant's evidence as in conflict with the regional consultant's report (which the tribunal considered itself overstated the severity of the claimant's symptoms). The regional consultant appears to have accepted the claimant's account of his sleep problems without reservation and it is far from clear from the statement of reasons why the tribunal considered that the claimant's evidence was in conflict with the regional consultant's report. However, the tribunal made no explicit finding on the nature and extent of the claimant's sleep problems. The claimant's depression and hypervigilance, which were the other symptoms on which the assessment was based, might be expected to affect the claimant's functioning in a number of ways, but are not mentioned in the statement of reasons. The tribunal may have come to the view that the claimant's enthusiasm for work and for the other activities which he undertakes were not consistent with the level of disability which he claimed, but that came nowhere near to providing a sufficient factual basis for the assessment which the tribunal made.

14. Finally, I am concerned by the observation at paragraph 23 of the statement of reasons because it may have given the impression that the tribunal was reviewing the decision under appeal, rather than considering the matter afresh.

15. For those reasons, I allow the appeal and give the decision set out above.

E A L BANO
1 July 2016