IN THE UPPER TRIBUNAL **Appeal No: CAF/3318/2012**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Manchester on 21 September 2011 under reference ASS/00765/2010 involved errors on material points of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions made by a Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing.

(2) If the appellant has any further evidence that he wishes to put before the tribunal that is relevant to his appeal this should be sent to the First-tier Tribunal's office at Fox Court in London within one month of the date this decision is issued.

(3) The First-tier Tribunal should have regard to the points made below.

Representation: Hugh Lyons of Hogan Lovells International LLP for the appellant

Colin Thomann (instructed by Treasury Solicitors) for the respondent

REASONS FOR DECISION

Preamble

1. This appeal was first decided by me on 4 June 2015. On an application by the Secretary of State for Defence for permission to appeal to the Court of Appeal, and both parties then having made further written submissions, I have by a decision of today's date reviewed and set aside the decision of 4 June 2015 pursuant to section 10(4)(c) of Tribunals, Courts and Enforcement Act 2007 and rule 45(1)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. I have set aside the 4 June 2015 decision on the basis that in deciding the level of disablement the First-tier Tribunal could find on an assessment appeal I had wrongly and materially overlooked the statutory definition of "disablement" found in Item 27 in Part II of Schedule 6 to the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 ("SPO 2006"). This provides that "**disablement**" means "**physical or mental injury or damage or loss of physical or mental capacity (and "disabled" shall be construed accordingly)**". That statutory definition is wide enough to encompass a past back injury or damage to a back which is currently asymptomatic. Thus it may be said that what the Secretary of State had decided in terms of entitlement was that in 2010 the appellant had a back disablement (in the wide statutorily defined sense) due to an injury which was attributable to service before 6 April 2005, but in terms of assessment of the *degree* of disablement that disablement gave rise to nil percentage disablement. Whether that nil assessment was in fact correct was, and remains, for the First-tier Tribunal to rule on.

3. The decision of 4 June 2015 is therefore no longer of any legal effect. I have re-decided this appeal by this decision and this decision therefore replaces in its entirety the decision made on 4 June 2015.

Introduction

4. This appeal raises a number of issues concerning what is referred to as "spanning" in the context of the two statutory compensation schemes that cover members of the armed force. The term "spanning" is used to refer to claims for pensions and compensation by ex-service men or women that cover service in the armed forces before and after 6 April 2005.

5. Putting matters broadly at this stage, prior to the Armed Forces (Pensions and Compensation) Act 2004 coming into effect in November 2004 an ex-service man or woman who had suffered disablement due to service had entitlement to a pension or allowances addressed under the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 ("SPO 1983").

6. Under the SPO 1983 the *Basic condition of awards* was that "**awards may be made where the disablement….of a member of the armed forces is due to service**" (article 3 of SPO 1983) and the *General Condition* of an award in respect of disablement was that "**awards may be made in respect of the disablement of a member of the armed forces which is due to service….**" (article 8 of SPO 1983). Neither article was subject to any restriction as to the time of the service.

7. However, the SPO 1983 was amended by the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions (Amendment) Order 2005 (SI 851 of 2005) with effect from 6 April 2005. This amending provision inserted the words "**before 6th April 2005**"after the word "**service**" in both articles 3 and 8 of the SPO 1983, as well as elsewhere in that Order. This had the effect that "**awards may be made where the disablement of a member of the armed services is due to service before 6th April 2005**". On the face of it disablement due to service on or after 6 April 2005 did not fall within the SPO 1983.

8. To like effect, article 4 of the SPO 1983 – tilted *Entitlement where a claim is made in respect of a disablement, or death occurs, not later than 7 years after the termination of service* (but as article 3 appearing in Part II of the SPO 1983 dealing with *General Principles of Awards*) - was amended so that, relevantly, it read (I have underlined the words which were inserted by the relevant amendment):

> "**4.-(1) Where, not later than 7 years after the termination of the service of a member of the armed forces, a claim is made in respect of a disablement of that member……such disablement….shall be accepted as due to service for the purposes of this Order provided it is certified that—**
> **(a) the disablement is due to an injury which—**
> **(i) is attributable to service, or**
> **(ii) existed before or arose during service and has been and remains aggravated thereby;….**
> **(2) Subject to the following provision of this article, in no case shall there be an onus on any claimant under this article to prove the fulfilment of the conditions set out in paragraph (1) and the benefit of any reasonable doubt shall be given to the claimant…..**
> **(6) For the purposes of this article "service" means service as a member of the armed forces after 30th September 1921 <u>but before 6th April 2005</u>."**

A similar amendment was made to article 5 of the SPO 1983, which dealt with claims made more than 7 years after the termination of service.

9. These amendments coincided exactly with the coming into operation of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 (the "AFCS Order 2005"), which was made under the Armed Forces (Pensions and Compensation) Act 2004. The intention behind the setting up of the AFCS Order 2005 was, to quote from the Court of Appeal in *Secretary of State for Defence –v- Duncan and McWilliams* [2009] EWCA Civ 1043; [2010] AACR 5:

> "**to provide a fair system, easy to administer and which, unlike previous schemes, would allow injured service men and women to have their claims determined, and compensation paid, whilst they remained in service. It constitutes a change from the philosophy of previous schemes….**"

10. The date 6 April 2005 was also central to the AFCS Order 2005. Thus, relevantly, article 7(1), dealing with *Injury caused by service*, set out that "**Benefit is payable in accordance with this Order to or in respect of a member or former member of the forces by reason of an injury which is caused (wholly or partly) by service where the cause of the injury occurred on or after 6th April 2005**", and article 8(1), addressing *Injury made worse by service*, provided that:

> "**Subject to the following provisions of this article, benefit is payable in accordance with this Order to or in respect of a former member of the forces by reason of an injury made worse by service if the injury:**
> **(a) was sustained before he entered service and was recorded in the report of his medical examination when he entered service;**
> **(b) was sustained before he entered service but without his knowledge and the injury was not found at the examination; or**
> **(c) arose during service but was not caused by service**
>
> **and in each case [service was the predominant cause of the worsening of the injury and] the injury was made worse by service on or after 6th April 2005.**"

(The words in square brackets were added at a later date. The whole of the AFCS Order 2005 was replaced by the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 with effect from 9 May 2011. It is the AFCS Order 2005, however, which is relevant to this appeal.)

11. Given the seemingly sharp edged dividing line of 6 April 2005, it may have been thought that the application of the two schemes was straightforward and mutually exclusionary: an injury due to, or caused by, service before 6 April 2005 falls under the SPO 1983 (or its successor); injury caused by service on or after that date is dealt with under the AFCS 2005 (or its successor). However, that is not necessarily the case (see *JN –v- Secretary of State for Defence* (AFCS) [2012] UKUT 479 (AAC) in the context of awards under the AFCS Order 2005). To understand why this may be so it is necessary to first detail the relevant facts on this appeal.

Relevant Facts

Introductory

12. The appellant joined the Army on 21 November 1994 at the age of 19. He served as a Vehicle Recovery Mechanic between 1994 and 2010, with tours of service in Bosnia, Iraq and Kuwait. He was medically discharged on 1 June 2010. As his service spanned 6 April 2005, his entitlement to any award in respect of his 'conditions' (to use a neutral word at this stage) on his discharge from service was assessed under the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 (the "SPO 2006" - which had replaced the SPO 1983) and the AFCS Order 2005.

Decision and appeals history

13. Before turning to the facts of the case in more detail, which will be necessary as both parties emphasise different aspects of the adjudicatory and medical assessment histories, it is helpful to describe the awarding decision(s) under appeal.

14. The decision under the SPO 2006 was made on 3 June 2010 (2 days after the appellant had been discharged from service), and made an interim assessment of 20% disablement for the conditions "Bilateral Chrondomalacia Patellae" and "Low Back Pain Syndrome (1994-2005)". (I will return later to the significance or otherwise of the bracketed dates.) It was accepted that these two conditions were attributable to service. The other medical conditions referred to – bilateral noise induced sensorineural hearing loss and diverticular disease – are not relevant to the issues that have to be determined on this appeal.

15. The decision was notified to the appellant on 3 June 2010, and he was told that he was entitled to a war disablement pension of £30.94 per week in respect of the finding of 20% disablement. The appellant then lodged an appeal against this decision on 10 August 2010. In his appeal

all he said by way of grounds was that he disagreed with the decision and he requested a hearing to sort the matter out. He asked that the hearing to be booked "**for the same day as my AFCS tribunal**".

16. I shall return later to the precise scope of this appeal: that is, was it (just) an "assessment appeal" pursuant section 5 of the Pension Appeal Tribunals Act 1943 or was it also an "entitlement appeal" under section 1 of that Act - section 1 referring (as we shall see below), inter alia, to whether the disablement is attributable to any relevant service)?

17. On 4 June 2010 the respondent made the decision under the AFCS Order 2005 in respect of the appellant. As he had been medically discharged, the appellant was not required to make a claim to the scheme under the AFCS Order 2005: see article 37(1)(a) of that Order. The decision was:

    (a) that the second principal invaliding condition – secondary low back injury – was accepted as being caused by service after 6 April 2005 and met the conditions set out in Table 9, Item 33[1], Tariff 14; but

    (b) to reject the first principal invaliding condition – chronic low back pain (with radiological MRI abnormality of (L) sacro iliac region) – because it was not caused, or made worse by service, on or after 6 April 2005.

    The first part of the wording in (a) refers to the test under article 7 of the AFCS Order 2005 and the closing words in (b) run together the tests in articles 7 and 8 of that Order. The second part of the wording in (a) refers to article 14 and Schedule 4 to the AFCS Order 2005, the broad effect of which is to award a lump sum payment and/or a "**guaranteed income payment payable until death**" depending on where the "injury" fitted within the Tables in Schedule 4.

[1] This is an obvious typographical error: it should read Item 32. Nothing turns on this.

18. The appellant was notified of this decision on 4 June 2010 and told that it gave rise to a final award under the AFCS Order 2005 of a one off payment of £2,888.00. The appellant submitted an appeal against this decision on 10 August 2010. Again all he said by way of grounds of appeal was that he disagreed with the decision and he requested a hearing to sort the matter out. He asked that the hearing to be booked "**for the same day as the tribunal for my war pension**".

19. Getting the two appeals to be heard together obviously caused some administrative difficulties as the appeals were not heard until 21 September 2011. The First-tier Tribunal in its decisions of that date on the two appeals (i) allowed the appellant's appeal from the SPO 2006 decision to the extent of increasing the percentage assessment to 30% (but in respect of his knees (and mental health) only and not his back) and ending the period of the interim assessment on 20 March 2012, and (ii) dismissed the appeal from the AFCS Order 2005 decision. (As I understand it the 30% assessment was later increased to 50%.)

20. The First-tier Tribunal Judge helpfully kept a typed record of the proceedings. These start off by setting out a summary of what the two appeals are about. Unfortunately it is unclear from whom this summary came as immediately after it the record says "**Introduction by TJ**". The summary is in the following form:

> "**There are two appeals.**
>
> 1) **SPO assessment appeal (decision 03.06.10 20%) – knees and back. However, the back condition is up to 2005 since there was recovery at that time and the subsequent back problem was post-AFCS.**
>
> 2) **AFCS tariff appeal back Table 9 Item 33 Tariff 14 – But he is on highest he can get since the next one up requires a trauma to his back with one or more Intervertebral disc prolapses, which isn't the case.**"

The tenor of the remarks, however, suggests this summary came from the Secretary of State's representative.

21. The record of proceedings then has the following exchange between the Secretary of State's representative (SPVA), the First-tier Tribunal Judge (TJ) and the representative for the appellant (RBL).

> **"SPVA – Any disablement in relation to the back would have been extinguished by the disablement to the back which is the subject of the AFCS claim.**
>
> **TJ – If there were 2 invaliding conditions relating to the back (p.64), how can it be said that one has been extinguished by the other?**
>
> **SPVA – There was chronic back pain prior to 2007 [this should read '2006'] injury going back as far as 1999. Then there was the injury caused by putting the track back on. If that was an exacerbation of the low back condition then it cannot be under both schemes.**
>
> **RBL – We don't agree with that point, we would say that the SPO back condition should still be taken into account. The SPVA made a mistake by making an assessment under the AFCS. It should have been only one back condition under the SPO. We don't have any alternative tariff under the AFCS.**
>
> **(TJ expresses the view that as there was an injury in 2007 [2006], that must fall under the AFCS, even if it is an aggravation of an SPO injury.)"**

In many ways this exchange reflects the issues that are at the heart of this appeal.

22. The First-tier Tribunal's findings of fact and reasons for its decisions, so far as is relevant, were as follows.

> "**[The appellant] was required to maintain a high degree of fitness. The rigours of service resulted in him suffering pain in his knees and back, which were diagnosed as Bilateral Chondromalcia Patellae and Low Back Pain Syndrome. These conditions arose prior to 2005 and would therefore fall to be dealt with under the Service Pensions Order 2005 ("SPO").**
>
> **Although the conditions affected his overall level of fitness and resulted in him being downgraded, he was still able to perform some of his duties and he continued to enjoy a reasonable standard of mobility, though his ability to run was impaired.**

In 2007 [this should read '2006'], while working on a vehicle in Poland, he suffered an injury to his lower back, which significantly worsened his existing problems. As a result of this and of worsening in his knees, his mobility is now seriously impaired, simple movements such as bending or kneeling are now impossible, and he has difficulty getting in and out of bed, using the stairs or using the bath.....

SPO Appeal
Mr Irwin [SPVA] argued that the 2007 [2006] back injury has effectively extinguished the effects of the earlier back problems and therefore all the effects of the back problems must be dealt with under the AFCS. Miss Davies [RBL] contended that [the appellant] should be entitled to be assessed under the SPO, since that was when his problems started and he never applied for compensation under the AFCS.....he would be better off if his back were assessed under the SPO and it would be unfair if a second injury after the commencement of the AFCS had the effect of reducing his overall compensation....

We are very sympathetic to [the appellant's] arguments but we have to reject them and accept Mr Irwin's arguments.

a) The 2007 [2006] injury falls to be dealt with under the AFCS. The fact that [the appellant] did not want to be compensated under the AFCS is irrelevant, as is the fact that he may be rendered worse off by such compensation.

b) It would be wholly artificial to treat [the appellant] as having two separate conditions of his lower back, one under the SPO and the other under the AFCS. The evidence is that all of his existing back symptoms are due to the 2007 [2006] incident. We accept....that there may be cases where a later injury which falls to be dealt with under the AFCS does no extinguish an earlier SPO condition, but that is not the case here, since the diagnosed conditions are the same.

c) Although it is a principle of civil law that where a person negligently causes or aggravates an existing injury to his victim, he is only responsible for the worsening of the injury, that does not apply here, since compensation under the SPO and AFCS is not fault-based and it is the paying party is the same (sic).

Our approach on the [SPO] assessment appeal is therefore to disregard the condition of [the appellant's] back and look only at his knees.

AFCS Appeal
[The appellant's] 2007 [2006] back condition was described as Low Back Injury and has been placed at table 9 Item [32]....This is an unfortunate label, since it describes the condition and not the effects. It appears unfair that the same descriptor could apply equally to a minor back pain and a severe one. However, it does not appear that any other descriptor applies.....The condition Chronic Low Back Pain relates to the pre-AFCS back condition and therefore falls outside the Scheme and must be disallowed."

23. The appellant then sought permission to appeal against the First-tier Tribunal's decisions. He did so on the basis that the tribunal had erred in law by: (i) applying the AFCS Order 2005 as opposed to the SPO 2006 to the assessment of a condition which originated before 2005, and (ii) treating an event which accelerated the worsening of an existing injury as a completely new injury and thereby disregarding evidence which pointed to it being a pre-existing injury.

24. Permission to appeal was given by the then Chamber President of the First-tier Tribunal, Upper Tribunal Judge Bano, on 8 November 2011. He did so because:

> "**Although the tribunal's decision seems to have turned on their finding that the 2007 back injury effectively extinguished the effects of the earlier back problems, I consider that permission to appeal should be given so that the Upper Tribunal can give guidance on the correct approach when a pre-2005 service injury is made worse or overtaken by an injury occurring after that date.**"

25. The appellant did not, however, submit his appeal to the Upper Tribunal until September 2012. On 1 March 2013 Upper Tribunal Judge Mesher extended time for the lodging of the appeal. He also gave directions on the appeal which, inter alia, asked how the assessment of disablement under the SPO 2006 was affected by a non-service related cause of disablement after 5 April 2005 (e.g. assessing the disablement in respect of a service caused injury to the right foot when after 2005 a post-service car accident means the right foot has been amputated).

The back injury evidence

26. The evidence relating the appellant's back is important both in terms of framing the legal arguments and because, as Judge Bano recognised, in one sense the First-tier Tribunal's decision(s) may be said to have been based on any back problems no longer existing as a matter of fact prior to the injury in 2006. Whether that view is justifiable depends on considering the evidence that was before the First-tier Tribunal.

27. The appellant's (Medical) *Attendance and Treatment Card's* earliest entry is from December 1992 and records a fall on the left knee while the appellant was doing cross country. Problems with the knees continue to be recorded on this card up to May 2002, and that is consistent with other medical evidence from this period (which continues beyond May 2002). For example, in February 2001 the appellant was referred to a Registrar in Orthopaedics by his Senior Medical Officer about the pain and stiffness in his knees. And a *MEDICAL BOARD Record* from May 2003 dealt with the appellant's knees only and said "**He is otherwise generally well**".

28. Back pain is not recorded in the *Attendance and Treatment Card*. The first reference to it in the service medical reports is in one dated 26 April 2005. This was a reference from an Army Medical Centre to a Medical Officer (MO), ostensibly about the appellant's knees. Under *Subjective Present Condition*, having recorded matters relating to the knees (e.g. "**Running aggravates knees**"), the MO recorded "**He also complains of low back pain which is intermittent and band like in a paravertebral lumbar area, with no sciatic symptoms, it occasionally radiates into the right groin and he occasionally has pins and needles of the right hallux but there does not seem to be a continuum of pain from his back down to his foot**".

29. Knee pain was again the main issue in the MO's report of 28 September 2005. However, under *Subjective Present Condition* there is recorded:

> "**He is playing golf once a week and attends the gym 5 times a week, and has completed the run/walk programme is able to do 12mins running. He did have some irritability of both hips [right more than left] during his PPG assessments. He was complaining of pain radiating from his back from the right groin, the back pain and the radiation to the right groin pain has gone. But still on testing he is tender on extreme flexion and has reduced internal rotation bilaterally. Prolonged sitting for more than 20 mins aggravate his knee pain.**"

30. The next report, from 22 November 2005, deals with the bilateral anterior knee pain but makes no mention of the back. The following rehab admission report is from November 2006. It again makes no mention of the back and is concerned with the knees. The appellant had been in exercise in Poland in the last four weeks and had aggravated his knees jumping down from a Warrior military vehicle. (It is this date which is later mistranslated into the 2007 injury date.)

31. It is in the next medical report that the appellant's back becomes the central issue. This report shows that the appellant was admitted to the Regional Rehabilitation Unit in Germany in respect of his spine between 11 and 26 January 2007. This was the first admission to this unit for the spine/back; the report recording that the appellant's four previous admissions had been for his knees. The report sets out:

> "**Seen in MIAC for review 10.1.07 following report of increasing back pain during last rehab admission (Nov-Dec 06 Lates course) for anterior knee pain. Had MRI in Dec 06 reported as normal. Has 1-2 year history of back pain, which was aggravated by recovery mechanic duties in Poland in October 06. ….In view of his increasingly S1 symptoms I would be grateful if he could be referred for a fairly urgent orthopaedic opinion. The most likely diagnosis is nerve root impingement and on looking at the MRI there is a small bulge at L5/S1……He should be downgraded to P7HO and is unfit to deploy on exercises and to BATUS.**"

32. A Medical Board then took place on 1 February 2007. The main diagnosis leading to the Board was given as "**Chronic Back Pain with prolapse + Chronic Bilateral Knee Pain**". The Board concurred with the appellant being graded P7. The Board also agreed with the following:

> "**[The appellant] has been graded P7/P3 since 2003 and for last year or so has tried functioning at P3 level but only managed with lots of analgesia. A recent MRI has revealed a small prolapse at S2/3 level…..He experiences definite neurological symptoms but these are intermittent and no evidence of permanent nerve damage or progression….Due to his history and co-existing bilateral chronic knee pain the appropriate grading is P7…**"

33. The translation of the findings of an MRT of the appellant's lumbar spine conducted in Germany in November 2007 referred in the history to "**Back pain for months**". However, a consultation note dated 11 January 2008 set out "**The patient reports of lumbar pain for years**".

34. Dr Barnes in a referral to Headley Court for a rheumatology opinion in March 2008 gives a history, relevantly, as follows:

> "**[The appellant] joined the Army in 1994, has been downgraded P3 since 2001, and P7 since 2003. His initial problem was bilateral anterior knee pain syndrome, with multiple RRU admissions and several operations without clear success. However, the main problem of late has been his back.**
>
> **When first saw in November [2007], he gave a history of progressively deteriorating diffuse lower back pain....**"

35. A second Medical Board was then held on 17 March 2008. Its purpose was to review the appellant's grading. The *History of presenting complaint* contains a lot of detail and no useful purpose would be served in setting all of it out here. However, by way of emphasis: it begins with "**The above soldier has problems with back pain and stiffness accompanied by numbness in his feet**"; it continues with "**It started with his left knee in Dec 92...**" and then continues with details of his knee problems, ending (on knees) with "**By Nov 05 he had bilateral knee pain and hip pain with right worse than left**"; and it then records "**He has now also developed back pain and ankle pain....**". The recommendation of the Board was that the appellant have a temporary grade of P7ND for 6 months and that he be referred to DMRC.

36. Pursuant to this recommendation, the appellant was seen on 12 May 2008. This medical record from that consultation sets out that:

> "**[The appellant] presents with a 7 year history of low back pain and bilateral posterior hamstring pain with numbness to the soles of his feet. He reports that this has gradually worsened over the past 1-2 years.**"

(By way of reminder, the 'incident' in Poland was in October 2006.)

37. A further review by a Medical Board on 7 October 2008 found the appellant was unfit for all duties. This set out, somewhat confusingly given the above recorded histories, that he had been downgraded due to low back pain since 2001, and that he reported a worsening of this back pain over the past 1-2 years.

38. Between February 2009 and October 2009 a *Medical History on Release from HM Forces* form was completed in respect of the appellant. Under *Details of significant past illnesses* it recorded the knee problems as being from 1998 onward and "**2006 onward low back pain, associated increase in bowel frequency and bilateral leg paraesthesia**". In a box titled *Disabilities*, which was only to be completed when medical discharge was recommended, there is recorded "**Low back pain with possible root symptoms**".

39. At the penultimate Medical Board on 29 June 2009 the appellant's main presenting complaint was his low back pain. The bilateral anterior knee pain was recorded under his relevant previous medical history, though it was accepted as still being present. As to the history of the low back pain, this Board recorded it, so far as is relevant, as follows:

> **"[The appellant] has suffered from low back pain for a number of years but initially did not seek very much medical attention for this, as he thought it was pretty much expected within his trade as a Recovery Mechanic. However, in 2007[2], whilst on exercise in Poland, he suffered with a significant increase in his pain following an incident where the track from his warrior tank came off whilst turning in sand, and due to the pace of the exercise, he was required to refit it with just the help of his driver. He tells me this is normally a 4-man job. He was aware at the time that his back was painful but had to complete the task and he describes his back as being noticeably worse ever since then."**

[2] This date would seem to be a mistake as the medical report from early 2007 referred to in paragraph 28 above, which is more likely to be accurate as to dates given its proximity, has the exercise in Poland taking place on October 2006. It seems likely that the mistake as to the date arose from the evidence the appellant gave orally to the Board in June 2009, as none of the other documentary evidence prior to this Board referred to the incident in Poland occurring in 2007. The fact of the wrong date is of no significance, though it is repeated by the First-tier Tribunal.

The Medical Board's prognosis was that the appellant was likely to fulfil the requirements for a medical discharge when he was next seen but that he should continue with his ongoing treatments in the meantime as his condition may improve.

40. Sadly, this did not prove to be the case. At a medical in September 2009 the view was taken that the appellant was unlikely to make further gains. In taking that view the medical officers recorded that the appellant had "**suffered from lower back pain for a number of years but initially did not seek medical attention. In [2006] he was on exercise in Poland and had to re-fit the track to a Warrior tank. He experienced a sudden onset of back pain but was able to continue with the task "because he had to"….**".

41. The appellant's final Medical Board was on 30 October 2009. It recommended that he be discharged from military service. He was then discharged on 1 June 2010. In the *Personal Statement* the appellant had completed for this Medical Board in or about October 2009 he set out that the injury to the back first started in Munster and he was treated for it in 2006. Answering question 12(a) in the Statement – *Give an account of any incidents or conditions of service which you think caused or made worse your disability. State approximate dates, where serving…., and duties at the time* – the appellant said:

> "**On trade course assessment twisted knee whilst on punishment run. In Iraq hurt knee whilst carrying out duties in desert carrying equipment in sand. I had pain in my back for a while but whilst in Poland hurt back putting track on a Warrior with only me and driver.**"

42. The Medical Board recorded the (relevant) *History of Presenting Complaints* as follows.

> **"[The appellant] has suffered with low back pain for almost 10 years. He first noted the problem whilst at Larkhill in 1999 in 1999 but, initially, did not seek much medical attention for his back pain. (At that time, he was having more problems with his knees). He was referred to RRU Gutersloh for treatment of both his back**

> **and knees in 2005 and, at that point, he was considered to have simple mechanical low back pain.**
>
> **In early 2007 [actually late 2006], whilst on exercise in Poland, he suffered from a significant increase in low back pain following an incident when a track from his warrior vehicle came off whilst turning in sand.....He developed acute low back pain following this incident...**"

Under *Specific examination findings* the Board recorded: "**The signs are consistent with a persistent mechanical low back pain**". The prognosis was uncertain. The Board concluded "**[the appellant] is unlikely to be able to offer regular and effective service in the foreseeable future and medical discharge is recommended**".

43. On his claim under the SPO 2006 the appellant was referred for a medical examination, which took place in York on 25 May 2010. A Medical Report Form was completed at and immediately after the examination. In the *History of Claimed Conditions* part of the form it is recorded under *Back Pain* (I have broken up the free script form of the recording by use of dashes):

> "**in 2000 I noticed back pain while carrying a heavy back pack as part of my army duties – after that I continued to have back pain on and off and exacerbated by the heavy lifting I had to do repeatedly because of my job as a recovery mechanic – at the time the medical people rather ignored my back as I was having knee problems at the time and the knee problem was given priority – I was told to do light duties if my if my back and knees were bad – I had some physiotherapy but that did not help – in 2007 although on light duties I was still expected to go on exercise – unfortunately during the exercise the tank track came off and I had to deal with that myself and that involved heavy lifting – I managed to get the track on but had not done it correctly and had to take it off again and put it on again but by that time someone had come to help me – by that stage I was in agony with my back – I was given no treatment but took simple pain killers I had a stash of – I did not get to see the MO until several weeks afterwards.....**"

And under *Knee Pain – Both* it is set out:

> "**I fell down a really steep bank on to my knees at one point and after that I had bilateral knee pain and this was during basic training – I had physiotherapy which seemed to clear things up at the time – for 1 or 2 years the knees were OK – in 1997 I started to have knee pain again – it was worse on the right because that knee seemed to give way and hyperextend which it is still doing now – in**

> **2000 I had an arthroscopy on the right knee – I also had scans on both knees – I am informed that the diagnosis of my problems was chondromalacia patellae on both knees – since I have lateral release surgery ion the left knee in about 2003 – my knees have continued to be painful....**"

The relevant law

SPO 2006

44. The SPO 2006 is made under sections 12(1) and 24(3) of the Social Security Miscellaneous Provisions Act 1977. Section 12(1) is the main *vires* for the SPO 2006, and provides:

> "**Any power of Her Majesty, whether under an enactment or otherwise, to make provision about pensions or other benefits for or in respect of persons who have been disabled or have died in consequence of service as members of the armed forces of the Crown shall continue to be exercisable in any manner in which it may be exercised apart from this subsection and shall also be exercisable by Order in Council in pursuance of this subsection; and such an Order shall be made by statutory instrument and laid before Parliament after being made.**"

45. The material parts of the SPO 2006 are as follows. Part II concerns *Awards in Respect of Disablement*. Within Part II is article 5, which is concerned with the *General Conditions for Part II*. Article 5(1) provides that:

> "**Under this Part, awards may be made in accordance with this Order in respect of the disablement of a member of the armed forces which is due to service before 6th April 2005 and may be made provisionally or upon any other basis.**"

Article 5(2) then provides that such an award cannot take effect before termination of the member's service in the armed forces.

46. Article 6 deals with *Retired pay or pension for disablement* and provides that:

> "**A member of the armed forces the degree of whose disablement due to service before 6th April 2005 is not less than 20 per cent may be awarded retired pay or a pension at whichever of the rates**

> **set out in the Table in Part II of Schedule 1 is appropriate to his rank or status and the degree of his disablement.**"

It was this article under which the appellant's SPO award was made on 3 June 2010. For that award to have been properly made the decision maker – be it the Secretary of State or First-tier Tribunal on appeal - had to be satisfied that the disablement presenting itself as at June 2010 was due to service before 6 April 2005 (and was assessed at 20% or more).

47. By way of contrast article 7 of the SPO 2006 deals with *Gratuity for minor disablement* and provides that:

> "**A member of the armed forces the degree of whose disablement due to service before 6th April 2005 is less than 20 per cent may be awarded a gratuity in accordance with the appropriate table in Part III of Schedule 1 in force at the time of the award.**"

Again, however, such an award can only be made in respect of disablement due to service before 6 April 2005.

48. The rest of Part II of the SPO 2006 is concerned with other forms of award. Part III deals with *Awards in respect of death*, the *General Conditions* for which are set out in article 22, which provides, so far as is relevant, that:

> "**Under this Part, awards may be made in accordance with this Order in respect of death of a member of the armed forces which is due to service before 6th April 2005.**"

49. Part V of the SPO 2006 deals *Adjudication*. Article 40 in Part V is concerned with *Entitlement where a claim is made in respect of a disablement, or death occurs, not later than 7 years after termination of service*, and provides, so far as is relevant, as follows:

> "**40.—(1) Except where paragraph (2) applies, where, not later than 7 years after the termination of the service of a member of the armed forces, a claim is made in respect of a disablement of that**

> **member, or the death occurs of that member and a claim is made (at any time) in respect of that death, such disablement or death, as the case may be, shall be accepted as due to service for the purposes of this Order provided it is certified that—**
> **(a) the disablement is due to an injury which—**
> **(i) is attributable to service, or**
> **(ii) existed before or arose during service and has been and remains aggravated thereby;**
> **or**
> **(b) the death was due to or hastened by—**
> **(i) an injury which was attributable to service, or**
> **(ii) the aggravation by service of an injury which existed before or arose during service.**
> **(2) Where a person is entitled to benefit under the 2005 Order in respect of an injury or death, that injury or death shall not be accepted as due to service for the purposes of this Order.**
> **(3) Subject to the following provision of this article, in no case shall there be an onus on any claimant under this article to prove the fulfilment of the conditions set out in paragraph (1) and the benefit of any reasonable doubt shall be given to the claimant.**
> **(4) Subject to the following provisions of this article, where an injury which has led to a member's discharge or death during service was not noted in a medical report made on that member on the commencement of his service, a certificate under paragraph (1) shall be given unless the evidence shows that the conditions set out in that paragraph are not fulfilled……**
> **(6) Where there is no note in contemporary official records of a material fact on which the claim is based, other reliable corroborative evidence of that fact may be accepted.**"

It was article 40 that applied on the appellant's claim under the SPO 2006.

50. An at first puzzling omission from article 40 is any temporal restriction on when the "service" occurred in article 40(1)(a), given the limit on when disablement awards may be made in respect of under article 5(1) of the same Order and the terms of article 4(6) of the immediate predecessor SPO 1983 (see paragraph 6 above). However the answer to this puzzle lies in the terms of article 1(2) and paragraph 54 in Schedule 6 to the SPO 2006 which combined provide that "**unless the context otherwise requires and expect where otherwise provided in the [SPO 2006] "service" [means] service as a member of the armed forces before 6th April 2005...**".

51. Although not relevant on the facts of this case, article 41 of the SPO 2006 addresses where a claim is made, or death occurs, more than 7 years after termination of service. It provides:

> "**41.—(1) Except where paragraph (2) applies, where, after the expiration of the period of 7 years beginning with the termination of the service of a member of the armed forces, a claim is made in respect of a disablement of that member, or in respect of the death of that member (being a death occurring after the expiration of the said period), such disablement or death, as the case may be, shall be accepted as due to service for the purpose of this Order provided it is certified that—**
> **(a) the disablement is due to an injury which—**
> **(i) is attributable to service before 6th April 2005, or**
> **(ii) existed before or arose during such service and has been and remains aggravated thereby; or**
> **(b) the death was due to or substantially hastened by**
> **(i) an injury which was attributable to service, or**
> **(ii) the aggravation by service of an injury which existed before or arose during service.**
> **(2) Where a person is entitled to benefit under the 2005 Order in respect of an injury or death, that injury or death shall not be accepted as due to service for the purposes of this Order.**
> **(3) A disablement or death shall be certified in accordance with paragraph (1) if it is shown that the conditions set out in this article and applicable thereto are fulfilled.**
> **(4) The condition set out in paragraph (1)(a)(ii), namely, that the injury on which the claim is based remains aggravated by service before 6th April 2005 shall not be treated as fulfilled unless the injury remains so aggravated at the time when the claim is made, but this paragraph shall be without prejudice, in a case where an award is made, to the subsequent operation of article 2(5) in relation to that condition.**
> **(5) Where, upon reliable evidence, a reasonable doubt exists whether the conditions set out in paragraph (1) are fulfilled, the benefit of that reasonable doubt shall be given to the claimant.**
> **(6) Where there is no note in contemporary official records of a material fact on which the claim is based, other reliable corroborative evidence of that fact may be accepted.**"

52. For completeness, article 42 in the SPO 2006 – concerned with *Determination of the degree of disablement* – sets out in article 42(1) that:

> "**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.**"

Article 42(2) continues:

> "**(2) Subject to the following provisions of this article—**
> **(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;**
> **(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—**
> **(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**
> **(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;**
> **(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;**
> **(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.**"

53. Finally, as noted in the preamble at the beginning of this decision, the statutory definition of "disablement" found in Item 27 in Part II of Schedule 6 to the SPO 2006 provides that "**disablement**" means:

> "**physical or mental injury or damage or loss of physical or mental capacity (and "disabled" shall be construed accordingly)**".

AFCS Order 2005

54. The AFCS Order 2005 was made under the Armed Forces (Pensions and Compensation) Act 2004. By its title this was, inter alia, an Act "**to make new provision for establishing pension and compensation schemes for the armed or reserve forces**".

55. Section 1 of the Armed Forces (Pensions and Compensation) Act 2004 provides, so far as is relevant as follows:

> "**(1) The Secretary of State may by order establish schemes which, in respect of a person's service in the armed forces, provide:**
> **(a) for benefits, in the forms of pensions or otherwise, to be payable to or in respect of him on termination of service or on death or retirement, or**
> **(b) for payments to be made towards the provision of such benefits.**
> **Such a scheme is referred to in this Act as an armed forces pension scheme.**

> **(2) The Secretary of State may by order establish schemes which provide for benefits to be payable to or in respect of a person by reason of his illness or injury (whether physical or mental), or his death, which is attributable (wholly or partly) to his service in the armed forces or reserved forces.**
> **Such a scheme is referred to in this Act as an armed and reserve forces compensation scheme.**"

It is section 1(2) which provides the *vires* for the AFCS Order 2005.

56. The AFCS Order 2005 came into operation on 6 April 2005. Article 7 of this Order was concerned with *Injury caused by service* and provided:

> "**7 (1) Benefit is payable in accordance with this Order to or in respect of a member or former member of the forces by reason of an injury which is caused (wholly or partly) by service where the cause of the injury occurred on or after 6th April 2005.**
> **(2) Where injury is not wholly caused by service, benefit is only payable if service is the predominant cause of the injury.**"

57. Article 8 of the AFCS Order 2005 addressed *Injury made worse by service* and provided under article 8(1) :

> "**Subject to the following provisions of this article, benefit is payable in accordance with this Order to or in respect of a former member of the forces by reason of an injury made worse by service if the injury:**
> **(a) was sustained before he entered service and was recorded in the report of his medical examination when he entered service;**
> **(b) was sustained before he entered service but without his knowledge and the injury was not found at the examination; or**
> **(c) arose during service but was not caused by service**
>
> **and in each case [service was the predominant cause of the worsening of the injury and] the injury was made worse by service on or after 6th April 2005.**"

58. Article 43 of the AFCS Order 2005 set out that it was for the Secretary of State for Defence to "**determine any claim for benefit and any question arising out of the claim**" (article 43(1); he then had to give reasons for his decision (43(2)); and he had to inform the claimant of his right of appeal (43(3)).

59. The rights of appeal in respect of both the SPO 2006 and the AFCS Order 2005 are conferred by the Pension Appeal Tribunals Act 1943 (as amended). Section 1 of this Act provides, so far as is relevant, as follows.

> "**1.(1) Where any claim in respect of the disablement of any person made under any such Royal Warrant, Order in Council or Order of His Majesty as is administered by the Minister or under a scheme made under section 1 of the Polish Resettlement Act 1947 is rejected by the Minister on the ground that the injury on which the claim is based—**
>
> **(a) is not attributable to any relevant service; and**
>
> **(b) does not fulfil the following conditions, namely, that it existed before or arose during any relevant service and has been and remains aggravated thereby;**
> **the Minister shall notify the claimant of his decision, specifying that it is made on that ground, and thereupon an appeal shall lie to the appropriate tribunal on the issue whether the claim was rightly rejected on that ground .**
>
> **(2) Where, for the purposes of any such claim as aforesaid, the injury on which the claim is based is accepted by the Minister as fulfilling the conditions specified in paragraph (b) of the last foregoing subsection but not as attributable to any relevant service, the Minister shall notify the claimant of his decision, specifying that the injury is so accepted, and thereupon an appeal shall lie to the appropriate tribunal on the issue whether the injury was attributable to such service....**"

60. Section 5 of the Act addresses appeals against the assessment of the extent of disablement, and provides that:

> "**5.—(1) Where, in the case of any such claim as is referred to in section one, section two or section three of this Act in respect of the disablement of any person, the Minister makes an interim assessment of the degree of the disablement, he shall notify the claimant thereof and an appeal shall lie to the appropriate tribunal from the interim assessment and from any subsequent interim assessment, and the appropriate tribunal on any such appeal may uphold the Minister's assessment or may alter the assessment in one or both of the following ways, namely—**
>
> **(a) by increasing or reducing the degree of disablement it specifies; and**
>
> **(b) by reducing the period for which the assessment is to be in force.**
>
> **In this section the expression "interim assessment" means any assessment other than such a final assessment as is referred to in the next following subsection.**
> **(2) Where, in the case of any such claim as is referred to in section one, section two or 4 of this Act in respect of the disablement of any person, it appears to the Minister that the circumstances of the case permit a final settlement of the question to what extent, if any, the said person is disabled, and accordingly—**

> **(a) he decides that there is no disablement or that the disablement has come to an end or, in the case of any such claim as is referred to in section three of this Act, that the disablement is not or is no longer serious and prolonged; or**
> **(b) he makes a final assessment of the degree or nature of the disablement;**
> **he shall notify the claimant of the decision or assessment, stating that it is a final one, and thereupon an appeal shall lie to the appropriate tribunal on the following issues, namely—**
>
> **(i) whether the circumstances of the case permit a final settlement of the question aforesaid;**
>
> **(ii) whether the Minister's decision referred to in paragraph (a) hereof or, as the case may be, the final assessment of the degree or nature of the disablement, was right;**
>
> **and the appropriate tribunal on any such appeal may set aside the said decision or assessment on the ground that the circumstances of the case do not permit of such a final settlement, or may uphold that decision or assessment, or may make such final assessment of the degree or nature of the disablement as they think proper, which may be either higher or lower than the Minister's assessment, if any and if the appropriate tribunal so set aside the Minister's decision or assessment they may, if they think fit, make such interim assessment of the degree or nature of the disablement, to be in force until such date not later than two years after the making of the appropriate tribunal's assessment, as they think proper.**"

61. Section 5A of the same Act deals with Appeals in other cases, and thus covered appeals in respect of decision under the AFCS Order 2005. It provides:

> "**5A.-(1) Where, in the case of a claim to which this section applies, the Minister makes a specified decision–**
>
> **(a) he shall notify the claimant of the decision, specifying the ground on which it is made, and**
> **(b) thereupon an appeal against the decision shall lie to the appropriate tribunal on the issue whether the decision was rightly made on that ground.**
>
> **(1A) This section applies to–**
>
> **(a) any such claim as is referred to in section 1, 2 or 3 of this Act;**
> **(b) a claim under a scheme mentioned in section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004 (compensation schemes for armed and reserve forces).**
> **(2) For the purposes of subsection (1), a "specified decision" is a decision (other than a decision which is capable of being the subject of an appeal under any other provision of this Act) which is of a kind specified by the Minister in regulations.**"

62. Lastly, by section 5B of the Pension Appeal Tribunals Act 1943 (as amended) – *Matters relevant on appeal* – it is provided that:

> "**5B. In deciding any appeal under any provision of this Act, the appropriate tribunal –**
>
> **(a) need not consider any issue that is not raised by the appellant or the Minister in relation to the appeal; and**
>
> **(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."**

Discussion and Conclusion

63. I am satisfied that the First-tier Tribunal's decision of 21 September 2011 ("the tribunal) was erroneous on material points of law and must be set aside.

64. I will start with the most straightforward of the errors. This was the failure of the tribunal to (a) make sufficient findings of fact on the crucial evidential issues before it which it needed to resolve, and (b) provide an adequate explanation as to how it came to those findings on the evidence.

65. It is perhaps best to approach this area at first unencumbered by the issues of the law to which I will next turn. The appeal before the Upper Tribunal is from the tribunal's decision of 21 September 2011 concerning, to put the matter deliberately loosely at this stage, the level of the appellant's award of pension under the SPO 2006 on appeal from the Secretary of State's decision of 3 June 2010. (Formally there is no appeal from the First-tier Tribunal's decision concerning the level of award under the AFCS Order 2005.)

66. On the SPO 2006 appeal before it the tribunal was looking back in three important respects. First, the terms of 5B(b) of the Pension Appeals Tribunals Act 1943 required the tribunal to consider matters as at 3 June 2010 (the date of the decision appealed against) and not to take into account circumstances obtaining after that date. Put another way, it had to put itself back in the Secretary of State's shoes on 3 June 2010 and arrive, as an independent tribunal, at the decision he ought to have arrived at on that date.

67. Second, and standing in the respondent's decision-making shoes on 3 June 2010, the tribunal was directed by the terms of the SPO 2006 to consider, again putting matters very generally at this stage, the level of disablement after service had ended. This follows in my judgment from the general structure of the SPO 2006 and in particular the use of the phrase "**termination of service**" in articles 41(1) and 42(1) of the SPO 2006 and article 5(2) of the same Order which provides that "**[a]n award in respect of disablement of a member shall not be made to take effect before the termination of his service**". This perspective is further underpinned by the provisions of article 46 and paragraph 1(2) in Schedule 3 to the SPO 2006 which provides a general rule that an award takes effect from the latest of the date of termination of service or the date of claim. It is also consistent with the use of the present tense in articles in the SPO 2006 such as article 6 – "**a member of the armed forces the degree of whose disablement due to service before 6th April 2005 is not less than 20 per cent ....**" (my underlining).

68. The appellant made his claim for an award under the SPO 2006 on 2 April 2010, before his service terminated on 1 June 2010. Any award therefore took effect from the 1 June 2010. Broadly speaking, the tribunal was therefore looking at the level of qualifying disablement taking effect as at 1 June 2010 on the basis of the circumstances obtaining up to but not beyond 3 June 2010. In the circumstances of this appeal the only relevant potentially qualifying disablement was that arising from the appellant's back.

69. The third respect in which the tribunal had to be looking back was in terms of whether any disablement arising from the back presenting in June 2010, but before 4 June 2010, was due to service before 6 April 2005. This further focus arises in my judgment from the terms of articles 5(1) and 40(1) of the SPO 2006 (the latter with the qualifying words for "service" read into it from article 1(2) and paragraph 54 in Schedule 6 to the same Order). The underpinning feature for any award under the Service Pensions Orders is "**disablement**" (see paragraph 26

of *R(AF)1/07*), and for the SPO 2006 that has to be disablement which is due to service before 6th April 2005. Further, and contrary to an argument made by the appellant, properly read article 40(1) of the SPO 2006 confers entitlement where the "**disablement is due to an injury which..is attributable to service [as a member of the armed forces before 6th April 2005], or ..existed before or arose during service [as a member of the armed forces before 6th April 2005] and has been and remain aggravated thereby..**"[3].

70. As Mr Commissioner Mesher (as he then was) pointed out in paragraphs 26-28 of *R(AF)1/07*, "disablement", "injury" and the cause of the injury are all analytically separate and need to be approached as such, and therefore with careful fact finding.

71. Stripped of the legal considerations to which I will come, it was therefore incumbent on the tribunal to investigate and make clear findings of fact on whether any of the disablement presenting from the appellant's back as the date of the decision of 3 June 2010 was due to service before 6 April 2005, and, possibly (see further below), whether it was due to an injury caused by service before 6 April 2005 or arose during such service. Such fact finding was complicated by the fact of incident in Poland in late 2006. However, it seems to me that there were at least three possible scenarios that needed to be explored arising from the evidence before the tribunal.

(i) First, what disablement, if any, had there been in respect of the appellant's back before the incident in Poland in late 2006 and before 6 April 2005? The evidence I have summarised above arguably contains little if no contemporaneous record of any back problems before 6 April 2005 (see, for example, paragraph 28 above).

[3] In contrast to the position under the AFCS Order 2005 in terms of "service: see paragraph 26 of *JN – v- Secretary of State for Defence* (AFCS) [2012] UKUT 479 (AAC).

(ii) Second, if there had been such disablement how much of it had as matter of fact resolved before the incident in Poland in late 2006?

(iii) Third, in respect of the disablement remaining in the back at the time of the incident in Poland in late 2006, to what extent did that incident as a matter of fact overset or extinguish that disablement?

72. In my judgment the tribunal failed to make clear and sufficient findings of fact on the above issues. Subject to the legal issues addressed below, the key factual issue the tribunal needed to address was whether any of the back problems the appellant had giving rise to disablement on 3 June 2010 were due to service before 6 April 2005. Put another way, were the back problems presenting in 2010 part of an injurious process that went back as far as 1999 (I choose this date simply because the tribunal identified it as the relevant "start" date), or to what extent had any disablement resulting from those back problems either diminished entirely by 6 April 2005 or been extinguished by an injury caused to the appellant's back during the incident in Poland in late 2006? Regardless of the surrounding law and where it may, or may not, have taken any factual analysis, which I address below, in my judgment the tribunal failed to carry out this critical fact finding to a sufficient extent.

73. The findings of fact and reasons the tribunal did make and provide on these issues are limited, unclear, and in places seem to have been made because of what the tribunal considered the law required. Thus the tribunal state:

> "**[t]he rigours of service resulted in him suffering pain in his knees and back"….[t]hese conditions arose prior to 2005 and would therefore fall to be dealt with under the Service Pensions Order 2005**" [the date of 2005 is a mistake];
>
> "**[in 2006] while working on a vehicle in Poland, he suffered an injury to his lower back which significantly worsened his existing**

> **problems. As a result of this and of worsening in his knees, his mobility is now seriously impaired**";
>
> "**[the 2006] injury falls to be dealt with under the AFCS….It would be wholly artificial to treat [the appellant] as having two separate conditions of his lower back, one under the SPO and the other under the AFCS. The evidence is that all existing back problems are due to the [2006] incident [in Poland]. We accept ….that there may be cases where a later injury which falls to be dealt with under the AFCS does not extinguish an earlier SPO condition, but that is not the case here, since the diagnosed conditions are the same**"; and
>
> "**[o]ur approach on the assessment appeal is therefore to disregard the condition of [the appellant's] back and look only at his knees…….Were we to assess [the appellant] for his knees and his back, we consider that the starting point would be 40% and there would be powerful arguments that the assessment should be 50% to take into account his mental condition. As it is, we must disregard the back…..the appropriate assessment is 30%.**"

These findings and reasons fail in my judgment to make clear precisely what occurred in terms of the aetiology of the appellant's back when the incident in Poland occurred towards the end of 2006. For example, did that incident worsen a pre-existing injury and the disablement that injury had caused (as the reasoning might suggest by "**significantly worsened his existing problems**"), such that disablement from the pre-6 April 2005 service still presented in June 2010, or had any disablement from that earlier injury diminished entirely by the time of the incident and therefore the injury and disablement arising from that incident presenting in 2010 arose solely from service occurring after 6 April 2005? Furthermore, what was the evidence that justified the finding of fact that *all* the disablement arising from the appellant's back in June 2010 was due to the incident in Poland? And what was the medical and factual basis for finding, if this is what the tribunal found, that the incident in Poland had extinguished the earlier disablement? A further difficulty with the findings and reasons of the tribunal is that they seem to proceed on the basis of what the tribunal considered the SPO 2006 and the AFCS Order 2005 required to be found rather than what the evidence may have shown.

74. This leads to a further error the tribunal made, which was having regard to the AFCS award, or at least not explaining the basis on which it was entitled to have regard to the AFCS award. I put the closing qualification in the previous sentence because the picture as to when entitlement to an award under the AFCS was decided is not entirely clear from the papers. I have taken the date of the decision making the AFCS award of 4 June 2010 from the AFCS appeal bundle (which is also before me even though the First-tier Tribunal's decision on the appeal from that decision is not before me). The AFCS appeal submission gives the date of the decision as 4 June 2010 and pages 69-70 of that appeal bundle show a letter dated 4 June 2010 to the appellant telling him that he is entitled to an award of a lump-sum payment of £2,888 as a final award. The payment was to be made "**as soon as possible**". On the other hand, the appeal bundle for the war pensions claim under the SPO 2006 contains a document called *War Pension Claim consideration* which is seemingly dated 27 April 2010 and has at its page 3 the *Additional Information* "**[The appellant] has received a payment of £2888 from the AFCS for the condition secondary low back injury**". I do not understand how that statement can have been made in April 2010 if the relevant AFCS awarding decision was not in fact made until 4 June 2010. This will be a matter the next First-tier Tribunal will need to investigate.

75. The importance of entitlement to an AFCS award to a decision on entitlement under the SPO 2006 lies in the terms of article 40(2) of the SPO 2006 and its provision that "**[w]here a person is entitled to benefit under the [AFCS Order 2005] in respect of an injury…, that injury….shall not be accepted as due to service for the purposes of this Order**". The key phrase, however, at least for the purposes of this appeal, is "**is entitled**". However, as at the 3 June 2010 date of the pensions decision under the SPO 2006 the appellant was not entitled to benefit under the AFCS 2005. That decision still had to be made, albeit only the next day. This it seems to me flows not only from the terms of the 4 June 2010 entitlement letter referred to in the immediately preceding paragraph

but also from the legislative structure governing the AFCS scheme and article 43 of the AFCS Order 2005 and section 5A of the Pension Appeals Tribunals Act 1943: entitlement cannot arise until the Secretary of State has determined or decided under the AFCS Order 2005 that there is entitlement.

76. If, therefore, the sequence of decision making is as I have described it in my description of the relevant facts, then in my judgment the tribunal was obliged to ignore the AFCS award because it arose after (albeit only by one day) the date of the SPO 2006 award, and so it erred in law in having regard to it. The SPO 2006 decision awarding the appellant a war disablement pension was made on 3 June 2010. On the appellant's appeal against that decision section 5B(b) of the Pension Appeals Act 1943 required the tribunal not to take into account any circumstances not obtaining on 3 June 2010. However, the decision awarding the appellant under the AFCS Order 2005 was made on 4 June 2010 and so, axiomatically, was not a circumstance obtaining on 3 June 2010, and therefore had to be ignored when considering the SPO 2006 assessment.

77. I discuss below whether the appeal before the tribunal was an appeal on entitlement or just an appeal on assessment. However I do not consider that that distinction is of importance for this point. It is true that Article 40 falls under the part of the SPO dealing with *Adjudication* and that article 40 is specifically titled as dealing with *Entitlement*. However article 40(2) is cast wider than this because it says its terms are "**for the purposes of this Order**". It qualifies the whole of SPO 2006 and not just article 40.

78. Article 40(2) may been intended to provide a sharp-edged division between the SPO 2006 and the AFCS Order 2005. However at the time of the SPO 2006 decision on 3 June 2010 the appellant was <u>not</u> entitled to benefit under the AFCS Order 2005, and so the decision maker on 3 June 2010, and the tribunal on the appeal therefrom, was not as a

matter of law precluded from considering whether the incident in Poland towards the end of 2006 was part of an injurious process in respect of the appellant's back due to his service from before 6 April 2005.

79. However, even if I am wrong in the above conclusion, either on the law or simply the sequence of decision making, in my judgment the terms of article 40(2) do not necessarily preclude the Secretary of State's decision maker or a First-tier Tribunal on appeal from such a decision from considering whether on the facts the disablement suffered by an ex-service member after 6 April 2005 may be compensated under the SPO 2006. This is for two reasons.

80. First, ignoring "death", the preclusion provided for by article 40(2) is limited to an "injury" and that injury cannot then be accepted as due to service under the SPO 2006. It will however be possible, as in fairness the tribunal recognised, for another injury still to count under the SPO 2006, as long as it too has not given rise to entitlement to benefit under the AFCS Order 2005. That assessment will call for very careful fact finding where the injury compensated under the AFCS Order 2005 may seem to be the same or in respect of the same part of the body as an earlier injury (as arises in this case).

81. The second reason I express more tentatively because I have not had any argument on the point, but it seems to me that the article 40(2) preclusion may not apply to a claim made under the SPO 2006 in respect of disablement "**due to an injury which existed before or arose during service**" (per article 40(1)(a)(ii) of the SPO 2006), as arguably the article 40(2) preclusion only takes out of account an injury which has been compensated under the AFCS Order 2005 as being due to service (i.e. caused by) and not an injury which existed before or arose during service and has been and remains aggravated thereby.

82. The final substantive issue I need to address is of less importance in the light of my reasons for reviewing and setting aside my previous decision. It concerns the nature of the appeal before the tribunal. I am now quite satisfied that it was an assessment appeal only. The entitlement decision the Secretary of State made (on the same date of 3 June 2010) was to the effect that the appellant had back 'disablement' in June 2010 due to an injury caused to his back by pre-6 April 2005 service. The mistake I made in my previous decision was to reason from the entitlement decision to the (wrong) conclusion that the appellant could not therefore have a nil assessment for that disablement because (as I wrongly reasoned) accepting that the appellant had back disablement in June 2010 due to service before 6 April 2005 meant that that disablement must have had an incapacitating effect in June 2010 (in other words, it had to have a percentage assessment of more than nil). I now accept that that view was wrong and it is for this reasons that I have set aside my previous decision on this appeal. I explain below why my previous view was wrong.

83. Before doing so, however, it may be useful to say a little about the distinction between entitlement and assessment decisions under the SPO 2006. The structure of the statutory scheme in respect of awards arising under the SPO 2006 is commonly accepted as giving rise to two discrete decisions that may be appealed. The first is the decision on entitlement and the second is the decision on assessment: per, respectively, sections 1 and 5 of the Pension Appeals Tribunals Act 1943, and see, for example, *MO –v- Secretary of State for Defence* (WP) [2013] UKUT 222 (AAC) and paragraph 24 of *PR –v- Secretary of State for Defence* (WP) [2013] UKUT 0397 (AAC). However, the entitlement appeal under section 1 of the Pensions Appeal Tribunals Act 1943 only arises where the injury on which the claim for disablement is based is rejected as being attributable to service [before 6 April 2005] or as being an injury that existed before or arose during [such] service and has been and remains aggravated thereby. (The

words in square take account of the temporal qualification within the SPO 2006.) If the claim is accepted as showing disablement(s) due to an injury or injuries either attributable to service before 6 April 2005 or which existed before or arose during [such] service and has been and remains aggravated thereby, then that disablement or disablements have to be assessed and any appeal will then only be in respect of the resulting assessment. On any appeal against the assessment decision the First-tier Tribunal cannot, therefore, consider whether the entitlement decision was correctly made: *R –v- Pensions Appeal Tribunal and Secretary of State for Defence ex parte Bunce* [2009] EWCA Civ 451.

84. The decision the Secretary of State made concerning the appellant's back on 3 June 2010 covered, as I see it, both entitlement and assessment. Axiomatically the entitlement decision had to precede the assessment decision. The entitlement decision was to the effect that the conditions Bilateral Chondromalacia Pattellae (i.e. the knees) and Low Back Pain Syndrome (1994-2005) were both accepted as attributable to service before 6 April 2005. In other words, both conditions satisfied the article 40(1)(a)(i) SPO 2006 test that the disablements claimed by the appellant in June 2010 were accepted as being due to an injury or injuries attributable to service before 6 April 2005[4]. That is also, it seems to me, the effect of section 1(1) of the Pension Appeal Tribunals Act 1943. Paraphrasing its wording slightly, the appellant's 2010 claim in respect of his then disablements (in his back and knees) was not rejected on the basis that the back injury on which the SPO claim was based was not attributable to service before 6 April 2005.

[4] Although at some stages reference has been made in the argument on behalf of the appellant to the back condition being aggravated by service, the article 40(1)(a)(i) basis of the entitlement decision has not been challenged by him (at least to date). I therefore do not consider further whether article 40(1)(a)(ii) could instead apply in respect of the back, though an argument might then arise as to whether the before 6 April 2005 temporal restriction also has to be read into the "remains aggravated thereby" part of article 40(1)(a)(ii).

85. In terms of what the entitlement decision was, some confusion may have been caused by the use of the bracketed dates "**(1994-2005)**" following the "**Low Back Pain Syndrome**" in the 3 June 2010 decision. Read one way, a cut-off of 2005 does not fit with the terms of article 40(1)(a)(i) of the SPO 2006 – a claim was made in respect of back disablement in 2010 and that 2010 back disablement was accepted by the Secretary of State as being due to an injury attributable to service before 6 April 2005. Once that entitlement had been established then the degree of disablement due to service before 6 April 2005 had to be assessed under article 42 of the SPO 2006. The wording in article 40(1) of the SPO 2006 and section 1 of the Pensions Appeal Tribunals Act 1943 links the injury attributable to service before 6 April 2005 to the disablement then claimed by the ex-serviceperson, as here years later on termination of service.

86. The 2005 cut-off used may have been related to the award made under the AFCS Order 2005. The *Certificate of Entitlement and Assessment* dated 2 June 2010 says this in respect of the low back pain:

> "**The history given at the departmental board and at invaliding as well as reference at doc 127 shows there was intermittent mild back pain prior to 06/04/05. I note the reference to possible fibrous dysplasia in the left sacrum but this is a radiological finding rather than a condition and is not shown to be causing disablement. I have therefore used the label as stated to answer this claim. The Secretary of State accepts military exercises and vehicle recovery work and these factors will have contributed to the back pain prior to 06/04/05 so it is attributable to service. The condition "secondary low back injury has been awarded under the AFCS and is the cause of the current back pain. The pre 06/04/05 back pain was mild and intermittent and will not be contributing to current back disablement. I have therefore assessed this condition as nil."**[5]

For the reasons given above, on the dates as I understand them no AFCS Order 2005 awarding decision had been made on 2 June 2010 and therefore the award under the AFCS Order 2005 ought not to have been taken into account.

[5] It is noteworthy that the focus is on the disablement presenting in early June 2010.

87. It would have been open to the Secretary of State to have decided in terms of entitlement that the back disablement claimed in 2010 was not due to an injury attributable to service before 6 April 2005. Had he done so then in terms of section 1(1) Pensions Appeal Tribunals Act 1943 he would have "**rejected**" that (part of the) claim and a right of appeal against that entitlement decision would then have arisen. However that is not what he decided. On my construction of the entitlement decision and the surrounding legislation, all that was under appeal to the tribunal was an appeal on assessment in respect of the back and knee disablements under section 5(1) of the Pensions Appeal Tribunals Act 1943 as the Secretary of State had not rejected any of the claimed June 2010 disablements as being attributable to an injury caused by service before 6 April 2005.

88. However, this does not mean – as I had wrongly decided on this appeal previously – that it was not open to the Secretary of State or the First-tier Tribunal to assess the extent of disablement resulting from the accepted back injury as nil. The reason why this is so is because of the wide statutory definition given to the word "disablement" in the SPO 2006. Item 27 in Part II of Schedule 6 to the SPO 2006 sets out that "**disablement**" means "**physical or mental injury or damage or loss of physical or mental capacity (and "disabled" shall be construed accordingly)**". That statutory definition, not drawn to my attention before, distinguishing between, but at the same time encompassing both, "injury or damage" *or* "incapacity" is wide enough to encompass a past back injury which is currently asymptomatic. As it was put by Mr Justice Denning (as he then was) in Harris –v- Minister of Pensions [1948] 1 K.B. 422 (at 423):

> "**On that definition, if there is a physical injury or damage, even though not causing any loss of capacity at the moment, that is, nevertheless, a "disablement" within the meaning of the warrant**".

And in *R*(*Scanlon) –v- President of the Pensions Appeals Tribunal and another* [2007] EWHC 471 Admin (at paragraphs [10] to [12]), Mr Justice Langstaff said:

> "**Before me, for reasons which will become apparent, the suggestion that a Tribunal had no power when considering assessment yet accepting entitlement to reduce an assessment to nil was first not pursued by Mr Gearty, who has appeared for the claimant, and later in his submissions accepted as being an entitlement of a Tribunal. Thus, before me, it has been accepted in an appropriate case that a Pension Appeal Tribunal may, whilst recognising that entitlement to assessment of a pension in respect of a disablement exists, nonetheless assess the amount of pension or the amount of disability at nil per cent. For explanation, a simple example of a situation in which that might occur was provided in the letter from the Tribunals Service, to which I have already referred. That letter of 22 January 2007 gives as one example the case of asthma. If asthma were aggravated by service, and it was accepted that that was so such that the serviceman concerned would be entitled to a pension in respect of disability caused to him by the asthma, one could envisage a situation in which he might for a considerable period of time nonetheless suffer no asthmatic symptoms. That might give rise to a situation in which an assessment for the time being was nil. It would leave open the question whether, if there were a recurrence of the asthma, perhaps because of an underlying vulnerability to it aggravated by service, that recrudescence of the asthma would be subject to compensation.**
>
> **It is similarly not difficult to see that constitutional conditions may be aggravated by service. That aggravation may give rise to frank symptoms upon the date of discharge causing a disability which entitles the sufferer to compensation in terms of pension. It may create an additional vulnerability to further disability. It is not difficult to see, however, that such vulnerability may well continue to exist without there always being symptoms. Providing it is once accepted that the vulnerability itself to further outbreaks of symptoms and consequent disablement has been aggravated by an event in service, it is always potentially the case that a subsequent outbreak of symptoms, and the disability resulting therefrom, will give rise to a justified further claim. One can see that at one time in such a case the assessment might be nil per cent; at another time, it may be very substantially more.**
>
> **Other examples are easy to envisage. On that basis, therefore, it has been accepted before me, in my view properly, that a Tribunal has the power in an appropriate case to reduce an assessment to nil per cent whilst recognising that the entitlement remains.**"

89. There is also, as the Secretary of State contends, sound policy reasons for finding entitlement in respect of currently asymptomatic conditions. For example, there may be deterioration in what previously had been a non-disabling condition such as to give rise to disablement.

In this situation, and on the above construction of the statutory scheme, it might then be open to the ex-serviceperson to seek a review of the nil percentage disablement assessment without needing to also show entitlement.

90. Accordingly, what the Secretary of State had decided in this appeal in terms of entitlement was that in 2010 the appellant had a back disablement (in the wide statutorily defined sense) due to an injury that was attributable to service before 6 April 2005, but in terms of assessment of the *degree* of disablement that disablement gave rise to nil percentage disablement. That conclusion was one which was entirely lawful under the terms of the SPO 2006. Whether that nil assessment was in fact correct was, and remains, for the First-tier Tribunal to rule on. What the assessment of disablement under article 42(2)(a) of the SPO 2006 requires is the assessment of the degree of back disablement due to service before 6 April 2005 presenting in June 2010. That will require the careful fact finding I have referred to above. It can, as I have emphasised, as a matter of law have an answer of nil

91. The tribunal however erred in law in shutting out from its consideration on the assessment of disablement on the SPO 2006 appeal the appellant's back condition. Given my conclusion above about the entitlement decision, the tribunal was obliged to assess the extent of the back disablement due to service before 6 April 2005. Moreover, given my earlier conclusion on the sequence of decision making under the SPO 2006 and the AFCS Order 2005 (if it is not factually in error), entitlement under the AFCS Order 2005 could not fall to be taken into account on the SPO 2006 decision and appeal and the preclusion in article 40(2) of the SPO 2006 does not apply.

92. I received submissions and argument on the law of tort and whether a later cause of disablement (under the AFCS Order) may extinguish any prior disablement (under the SPO 2006). Given the way in which the

arguments have developed and my reasoning on them, and those considerations are no longer of central importance, at least at this stage I therefore decline to say anything more on these issues. If necessary they can be subsumed in the issues the next First-tier Tribunal may need to address.

93. For the reasons given above, the tribunal's decision dated 21 September 2011 must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will therefore have to be re-decided by a completely differently constituted First-tier Tribunal. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about how his appeal will be decided on the facts.

94. Given the complex issues that may still arise on the appeal it is hoped that both parties may be able to be represented before the new First-tier Tribunal.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 15th September 2016