IN THE UPPER TRIBUNAL **Case No.** CAF/3487/2016
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 13 July 2016 is set aside and the case is remitted to the First-tier Tribunal to be re-decided in accordance with my reasoning below.

REASONS FOR DECISION

1. This is an appeal, brought with permission granted by Upper Tribunal Judge Turnbull, against a decision of the First-tier Tribunal dated 13 July 2016, whereby it dismissed the claimant's appeal from a decision of the Secretary of State dated 17 February 2015 not to accept that there had been worsening of an injury to the claimant's right hand for the purposes of a claim under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517). The Secretary of State supports the appeal.

2. The claimant, a private in the Royal Logistics Corps, suffered injuries to his right hand in a road traffic accident on 26 January 2009, when returning to barracks from leave. He made a claim under the forerunner of 2011 Order but it was decided that the injury was not caused by service and his claim was rejected on that ground on 2 December 2009 and that decision was maintained on reconsideration on 28 January 2010. He did not appeal.

3. On 17 February 2015, the Secretary of State received a letter from the claimant, who had been discharged from service on medical grounds on 11 May 2010, stating that he had been told that his hand would be permanently deformed and that the Army had "contributed greatly to this malfunctioning of my hand". He provided further details about the circumstances in which he had been travelling back to his barracks when the accident occurred and also stated that he had been downgraded as a result of his injuries and was limited in what he could do. In particular, he said that, although he had been put on light duties, he had been assigned to the armoury where the frequent lifting of weapons "made my hand no better". He also referred to the difficulties he had had since leaving the Army. There was a response to that letter that is not in the papers before me, as a result of which the claimant wrote again on 16 March 2015, specifically alleging that his current disablement was due to "the work the Army subjected me into after my hand surgery".

4. The claimant was treated as having made a claim under article 9 of the 2011 Order, which provides –

> "**Injury made worse by service**
> **9.**—(1) Subject to articles 11 and 12, benefit is payable to or in respect of a former member of the forces by reason of an injury made worse by service if the injury—
> (a) …,
> (b) …, or

> (c) arose during service but was not caused by service,
>
> and in each case service on or after 6th April 2005 was the predominant cause of the worsening of the injury.
>
> (2) Benefit is only payable under paragraph (1) if the injury has been worsened by service and remains worsened by service on—
>
> (i) the day on which the member's service ends; or
>
> (ii) the date of claim if that date is later.
>
> (3) ….
>
> (4) ….
>
> (5) In the case of paragraph (1)(c), benefit is only payable if the member—
>
> (a) was downgraded within the period of 5 years starting on the day on which the member sustained the injury and remains continually downgraded until service ends; and
>
> (b) the worsening was the predominant cause of the downgrading."

5. On 29 June 2015, the claimant was told that his claim had been rejected. The reason given was –

> "The scheme rules state that benefit is only payable by reason of worsening by service if the worsening was the predominant cause of your downgrading. The available medical evidence confirms that the reason for your downgrading was as a protective measure because of the ongoing condition and not the worsening of your condition. As such no benefit is payable by reason of worsening."

On 10 July 2015, the Secretary of State received a further letter from the claimant, which was treated as a letter of appeal. The decision notified on 29 June 2015 was reviewed, but not revised, on 3 December 2015 and so the case came before the First-tier Tribunal. The claimant set out his case in some detail in a witness statement that was handed in at the hearing, at which he was represented by the Royal British Legion.

6. When dismissing the appeal, the First-tier Tribunal said in its statement of reasons –

> "16. It was also submitted on the Appellant's behalf that while downgraded, which included a restriction on his handling weapons, he was required to 'handle weapons' while employed in his unit armoury. It was put to the Appellant that a restriction on handling weapons refers to a soldier's ability to handle a weapon in order to be able to fire it, either operationally or while training; the restriction is not intended to prevent his being responsible for weapons in an armoury, including the requirement to strip and clean them. The Tribunal preferred its knowledge as an expert Tribunal to the Appellant's opinion on this point.
>
> 17. The Tribunal could not accept the Appellant's contentions that he had been required to undertake activities as part of his duties which led to deterioration or worsening of his right hand. The medical records show that the injury to his index finger recovered, and the effects of the injury to his right thumb were reduced by appropriate treatment and by limiting the activities the Appellant was required to undertake. The evidence showed there was an improvement, not any worsening, during service.

> 18. The Tribunal could not identify any causal service factor that led to any worsening nor any reduction in the progress of recovery from the injury. Accordingly, the Tribunal could not allow the appeal."

7. The claimant applied for permission to appeal, which was refused by the First-tier Tribunal but granted by Upper Tribunal Judge Turnbull. Although Judge Turnbull did not expressly limit his grant of permission, he rejected contentions that there were material errors of law in paragraphs 12 and 15 of the statement of reasons and I also do so for the reasons that Judge Turnbull gave. However, he found there to be two arguable errors of law in paragraphs 16 and 17 of the statement of reasons.

8. As regards the first, Judge Turnbull said –

> "The finding that the Appellant's medical downgrading was not intended to prevent him dealing with weapons in the armoury, including stripping and cleaning them, may have overlooked the fact that the downgrading on 12 March 2009 (p.47) stated that "he should do desk based jobs only to prevent further injuries.' Arguably carrying, and stripping, heavy weapons, if that is what the Appellant was required to do, was inconsistent with that."

In its context, the word "heavy" was clearly used by Judge Turnbull merely because it was the claimant's contention that the weight of weapons such as general purpose machine guns, light machine guns and SA80s was what made them dangerous to his recovery, rather than as part of a term "heavy weapons" referring to a particular category of weaponry.

9. The Secretary of State agrees with the claimant and submits that "Weapon handling" would include stripping and cleaning of weapons. However, it seems to me that the meaning of that phrase in the context of the particular documents in which it appeared was a question for the First-tier Tribunal. On the other hand, the medical board of 12 March 2009 not only said that the claimant was unable to "use a weapon" but also that he was unable to "lift any weight or make a fist" and the "light Duties Proforma" of 16 September 2009 not only said that the claimant was unfit for "Weapon handling" but also that he was unfit for other activities, such as "Heavy lifting" (which is arguably an even less precise term) and "Upper body PT". Therefore, whatever the strict meaning of "Weapon handling", there were other restrictions on the claimant's employability and, perhaps inevitably, a certain amount of judgment was required by those tasked with finding work for the claimant to do. However, I cannot see why it mattered whether the claimant working in the armoury was in breach of the terms of medical restrictions or not. The 2011 Order provides for a no-fault scheme of compensation. If damage arising from working in the armoury was the predominant (or only) cause of a worsening of the injury to the claimant's hand, he fell within the terms of article 9(1)(c) whether or not he should have been required to work there. Moreover, on any view, he was still undertaking only a restricted range of duties by comparison to those he would have been obliged to undertake had he been fully fit.

10. The Secretary of State appears to submit that there is no evidence to support the contention that the claimant was in fact "dealing with heavy weapons", on the

basis, as I understand his submission, that the medical records show that he ought not to have been doing so and also do not show that he ever complained about being required to do so. However, that is to ignore the claimant's own evidence, both written (in his letter of 16 February 2015) and oral (in which specific reference is made to stripping weapons – see, for example, docs 74 and 80), and also, as the claimant has pointed out in his reply, the testimonial from his commanding officer (doc 36, reverse), which confirms that he had been "responsible for the safe storage of weapons and ancillaries" and so supports his contention that he had been working in the armoury and the farewell card from his colleagues (doc 37 and, now, 126 and 127). On the other hand, the Secretary of State is on stronger ground in submitting that the First-tier Tribunal did not make any clear finding as to whether the claimant did work in the armoury and, if so, whether that work had any impact on his injury, although it might perhaps be inferred from paragraph 16 of its statement of reasons that the First-tier Tribunal did not doubt that the claimant had worked in the armoury and, from paragraphs 17 and 18, that it considered that that work did not cause him any harm.

11. This brings me to the second ground upon which Judge Turnbull gave permission to appeal. He said –

> "If, as a result of that activity, the injury to the Appellant's thumb did not recover to the extent that it would otherwise have done, as a result of which his downgrading was continued on 9 September 2009, it is arguable that the terms of article 9(1) and (5) of the 2011 Order were satisfied in that (a) the exacerbation of the injury such that it does not recover to the extent anticipated may for this purpose constitute a 'worsening' and (b) that 'worsening' may have been the predominant cause of the downgrading on 9 September 2009. It does not appear to be necessary that the initial downgrading on 12 March 2009 was also due to a worsening caused by service."

12. On this point, the Secretary of State merely says that he "would agree that article 9(5) has not been addressed". I take that to be agreement with the point that Judge Turnbull was making. In any event, I agree with Judge Turnbull, although I would stress that in using the word "anticipated", he presumably meant "would have been anticipated", rather than "was anticipated". In other words, the exacerbation must be such that the claimant does not recover from the injury to the extent that he or she otherwise would have done. What was anticipated at the time is not determinative, although obviously that would be taken into account when considering retrospectively what would have happened but for the exacerbation.

13. So, the question in this case was whether, as a result of working in the armoury, the claimant's recovery from his hand injury was delayed or prevented so that he remained downgraded until the end of his service when otherwise he would not have been downgraded until then to the same extent or at all. The First-tier Tribunal's finding in paragraph 18 of the statement of reasons that there was no "causal service factor that led to … any reduction in the progress of recovery from the injury" does, in my judgment, provide an answer that question.

14. However, the Secretary of State submits that the First-tier Tribunal has not given sufficiently detailed reasons for its conclusion and I am prepared to accept that

concession because the claimant had relied on the medical evidence as showing that he was not recovering to the extent expected and the First-tier Tribunal has not addressed those contentions.

15. Accordingly, on that limited ground, I allow this appeal and remit the case to the First-tier Tribunal.

16. Finally, I observe that the Secretary of State included in his response to the appeal, the following paragraph –

> "10. In the event that the Appellant requests an oral hearing the Respondent requests that he be afforded the opportunity of representation."

In the event, neither party asked for an oral hearing and I have been able to determine the appeal without one (see rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)). However, if the claimant had asked for an oral hearing and the Upper Tribunal had directed one, the Secretary of State would have been entitled to, and would have been given, notice of the hearing and he would also have been entitled to be represented at it (see rules 11, 35 and 36). Moreover, if the direction for a hearing had been made without obtaining further representations from the Secretary of State (as would usually have been the case) and he had wished to object to there being a hearing, he would have been entitled to apply for the direction to be set aside (see rule 6(5)). Consequently, there is no need for the Secretary of State to include in a response to an appeal the kind of request that he did in this case. He need only say whether or not he wants there to be a hearing (see rule 24(3)(f)), so that the Upper Tribunal can take that view into account when deciding whether to direct one. Unlike the First-tier Tribunal, the Upper Tribunal is not bound to hold an oral hearing merely because a party asks for one, but it must have regard to the parties' views (see rule 34(2)).

Mark Rowland
14 September 2017