IN THE UPPER TRIBUNAL **Appeal No. CAF/1362/2020**
(ADMINISTRATIVE APPEALS CHAMBER) **UA-2020-001264-CAF**

On Appeal from the First-tier Tribunal (War Pensions and Armed Forces Compensation ASS/00427/2019

BETWEEN

Appellant JOC

and

Respondent THE SECRETARY OF STATE FOR DEFENCE

BEFORE UPPER TRIBUNAL JUDGE WEST

Hearing date: 26 April 2022

Decision date: 18 July 2022

Representation: Mr Glyn Tucker (for the Appellant)
(instructed by the Royal British Legion)

Mr Adam Heppinstall QC, counsel (for the Respondent)
(instructed by the Government Legal Department)

DECISION

The decision of the First-tier Tribunal sitting at Birmingham on 25 February 2020 under file reference ASS/00427/2019 does not involve an error of law. The appeal against that decision is dismissed.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This decision concerns hearing disablement in a "spanning" case, where the claimant's military service both predated and postdated 6 April 2005 and how to deal with hearing disablement arising due to his different periods of service, which are governed by separate statutory codes of compensation.

2. This is an appeal, with my permission, against the decision of the First-tier Tribunal sitting at Birmingham on 25 February 2020.

3. I shall refer to the appellant hereafter as "the claimant". The respondent is the Secretary of State for Defence. I shall refer to him hereafter as "the Secretary of State". I shall refer to the tribunal which sat on 25 February 2020 as "the Tribunal".

4. The claimant was discharged from Territorial Army service on medical grounds on 23 November 2017. The effect of article 35(2) of the Naval, Military and Air Forces etc. (Disablement and Death) Service Pensions Order (SI 20067/606) ("the 2006 Order") was that the Secretary of State was required to consider whether a war pension was payable under the 2006 Order without a claim being made by the claimant.

5. In his original decision dated 19 June 2018 the Secretary of State accepted that the claimant's hearing loss was due to his military service between 1984 and 6 April 2005 for the purpose of article 40 of the 2006 Order and assessed the hearing loss as 53dB (right ear) 62 dB (left ear) at 30% final.

6. However, on 10 December 2018 the Secretary of State purported to exercise his power to carry out a review of that decision pursuant to article 44 of the 2006 Order and produced a further certificate which changed the assessment of the hearing loss to Nil. In summary, the ground for the review

was expressed to be "a change in the climate of medical opinion" and "further clarification of policy and instruction to take account of the first available audiogram after 06 04 2005", namely an audiogram dated 26 February 2009. That is a reference to an audiogram of that date which showed that the level of hearing loss at that date in the left and right ears at 1, 2 and 3 kHz was significantly less than 50 dB in each ear. The original assessment was therefore overturned. The revision continued:

> "In this spanning case, it is appropriate to separate hearing disablement arising due to his SPO and AFCS periods of service.
> The assessment is based upon the audiogram dated 26.2.09, which equates to a nil assessment. Under these circumstances, consideration under the Armed Forces Compensation Scheme for the post-6.4.2005 service period, is advised".

7. The claimant appealed against that decision. The matter came before the Tribunal on 25 February 2020 when the claimant appeared with his wife and his representative, Mrs Green of the Royal British Legion, and gave oral evidence. The Secretary of State's representative, Mr Frith, appeared by telephone.

The Decision Notice

8. The Tribunal dismissed the appeal by a majority. In its decision notice dated 26 February 2020 the decision of the majority was to uphold the Secretary of State's assessment on review as notified on 14 December 2018 of nil% (final) in respect of bilateral noise induced sensorineural hearing loss (1984-2005).

9. The service member's dissenting decision was to allow the appeal against the assessment as the grounds given for the decision to carry out the review and the decision to review the award to the detriment of the claimant (a change in medical opinion) were flawed and unsubstantiated and in any event the basis for assessment entailed an incorrect reading of article 42(8) of the

2006 Order as it failed to assess his hearing loss at termination of his complete service.

The Statement Of Reasons

10. In its statement of reasons, so far as material, the Tribunal stated that

> "**The hearing**
> 3. The Appellant attended the hearing accompanied by his wife and was represented by Mrs Green of the Royal British Legion. The Secretary of State was represented by Mr A Frith, who attended the hearing by telephone.
>
> **The proceedings**
> 4. The Appellant suffers from Bilateral noise induced sensorineural hearing loss and associated tinnitus. This significantly impairs his ability to participate in ordinary conversations even with the assistance of hearing aids. In order to accommodate the participation of Mr Frith in the hearing, the telephone speaker was moved closer to the area in the hearing room where the Tribunal was sitting.
>
> 5. The hearing commenced initially at 10.04 am and after the Tribunal Judge's introduction, Mr Frith was asked to introduce the Secretary of State's case.
>
> 6. It became clear within seconds that the Appellant was struggling to hear Mr Frith and (with his agreement) the Appellant moved to an area in the hearing room within some 10 feet of the telephone and the Tribunal. The Tribunal Judge checked throughout the hearing that the Appellant was able to participate in the proceedings and he was invited to draw attention to any parts of the proceedings that he could not hear properly so they could be repeated.
>
> 7. The Tribunal also adjourned for some 6 minutes shortly after the commencement of the Appellant's evidence, when the Appellant became distressed. During each adjournment, the telephone connection with Mr Frith at Veterans UK was disconnected. The connection was made again when the Appellant and his representative had entered the hearing room.
>
> **Decision**
> 8. The majority decision of the Tribunal is to uphold the assessment of the Secretary of State upon review as

notified on 14th December 2018 of Nil% (Final) in respect of the following condition: Bilateral noise induced sensorineural hearing loss including tinnitus (1984-2005) ("the hearing loss").

9. In these reasons references to the page numbers in the Response are in [].

The nature of the appeal

10. The Appellant was discharged from Territorial Army service on medical grounds on 23 November 2017. The effect of article 35(2) of the Naval, Military and Air Forces etc. (Disablement and Death) Service Pensions Order (SI 20067/606) ("the 2006 Order") is that Veterans UK were required to consider whether a War Pension was payable under the 2006 Order without a claim being made by the Appellant in such circumstances.

11. The Secretary of State by a decision evidenced by a certificate of entitlement and assessment dated 19th Judge 2018 [5-7] accepted the hearing loss was due to the Appellant's service between 1984 and 6th April 2005, for the purpose of article 40 of the 2006 Order and assessed the hearing loss as 53dB (right easer [sic]) 62 dB (left ear) at 30% final.

12. On 10th December 2018 the Secretary of State purported to exercise his power to carry out a review of that decision pursuant to article 44 of the 2006 Order (see the record of the decision at [10] and produced a further certificate of 10th December 2018 which changed the assessment of the hearing loss to Nil. In summary, the ground for the review was expressed to be "a change in the climate of medical opinion": see [7] and "further clarification of policy and instruction to take account of the first available audiogram after 06 04 2005" namely the audiogram dated 26 02 2009: see [7] (reverse] [sic]. This is a reference to an audiogram contained on the reverse of a page [32] being part of a Medical Board of the same date which showed that the level of hearing loss at that date in the left and right ears at 1, 2 and 3 kHz was significantly less than 50 dB in each ear.

Scope of this appeal

13. On about 8th March 2019 the Appellant sought a review of his hearing loss: see application at pages [84-90]. According to the terms of reference, the decision made on that review was not the subject of this appeal

and any decision upon that review application is not the subject of the decision considered in these reasons or the decision under appeal".

Statutory framework for this appeal

14. This appeal arises under section 5 of the Pensions Appeal Tribunals Act 1943 (as amended) ("the Act"). The Tribunal applied the legal framework set out in the Act and in Articles 1, 5, 42 and 44 of the 2006 Order. Accordingly, the Tribunal has not taken into account circumstances that did not obtain at the date of the decision.

The effect of the relevant statutory provisions

15. The Tribunal's task is to look at the decision under articles 42 and 44 of the 2006 Order and decide whether it was rightly made for the grounds stated, given the circumstances that obtained on that date.

…

"**Proceedings at the hearing**

19. The Tribunal considered the Response (114 pages), the evidence of the Appellant and submissions by Mrs Green and Mr Frith, both very experienced representatives.

20. In summary the Tribunal finds as follows in relation to the Appellant's hearing loss:

a. The Appellant was born in 1963. He served between 1984 and November 2017 with a number of cap badges including The Infantry, the Royal Artillery and towards the end of his service the Royal Logistics Corps he achieved the rank of Major, a very responsible role.

b. The Secretary of State accepted the description of his duties in the report of Lt Col Banfield Consultant ENT Surgeon, in the clinic letter of 16 January 2015 at [39-40] where it was said the Appellant had done a lot of work on the ranges likely to have exposed him to potentially damaging loud noise. At that stage, hearing loss was described as severe across the frequency range but most marked in the high tone frequencies.

c. The Appellant gave a history of extensive in service shooting running ranges and competition ranges. He organised competitions and took part in the

competitions. From about 1984 -1996 he was involved in duties of a gun position officer.

d. Despite extensive questioning the Appellant did not appear to have been exposed to explosions or other acoustic trauma giving rise to the hearing loss.

e. The audiogram dated 26 02 2009 was found on the reverse of page [32] being part of a Medical Board of the same date which showed that the level of the hearing loss at that date in the left and right ears at 1, 2 and 3 kHz were significantly less than 50dB in each ear.

f. There are later audiograms of 17 04 2009 at [33] and 26 03 2010 at [34] which showed that the level of the hearing loss at that date in the left and right ears at 1, 2 and 3 kHz were significantly less than 50dB in each ear.

g. There were other audiograms in the Response in 1998 [30] and 2002 [31] which showed a similar but not identical pattern of hearing loss in the left and right ears at 1, 2 and 3 kHz at levels significantly less than 50dB in each ear.

h. As far as can be ascertained from the audiograms in the response thereafter undertaken in 2011 [35], 2012 at [36] and 2013 at [37], the first time the average of hearing loss in the left and right ears at 1, 2 and 3kHz exceeded 50 dB appears to have been in 2013: see the audiogram at [37] dated 16 08 2013.

i. The Tribunal was informed by the Appellant that he had been considered for an award for hearing loss under the Armed Forces Compensation Scheme ("the AFCS") after he left service but no award had been made. The Appellant was uncertain but Mrs Green thought that award had been rejected because it had not been shown that the requisite level of hearing loss was caused by service after 6th April 2005 (the period that is covered by the AFCS). None of the AFCS papers were available to the Tribunal, which was accordingly unable to reach a concluded view about this issue."

The Majority Decision

11. The Tribunal was, however, split as to the correct disposal of the appeal.

The analysis of the majority was that

"**Analysis – majority decision**

21. The Tribunal's task is to make an assessment of disablement at the date of the decision in accordance with articles 5, 42 and 44 of the 2006 Order.

22. The award under the 2006 Order can only relate to service before 6th April 2005: see article 5 of the 2006 Order read with item 54 of part II of Schedule 6 to the 2006 Order applied by article 1(2) of the 2006 Order.

23. Article 42(8), 42(10) and part VI of Schedule 1 to the 2006 Order are drafted on the assumption that that [sic] average hearing loss for each ear at 1, 2 and 3 kHz is 50 dB or more at termination of service. Those provisions were however all drafted when the War Pension Scheme was the only scheme in force and the AFCS did not apply to hearing loss due to service after 6th April 2005.

24. Article 42(9) of the 2006 Order contemplates that earliest available evidence of the degree of disablement due to service whether in terms of audiometric test or other evidence relevant to level of hearing loss at termination of service. These provisions are directed to assessing disablement due to "service" as defined by the 2006 Order, that is to say service before 6th April 2005.

25. The ground given by the Secretary of State for the review of the June 2018 decision "change in climate of medical opinion" is inaccurate and less than frank. No such change is hinted at or referred to in the evidence. Whether the review took place under article 44(1) and/ or 44(2) or article 44(4) of the 2006 Act, the real reason for the change in the Secretary of State's approach is that the June 2018 decision was made as the result of a mistake [as to] a material fact or as to the law, namely that the 2017 audiogram was good evidence of hearing loss caused by (i.e. due to) service before 6th April 2005.

26. The Majority of the Tribunal disagree with the service member's approach to interpretation of article 42 of the 2006 Order which places emphasis upon assessing the hearing loss at termination of service, partly because under article 5(2) no claim for War Pension can be made or take effect until termination of service. In the majority's view the provisions of the 2006 Order cannot be properly read as to enable or require hearing loss due to service before 6th April 2005 to be assessed by audiograms or other evidence at termination of service

> many years after that date where there is available evidence much closer to 6th April 2005.
>
> 27. The Tribunal Judge and Medical member would dismiss the appeal but encourage the Appellant to seek urgent advice about whether an appeal against the refusal of an award under the relevant AFCS Scheme might succeed."

The Minority Decision

12. The service member dissented:

> "28. Grounds for carrying out a review. The reasons given for carrying out the review are on page [7] of the Response. At paragraph 4 the box has been ticked for "a change in the climate of medical opinion" not a change in the interpretation of the law. At the hearing, Mr Frith the Vets (UK) rep was given the opportunity to explain further why the review had been carried out but was not able to provide any fuller explanation. The narrative on the reverse of Page [7] indicates that it was a "clarification of policy" by the Vets (UK) Medical Advisors. RBL submitted that this reflected a change in the interpretation of the law, not the law itself. My view is that neither a change in the climate of medical opinion, nor a change in interpretation of the law meets the criteria under Article 44(4) for a revision of the assessment to the detriment of the appellant. Therefore, the appeal should succeed and the original assessment of 30% should stand.
>
> **Date used for "termination of Service"**
>
> 29. Whilst the above reason is a technical ground as to why the Appellant's assessment should not be reduced, there is a more substantive issue in this appeal which is likely to affect many more Servicemen. That is the date at which hearing loss is measured, both for this Appellant and for others in a similar position who have served under both the SPO and AFCS. It is clear from the evidence before us that the Appellant has been subjected to loud noise throughout his service and that this has given rise to hearing loss. This fact is not disputed.
>
> 30. The original award was based on his level of disability from hearing loss at the date nearest to his

actual release from his Service in the armed forces. This is recorded in the medical board of 17 [April] 2017, which led to his medical discharge. At this time, the average hearing loss at 1, 2 & 3 kHz was recorded at 53dB in the right ear and 62dB in the left ear. This gave rise to an award of 30% under the 2006 Order and includes all the hearing loss caused by the whole of his service in the armed forces.

31. When the award was revised, under current Vets UK policy, only the hearing loss at the date nearest to April 2005 when the SPO was replaced by the AFCS was measured. In the Appellant's case this was from an audiogram in 2009 recorded on page [33] of the Response. At this time his average hearing loss in the left ear was 28dB, and in the right 33dB. This is below the threshold for an award under the 2006 Order.

32. The Vets UK case is that after 2005 the Appellant's hearing was not damaged further by Service "under the SPO". The reason for my dissenting opinion is that I believe that his hearing was damaged due to serv[ic]e up to his medical discharge in 2017, and the current Vets UK policy of dividing hearing loss into separate periods of Service when neither the SPO or the AFCS was in force is wrong.

33. My reasoning is supported by the fact that no Serviceman's claims under the SPO are accepted until the termination of their complete period of Service not just their SPO Service – otherwise all Servicemen would immediately have been entitled to SPO awards from April 2005. Similarly, the period for which Article 40 is replaced by Article 41 for consideration of entitlement is 7 years after "the termination of Service" – not the termination of "SPO Service" in 2005.

34. So, for these legal purposes, termination of Service means termination of all Service. The Vets UK use of the date of April 2005 as "termination of Service" for the measurement of hearing loss in the Appellant's case (and in other cases) is inconsistent with its other legal interpretation of termination of Service. Because of the specific high levels of hearing loss required for an award under either the SPO or the AFCS this inconsistency works to the disadvantage of the claimant. In the Appellant's case very significantly to his disadvantage.

> 35. We considered this claim under the 2006 Order alone, in accordance with the Terms of Reference for the Appeal on page [1] of the response. We did not consider the Appellant's hearing loss under the AFCS, although we noted that at page [82] Vets UK informed him that they would advise their colleagues to consider his hearing loss under the AFCS, and that at page [114] they noted that his hearing loss had been disallowed under the AFCS. It became apparent at the hearing that the Appellant had not yet appealed the AFCS decision, but he was still in time to do so. Because there was no appeal yet under the AFCS we decided to carry on with this appeal, although if there had been an AFCS appeal we would have adjourned the case to have both matters heard together.
>
> 36. At the end of his Service, the Appellant has been left with a significant hearing loss, caused by exposure to high levels of noise in Service. The hearing loss would attract a significant award if it was considered under the SPO – as it was in the original award. If it was all considered under the AFCS it would also be assessed at level 8 – a substantial award. The way that only part of [his] hearing loss due to Service is being considered in this case by Vets UK is unjust and wrong, and that is why I would allow the appeal."

The Appeal

13. The claimant sought permission to appeal, which was refused by the senior judge of the Chamber on 3 July 2020. That decision was issued to the parties on 23 July 2020. The claimant applied to the Upper Tribunal for permission to appeal on 21 August 2020, essentially on the basis of the service member's dissenting decision. On 21 October 2020 I acceded to that application and granted him permission to appeal.

14. The matter was originally due to be heard in Birmingham on 11 October 2021, but had to be adjourned because of the sad death of the Secretary of State's representative shortly before the hearing. I eventually heard the appeal in Birmingham on the morning of 26 April 2022. The claimant was represented by Mr Glyn Tucker of the Royal British Legion. The Secretary of State was represented by Mr Adam Heppinstall QC of counsel. I am obliged to both of them for their clear and economical submissions.

The Legislation

15. The appeal arises under the Pensions Appeal Tribunals Act 1943 ("the Act").

16. So far as is material, the 2006 Order provides (with emphasis added for ease of reference) that

> "General conditions for Part II
>
> 5(1) 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.
>
> (2) An award in respect of the disablement of a member shall not be made to take effect before the termination of his service or, in the case of an officer, while he is an officer on the Active List.
>
> (3) Except where paragraph (4) applies, *an award under this Part of this Order shall not be made in respect of—*
>
> (a) *noise-induced sensorineural hearing loss*; or
>
> (b) a related condition or symptom if it is accompanied by noise-induced sensorineural hearing loss
>
> *unless the degree of disablement from that loss alone is assessed as being at least 20 per cent.*[1]
>
> (4) Where the degree of the disablement in respect of noise-induced sensorineural hearing loss, or in respect of such hearing loss and a related condition or symptom, is assessed at less than 20 per cent, and a claim for an award in respect of that disablement was made prior to 7th January 1993, payment of any award resulting from that claim shall be made as though paragraph (3) were omitted.
>
> **…**

[1] For the reasons behind this provision, see *War Pensions and Armed Forces Compensation: Law and Practice* (Andrew Bano, 2nd ed., 2022) at 8.10.

Determination of degree of disablement

42(1) *The following provisions of this article shall apply for the purposes of the assessment of the degree of the disablement of a member of the armed forces due to service before 6th April 2005.*

(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;

…

(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.

(3) Where the average hearing loss at frequencies of 1, 2 and 3 kHz is not 50 dB or more in each ear, the degree of disablement in respect of that loss shall be assessed at less than 20 per cent.

(4) Neither noise-induced sensorineural hearing loss nor a related condition or symptom shall be taken into account in determining a member's total degree of disablement if the degree of disablement in respect of that loss alone is less than 20 per cent.

(5) The degree of disablement assessed under the foregoing provisions of this article shall be certified by way of a percentage, total disablement being represented by 100 per cent (which shall be the maximum assessment) and a lesser degree being represented by such percentage as bears to 100 per cent the same proportion as the lesser degree of disablement bears to total disablement, so however that a degree of disablement of 20 per cent or more shall be certified at a percentage which is a multiple of 10, and a degree of disablement which is less than 20 per cent

shall, except in a case to which Table 1 of Part III of Schedule 1 applies, be certified in a manner suitable for the purposes of Table 2 of Part III of that Schedule.

(6) Where a disablement is due to an injury specified in Part V of Schedule 1 or is a disablement so specified, and, in either case, has reached a settled condition, the degree of that disablement shall, in the absence of any special features, be certified for the purposes of this article at the percentage specified in that Part as appropriate to that injury or to that disablement.

(7) An assessment of the degree of disablement due to service in respect of noise-induced sensorineural hearing loss shall be based solely on hearing loss due to service and shall not include any hearing loss due to age or other factors which are not related to service as a member of the armed forces and which arise after service.

(8) Noise-induced sensorineural hearing loss shall be measured by reference to audiometric tests, where available, conducted at or about the termination of the member's service and the degree of disablement due to service shall be assessed in accordance with paragraph (10).

(9) Where no such tests were conducted or are available, the assessment of the degree of disablement due to service shall be informed by the earliest available evidence, whether in terms of audiometric tests or other evidence relevant to the level of hearing loss that existed at termination of service and the assessment shall have regard to the relative percentages of degrees of disablement and measured hearing loss specified in Table 1 of Part VI of Schedule 1 but any hearing loss arising after termination of service shall not be included in the assessment.

(10) Subject to paragraphs (7), (8), (9) and (11), the degree of disablement in respect of noise-induced sensorineural hearing loss which is due to service shall be assessed by—

(a) determining the average total hearing loss for each ear at 1, 2 and 3kHz frequencies; and then by

(b) determining the percentage degree of disablement for each ear in accordance with Table 1 of Part VI of Schedule 1; and then by

(c) determining the average percentage degree of binaural disablement in accordance with the following formula: ((degree of disablement of better ear x 4) + (degree of disablement of worst[2] ear)) divided by 5; and

(d) in subparagraph (c) "better ear" means that ear in which the claimant's hearing loss is the less and "worse ear" means that ear in which the claimant's hearing loss is the more.

(11) Paragraphs (8), (9) and (10) shall not be applied so as to reduce any award made prior to 12th April 2004.

(12) For the purpose of determining the percentage degree of disablement in Table 1 of Part VI of Schedule 1, any fraction of an average hearing loss shall, where the average hearing loss is over 50dB, be rounded down to the next whole figure.

…

Review of decisions, assessments and awards

44(1) Subject to the provisions of paragraphs (3), (4) and (5) and to the provisions of paragraph (8)—

(a) any decision accepting or rejecting a claim for pension; or

(b) any assessment of the degree of disablement of a member of the armed forces; or

(c) any final decision that there is no disablement or that the disablement has come to an end

may be reviewed by the Secretary of State at any time on any ground.

(2) Subject to the provisions of paragraphs (4), (5), (8) and (9), *any award under this Order may be reviewed by*

[2] This is a typographical error. The word should be the comparative adjective "worse" as the next sub-paragraph makes clear.

the Secretary of State at any time if the Secretary of State is satisfied that—

(a) the award was made in consequence of ignorance of, or a mistake as to, a material fact, or of a mistake as to the law;

(b) there has been any relevant change of circumstances since the award was made;

(c) the award was based on a decision or assessment to which paragraph (1) of this article applies, and that decision or assessment has been revised.

…

(4) Subject to the provisions of paragraph (9), *following a review under paragraph (1) of any decision accepting a claim for pension or any assessment of the degree of disablement of a member of the armed forces, that decision or assessment may be revised by the Secretary of State to the detriment of a member of the armed forces only where the Secretary of State is satisfied that—*

(a) the decision or assessment was given or made in consequence of ignorance of, or a mistake as to, a material fact, or of a mistake as to the law; or

(b) …

(c) there has been a change in the degree of disablement due to service since the assessment was made.

(5) *An award under this Order may be revised by the Secretary of State to the detriment of a member of the armed forces only where the Secretary of State is satisfied that—*

(a) the award was made in consequence of ignorance of, or a mistake as to, a material fact, or of a mistake as to the law; or

(b) there has been any relevant change of circumstances since the award was made; or

(c) the decision or assessment upon which the award was based has been revised under paragraph (4).

> (6) Subject to the provisions of paragraphs (4) and (5), on a review under this article, the Secretary of State may maintain or continue, vary or cancel the decision, assessment or award and any revised decision, assessment or award shall be such as may be appropriate having regard to the provisions of this Order".

The AFCS Appeal

17. As mentioned above, the claimant had also mounted an appeal under the Armed Forces Compensation Scheme ("AFCS") under reference AFCS/00643/2021, which was heard in Birmingham on 2 March 2022 (when the claimant was again represented by Mr Tucker; the Secretary of State was represented by Mr Ferguson). That appeal was resolved in his favour. The unanimous decision of that tribunal was to allow the claimant's appeal. The Tribunal found that his bilateral noise induced sensorineural hearing loss was predominantly caused by his service after 6 April 2005.

18. In its statement of reasons of 4 March 2022 it stated that

> "1. The appellant, who was born on 11 November 1963, served in Territorial Army and Reserves between 1984 and 2017. His service therefore spanned periods during which first the Service Pensions Order (SPO) and subsequently the Armed Forces Compensation Scheme (AFCS) were in force.
>
> 2. The appellant had hearing problems and, as he approached the termination of his service, an audiogram on 14 April 2017 revealed an average hearing loss at frequencies of 1, 2 and 3 kHz of 50dB and 70dB in each ear [101].
>
> 3. The tribunal was asked to determine whether this hearing loss, which was sensorineural in nature, was predominantly caused by his service after 06 April 2005, the period during which the AFCS was in force.
>
> 4. The tribunal, in determining this issue, had regard to the fact that the respondent had already accepted that the appellant had experienced hearing loss during his period of service covered by the SPO and that this was

attributable to service. After an initial error, his disablement from this condition had been assessed at 0% in accordance with the rules for hearing loss assessment in Article 42 of the scheme.

5. The tribunal heard oral evidence from the appellant, who gave a detailed account of serving as a Range Conducting Officer, a role in which he would run military firing ranges for his own and other units. These ranges would often run for several continuous days at a time and he estimated that between 2,000 and 3,000 rounds would typically be fired each day.

6. As the officer responsible for both instruction and safety, although the appellant was issued with ear protection, he felt unable to perform his role without removing it. This was because of a need to remain aware of what was happening on the range and to be vigilant of possible dangers, and because of the need to answer questions and give instructions. He stated he *needed to keep one ear open at all times* to ensure the safety of others on the range. As a consequence, during his service he had prolonged exposure to loud high frequency noise.

7. The appellant further explained that, although there was reference in the Response to him shooting recreationally, this was incorrect. The appellant had been involved in competition shooting, but this had always been in a service environment.

8. The tribunal was careful to establish the dates of the appellant's noise exposure. He explained that between 2005 and 2009 he had continued to organise and conduct ranges on a regular basis and that, even after problems with his hearing had been identified in 2009, this continued. He explained that the frequency of this activity only began to decrease in 2014 and that in his final training year 2015-16 he only did 8 to 10 days shooting. The tribunal also noted that the appellant was not exposed to excessive noise in his civilian occupation.

9. The appellant's oral evidence was not challenged by Mr Ferguson and the tribunal found him to be an honest witness who gave a clear and cogent account of his experiences. The tribunal consequently found that

> during his AFCS service he was exposed to noise that was likely to lead to sensorineural hearing loss.
>
> 10. The appeal, however, was complicated by the fact that the appellant also served during the currency of the SPO. The tribunal therefore sought to determine the level of his hearing loss in or around 2005, when this scheme was replaced with the AFCS.
>
> 11. The closest audiogram to the end of SPO service was from 2003 and showed hearing loss averaged over 1, 2 and 3 kHz of 15dB in each ear [87].
>
> 12. By 2009, 4 years into the appellant's AFCS service, a period during which the tribunal accepted there was significant noise exposure, an audiogram showed his hearing had deteriorated, with readings over the same frequencies averaging over 30 dB per ear [76].
>
> 13. By the time the noise exposure was eradicated, an audiogram dated 17 November 2016 indicated an average hearing loss at 1, 2 and 3 kHz of approximately 60 and 50dB [106] and, as stated above, an audiogram on 14 April 2017 showed 50 and 70dB.
>
> 14. In these circumstances, the tribunal was of no doubt that the majority of the appellant's hearing loss had occurred during his AFCS service and that, having regard to his level of noise exposure, that this hearing loss was noise induced.
>
> 15. Having regard to the findings above, the tribunal concluded on a balance of probabilities that the appellant's noise induced sensorineural hearing loss was predominantly caused by service during the period covered by the AFCS.
>
> 16. Consequently, the appeal was allowed."

19. The Secretary of State did not appeal that decision. Instead on 7 April 2022 he implemented the decision by making a lump sum payment to the claimant. He was also to receive a monthly guaranteed income payment which would be paid monthly, but which needed to be calculated separately.

20. As the Secretary of State explained, following his successful appeal, the case had been referred to a medical adviser who recommended that the most appropriate award for his hearing loss was Level 7 on Table 7 Item 11 – blast injury to ears or acoustic trauma due to impulse noise with permanent bilateral sensorineural hearing loss of 50-75dB averaged over 1, 2 and 3 kHz.

21. Under the tariff that descriptor merited an award of £92,700.00, from which there was a civil compensation deduction of £11,103.30. The claimant's award under the AFCS was therefore £81,596.70.

The Secretary Of State's Original Submission

22. The Secretary of State submitted that the claimant had long Territorial Army (TA) service from June 1988 until November 2017. In terms of no-fault compensation the period 1988 until 5 April 2005 (i.e. the end date of the War Pensions Scheme ("WPS")) was covered by the WPS and amounted to 17 years out of his total 29 years' service. During the 1988-2005 period it was accepted that he was exposed to service noise with 5 years' service in the Royal Artillery (RA) and 5 years in the Royal Armoured Corps (RAC), exposing him to noise from weapons and tanks. He was also a participant in military shooting including competitions on behalf of the Army. In addition, he enjoyed regular recreational sports e.g. shooting. He was not operationally deployed. From 2002 he was medically non-deployable on account of diabetes mellitus. It was also accepted that at the WPS service dates, especially during the earlier years, hearing protection was inadequate. The Secretary of State accepted service-related noise exposure. The service medical records documented declining hearing over the period, with the development of moderate/severe sensorineural hearing loss, accepted as bilateral noise induced sensorineural hearing loss (BNISNHL) and attributable to military service.

23. The assessment of noise induced sensorineural hearing loss for WPS in the 2006 Order followed the rules set out in Article 44. Those reflected expert understanding of the disorder. An expert Independent review of the scientific

basis of the assessment of noise induced hearing loss was held in November 1997, chaired by the then Chief Medical Officer, Sir Kenneth Calman. That formed the basis of a War Pensions Policy statement dated 1999. A further review of Hearing Loss was carried out by the MOD-sponsored Non-Departmental Public Body, the Independent Medical Expert Group (IMEG), in the Second (2013) Report. Copies of those documents were attached to the submission.

24. The claimant's service covered both SPO and AFCS service and as such was referred to as a "spanning" case. The 6 April 2005 date had no military significance other than being the date of introduction of the AFCS.

25. Claims to war pension could only be made at or beyond service termination and there were no time limits to claims. Claims under AFCS could be made while still serving. Where there was "spanning" service, an award under each scheme might be appropriate. However, such outcomes were complex due to the different nature of the schemes, standards of proof, form of awards, time limits and review provisions. As a result, departmental policy was that, where case facts allowed, there should be acceptance (where appropriate) of all service causally-related disablements under one or other of the schemes, but not both.

26. However, because of the nature of BNISNHL, and as discussed in the attached documents, assessment and award of the disorder did not follow that general rule. Noise induced sensorineural hearing loss accepted under SPO resulted from a series of discrete noise injuries to the cochlea. When exposure by the individual injury ceased, the damage caused by all previous discrete noise injuries did not increase further and so the SPO assessment, and hence award, were made according to the article 44 rules, made final at the SPO scheme closure date.

27. The expert documents attached also discussed the assessment of noise induced hearing loss due to service and, in particular, why, as in the UK civil

courts, audiometric readings at 1, 2 and 3 kHz were used. At WPS service termination/scheme closure date, audiometric loss due to constitution and ageing was also included and awarded. In the instant case the nearest audiometry to 5 April 2005 was in 2009 when assessment was Nil according to article 44 rules. The claimant reported the associated symptom, tinnitus. Its assessment was also discussed in the War Pension Policy Statement. The legislation provided that an increase in assessment of hearing loss could only be made when the noise induced hearing loss itself was assessed at 20% or more. That was not met in the claimant's case.

28. The claimant continued to service after 6 April 2005 until medical discharge on 23 November 2017. He remained in the TA, but owing to his medical fitness limitations from diabetes and later (in 2009), bilateral sensorineural hearing loss, he served the remaining 12 years in the Royal Logistics Corps (RLC). Hearing protection was much improved over that period, Health and Safety law/regulations changed and, with them employer responsibility/liability. While no longer exposed to heavy weapons noise and with, from 2009, clear limitation on noise exposure, including minimised exposure to noisy environments, double ear protection, minimised weapons firing and mandatory annual audiometry, the claimant was no longer exposed to heavy weapon noise and was not deployed, but did continue regular military competitive and recreational shooting.

29. The claimant had now claimed hearing loss due to or worsened by AFCS service. Both were rejected and were at the time of writing (on 16 March 2021) under AFCS appeal. In 2019 a civil claim which he made against the MOD in respect of Noise Induced Deafness was settled for a sum in excess of £75,000.

30. In conclusion, the evidence supported SPO service as the index cause of hearing loss and the Secretary of State maintained that the percentage assessment awarded remained appropriate for the reasons given above.

31. For thoroughness and to ensure a robust accurate lawful decision, full reconsideration of the AFCS rejection would be undertaken as part of the appeal process.

32. The Secretary of State submitted that the claimant had not shown an error on a point of law and that the appeal should be dismissed.

Mr Heppinstall QC's Submission

33. It is apparent that some of the Secretary of State's original submission (which had been produced in March 2021) had been overtaken by events, not least the claimant's successful AFC appeal in March 2022. Although he did not abandon the original submission of his late predecessor, Mr Heppinstall QC took matters rather more succinctly.

34. War Pensions were only awarded "*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(1) of the 2006 Order). Article 42(8) was to be construed as relating to termination of service before 6 April 2005, as could also be seen from article 42(1). Therefore the majority of the Tribunal below was entirely correct to refuse the appeal. The appeal should be dismissed.

35. In his own words, the claimant stated that his quality of hearing deteriorated in 2009 and that reduction in capacity became evident to him in 2014 [54]. Indeed, that was consistent with him being found H3H3 in 2009 [32]. A 50dB loss in each ear (the article 42 threshold) was not observed until 2013 [37]. His hearing loss therefore fell to be compensated under the AFCS and not the 2006 Order. This is what the Tribunal below decided on 2 March 2022, viz. that his hearing loss was predominantly caused by service after 6 April 2005. The Secretary of State had not appealed that determination and had informed the claimant that it had made a Level 7 award (£90,000) as well as a Guaranteed Income Payment (which was being calculated). The claimant would also receive an Armed Forces Independence Payment (£156.90 per week). A reduction had been applied to those awards under article 58 of the

AFCS 2011 to reflect the common law damages payment for the same injury. Fresh rights of appeal arose in relation to all of those determinations.

36. As was made clear by the policy expressed at article 12(2) of the AFCS, if this appeal resulted in any payment of a war pension, it would need to be reduced back to nil under article 52 of the 2006 Order to take into account of both the AFCS and the common law compensation.

37. Therefore, even if this appeal had any merit, which it did not, prosecuting it would not advance the claimant's position. The Secretary of State had therefore invited the claimant to withdraw his appeal by letter dated 21 April 2022, which was declined by him by email dated 22 April 2022, which stated:

> *"[The Appellant] does not wish to challenge the FTT's recent decision either and fully accepts that he cannot receive compensation for the same injury under both the AFCS and War Pension schemes. He does not however wish to withdraw his appeal to the Upper Tribunal.*
>
> *[The Appellant], who was medically discharged because of his service attributable hearing loss, was not required to make a claim for the condition to be considered under the compensation schemes and did not do so under any particular scheme. The confusion that followed was entirely due to the administrators of the schemes.*
>
> *Due to the uncertainty about how his spanning service should be treated under the schemes, it has taken four years to get this far in establishing his entitlement to compensation. [He] has found this uncertainty and delay, coming on top of having to come to terms with his deafness and the loss of his career, to be extremely stressful and would not want any other service veteran to have to go through what he has been through.*
>
> *The Upper Tribunal has a discretion to give permission to appeal if there is a realistic prospect that the FTT's decision was erroneous in law or there is some other good reason to do so. [He] has instructed me to put it to the Upper Tribunal Judge that clarifying the law regarding overlapping service is a very good reason to continue with this appeal".*

38. The Secretary of State acknowledged the claimant's sentiments and that the state of affairs obtaining had not come about by reason of anything which he had done or not done.

39. The Secretary of State nevertheless invited the Tribunal to dismiss the appeal.

The Claimant's Submission

40. Mr Tucker's original written submission dated back to May 2021 and had again been overtaken by events. He submitted that the claimant served in the Territorial Army from 20 January 1984 to 23 November 2017 when he was discharged on medical grounds and automatically considered for a War Pension. An award was made on 19 June 2018 in respect of bilateral noise induced sensorineural hearing loss with disablement assessed at 30%.

41. That decision was reviewed and revised by the Secretary of State on 12 December 2018. The revised decision notified to the claimant on 14 December 2018 was to withdraw his War Pension because "our doctors have confirmed that you are not suffering from any assessable degree of disablement".

42. The claimant appealed against the revised decision on 29 April 2019 and his appeal was heard on 25 February 2020. The majority decision of the Tribunal was "to uphold the Secretary of State's assessment upon review as notified on 14 December 2018 of Nil% (final) in respect of the following condition: bilateral noise induced sensorineural hearing loss (1984 – 2005)".

43. The statement of reasons included a minority judgement by the service member which the claimant had adopted as grounds for his application for permission to appeal to the Upper Tribunal. The first ground concerned the carrying out of a review.

44. As noted by the service member in paragraph 28, the reasons given for carrying out the review were on page 7 of the appeal documents. At paragraph 4 the box had been ticked for "a change in the climate of medical opinion", not a change in the interpretation of the law and the narrative on the reverse of page 7 indicated that it was a "clarification of policy".

45. In the view of the service member, which the claimant adopted, neither met the criteria under a revision of the assessment to his detriment. That important protection for War Pensioners against the reduction of their assessments based upon a mere difference of opinion was considered by the Upper Tribunal in ***JM v Secretary of State for Defence (WP)*** [2014] UKUT 358 (AAC).

46. In paragraph 14 of his decision in ***JM***, Upper Tribunal Judge Rowland stated

> *"The conditions in article 44(4) material to the present case are that the original assessment 'was … made in consequence of ignorance of, or a mistake as to, a material fact, or a mistake as to the law' or that 'there has been a change in the degree of disablement due to service since the assessment was made'."*

> *"These conditions"* the Upper Tribunal Judge confirms "*ensure that a mere difference of opinion as to the proper level of the assessment cannot justify a reduction in the assessment or the consequent award." "It is therefore"* he continues *"incumbent on the First-tier Tribunal to make it clear when revising an assessment to the detriment of a claimant, whether a condition in article 44(4) is satisfied and, if so, why."*

47. In this case the decision before the Tribunal was a decision on a review by the Secretary of State. It was therefore incumbent on the Tribunal to determine at the outset whether the Secretary of State had valid grounds for revising the previous award to the detriment of the claimant. If the Secretary of State did not have valid grounds for doing so when conducting the review,

the Tribunal was, it was submitted, obliged to set aside the review decision reinstating the previous award.

48. In the minority judgement adopted by the claimant as grounds for his appeal, the service member argued that there was a more substantive issue in the appeal which was likely to affect many more Servicemen, which was the date at which hearing loss was measured. The original award was based on the claimant's level of disability from hearing loss at the date nearest to his actual release from service.

49. When the award was revised, only the hearing loss at the date nearest to April 2005, when the 2006 Order was replaced by the AFCS, was measured and the claimant's War Pension withdrawn. That approach was upheld by the majority decision of the Tribunal with the result that, at the end of his service, the Appellant had no award for significant hearing loss caused by exposure to high levels of noise in service.

50. The service member noted that the claimant's hearing loss would attract a significant award if it were all considered under the 2006 Order – as it was in the original award. If it were all considered under the AFCS, it would also be assessed at level 8 – a substantial award. He stated that he would allow the appeal because the way that only part of the claimant's hearing loss was being considered was unjust and wrong.

51. That issue was addressed by the MoD's Assistant Head, Armed Forces Compensation & Insurance in a letter to the claimant's representative dated 5 December 2013. Under the heading 'Definition of "service" under the Service Pensions Order (SPO)' the writer acknowledged that in Schedule 6 "service" was given the meaning '*service as a member of the armed forces before 6 April 2005 and the word "served" shall be construed accordingly*'.

52. However, as the writer pointed out, the 2006 Order specifically provided in Article 1(2) that the definitions applied, '*unless the context otherwise requires and except where otherwise provided in the Order*'. In the Secretary of State's view, given the clear direction given in article 1(2) of the 2006 Order that terms must be read in context, the Secretary of State did not consider that the interpretation of "service" used in one article should necessarily inform another. The writer hoped that that would provide some reassurance that the Department was adopting a sensible and fair approach to this complicated matter.

53. That flexible approach was endorsed by the Independent Medical Expert Group (IMEG) in their fourth report dated December 2017 concerning 'spanning cases'. In 'Example 4' where the facts were similar to those of the claimant, all sensorial hearing loss was to be accepted under AFCS because "Apportionment of loss between the two schemes would result in no award under either scheme and would be manifestly unfair."

54. The Tribunal in the present case could not have made such an award because no appeal against the refusal of an award under AFCS was before it. The claimant had since lodged an appeal and was awaiting the Secretary of State's response to that. Should the Upper Tribunal find the majority decision was erroneous in law it might wish to consider remitting this appeal to a fresh Tribunal with a direction that it be reheard with the pending AFCS appeal.

Discussion

Spanning Cases

55. In cases where there is a claim for compensation arising out of service covering periods governed by both the 2006 Order and the AFCS, the claims should ordinarily be heard together as a matter of best practice. That is not to criticise the Tribunal which decided to proceed with the appeal on 25 February 2020. Given the state of affairs likely to result at that time from the impending pandemic, the Tribunal was clearly (and rightly) concerned not to leave

matters in limbo and to reach a determination of the claim under the 2006 Order before it. Moreover, as the service member noted in his dissent, the claimant had not yet appealed the Secretary of State's adverse AFCS decision. If he had, the Tribunal would have adjourned the case for both matters to be heard together. As a result of the disruption caused by the pandemic, the AFCS appeal was not in fact determined until 2 March 2022, almost 2 years later.

56. However, as a result of the two claims not being heard together, the claimant was faced with a situation for almost 2 years where his appeal under the 2006 Order had been dismissed and his unsuccessful claim under the AFCS had not been the subject of an appeal, with the result that he was left in the unfortunate position, through no fault of his own, of not being entitled to compensation for his undoubted hearing loss due to his military service under either scheme, at least until his AFCS appeal was resolved in his favour on 2 March 2022.

The Grounds For Review

57. The ground given for the review by the Secretary of State on 10 December 2018 was "a change in the climate of medical opinion" and on the reverse of the page "further clarification of policy". Both of those statements are inaccurate, but what is clear is that there had been a mistake on the part of the Secretary of State, namely that the 2017 audiogram was good evidence of hearing loss due to service before 6 April 2005. Whether that mistake was one of fact or law matters not for present purposes. Nevertheless it is apparent that the original decision had been made in consequence or ignorance of, or a mistake as to a material fact or a mistake as to the law. Whether the review arose under article 44(2), (4) or (5), there was therefore a valid basis on which the Secretary of State could revise the original decision of 19 June 2018.

58. The view of the service member, that neither a change in the climate of medical opinion, nor a change in interpretation of the law met the criteria under article 44(4) for a revision of the assessment to the detriment of the

claimant, does not take account of the power to revise in consequence or ignorance of, or a mistake as to a material fact or a mistake as to the law.

59. The problem was caused by virtue of the fact that the form WPS0375 does not accurately mirror the terms of articles 44(2), (4) and (5), but what governs the Secretary of State's power of review is the terms of the article. Effect must be given to the terms of the article and the inaccurate terms of the form do not preclude a review on valid grounds if they exist, even though the compiler of the form ticks boxes which do not mirror the terms of the article.

60. I am therefore satisfied that, albeit not correctly stated in the form WPS0375 (which does not accurately mirror the terms of article 44(2), (4) and (5)), the Secretary of State did have the power to revise the original decision of 19 June 2018 and that the majority was correct so to hold.

61. Nevertheless I do take the opportunity to reiterate what Upper Tribunal Judge Rowland said in ***JM*** at [14] about the limitations of the power of revision to the detriment of a claimant:

> "The conditions in article 44(4) material to the present case are that the original assessment "was … made in consequence of ignorance of, or a mistake as to, a material fact, or a mistake as to the law" or that "there has been a change in the degree of disablement due to service since the assessment was made". These conditions ensure that a mere difference of opinion as to the proper level of the assessment cannot justify a reduction in the assessment or the consequent award (see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 (reported as *R(DLA) 6/01*)). It is therefore incumbent on the First-tier Tribunal to make it clear when revising an assessment to the detriment of a claimant, whether a condition in article 44(4) is satisfied and, if so, why. In the present case, the First-tier Tribunal made no mention of article 44(4). Sometimes the First-tier Tribunal's reasons for making a lower assessment imply a clear finding that one of the conditions of article 44(4) is satisfied …"

62. It is also important that First-tier Tribunals bear in mind the guidance of Upper Tribunal Judge Lane in ***DP v Secretary of State for Defence (WP)*** [2017] UKUT 434 (AAC)

> "5. … This is not to say that a failure to refer to the article explicitly is inevitably fatal. That would amount to the triumph of form over substance. It may be possible to infer from the decision that a condition was fulfilled, but it is dangerously easy to go astray.
>
> …
>
> 12. Given the protective nature of the provision and its complexity, it is plainly wise for a First-tier Tribunal to refer expressly to Article 44(4) when it wishes to reduce an assessment. That way, it can keep the conditions clear in its Statement of Reasons and make sure that it has dealt with them fully."

The Interpretation of Article 42

63. It is clear from article 5(1) that an award under the 2006 Order can only be made in respect of the disablement of a member of the armed forces which is due to service before 6 April 2005. It is also clear from article 5(2) that an award under the 2006 Order can only take effect after the termination of the member's service. Thereafter a claim for compensation due to service arising on or after 6 April 2005 is governed by the AFCS. I can well understand the concerns of the service member as at 25 February 2020 when the claimant was faced with the potentially grotesque position of not being entitled to *any* compensation under *either* scheme, but I do not therefore accept his criticism in paragraphs 32 and 36 of the statement of reasons that the division of hearing loss into two separate periods is wrong. On the contrary, it is fully in accord with, and is required by, the legislation. The potential problem with having two statutory schemes and a period of spanning service should be obviated in most cases by ensuring that appeals under the different statutory codes are heard and decided together.

64. The article 42 threshold for an award is an average of 50dB or more in each ear at 1kHz, 2kHz and 3kHz.

65. The closest audiogram to the end of pre-6 April 2005 service was from 2003 and showed hearing loss averaged over 1, 2 and 3 kHz of 15dB in each ear. That was below the threshold.

66. The audiogram of 26 February 2009 showed that the hearing loss in the left ear was 20dB over 1kHz, 35dB over 2 kHz and 35dB over 3kHz and 30dB over 1kHz, 30dB over 2 kHz and 30dB over 3kHz in the right ear. That was below the threshold. That was 4 years into the claimant's AFCS service. During that period the Tribunal accepted there was significant noise exposure and that his hearing had deteriorated, with readings over the same frequencies now averaging over 30 dB per ear.

67. The audiogram of 17 April 2009 showed that the hearing loss in the left ear was 30dB over 1kHz, 25dB over 2 kHz and 30dB over 3kHz and 20dB over 1kHz, 40dB over 2 kHz and 40dB over 3kHz in the right ear. That was below the threshold.

68. The audiogram of 26 March 2010 showed that the hearing loss in the left ear was 35dB over 1kHz, 30dB over 2 kHz and 35dB over 3kHz and 25dB over 1kHz, 40dB over 2 kHz and 50dB over 3kHz in the right ear. That was below the threshold.

69. The audiogram of 19 September 2011 showed that the hearing loss in the left ear was 40dB over 1kHz, 35dB over 2 kHz and 45dB over 3kHz and 25dB over 1kHz, 45dB over 2 kHz and 45dB over 3kHz in the right ear. That was below the threshold.

70. The audiogram of 21 September 2012 showed that the hearing loss in the left ear was 40dB over 1kHz, 45 dB over 2 kHz and 50dB over 3kHz and 35dB over 1kHz, 50dB over 2 kHz and 55dB over 3kHz in the right ear. That was below the threshold.

71. The first time at which the article 42 threshold was reached was in the audiogram of 16 April 2013 which showed that the hearing loss in the left ear was 45dB over 1kHz, 50dB over 2 kHz and 55dB over 3kHz and 40dB over 1kHz, 50dB over 2 kHz and 50dB over 3kHz in the right ear.

72. The audiogram of 4 April 2017 showed that the hearing loss in the left ear was 60dB over 1kHz, 60dB over 2 kHz and 65dB over 3kHz and 45dB over 1kHz, 55dB over 2 kHz and 60dB over 3kHz in the right ear.

73. As a matter of common sense one would have thought that an assessment of hearing loss as at 6 April 2005 would more accurately be reflected by an audiogram at 26 February 2009 than one at 17 April 2017.

74. Mr Tucker, however, said that the terms of article 42(8) and (9) require the later test results to be used because they were conducted at or about the termination of the claimant's service which took place on 23 November 2017 and that that result is mandated by the terms of article 42(8) and (9) which provide (with emphasis added) that

> "(8) Noise-induced sensorineural hearing loss *shall be measured by reference to audiometric tests, where available, conducted at or about the termination of the member's service* and the degree of disablement due to service shall be assessed in accordance with paragraph (10).
>
> (9) *Where no such tests were conducted or are available, the assessment of the degree of disablement due to service shall be informed by the earliest available evidence,* whether in terms of audiometric tests or other evidence relevant to the level of hearing loss that existed at termination of service and the assessment shall have regard to the relative percentages of degrees of disablement and measured hearing loss specified in Table 1 of Part VI of Schedule 1 but any hearing loss arising after termination of service shall not be included in the assessment".

75. So, said Mr Tucker, the use of an audiometric test conducted at or about the termination of the claimant's service had to be used. It was only if there

were no such test that it would be permissible to assess the degree of hearing loss by reference to the earliest available evidence

76. Termination of service meant 23 November 2017, not 6 April 2005. In that regard Mr Tucker relied on the terms of the interpretation provisions in Schedule 6 Part II of the 2006 Order which provide the following definitions:

> "54. "service" service as a member of the armed forces before 6th April 2005 and the word "served" shall be construed accordingly
>
> …
>
> 59. "termination" in relation to service as a member of the armed forces—
>
> (a) subject to the provisions of paragraph (b) below, termination of service as such a member by reason of—
>
> (i) retirement
> (ii) discharge
> (iii) demobilisation
> (iv) transfer to the Emergency List or Reserve;
> or in any other manner;
>
> (b) where the member renders service during more than one period, the date, having regard to the foregoing provisions of this item, of the end of the period which is relevant in his case; (and the word "terminated" shall be construed accordingly)".

These provisions did not say that termination occurs on 6 April 2005; termination in this context must mean termination of all service (as at 23 November 2017).

77. By contrast, Mr Heppinstall QC said that the matter was ultimately decided by the terms of article 40(1)(a) which provide that

> "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".

78. In the context that must mean service before 6 April 2005. If the disablement was not attributable to service before 6 April 2005, one never got as far as article 42. If the claimant could not show, as he could not, hearing loss above the threshold prior to 6 April 2005, that was an end of the matter. The Tribunal could not rely on article 42(8) to import compensation for an injury suffered after 6 April 2005. The simple fact was that attribution of the injury to the time prior to 6 April 2005 was not made out.

79. I am satisfied that Mr Heppinstall QC is correct, at least insofar as the construction of article 42 is concerned, and that the majority of the Tribunal was correct to hold as it did.

80. The fact that article 5(2) provides that an award under the 2006 Order can only *take effect* after the termination of the member's service (as at 23 November 2017 rather than 6 April 2005) does not support the service member's conclusion as set out in paragraph 32 of the statement of reasons. The fact that no award can take effect until termination of service does not mean that article 5(1) can be construed as applying to disablement due to service on or after 6 April 2005 nor that the claimant was entitled to an award under the 2006 Order for "all the hearing loss caused by the whole of his service in the armed forces".

81. Accordingly, for the purposes of article 42(8) and 42(9) the words "termination of service" mean the end of service as a member of the armed forces before 6 April 2005 rather than having the general meaning ascribed to that phrase in paragraph 59 of Part II of Schedule 6 of the 2006 Order. That is not inconsistent with the definition in paragraph 59 since article 1(2) of the 2006 Order provides that

> "In this Order, *unless the context otherwise requires* and except where otherwise provided in the Order, an expression for which there is an entry in the second column of Schedule 6 shall have the meaning given against it in the third column of that Schedule or, as the case may be, shall be construed in accordance with the instructions given against it in that column".

82. Thus the articles in question should be construed as reading

> "(8) Noise-induced sensorineural hearing loss shall be measured by reference to audiometric tests, where available, conducted at or about 6 April 2005 and the degree of disablement due to service before 6 April 2005 shall be assessed in accordance with paragraph (10).
>
> (9) Where no such tests were conducted or are available, the assessment of the degree of disablement due to service before 6 April 2005 shall be informed by the earliest available evidence, whether in terms of audiometric tests or other evidence relevant to the level of hearing loss that existed at 6 April 2005 and the assessment shall have regard to the relative percentages of degrees of disablement and measured hearing loss specified in Table 1 of Part VI of Schedule 1 but any hearing loss arising after 6 April 2005 shall not be included in the assessment".

83. That interpretation is also consistent with article 42(7) which, read in conjunction with the definition in paragraph 54 of Part II of Schedule 6, provides that

> "An assessment of the degree of disablement due to service [as a member of the armed forces before 6 April 2005] in respect of noise-induced sensorineural hearing loss shall be based solely on hearing loss due to service

> [as a member of the armed forces before 6 April 2005] and shall not include any hearing loss due to age or other factors which are not related to service as a member of the armed forces [before 6 April 2005] and which arise after service [as a member of the armed forces before 6 April 2005]".

84. It is also consistent with the provisions of article 42(10).

85. Moreover, what article 42(8) requires is that, whilst the hearing loss is to be measured by reference to the relevant tests, the degree or disablement due to service (before 6 April 2005) must be assessed in accordance with paragraph (10). What paragraph 42(1) requires is the assessment of the degree of disablement which is due to service before 6 April 2005.

86. Correctly interpreted therefore, the 2006 Order does not have the effect of mandating that an assessment of hearing loss as at 6 April 2005 must be decided by reference to an audiogram at 17 April 2017 rather than one at 26 February 2009.

87. The service member was therefore wrong to conclude that the claimant was entitled to an award under the 2006 Order for "all the hearing loss caused by the whole of his service in the armed forces" (paragraph 30) and that the hearing loss would attract a significant award if considered under the 2006 Order (paragraph 36). That would be contrary to article 5(1) of the 2006 Order. The majority was correct to hold that the provisions of the 2006 Order cannot be properly read as to enable or require hearing loss due to service before 6 April 2005 to be assessed by audiograms or other evidence at termination of service many years after that date where there is available evidence much closer to 6 April 2005.

88. To have held otherwise and to have allowed the appeal and remitted the matter for rehearing would have done the claimant no favours. If the appeal under the 2006 Order had been remitted for rehearing, and on the assumption that it had been successful, any award would have been subject to reduction under article 52 to take account of the AFCS compensation and the common

law award of damages. The Tribunal would also have had to grapple with the potential problems of the different natures of the two statutory schemes, the different tests of liability and burden of proof and other matters. Those potential problems do not arise in the event that the majority was correct to have dismissed the appeal.

Conclusion

89. The claimant decided that he wished to maintain his appeal, notwithstanding that his AFCS appeal had been successful, because he did not wish other service veterans to have to go through what he had been through and he wished to clarify the law regarding overlapping or spanning service. I have now done so.

90. For the reasons set out above I am satisfied that the decision of the First-tier Tribunal sitting at Birmingham on 25 February 2020 under file reference ASS/00427/2019 does not involve an error of law.

91. The appeal against that decision is therefore dismissed.

Mark West
Judge of the Upper Tribunal

Signed on the original 18 July 2022