IN THE UPPER TRIBUNAL **UA-2021-001017-WP**
ADMINISTRATIVE APPEALS CHAMBER **(Formerly Case No. CAF/1097/2021)**

On appeal from the First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber)

Between:

CRP

Appellant

- v -

SECRETARY OF STATE FOR DEFENCE

Respondent

Before: His Honour Judge Najib sitting as a Deputy Upper Tribunal Judge

Decision date: 12 August 2022
Decided on consideration of the papers

Representation:
Appellant: In person
Respondent: Ms Daisy Beck

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the First-tier Tribunal dated 22 March 2021 under file reference AFCS/00201/2020 does not involve any error of law. The First-tier Tribunal's decision stands.

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

REASONS FOR DECISION

Introduction

1. This is an appeal against the decision of the First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber) ('the FtT') dated 22 March 2021 dismissing the Appellant's appeal against the Secretary of State for Defence's decision dated 7 July 2018 under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 ('AFCS') to place the Appellant's mental health condition at Table 3 - Item 2.

Factual Background

2. The Appellant was born on 04 January 1959. He was a Surgeon Commander in the Navy and worked full time as an ENT consultant. He also undertook research, was a Defence Consultant Advisor and sat on various committees at senior levels. He began to suffer from intermittent episodes of work related stress from 2006. By October 2009 his mental health had deteriorated. He then sought specialist advice and was formally diagnosed as suffering from recurrent depressive adjustment disorder.

3. Thereafter, the Appellant undertook gradually more limited private work, NHS locum work and an occupational clinic at the Institute of Naval Medicine. In 2014 the Appellant was advised to cease NHS work because of his mental health problems. He ceased NHS work in 2015 but continued with his clinical work at the Institute of Naval Medicine. In 2016 the Appellant was appointed as a fee-paid medical member in the First-tier Tribunal (Social Entitlement Chamber). The Appellant made two unsuccessful attempts to 'gradually return to work' under the GROW scheme. Eventually, he was medically discharged from the Navy in 2017. The Appellant, however, continued (and continues) to sit as a fee paid medical member in the First-tier Tribunal. Full details of the Appellant's work history post 2009 are set out in his helpful chronology at [179].

4. In August 2018 the Appellant was referred to Occupational Health because he found that "*exposure to confrontation and complaints as a tribunal member has triggered deterioration in his mental health. These experiences resonate with health problems he developed after similar exposure in the Navy and NHS"*. He was advised to take a period of 3 months off work, but he did not do so. He continued to sit in the fee paid role but made various adjustments to reduce stress levels.

5. The Appellant is required to sit a minimum of 15 days per year. However, in his evidence to the FtT, he stated that he routinely sits 1 day per week and that in 2019 and 2020 he sat for circa 48 days per year. He said that he finds this level of commitment sustainable and that he had not had to cancel any sittings or taken any periods off, other than holidays. He also stated that when the opportunity arises, he will take on additional days when other fee paid medical members have had to cancel.

The Claim Under the AFCS and the Appeal to the FtT

6. On 14 June 2016, the Appellant made a claim for compensation under the AFCS. On 3 July 2017 an interim award was made in the sum of £10,000, reviewable after 18 months.

7. By a decision dated 07 July 2018, the Secretary of State reviewed the interim award and placed the Appellant's mental health condition at Table 3 - Item 2, namely that it was a

"*permanent mental disorder, causing moderate functional limitation or restriction*" (emphasis added). This meant that the applicable tariff amount was £61,800.00. Taking into account the interim award of £10,000, the Appellant was entitled to a further payment of £51,800. The Secretary of State also determined that the Appellant was entitled to a Guaranteed Income Payment ('GIP") but that the GIP was calculated at £nil. The GIP was later increased on 22 January 2019 to £4,266.72 per annum.

8. The Appellant appealed the decision to place his mental health condition at Table 3 - Item 2 to the FtT. He asserted that his mental health condition properly fell within Table 3 - Item 1, namely that it was a "*permanent mental disorder, causing severe functional limitation or restriction*" (emphasis added).

9. There was no dispute before the FtT that the Appellant's mental health condition was 'permanent'. The issue for the FtT was whether the Appellant's mental health condition caused 'severe' rather than 'moderate' functional limitation or restriction. The footnotes to Table 3 provide the following definitions:

   "(*a) Functional limitation or restriction is severe where the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of onset of the illness and over time able to work only in less demanding jobs.*

   (b) Functional limitation or restriction is moderate where the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of onset of the illness but able to work regularly in a less demanding job." (emphasis added).

10. Having considered the footnotes to Table 3, and there being no dispute that the Appellant's role as a fee-paid medical member in the First-tier Tribunal was a 'less demanding job' than his previous job(s), the FtT concluded that the Appellant's ability to routinely sit one day per week as a fee-paid medical member in the First-tier Tribunal meant that he was able to '*work regularly in a less demanding job'* and so his mental health condition properly fell within Table 3 - Item 2. The FtT, therefore, dismissed the Appellant's appeal.

The Appeal to the Upper Tribunal

11. The Appellant sought permission to appeal to the Upper Tribunal. He set out his grounds in detailed written submissions. In summary, the Appellant asserted that the FtT had erred in (i) its interpretation of Item 1 in that Item 1 does not preclude the possibility that a claimant is able to work with some degree of 'regularity' and does not require that he only be able to work 'intermittently'; (ii) limiting its consideration only to the period after his discharge from the Navy when it ought to have considered the whole period from "*the time of the onset of the illness"*; (iii) finding that working one day per week as a fee paid medical member in the First-tier Tribunal amounts to working 'regularly'; and (iv) failing to take account of the fact that since the onset of his mental health condition in 2009, he has only been able to work over time in a series of less and less demanding jobs and so falls within Item 1.

12. By an order dated 7 June 2021, Deputy Upper Tribunal Judge Mark Rowland sitting as a judge of the FtT refused permission to appeal. He concluded that (i) the FtT correctly identified that the key issue was whether the Appellant "*was able to work regularly in a less demanding job"*; (ii) the FtT was entitled to find on the evidence that the Appellant was in fact able to work 'regularly' in such a less demanding job, namely as a fee paid medical member in the First-tier Tribunal; (iii) the terms of the footnotes to Table 3, read with section 5B(b) of the Pensions Appeals Tribunals Act 1943, require the capacity of a claimant to work to be considered as at the date of the Secretary of State's decision but that whilst there may be an "*element of looking*

back at what a claimant has actually done since the onset of the illness, because that may be relevant to assessing his or her ability to work", that cannot be determinative of what a claimant is 'capable of doing' as at the date of the Secretary of State's decision; (iv) despite the manner in which the FtT expressed itself, on a proper construction and application, Items and 1 and 2 are mutually exclusive - footnote (a) (Item 1) must be read as not including jobs that might fall within footnote (b) (Item 2) which covers jobs that a claimant can do 'regularly'; (v) the FtT was entitled to disregard the jobs that the Appellant had done between the onset of his mental health condition and his discharge from the Navy, because it was clear that he could no longer do those jobs 'regularly' – they did not, therefore, assist with the question of whether he was able to work 'regularly' as at the date of the Secretary of State's decision; and (vi) the Appellant's work as a fee paid medical member in the First-tier Tribunal, even if only one day per week, did not fall to be disregarded.

13. The Appellant then applied to the Upper Tribunal for permission to appeal. He set out of his grounds in a very detailed document running to some 11 pages. The core of the Appellants' grounds of appeal and arguments remained as previously, however, he set out further detailed submission in support. He also added additional grounds of appeal, namely (i) that the hearing was procedurally unfair because he was not permitted to cross-examine the Secretary of State's representative (Mr Newman) at the hearing, the FtT had already formed a settled view on the interpretation of footnote (b), the FtT did not give any indication that "*it would rule out Item 1 on the basis that [he] was not working intermittently"* or that it would exclude from consideration the "*steady decline in [his] capacity for work whilst [he] was still serving"* and so was he not able to address those points in submissions; (ii) the FtT failed to give reasons for why it rejected his evidence as to his alleged discussions with Ms Janet Gregory who is a decision maker on behalf of the Secretary of State; and (iii) the FtT failed to ascertain the Secretary of State's interpretation of Items 1 and 2 and footnotes (a) and (b) and so failed to establish the extent of the conflict of opinion.

14. By an order dated 4 February 2022, Upper Tribunal Judge Wright gave permission to appeal. Upper Tribunal Judge Wright noted that he tended to the view that the FtT came to the correct decision on the law and evidence, essentially for the reasons given by Deputy Upper Tribunal Judge Mark Rowland, but that he was prepared to grant permission because clear authority from the Upper Tribunal on the relevant legal provisions might be of assistance.

15. The Secretary of State lodged detailed written submissions opposing the appeal. The Appellant lodged further detailed written submissions in response.

Discussion

<u>The FtT's task when determining which descriptor applies</u>

16. Article 16(1)(b) AFCS provides as follows:

> ***16.****—(1) Subject to articles 25 and 26—...*
>
> *(b)where an injury may be described by more than one descriptor, the descriptor is that which best describes the injury and its effects for which benefit has been claimed;*

17. In ***Secretary of State for Defence v Duncan and McWilliams*** **[2009] EWCA Civ 1043** the Court of Appeal accepted as correct, the Upper Tribunal's statement that the objective was to identify *"the single descriptor most accurately describing [the injury]"* and stated that *"[t]his requires a careful analysis of the facts and then a consideration of which descriptor is the most appropriate"* (§56).

18. The Court of Appeal also stressed that the compensation scheme under AFCS was designed to be "*easy to administer",* that as decisions would, in the first instance, be made by lay persons, it was important that the "*scheme should be relatively simple"* (§§2-3) and that "*[t]he whole purpose of the scheme is to fix sums by quite detailed and precise rules which can be readily interpreted at the first stage by laymen. The appropriate descriptor will in many cases be relatively easy to determine and where that is so there will be no purpose, and indeed no justification, in looking further"* (e.g. by cross referring to other parts of the scheme) (§57).

19. Article 16(1)(b) clearly allows for the possibility that a claimant's circumstances may be described by more than one descriptor. There is nothing surprising in that. Determining whether a permanent mental disorder has caused 'moderate' or 'severe' functional limitation or restriction is a matter of evidence and judgment. The answer may not be clear and arguments may be made either way. However, bearing in mind that the purpose of the descriptors in Table 3 is to provide a hierarchy of descriptors providing different levels of disability, the functional limitation or restriction cannot be both 'moderate' and 'severe' at the same time. It is one or the other - and it is the task of the decision maker or tribunal to determine which it is. It does so by considering all relevant evidence and then determining which of the two most accurately describes the functional limitation or restriction and is, therefore, most appropriate.

20. In the present case, there were only two descriptors which could potentially apply, namely Item 1 (severe functional limitation or restriction) or Item 2 (moderate functional limitation or restriction). As such, the task of the FtT was simply to determine which of two was most appropriate.

21. I am more than satisfied that the FtT approached the task in that manner and did not err. At §23 of its Statement of Reasons ('SoR') the FtT clearly noted that it had to determine which of Items 1 and 2 was more appropriate and at §27 asked itself the correct question, namely "*which is the descriptor that best describes [the Appellant's] limitations*".

<u>The distinction between Items 1 and 2</u>

22. As set out at §9 above, 'severe' and 'moderate' functional limitation or restriction are defined in footnotes (a) and (b) to Table 3.

23. Functional limitation or restriction is 'severe' where the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of onset of the illness "*and [is] over time able to work only in less demanding jobs"*.

24. Functional limitation or restriction is 'moderate' where the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of onset of the illness "*but [is] able to work regularly in a less demanding job*."

25. The gist of the Appellant's argument is the FtT erred in approaching the matter by focusing solely on whether his work as a fee paid medical member in the First-tier Tribunal could be described as 'regular' and that if it could, that meant he fell within Item 2. He says that although the word 'regularly' is not used in footnote (a) when defining 'severe' functional limitation or restriction, footnote (a) does not preclude the possibility that a claimant is able to work with some degree of 'regularity' and it does not require that he only be able to work 'intermittently'. He argues that there is a distinction between the concept of a 'work' and a 'job', the latter implying a reliable source of income and a steady commitment and that all jobs have some degree of regularity. It follows, he says, that as the word 'job' is used in footnote (a), some degree of 'regularity' is to be read into the same. He further says that to exclude any degree

of 'regularity' from Item 1 frustrates the intention of Parliament to compensate claimants for their loss of earning capacity. It follows, he says, that even if his work as a fee paid medical member in the First-tier Tribunal could be described as 'regular' that did not mean Item 1 was not the appropriate descriptor.

26. As stated above, the purpose of the descriptors in Table 3 is to provide a hierarchy of descriptors providing different levels of disability which are simple to interpret and apply. This means that functional limitation or restriction which is 'moderate' is distinct from that which is 'severe' and footnotes (a) and (b) must be read as such. Footnote (b) uses the word 'regularly' to describe or qualify a claimant's ability to work in less demanding jobs, whereas footnote (a) does not. The use of the work 'regularly' in footnote (b) must be taken to have been deliberate and intentional. Footnote (a) must, therefore, be read as not including jobs that might fall within footnote (b) as being ones that a claimant is able to do 'regularly'. To read it otherwise is to ignore Parliament's deliberate use of the word 'regularly' in footnote (b) and to omit it in footnote (a).

27. As to the argument that all jobs have some degree of regularity, the Appellant is conflating two separate issues, namely (i) the proper construction of footnotes (a) and (b); and (ii) whether the work that a claimant is able to do can properly be described as being done 'regularly'. For the reasons set out in the preceding paragraph, upon a proper construction of footnotes (a) and (b), if a claimant is able to work 'regularly', he does not fall within Item 1. As to whether the work he is able to do can properly be described as being done 'regularly', that is a different question. The word 'regularly' is, as described by Upper Tribunal Judge Wikeley in ***Secretary of State for Work and Pensions v MG (DLA)*** **[2012] UKUT 429 (AAC)**, a "*protean one, so taking its meaning from its context"*. So, by way of example, if a claimant is only able to work 1 day in each year and works, say, on the first day of each January, despite there being some element of a regular pattern, it could hardly be said that he is able to work 'regularly'. That, however, does not alter the proper construction of footnotes (a) and (b).

28. As to the argument that this frustrates the intention of Parliament to compensate claimants for their loss of earning capacity, once again, the Appellant is conflating the same two issues. As stated above, the scheme was designed to be simple to administer and to *"fix sums by quite detailed and precise rules which can be readily interpreted at the first stage by laymen"*. This is done by setting out a hierarchy of descriptors providing different levels of disability and, in the context of the present case, by drawing a clear distinction between Items 1 and 2. Contrary to the Appellant's argument, to read footnote (a) as including the ability to work with some degree of 'regularity' would deprive footnote (b) of any practical meaning. That is clearly not what Parliament intended. The Appellant's concerns as to whether a particular claimant is compensated for his loss of loss of earning is addressed by the fact that issue of a claimant's ability to work 'regularly' is fact specific and each case must be decided on its own particular facts. Again, if a claimant is only able to work one day in each year and works on the first day of each January, Parliament's intention to compensate the claimant for his loss of earning capacity is addressed by the simple conclusion that, despite there being some degree of a regular pattern, he is clearly not able to work 'regularly' and so would fall within Item 1. That conclusion is reached not by construing Item 1 as including some degree of 'regularity' but rather by simply concluding on the facts of the case that an ability to only work one day per year, cannot properly be described as 'regularly'. Of course, as the Court of Appeal later highlighted at §55 of ***Duncan and McWilliams*** (albeit in the context of the date at which descriptors are to be assessed – but which, in my view, also applies in the present context), there will always be some difficult cases and arbitrary results which will result in such a scheme and that this "*is a consequence of adopting a scheme which enables service men and women to pursue their claim quickly, and whilst they are still in service".* In any scheme that provides for compensation by reference to fixed sums and detailed and precise rules, there is always

some degree of trade-off between certainty/predictability and full compensation for all losses. That is not contrary to and does not frustrate Parliament's intention. Indeed, as the Court Appeal went on to explain "*[a]ny stark injustice can be avoided because in an exceptional case even the final award can be reopened where further injuries unexpectedly develop"*.

29. I am, therefore, satisfied that the FtT did not err in its approach. Once the FtT determined that the Appellant's work as a fee paid medical member in the First-tier Tribunal was 'regular' (as to which see further below), it was not only entitled, but was compelled to conclude that Item 2 applied.

30. As to the Appellant's argument that the FtT erred in importing a requirement that Item 1 only applies if a claimant is only able to work 'intermittently', as footnote (a) uses the plural 'jobs', it clearly allows for the possibility that a claimant might be capable of working intermittently in successive jobs over time but is not able to work 'regularly' in one job (or, as the singular generally includes the plural, in more than one job 'regularly'). This does not mean that the word 'intermittent' is to be read into footnote (a) or that Item 1 only applies if a claimant is able to work 'intermittently'. It simply means that one scenario in which a claimant can be said to not be able to work 'regularly' is if he is only able to work 'intermittently'. Item 1, therefore, might apply where a claimant is able to work 'intermittently' but is unable to do so 'regularly'. As Deputy Upper Tribunal Judge Mark Rowland pointed out, although it is possible for a claimant to be able to do less demanding jobs only 'intermittently' but also to be able to do an even less demanding job 'regularly', the legislation must clearly be construed so that in such a case the claimant falls within the scope of Item 2, rather than item 1. It cannot have been intended that where two different claimants are able to work regularly in some form of less demanding job but one is also able to work intermittently in a more demanding job (but still less demanding than he could have before the onset of the illness), that claimant should be treated as falling within Item 1 rather than Item 2. The Appellant's reliance on the words of other descriptors in Table 4 takes the matter no further.

31. I am satisfied that the FtT adopted this approach, and so did not err, when it said at §29 of the SoR that "*[b]ased on the evidence before us we conclude that the work is regular in the sense that it is not intermittent"* and that Item 1 implies that the "*work will not be regular and there <u>may</u> be a series of intermittent roles"* (emphasis added). The use of the word 'may' makes it clear that the FtT was not importing a requirement that Item 1 only applies if a claimant is able to work 'intermittently – it was simply highlighting that as one possibility.

<u>Ability to work 'regularly'</u>

32. The Appellant argues that working one day per week as a fee paid medical member in the First-tier Tribunal does not amount to working 'regularly'. He further argues that the word 'regularly' is context specific and that in the context of work it suggests something akin to five days per week and that if one incrementally reduces from five days per week (which is 'regular') to no work at all, there comes a point at which a claimant who works part time can no longer be described as working 'regularly'. The Appellant says that working three to five days per week could properly be regarded as 'regular' but working one to two days per week would no longer be 'regular'. He further says that Parliament cannot have intended that the ability to work 'regularly' is to be determined solely by the frequency of a claimant's work or the duration of a claimant's spells of work and he relies on the example of a claimant who works 50 days per year by working one day per week and a claimant who works say 50 days per year by working in blocks of one week or a month. He says that Parliament could not have intended that they be treated differently. Conversely, he argues that Parliament could not have intended to treat a claimant who is only able to work one day per week in the same manner as a claimant who is able to work 5 days a week (the latter being less disabled than the former).

In short, he submits that the FtT failed to draw any distinction between full-time and part-time work.

33. There is a good reason why the FtT did not draw a distinction between full-time and part-time work – no such distinction falls to be drawn. No one could properly suggest that a person who works on a part-time basis, say a few hours per day for, say 3-4 days each week, as a shop assistant, waiter or cleaner etc does not have a 'regular' job. This not only goes against, the common English linguistic meaning and usage of the word 'regularly' (the English Oxford Dictionary defines it as 'in a steady, predictable, or uniform manner' and 'at fixed times or uniform intervals; repeatedly, without interruption; frequently; often) but also goes againt simple common sense. As Deputy Upper Tribunal Judge Mark Rowland pointed out, working for fewer hours is one conventional way of making work less demanding. A person may no longer be able to do a job full time but may well still be able to do the same job or a lesser job 'regularly' on a part-time basis (e.g. a few hours per day each week, a few hours per day for a few days each week, or 1 full day each week). Each case would have to be decided on its own facts to determine if such work could, in fact, be described as work that was done 'regularly'. The Appellant has fallen into the trap of on the one hand saying that the ability to work 'regularly' is <u>not</u> to be determined <u>solely</u> by the frequency of a claimant's work or the duration of a claimant's spells of work and on the other arguing precisely the opposite, namely that 'regularly' can only mean something akin to 'substantially full-time work' or only work which is done 3 to 5 days per week. There is nothing advanced by the Appellant to justify such a prescriptive and rigid approach.

34. There is no 'one size fits all' definition or test that can be applied and a rigid approach is to be avoided. 'Regularly' is a common English word and understood by most. In my view the approach taken by the FtT is correct in that 'regularly' generally denotes something other than intermittent, something which is steady and reasonably frequent and tends to be at reasonably uniform intervals. This is not a strict definition. Rather, these are simply relevant factors to be taken into account in the overall assessment. 'Regularity' is not to be determined <u>solely</u> by the frequency of a claimant's work or the duration of a claimant's spells of work but these are important and relevant factors. The decision maker or tribunal must consider the above factors together with any other relevant factors and by reference to the particular facts and context of the case in order to determine whether a claimant is able to work 'regularly'. This approach will allow decision makers and tribunals to make fair decisions on a case by case and fact specific basis.

35. This approach would allow decision makers and tribunals to easily conclude in the case of the claimant who is only able to work one day in each year, that he is not able to work 'regularly' as it would be entitled to conclude that one day per year was not sufficiently frequent. Alternatively, as Deputy Upper Tribunal Judge Mark Rowland pointed out, some very limited capacity for part-time work only might perhaps simply be disregarded as *de minimis*.

36. Similary, this approach would leave it to the decision maker or tribunal on a case by case basis to determine (using the Appellant's example) if a claimant who works, say 50 days per year by working in blocks of one week or a month, can properly be described as being able to work 'regularly'.

37. As to the Appellant's argument that Parliament could not have intended to treat a claimant who is only able to work one day per week in the same manner as a claimant who is able to work 5 days a week, there is no proper basis for so concluding. Parliament did not define 'regularly' – it could easily have done so. There is nothing in AFCS to exclude part-time work from the ability to work 'regularly', conversely there is nothing in AFCS to limit it to only work which is akin to 'substantially full-time' work or for a majority of the days per week etc. Quite

the opposite, as stated above, working for fewer hours is one conventional way of making work less demanding and so it is fair to conclude that Parliament must have intended that part-time work be included.

38. I am, therefore, satisfied that the FtT did not err in its approach. I am also satisfied that the FtT did not err in concluding on the particulars facts of the case that the Appellant's ability to work one day per week as a fee paid medical member in the First-tier Tribunal meant that he was able to work 'regularly'. It was clearly open on the facts and the law for the FtT to conclude that the Appellant working one day per week as a fee paid medical member in the First-tier Tribunal was sufficiently steady, reasonably frequent and at reasonably uniform intervals that it amounted to working 'regularly'. Again, as Deputy Upper Tribunal Judge Mark Rowland pointed out, it is not relevant that the Appellant was not obliged to commit himself to working as often as he did. Having the ability to reduce his commitment may have itself reduced the stress involved in making the commitment in the first place, but nonetheless the FtT was entitled to find that, as long as he had that right, he was in fact able to work 'regularly'.

Period to be considered

39. The Appellant asserts that the FtT erred in limiting its consideration only to the period after his discharge from the Navy when it ought to have considered the whole period from "*the time of the onset of the illness"*. He makes various arguments in support at §§3-16 of his grounds of appeal by reference to an analysis of the grammar and choice of words in footnotes (a) and (b) and the requirement in ***Duncan and McWilliams*** to consider the 'trajectory' of a claimant's illness.

40. The Appellant is once again conflating two separate issues, namely (i) the point in time at which the conditions in the relevant descriptor must be met in order for that descriptor to apply; and (ii) the evidence that may be considered in determining whether the conditions in the relevant descriptor have been met.

41. Section 5B(b) of the Pensions Appeals Tribunals Act 1943 provides as follows:

> ***Matters relevant on appeal.***
>
> *In deciding any appeal under any provision of this Act, the appropriate tribunal—...*
>
> *(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.*

42. Read together with footnotes (a) and (b), the effect of section 5B(b) is that a decision maker or tribunal must assess and determine a claimant's ability to work as at the date of the Secretary of State's decision. In ***Duncan and McWilliams*** the Court of Appeal confirmed that "*the Upper Tribunal was correct in concluding that the relevant date for assessing the injuries and their likely trajectory is the date of the decision and not the date of the initiating injury"* (§110) (emphasis added).

43. This is to be contrasted with the evidence that may be considered in determining whether the conditions in the relevant descriptor have been met as at the date of the Secretary of State's decision. In that respect, the Court of Appeal confirmed that "*the decision maker must take account of all the evidence available to him or her when determining the nature and gravity of the injury"* (§§47-48). It is axiomatic that 'all the evidence' means 'all relevant evidence' as there is no obligation to consider evidence which is irrelevant.

44. The FtT can and should take account of all evidence from the date of the onset of the illness to the date of Secretary of State's decision and indeed, in some cases, evidence which postdates the Secretary of State's decision if such evidence assists in determining the nature and gravity of the injury as at the date of Secretary of State's decision – provided the evidence is relevant. By way of example, in a case where 'permanence' is in issue, there will be an element of looking forward to the trajectory of the claimant's illness and consequential limitation and restriction to determine whether any material improvement in his capacity for work is, or was, expected at the date of the Secretary of State's decision. Even in a case where 'permanence' is not in issue, there may be an element of looking at what has happened since the date of the onset of the illness as that may be relevant to assessing the claimant's ability to work at the date of the Secretary of State's decision. However, that cannot be determinative of what work a claimant is able to do as at that date. As Deputy Upper Tribunal Judge Mark Rowland pointed out, that is because a claimant may have done more or less work that he was able to do and/or because a state of 'permanence' may not have been reached in the earlier part of that period.

45. The FtT's task in the present case was simple, namely, to determine which of Items 1 or 2 was most appropriate. As there was no dispute that the Appellant's role as a fee-paid medical member in the First-tier Tribunal was a 'less demanding job' than his previous job(s), the FtT correctly identified that the key issue was whether that meant that the Appellant was able to work 'regularly'. As the Appellant, on his own case, was unable to do his previous job(s) ('regularly' or at all) and had ceased doing them at the date of his discharge from the Navy, the various jobs he did between the date of the onset of his illness in 2009 to his discharge in 2017 were irrelevant. On his own case, the only job that the Appellant was in fact doing as at the date of the Secretary of State's decision was sitting as a fee-paid medical member in the First-tier Tribunal. That was the best evidence of his ability to work 'regularly' as at that date. The fact that he could not do his previous job(s) was only relevant to the extent that it meant that he was only able to do a less demanding job' than his previous job(s). It did not assist him in showing that he did not have the ability to work 'regularly' in a 'less demanding job'.

46. Once the FtT determined that the Appellant's ability to work one day per week as a fee-paid medical member in the First-tier Tribunal meant that he was able to work 'regularly' in a 'less demanding job', it was entitled, and as previously stated, was compelled to conclude that the Item 2 applied. Once it had determined that Item 2 applied, that was the end of the matter. As long as Item 2 applied, Item 1 could not apply.

47. It follows that the FtT did not err in its approach to the relevant period and/or evidence to be considered.

48. I should add that the Appellant's repeated reliance on the concept of 'trajectory' is, in my view, misplaced. ***Duncan and McWilliams*** concerned cases in which there was more than one injury and the future trajectory of the injury and consequential limitation and restriction was relevant. That was not an issue in the present case.

Remaining Grounds of Appeal

49. I am satisfied that the Appellant's remaining grounds of appeal are without merit.

50. The Appellant had no right to cross-examine the Secretary of State's representative (Mr Newman). Mr Newman was not a witness on behalf of the Secretary of State and had not provided any evidence upon which he could be cross-examined. He was there merely to represent the Secretary of State as advocate.

51. It is clear that the FtT had not formed any settled view as to the interpretation of footnote (b). At §27 of the SoR, the FtT expressly states that it did not find the footnotes to Table 3 to be 'very easy to interpret' and the analysis at §§27-29 demonstrates that the FtT tried its best to grapple with the proper interpretation of the footnotes. Even if the FtT had formed a preliminary view as to the interpretation of footnote (b), there is in principle nothing wrong with that. A tribunal is entitled to form a preliminary view on the papers provided that it is open to hearing submissions to the contrary and to then make a final determination. The SoR clearly demonstrates that the FtT only made its final determination once it had taken account of the Appellant's submissions.

52. For the reasons set out at §§30-31 above, there is no merit in the argument that the FtT did not give any indication that "*it would rule out Item 1 on the basis that [he] was not working intermittently"*. It did not rule out Item 1 on the basis that the Appellant's work as a fee-paid medical member in the First-tier Tribunal was not intermittent, rather it determined that Item 2 applied because that work demonstrated that the Appellant was able to work 'regularly' in a 'less demanding job'.

53. Similarly for the reason set out at §45 above, there is no merit in the argument that FtT did not give any indication that it would exclude from consideration the Appellant's "*steady decline in [his] capacity for work whilst [he] was still serving"*. His decline and inability to do his previous job(s) was irrelevant to determining his ability to work 'regularly' in a 'less demanding job' as at the date of the Secretary of State's decision.

54. The Appellant's alleged discussions with Ms Janet Gregory were irrelevant as (i) the Secretary of State's position was before the FtT by way of written submissions and oral submissions from Mr Newman; and (ii) Ms Janet Gregory's subjective view of what 'regularly' meant was of little or no relevance to the FtT's determination as to what it meant as a matter of statutory construction and law. For the same reasons, the argument that the FtT failed to ascertain the Secretary of State's position as to how he interpreted Items 1 and 2 and footnotes (a) and (b) and so failed to establish the extent of the conflict of opinion, is without merit.

Conclusion

55. For the reasons set out above, I am satisfied that the FtT reached a decision which it was entitled to do on the evidence before it. It directed itself properly on the relevant law, made appropriate findings of fact and gave adequate (and indeed comprehensive and cogent) reasons for its decision.

56. I, therefore, conclude that the decision of the FtT does not involve any material error of law and I dismiss the appeal.

Signed on the original
On 12 August 2022

His Honour Judge Najib
Sitting as a Deputy Upper Tribunal Judge