IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

UT refs: UA-2023-001353-WP
UA-2023-001356-WP
[2024] UKUT 241 (AAC)

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

Between:

MH

Appellant

- v –

The Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 7 August 2024
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow both appeals. The decisions of the First-tier Tribunal made on 2 March 2023 under references ASS/241/2022 and SD/69/2021 both involved an error on a material point of law and are set aside.

The Upper Tribunal is not able to re-decide the appeals. It therefore refers the two appeals to be redecided afresh by a completely differently constituted First-tier Tribunal, at an oral hearing.

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

REASONS FOR DECISION

Introduction

1. This is an appeal against two decisions of the First-tier Tribunal made in a combined decision dated 2 March 2023 ("the FTT"). It is convenient to take each decision of the FTT separately.

ASS/425/2021 decision

2. The decision made by the FTT in this appeal was on an assessment appeal under section 5(1) of the Pensions Appeal Tribunals Act 1943 against the Secretary of State's decision to award an interim 60% assessment to the appellant. This interim assessment of 60% disablement was in respect of two conditions found to be attributable to service: shrapnel wounds abdomen, right arm, left leg and right thigh; and post-traumatic stress disorder.

3. The crucial aspect of this decision of the FTT was to reduce the interim assessment to 40%. The critical reasons for the FTT making this reduction on the appellant's appeal are set out in paragraph 40 of its reasons for decision.

> "40. This was not a decision which the Tribunal had taken lightly. Further, at the outset of the hearing, the appellant and his representative, Mr Goff of counsel, were informed that the Tribunal had the power to increase an award, to leave the award as it is, or to remove it altogether. It was explained that whilst no decision had been made and would only be made after all the evidence had been heard, the papers indicated that the existing 60% award may be at risk if the appellant went ahead with the appeal. A short adjournment was allowed for the appellant to speak with his legal representative, following which it was confirmed that he did wish to proceed."

4. In my judgement, the FTT erred in law at the outset of the hearing by failing to show that it acted lawfully in its decision to bring into issue on the appeal whether a lower percentage assessment of disablement may be awarded on the appeal.

5. The provision in section 5B(a) of the Pensions Appeal Tribunals Act 1943 applied on this appeal to the FTT. In all material particulars, it is an identical provision to that found in section 12(8)(a) of the Social Security Act 1998. One of the leading social security cases on the exercise of the power found in section 12(8)(a) of the Social Security Act 1998 is *R(IB)2/04* (I take it that it is *R(IB)2/0**4*** to which the FTT intended to refer as *R(IB)2/05* is not on section 12(8)(a).) Although *R(IB)2/04* does set out, as the FTT noted, that the First-tier Tribunal on an appeal can make any decision that it was open to the Secretary of State to take in the decision under appeal, the FTT failed to take account, and so direct itself properly, on what was said in *R(IB)2/04* about the proper and fair exercise of the power to decide an issue the Secretary of State could have decided but did not decide (that is, <u>reducing</u> the percentage assessment).

6. In addressing the discretion to consider an issue not raised by the appeal, the Tribunal of Commissioners said the following in paragraph [94] of *R(IB)2/04*:

> "94. There must, however, be a conscious exercise of this discretion and (if a statement of reasons is requested) some explanation in the statement as to the reasons why it was exercised in the manner it was. In exercising the discretion, the appeal tribunal must of course have in mind, in particular, two factors. First, it must bear in mind the need to comply with Article 6 of the Convention and the rules of natural justice. This will involve, at the very least, ensuring that the claimant has had sufficient notice of the tribunal's intention to consider

> superseding adversely to him to enable him properly to prepare his case. The fact that the claimant is entitled to withdraw his appeal any time before the appeal tribunal's decision may also be material to what Article 6 and the rules of natural justice demand. Second, the appeal tribunal may consider it more appropriate to leave the question whether the original decision should be superseded adversely to the claimant to be decided subsequently by the Secretary of State. This might be so if, for example, deciding that question would involve factual issues which do not overlap those raised by the appeal, or if it would necessitate an adjournment of the hearing."

7. On the face of the FTTs reasoning at paragraph 40 of its reasons for its decision, its concern to 'warn' the appellant at the outset of the hearing about its powers was not a general one that after consideration of the oral evidence an issue might arise about making a lower percentage assessment than 60% for disablement. Rather, the FTT's concern was more concrete and based on the paper evidence indicating that the existing 60% award may be at risk if the appellant went ahead with the appeal. What the paper evidence indicated is not explained. Nor has the FTT made clear that an explanation was given to the appellant and his representative of what it was in the paper evidence that perhaps stood in favour of a lower percentage assessment than 60%.

8. Following case law such as *Hooper –v- SSWP* [2007] EWCA Civ 495 (*R(IB) 4/07*), *BTC –v- SSWP* [2015] UKUT 155 (AAC) and *ET v SSWP (PIP)* [2017] UKUT 478 (AAC), the FTT's analysis should have started with whether the evidence in the papers brought into issue on the appeal whether a lower percentage award may be merited. On the face of it, neither the appellant nor the Secretary of State was making a lower award an issue on the appeal: the Secretary of State was supporting his 60% decision and the appellant was seeking a higher award. As the appellant has pointed out, in the decision letter to the appellant of 9 December 2019, the Secretary of State said that the appellant's current assessment of 60% "has been maintained" and was "still correct". If a lower award arose obviously from the paper evidence and so was an issue on the appeal, the FTT was obliged by section 5B(a) to consider it, if the appeal continued. Moreover, in order to make any 'warning' effective, following *BTC* the FTT ought to have pointed out to the appellant at the outset of the hearing what specifically it was in the paper evidence that brought the making of a lower award into issue on the appeal.

9. If, on the other hand, the evidence at the outset of the hearing did not obviously raise entitlement to a lower percentage award as an issue on the appeal, this left the FTT with a discretion whether to bring a lower award into issue on the appeal. Following *R(IB)2/04*, that is a judicial discretion and proper reasons had to be given for exercising it. If this was the First-tier Tribunal's analysis at the outset of the hearing of this assessment appeal, in my judgement it did not give adequate reasons for why it was exercising this discretion. Again, in order to make any 'warning' effective, following *BTC* the FTT ought to have pointed out to the appellant at the outset of the hearing what specifically in the evidence had led it to exercise its power to bring a lower percentage assessment into issue on the appeal.

10. It is unclear from the FTT's reasoning which of these two alternatives under section 5B(a) it was taking.

11. Further, in my judgement the effectiveness of any 'warning' and the time given to the appellant and his representative to digest it, has to be gauge in the context, as *BTC* discusses, that if it had been the Secretary of State's position on the appeal that the appellant should qualify for a lower percentage assessment of disablement, he would have needed to set out his reasons why that was so on the evidence and *in advance* of any hearing in his appeal response. Therefore, contrary to the above, even if the FTT by its reasoning had (or has) shown it properly thought through its approach to the appeal under section 5B(a) of the Pensions Appeal Tribunals Act 1943 and acted lawfully under that subsection, it erred in law in my judgement in failing to consider the need to give the appellant adequate time to consider the implications of continuing with his appeal. Following *BTC*, in my judgement, even if the FTT had made clear (which its reasoning does not) what either did or may give rise to a lower percentage assessment potentially arising on the evidence, a short adjournment on the day of the hearing was not sufficient. Or at least the FTT had to explain why a short adjournment was adequate and placed the appellant in a position sufficiently analogous to the position he would have been had the Secretary of State's decision reduced the interim assessment to 40%.

12. I have referred a number of times above to the 'outset of the hearing. That is not simply an observation about what the FTT did. A mere description at the outset of a hearing of a First-tier Tribunal's powers (e.g., that it can make a lesser award than that under appeal) may not in and of itself engage the duties and powers (per paragraph 94 of *R(IB)2/04*) under section 5B(a) of the Pensions Appeal Tribunals Act 1943 and may be quite anodyne. However, if the oral evidence then heard by a First-tier Tribunal brought into question whether a lower award might result on the appeal, the powers and duties in section 5B(a) would arise on the appeal at that stage in the appeal proceedings and require the First-tier Tribunal to consciously address the exercise of the power in section 5B(a). In this appeal, however, what occurred at the outset of the hearing was not the mere description of the FTT's possible powers and duties but a more focussed concern based on the written evidence which at least suggested that a lower award might result on the appeal. That required the FTT to engage properly with its duties and powers under section 5B(a) of the Pensions Appeal Tribunals Act 1943, and its failure to do so was a material error of law.

13. The Secretary of State opposes the appeal and argues, first, that the FTT's "task…was to determine the appropriate assessment for the appellant's disablement at the date of the Secretary of State's decision". This submission ignores the effect of section 5B(a) of the Pensions Appeal Tribunals Act 1943. By analogy with paragraph [16] of *DT v SSWP* (PIP) [2020] UKUT 156 (AAC), the law did not require the FTT to decide all and any issues that may arise on the evidence. Under section 5B(a) the FTT was only required to decide issues that were raised by the appeal and it had a discretionary power to decide other issues.

14. The Secretary of State further argues:

> "8. Furthermore, the terms of reference state (emphasis added):
>
> > "The appeal lies against the Secretary of State's decision to award an interim assessment of 60% for the conditions Shrapnel Wounds Abdomen, Right Arm, Left Leg & Right Thigh (1982) and Post Traumatic Stress Disorder accepted as being caused by service.

> The Tribunal is asked to decide if this assessment is correct and if not to **substitute its own assessment** for the period under appeal."

> 9. For these reasons, the Secretary of State does not consider that potential reduction of the assessment was a new issue that needed to be raised because it was already encompassed within the general powers of the Tribunal and the terms of reference for the appeal.

15. I am not persuaded by this submission either. As I explained in *DT v SSWP* (PIP) [2020] UKUT 156 (AAC), describing what a First-tier Tribunal's powers are is different from the First-tier Tribunal actually exercising those powers, which must be done by all the members of the FTT convened to hear and decide the appeal.

SD/69/2021 decision

16. This appeal concerned the Secretary of State's decision to cancel the appellant's award of a War Pensions Mobility Supplement ("WPMS"). The FTT (and the Secretary of State in his written appeal response to the FTT) did not address the exact basis under Article 44 of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 ("the SPO") for removing the award.

17. In my judgement, the FTT failed properly and fully to address the nature of the statutory questions which were before it and which it had to determine under Article 44 of the SPO.

18. As the Secretary of State's decision was one which was "to the detriment of a member of the armed forces" the review powers in Article 44(1)(b) and 44(6), which are the only parts of Article 44 to which the FTT referred, are expressly subject to Article 44(4) and (5). Each of the provisions in Article 44(4) and (5) set out two substantive grounds for reviewing an award to the detriment of a member of the armed services. The first is that the awarding decision was made in consequence of ignorance of, or a mistake as to, a material fact, or of a mistake as to the law. The second is that there had been a relevant change of circumstances since the award was made. The FTT failed to identify which of these review powers was being used or why it was satisfied. Moreover, on the basis of what the FTT said in paragraph 5 of its reasons, it failed in my judgement to direct itself properly that the issue before it was whether one of the conditions in either Article 44(4) or 44(5) was satisfied. Those failures amounted to an error of law: see *DS v SSWP* [2016] UKUT 538 (AAC); [2017] AACR 19. What the FTT said in paragraph 5 (and paragraph 37) of its reasons was:

> "5….the issue for the Tribunal was whether as at the date of the decision, namely 18 August 2020, the appellant satisfied the criteria in article 20(1)(b) of the [SPO].
>
> 37. Given the appellant's evidence, including the appellant's own description of his walking ability that was contained in the bundle, the Tribunal did not consider that his accepted service disablements rendered him "unable to walk", or restricted his leg movements to such an extent that his ability to walk (with any such prothesis or artificial aid) without severe discomfort is of little or no practical use to him", or that his ability to walk to walk was "of little or no practical use to him" due to physical pain or breathlessness (or that there was a danger to his life or a likely cause of

> serious deterioration in his health). In those circumstances, the Tribunal unanimously decided that the article 20 criteria had not been satisfied and therefore the Tribunal was bound to dismiss the appeal."

19. Describing the relevant issue is this way would have been correct if the appeal before the FTT was from the initial decision made by the Secretary of State that the appellant was not entitled to an award of the WPMS. But that was not the decision under appeal. The appellant already had an award of the WPMS and the decision under appeal was one seeking, on review, to remove that award. In my judgment it was incumbent on the FTT to identify the ground for removal and then satisfy itself that that ground was made out.

20. The Secretary of State opposes the appeal and argues that "it can easily be assumed from the context that the relevant criteria is found in Article 44(4)(c) and therefore it was not necessary for the Tribunal to make explicit reference to Article 44(4)". Article 44(4)(c) of the SPO provides that the awarding decision may be revised to the detriment of the armed services member (only) where "there has been a change in the degree of disablement due to service since the assessment was made".

21. Part of that context, as the Secretary of State rightly points out, is that the Secretary of State in terms of reference for this appeal to the FTT stated:

> "The appeal lies against the Secretary of State's decision of 18/8/20 that War Pensioners Mobility Supplement (WPMS) **is no longer merited**" (emphasis added)

22. Although the Secretary of State does not take this point, it can also be said that the FTT in paragraph 5 of its reasons, having set out that the specified decision under appeal was one to cancel an award of the WPMS, identified that the issue for it was "whether as at the date of the decision, namely 18 August 2020, the appellant satisfied the criteria in article 20(1)(b) of [the SPO]". Article 20 of the SPO contains the entitlement conditions for an award of the WPMS.

23. I am not persuaded by these arguments. The reasons why I consider the FTT did nevertheless err in law are threefold and are all related. They are as follows.

24. First, this should not be a matter of assumption. It was for the FTT to set out the correct statutory basis adequately and clearly for its decision. Article 44(1)(b) is expressly made subject to Article 44(4) and it is only the later which deals with what occurs "following a review". As I have set out above, the issue before the FTT was whether the statutory condition for removing or cancelling the WPMS award were made out. Moreover, a key aspect of the statutory provisions in Article 44(4) (and 44(5)) is that the award may be revised to the detriment of the member of the armed services only if the Secretary of state (or on appeal the First-tier Tribunal) is satisfied that one of the specified grounds for revision is made out. This is an important and deliberate statutory protection for armed service members against having awards removed. It is not available simply where the decision maker (be that the Secretary of State or FTT) considers the award is no longer merited. It was an issue which therefore needed to be addressed, but was not.

25. Second, section 44(4) does not itself provide that an award may be "cancelled". It provides a number of grounds on which the decision being reviewed may be revised

to the detriment of the member of the armed forces, including (per article 44(4)(a)) where the decision was wrongly made at the time it was made. It is Article 44(6) of the SPO which speak about, inter alia, 'cancelling' the "decision, assessment or award", though it also provides relevantly for the decision, assessment or award to be varied. However, the word "cancel" is ambiguous and could cover either removing the award from when it was first made or stopping it from the date of the review decision. Indeed, it seems in my judgement that 'cancel' is the only Article 44(6) outcome which can cover removing the award from when it was first made. To "maintain", "continue" or "vary" the "decision, assessment or award" is not to remove the award or the assessment from the outset. In circumstances where to 'cancel' the assessment or award can cover either removing the award from when it was first made or removing it from the date of the review decision, it was incumbent on the FTT to show it had applied the correct statutory test.

26. I recognise that the FTT did identify in paragraph 5 of its reasons that it was only concerned on this particular appeal before it with a decision removing the WPMS award from date of the 18 August 2020. There is therefore force in the Secretary of State's argument that that decision can only have been made under Article 44(4)(c), as it was not a decision removing the WPMS award from any earlier date or the date it was first awarded (albeit the terms of Article 44 may not compel this result). However, even if this is accepted, this still left the key statutory question before the FTT not whether Article 20 of the SPO was satisfied, as the FTT directed itself, but whether there had been a change in the appellant's degree of disablement due to service since the last assessment had been made. The FTT's self-direction in paragraph 5 of its reasons did not contain this crucial statutory test.

27. Third, and particularly related to the second point I have made immediately above, as the appellant sets out, an argument was made to the FTT along the lines that the appellant's degree of disablement due to service had *not* changed (at least for the better) since he was initially awarded the WPMS. That in my judgement required the FTT to show it had addressed its mind to that issue and the Article 44(4)(c) question. The effect of the appellant's argument was that if he had not changed and he did not satisfy the conditions of entitlement to the WPMS on 18 August 2020, that may have given rise to an issue on the appeal as to whether the award had been correctly made in the first place. That argument showed even more so why the FTT had to answer what it was that had changed by 18 August 2020, and it failed to do so in paragraph 37 of its reasons or more generally.

Conclusion

28. Given the two appeals succeed on the grounds set out above, I do not need to address any other grounds of appeal.

29. For the reasons given above, both appeals succeed. The Upper Tribunal is not able to re-decide the first instance appeals. The two appeals will therefore have to be re-decided afresh by a completely differently constituted First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber), at a hearing.

30. The appellant's success on these appeals to the Upper Tribunal on error of law says nothing one way or the other about whether his appeals will succeed on the facts before the new First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 7th August 2024