



Neutral Citation Number: [2026] UKUT 165 (AAC)

Appeal No. UA-2022-001634-WP

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

PT

Appellant

- v -

The Secretary of State for Defence

Respondent

**Before: Upper Tribunal Judge Church
Decided on consideration of the papers**

Representation:

Appellant: Not represented

Respondent: Daisy Beck and Kate Ferris of Veterans UK

On appeal from:

Tribunal: First-tier Tribunal (WPAFCC)

Tribunal Case No: ASS/00485/2021

Tribunal Venue: Remote video hearing by CVP

Tribunal Panel: Judge Williams, Medical Member Dr Singh and Service Member Evans

Hearing Date: 16 June 2022

Decision Date: 25 August 2022 (issued 26 August 2022)

SUMMARY OF DECISION

WAR PENSIONS AND ARMED FORCES COMPENSATION (56)

56.2 War pensions - assessment

Judicial summary – PT, a former Royal Marine, challenged the First-tier Tribunal (“FtT”)’s decision reducing his war pension disablement assessment. In considering PT’s mental disablement, the FtT had directed itself that it could not take into account

two pieces of documentary psychiatric evidence because they post-dated the decision under appeal.

The Upper Tribunal reviewed the statutory framework, in particular section 5B(b) of the Pensions Appeal Tribunals Act 1943, which prohibits taking account of “circumstances not obtaining at the time when the decision appealed against was made “.

Applying established authority (including **R (DLA) 3/01**), the Upper Tribunal held that evidence created after the date of the decision under appeal is admissible to the extent that it sheds light on the claimant’s condition as it existed at that earlier time. The FtT had misdirected itself. Instead of excluding the evidence simply because its creation post-dated the Secretary of State’s decision, the FtT should have analysed whether the evidence, or parts of it, spoke to the relevant period. The Upper Tribunal rejected the Secretary of State’s argument that **R (DLA) 3/01** and **CM v Secretary of State for Defence** [2021] CAF/795/2020 should be distinguished because they related to schemes that had a forward-looking element.

The Upper Tribunal set aside the FtT’s decision and remitted the case for rehearing.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal.

REASONS FOR DECISION

Introduction

1. This appeal is about the Appellant (to whom I shall refer as “**PT**”) who served in the Royal Marines.
2. On 15 October 2020 the Secretary of State made a composite interim assessment of 70% in respect of the Appellant’s accepted physical and mental health conditions (AD1 Sprain of the Right Shoulder (1992), AD2 Osteoarthritis of Both Shoulders, AD3 Internal Derangement of the Right Knee, AD4 Osteoarthritis of Both Knees, AD5 Sprains of Both Ankles (1985-2005), AD6 Osteoarthritis of Both Ankles, AD7 Osteoarthritis of the Right Hallux, AD8

Bilateral Carpal Tunnel Syndrome, AD9 Soft Tissue Injury to Neck (1999), AD10 Lumbar Disc Lesions, AD11 Bilateral Noise-Induced Hearing Loss (1986-2005), AD12 Osteoarthritis Left 1st Metatarsophalangeal Joint, AD13 PTSD), all of which were accepted to be attributable to his service in the Royal Marines (the “**SoS Award**”).

The Decision Under Appeal

3. PT appealed the SoS Award to the First-tier Tribunal, which convened for a remote oral hearing by CVP on 16 June 2022. Having heard evidence and submissions, the three-member panel (the “**Tribunal**”) decided that the SoS Award significantly over-assessed PT’s disablement as a result of his physical health problems and under-assessed his disablement as a result of his mental health problems. The Tribunal dismissed PT’s appeal and reduced the composite assessment from 70% to 40%.
4. PT was dissatisfied with this outcome and applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. He argued that the Tribunal made irrational or perverse findings of fact about various matters (whether he took pain killers, his employment and his ability to drive) and failed adequately to explain its reasons for its decision.
5. On 16 November 2022 Judge Siddique considered PT’s application for permission to appeal. While Judge Siddique was not persuaded that the grounds identified by PT were arguable, in exercise of his inquisitorial powers Judge Siddique identified a ground of appeal that he did consider realistically arguable, and he granted permission to appeal.
6. The potential error that Judge Siddique identified was the Tribunal’s self-direction that it could not take into account two pieces of evidence that were before it: a letter dated 30 November 2020 from Dr Charnaud (a consultant psychiatrist) and a psychiatric report dated 1 October 2021 prepared by Dr Paul Foster (also a consultant psychiatrist) because those pieces of evidence both post-dated the SoS Decision.
7. PT applied to the Upper Tribunal for successive stays of these proceedings while he sought legal advice in relation to his appeal and while he awaited the outcome of his claim under the Armed Forces Compensation Scheme. I granted those applications. When the stay came to an end I made case management directions in relation to the hearing of the appeal. Neither party asked for an oral hearing and I decided that the interests of justice favoured my deciding the appeal on the papers to avoid further delay.

The Legal framework

8. Entitlement to a war pension is governed by the Naval, Military and Air Forces (Disablement and Death) Service Pensions Order 2006 (the “**SPO**”).

9. The prescribed approach to assessing the degree of disablement is set out in Article 42 of the SPO. Article 42(2)(a) provides:

“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.”

10. Article 42(2)(c) of the SPO provides further that:

“where such disablement is due to more than one injury, a composite assessment of the degree of disablement shall be made by reference to the combined effect of all such injuries.”

11. Appeals against decisions made under the SPO are governed by the Pensions Appeal Tribunals Act 1943 (the “**1943 Act**”). Section 5B of the 1943 Act provides:

“**5B Matters relevant on appeal**

In deciding any appeal under any provision of this Act, the appropriate tribunal-

(a) need not consider any issue that is not raised by the appellant or the Minister in relation to the appeal; and

(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.”

12. In *R (DLA) 3/01*, an appeal relating to a Disability Living Allowance claim, Commissioner Jacobs (as he then was) held at paragraph 64:

“The appeal Tribunal may, and must, take account of any evidence about the claimant’s likely disablement beyond the date of decision that can sensibly be related to the circumstances obtaining at that date. The conclusion will be a finding of fact on probability which the appeal tribunal

may substitute for the finding of fact on that issue made by the officer acting on behalf of the Secretary of State.”

13. **R (DLA) 3/01** was concerned not with section 5B of the 1943 Act but rather with section 33(7) of the Social Security Administration Act 1992 (the “**1992 Act**”) and section 12(8)(b) of the Social Security Act 1998 (the “**1998 Act**”). However, it has relevance to this appeal because the wording of section 33(7) of the 1992 Act and section 12(8)(b) of the 1998 Act is identical to the wording of section 5B(b) of the 1943 Act.
14. The approach taken by Commissioner Jacobs in **R (DLA) 3/01** was reaffirmed by Judge Hemingway in **CM v Secretary of State for Defence** [2021] CAF/795/2020, who considered how the duties under section 5B of the 1943 Act were to be squared with those in Article 5 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (the “**AFCS Order**”) that was applicable to that case.
15. Judge Hemingway said:

“12. ...The answer it seems to me... is that the F-tT must consider the expected effects of the primary injury and its appropriate clinical management when making a decision but must do so on the basis of the circumstances obtaining at the date of the decision. But it is also right to say that it is not precluded from considering post decision evidence which is capable of informing it as to the situation or as to the assessment it was required to undertake, as at the date of the decision...”

13. In light of the above, I have to conclude that the F-tT did err in law. I do think that it very probably did look at things in the way I, the representative for the Secretary of State, and the claimant say it should have done. But it did not quite say so. The simple indication that it was confined to looking at how the claimant was at the date of the decision under appeal made it appear that it was not applying Article 5 at all. That being so, I agree with the parties that the decision ought to be set aside.”

The Secretary of State’s Response to this Appeal

16. The Secretary of State resisted the appeal. In the submission made on his behalf it was sought to distinguish this appeal from both **R (DLA) 3/01** and **CM v Secretary of State for Defence**. It was argued that the schemes relevant to each of those appeals (disability living allowance and armed forces compensation,

respectively) require a degree of “looking forward” that an assessment under the war pensions scheme does not.

17. The armed forces compensation scheme differs from the war pensions scheme because an award under the former is intended to be a full and final award that addresses the expected future effects of the injury and treatment. Article 5 of the AFCS Order provides:

“Descriptor, further interpretative provisions

5.-(1) Subject to article 25, a descriptor is to be construed as encompassing the expected effects of the primary injury and its appropriate clinical management ... including ...

(b) the effect of operative intervention...

...

(c) the effect of therapeutic drug treatment ...”

18. The SPO governing the war pensions scheme, by contrast, provides that:

“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”.

19. **CM v Secretary of State for Defence** was mainly concerned with the intersection of Article 5 of the AFCS Order and Section 5B of the 1943 Act. Judge Hemingway identified the issue before the Upper Tribunal as follows:

“The real question ... is how the duties under section 5B and those in Article 5, as highlighted above, can be squared.”

20. The appeal was allowed on the basis that the First-tier Tribunal had erred in law by failing to consider evidence that post-dated the Secretary of State’s decision *because in doing so it failed properly to apply Article 5 of the AFCS Order* (see paragraph 12). The Secretary of State says that because there is no equivalent provision to Article 5 of the AFCS Order in the SPO, **CM v Secretary of State for Defence** is of limited use in this appeal.
21. Similarly, the Secretary of State argues that because the question before Commissioner Jacobs in **R (DLA) 3/01** was “how long was the claimant likely to

satisfy the conditions of entitlement for a disability living allowance, disregarding fresh circumstances”, that case is also distinguishable from the current appeal.

The Appellant’s Reply

22. The Appellant had nothing further to add to what he had said in his application for permission to appeal, except to say that he disagreed with what the Secretary of State had said in his Response.

Analysis

23. While *R (DLA) 3/01* involved consideration of how long the claimant was likely to satisfy the conditions of entitlement for a disability living allowance, Commissioner Jacobs provided a close analysis of the meaning of section 12(8)(b) of the Social Security Act 1998 (the “**1998 Act**”) that is of more general application. Its relevance is not restricted to those cases where the tribunal is applying a forward-looking test.
24. Because the words of section 5B(b) of the 1943 Act are identical to those in section 12(8)(b) of the 1998 Act, Commissioner Jacobs’s analysis is equally applicable to the current situation.
25. In considering the words “shall not take into account any circumstances not obtaining at the time when the decision appealed against was made” Commissioner Jacobs drew a distinction between a *circumstance* and *evidence of that circumstance* and he reaffirmed what he had said in a previous disability living allowance appeal (*CDLA/2934/1999* at paragraph 9):

“In the case of a claim for a disability living allowance, the jurisdiction [of an appeal tribunal] is limited to the inclusive period from the date of claim to the date of the decision under appeal. The effect is also to limit the evidence that is relevant to the appeal. The only evidence that is relevant is evidence that relates to the period over which the tribunal has jurisdiction. *However, it is the time to which the evidence relates that is significant, not the date when the evidence was written or given. It does not limit the tribunal to the evidence that was before the officer who made the decision. It does not limit the tribunal to evidence that was in existence at that date. If evidence is written or given after the date of the decision under appeal the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible, If it relates to a later time, it is not admissible*” (emphasis added).

26. At sub-paragraph 13 of paragraph 24 of its written reasons the Tribunal explained how it approached the psychiatric evidence, and why it considered it could not have regard to the psychiatric evidence either of Dr Charnaud or of Dr Foster:

“We have accepted that [the claimant] works long hours as a coping mechanism to deal with his PTSD and his evidence that this condition is taking its toll on his personal mental health and family life. We cannot however have regard as suggested by Mr Holmes to either of [sic] letter from the Consultant Psychiatrist dated 30th November 2020 (pages 132 to 133 of the Response Bundle) nor the Report prepared by the Consultant Psychiatrist dated 1st October 2021 (pages 134 to 143 of the Response Bundle) in support of his submission that [the claimant] has moderate to severe PTSD and the diagnosis of complex PTSD as both of these post-date the date of this assessment by the Secretary of State.”

27. The Tribunal explained further in paragraph 28:

“Finally although as stated above we cannot take account of the latest evidence from the Consultant psychiatrists we note their opinions and that [the claimant] has since April 2021 not been able to work and he may wish to consider consulting with his representative and seek their advice as to a potential claim for worsening.”

28. The Tribunal has failed to appreciate the important distinction between a *circumstance* and the *evidence of that circumstance* identified by Commissioner Jacobs in **CDLA/2934/1999** and reiterated in **R (DLA) 3/01**. The “relevant circumstance” for the purposes of this appeal was the claimant’s psychiatric condition. The Tribunal was only permitted to take into account those circumstances “obtaining at the time when the decision appealed against was made”, which was on 15 October 2020 (the “**SoS Decision Date**”). In stating that it could not rely on the psychiatrists’ evidence because it was created after the SoS Decision Date the Tribunal misdirected itself in law. The Tribunal was entitled to take into account *evidence* that was created after the SoS Decision Date to the extent that that evidence spoke to the *circumstances* obtaining on the SoS Decision Date. Ascertaining whether the psychiatrists’ letter and report, created after the SoS Decision Date, could be relied upon as evidence of the circumstance up to the SoS Decision Date required the Tribunal to make findings as to the time to which the letter or report (or passages within them) related. It failed to do so, and that failure amounted to an error of law.

29. Having identified an error of law, I must consider whether that error was material. In other words, I must decide whether the outcome of the appeal might have been any different had the error not been made.
30. Dr Charnaud's letter dated 30 November 2020 identifies the issue he was engaged to opine on: "the degree to which [the claimant's] trauma affects him in the here and now". A literal interpretation supports a conclusion that the letter speaks to the claimant's degree as of 30 November 2020, the day the letter was dated, and so after the SoS Decision Date. However, that is far from the only interpretation the letter would support.
31. The sources on which Dr Charnaud drew in reaching the conclusion that the degree of the claimant's trauma was properly categorised as "moderate to severe" rather than "mild to moderate" (as previous psychiatrists had diagnosed) relate to different dates or periods: written reports (which must relate to the (unspecified) date they were produced, or perhaps the earlier date of the sources upon which those reports drew in turn), Dr Charnaud's interview with the claimant (which took place on 21 November 2020), and "previous information from [the claimant's] therapist" (the date of which is unspecified). As a matter of logic, Dr Charnaud's reliance on these prior sources indicates that it is at least possible that some of the findings relate to a time prior to the SoS Decision Date.
32. Further, Dr Charnaud's assessment of the degree of the claimant's mental disorder as "moderate to severe" does not appear to be based on any recent change in the claimant's symptoms, but rather on Dr Charnaud having placed a different interpretation on the claimant's presentation from that of previous psychiatrists. While Dr Charnaud says previous psychiatrists saw the claimant's ability to hold down a job as indicating lesser degree, Dr Charnaud saw the claimant's continuing to work as a coping strategy for dealing with his symptoms of post-traumatic stress that supported a finding of "moderate to severe" degree.
33. Dr Foster's report is dated 1 October 2021. While it addresses the claimant's longstanding mental health issues, under the heading "Current Problems" it speaks of increasing anxiety symptoms, gastrointestinal symptoms with reflux oesophagitis, and increasing difficulty with frustration and irritability as a result of his trauma history. It explains that these symptoms, combined with the claimant's physical health difficulties, made it impossible for the claimant to continue regular employment. It identifies the "lack of structure in his day" and "increasing feelings of isolation and loneliness" as being particular problems, and says the withdrawal of US and allied troops from Afghanistan has caused him to question the purpose of his military service there, compounding his difficulties. Since both the

claimant's ceasing to work and the withdrawal of US and allied troops from Afghanistan occurred some months after the SoS Decision Date, the 'Current Problems' section of the report relates to a circumstance that was "not obtaining at the time when the decision appealed against was made". At least some of other sections (such as 'Personal/Social History', 'Past Medical/Psychiatric History' and 'Family History') clearly cover circumstances prior to the SoS Decision Date.

34. Rather than directing itself not to have regard to the written psychiatric evidence that post-dated the SoS Decision Date at all, the Tribunal should have excluded from consideration only those passages that related to circumstances not obtaining at the SoS Decision Date. In respect of the other passages, it should have considered their relevance and, if relevant, their reliability and assigned appropriate weight to them accordingly when carrying out its fact-finding role.
35. It is clear to me that the Tribunal misdirected itself as to the proper meaning of the prohibition in section 5B(b) of the 1943 Act on taking into account "any circumstances not obtaining at the time when the decision appealed against was made", confusing a "circumstance" with "evidence of that circumstance". That misdirection caused it to exclude from its consideration evidence that, had it been considered, might have caused the Tribunal to make different findings, which might have resulted in a different outcome to the appeal.

Conclusion

36. I conclude that the decision of the First-tier Tribunal involves a material error of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
37. Further facts need to be found. The First-tier Tribunal, with its expert members, is best placed to carry out that fact finding.
38. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new panel of the First-tier Tribunal. That panel will not be bound by the findings of the Tribunal.

Thomas Church
Judge of the Upper Tribunal

Authorised by the Judge for issue on 27 April 2026