IN THE UPPER TRIBUNAL **Case No.** CAF/3122/2016
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 27 July 2016 is set aside and, by consent, there is substituted a decision maintaining a composite interim assessment of 70% from 20 August 2012 in respect of the following conditions –
(a) prolapsed intervertebral disc (AD1); and
(b) pain and numbness in left leg and pain in right hip (AD2).

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with permission granted by the First-tier Tribunal, against a decision of the First-tier Tribunal dated 27 July 2016, whereby, on his appeal from a decision of the Secretary of State notified on 21 July 2015 reviewing but maintaining an assessment of disablement at 70%, it reduced the assessment to 40% with effect from 20 August 2012. The Secretary of State supports the appeal and both parties are now agreed that the assessment should be restored to 70%.

2. A form of consent order in the style used in courts has been submitted Nevertheless, I will follow the Upper Tribunal's usual practice of giving brief reasons for allowing the appeal, for the benefit of the First-tier Tribunal as much as for the benefit of the parties.

3. The claimant was born in 1930 and so is now in his mid-80s. He served in the Army from 1948 to 1950 and was then a member of the Territorial Army until 1969. The documents originally before the First-tier Tribunal did not give the full history of his claim for a war pension, but it managed to elicit further evidence sufficient for its purposes. The original award of a war disablement pension was made in 1969 in respect of a prolapsed intervertebral disc. The assessment was then 30%, increased to 40% in 1994 and to 50% by a Pensions Appeal Tribunal in 1998. In 2002, another Pensions Appeal Tribunal accepted a claim for a second condition – "pain and numbness in left leg and pain in right hip", with effect from 2000, and a composite assessment of 60% was made. On 20 August 2010, the First-tier Tribunal (which had by then replaced the Pensions Appeal Tribunals in England and Wales) made an interim assessment of 70% in respect of the period from 19 June 2009 to 19 August 2012. As far as I can see, the fact that the assessment was for a limited period seems to have escaped the Secretary of State and he continued paying the pension after the period had ended. It was not until 28 January 2015 that another certificate, making a long-term interim assessment of 70%, was issued, together with a decision in which it was said –

> "The Generous assessment of 70% for AD1 and AD2 is maintained".

Nothing specific was said in the certificate or the decision as to the period for which the assessment was effective, but the First-tier Tribunal subsequently treated it as a

decision effective for an indefinite period from 20 August 2012, which seems consistent with what is usually meant by "Interim LTA" and with the duty – which has to be implied in the absence of any express provision in the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 (SI 2006/606)) – to make a further assessment when a fixed-term interim assessment expires.

4. The claimant applied for a review of that assessment. That was correctly treated by the Secretary of State as an application for a review "on any ground" under article 44(1)(b) of the Order that, because it had been made within three months of the decision to be reviewed, could be effective from the date from which the decision being reviewed was effective (see paragraph 1(3) of Schedule 3 to the Order[1]). However, the previous assessment was maintained, in a decision apparently given on 17 July 2015 but notified to the claimant on 21 July 2015 and for which reasons were given only on 15 September 2015, after the claimant had appealed.

5. The claimant's appeal came before the First-tier Tribunal on 27 July 2016. At the outset, the claimant was warned that the First-tier Tribunal could reduce the assessment of disablement but, having taken advice from his Royal British Legion representative, he indicated that he wished his appeal to proceed. The First-tier Tribunal had formed a preliminary view that the claimant had previously been over-

[1] The Secretary of State actually purported (see doc 2 (reverse)) to rely on "Article 46.1(3)", but article 46 is very short provision that merely introduces Schedule 3 and it is therefore clear that paragraph 1(3) of that Schedule is what he had in mind, presumably as read with paragraph 1(4)(b). In *War Pensions and Armed Forces Compensation – Law and Practice* (Wildy, Simmonds & Hill, 2016), Judge Andrew Bano says in a footnote on page 46 that the wording of paragraph 1(3), (4) and (5) of Schedule 3 "is very unclear". That is, in my view, a gross understatement: one can interpret those subparagraphs only by imagining what the legislator might have wished to achieve, which is not an altogether satisfactory approach to statutory construction. Paragraph 1(1) to (5) provides –

> "**1.**—(1) Subject to the following provisions of this Schedule, an award or an adjustment of an award shall have effect from such date as may be specified in the award, being a date not earlier than the date specified in subparagraph (2) which is relevant in the claimant's case.
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> (2) The date specified in this subparagraph is whichever date is the latest in time of the date—
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> (a) following the date of termination of service or, in a case under Part III, following the date of death of the member;
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> (b) of the claim;
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> (c) of the last application for review; or
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> (3) Where in a case to which subparagraph (1) applies, the claimant satisfies the requirements of subparagraph (4) the award shall have effect from the date the subparagraph is satisfied.
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> (4) This paragraph is satisfied where the date of claim or application for review is made within 3 months of—
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> (a) the date of termination of service, or the date of death where an award is made in respect of a member's death; or
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> (b) except where paragraph (a) applies, the date of notification of a decision on the claim or review.
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> (5) Where the requirements of subparagraph (4) are satisfied on more than one occasion and the occasions on which they are satisfied are consecutive, subparagraph (3) shall apply as from the first occasion on which subparagraph (4) is satisfied."

The surplus or misplaced "or" at the end of paragraph (2) is presumably the result of forgetfulness after the draftsman had decided that a draft head (d), whatever it was, was not a good idea and should be omitted, but the drafting of subparagraphs (3) and (5) is difficult to excuse. What is meant by the date on which, or the occasion from which, subparagraph (4) is satisfied? A sensible literal construction is not possible.

assessed and it did not alter that view in consequence of the hearing. In a detailed statement of reasons, it explained its thinking and also showed clearly that it had in mind the terms of article 44 of the 2006 Order, relating to reviews.

6. In relation to assessments of disablement, article 44(4) provides –

> "(4) Subject to the provisions of paragraph (9), following a review under paragraph (1) of … any assessment of the degree of disablement of a member of the armed forces, that … 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—
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> (a) the … 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
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> (b) …; or
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> (c) there has been a change in the degree of disablement due to service since the assessment was made."

As I said in *JM v Secretary of State for Defence (WP)* [2014] UKUT 358 (AAC) –

> "14. … 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)). …"

7. The First-tier Tribunal found that the claimant's total disablement merited an assessment of 70% but that at least half of that was attributable to chronic obstructive pulmonary disease, asthma and a cardiac condition that were not due to service. Accordingly it considered that disablement due to service should be assessed at 35%, which it rounded up to 40% under article 42(5). As to the restrictions on revision of an assessment of disablement imposed by article 44(4), it said –

> "39. … We find that the review decision under appeal was made in consequence of ignorance of, or a mistake as to, a material fact. We find that on review the Respondent failed to take into account the very significant disabling nature of the non-accepted conditions namely COPD and cardiac condition."

In giving permission to appeal, the senior resident judge, who had not been the judge presiding at the hearing, pointed out that the reasons given on 15 September 2015 for the review decision that was under appeal had in fact referred to both COPD and the cardiac condition. When issuing case management directions, I suggested that, if the decision being reviewed was the decision of the First-tier Tribunal dated 20 August 2010, article 44(3) applied to impose further restrictions.

8. It is important when applying article 44 on an appeal to distinguish between the review decision against which the appeal has been brought and the decision that was under review (which may itself have been a review decision in relation to an even earlier decision). I accept the Secretary of State's submission that it was not the decision of the First-tier Tribunal dated 20 August 2010 that was being reviewed here (at least in any material sense), because the assessment in that case had

expired. It was the Secretary of State's assessment of 28 January 2015 that was reviewed in July 2015. Save perhaps to the extent that it could be regarded as a continuation of the review of the earlier 60% assessment, which was started by the 2010 decision of the First-tier Tribunal, the decision of 28 January 2015 had not itself been a review decision: it had merely been an assessment belatedly made following the expiry of the earlier interim assessment.

9. Thus, what mattered in this case was not whether the decision made in July 2015 had been made in consequence of ignorance of, or a mistake as to, a material fact but whether the decision of 28 January 2015 had been. It follows that the reasoning of both the panel sitting on 27 July 2016 (if it really meant to say what it did say) and that of the senior resident judge is flawed. On the other hand, the senior resident judge's point holds good in respect of the earlier decision because the reasons given for that decision show clearly that the Secretary of State and his medical advisor were, unsurprisingly, even then well aware that much of the claimant's disablement was due to non-accepted cardiac and respiratory conditions.

10. The Secretary of State submits, that the First-tier Tribunal appears to have taken a different view as to the extent to which disablement was caused by the non-accepted conditions. It seems to me that it was in respect of the appropriate assessment of the overall disablement and the relative contributions of the accepted and non-accepted conditions where there were differences of view but, in any event, such differences of opinion are not enough to justify revising an assessment to the detriment of the claimant. Given that the Secretary of State had been well aware of the non-accepted conditions and had accepted that their contribution to the claimant's overall disablement had to be ignored in the assessment of disablement for war pensions purposes, it is not obvious on what grounds it could be said that the assessment of 28 January 2015 was made in consequence of ignorance of, or a mistake as to, a material fact or of a mistake as to a law. In any event, the First-tier Tribunal's statement of reasons did not provide an explanation. I therefore accept that the First-tier Tribunal's decision is wrong in law.

11. Originally, the Secretary of State submitted that the case should be remitted to the First-tier Tribunal. However, both parties are now agreed that I should merely substitute a decision maintaining the previous assessment, thus reinstating the Secretary of State's original decision. That seems to me to be a sensible approach in the circumstances of the case and I therefore give the decision set out above.

Mark Rowland
10 May 2017