IN THE UPPER TRIBUNAL **Appeal No.** CAF/2789/2016
ADMINISTRATIVE APPEALS CHAMBER

Before Judge S M Lane

DECISION

The appeal is dismissed.

The decision of the First-tier Tribunal ('F-tT) heard on 3 June 2016 under reference ASS/00035/2016 did not involve the making of any, or any material, error on a point of law.

> The decision reducing the assessment of disablement from 40% to 30% in respect of accepted conditions ('AC') 1, 2 and 3 is accordingly confirmed.
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> AC1 and 3 (the back conditions) are assessed at 20% and AC2 (the knee conditions) is assessed at the lower end of 6 – 14%

REASONS FOR DECISION

1 I apologise for the delay in issuing this decision, which follows an oral hearing on 13 July 2017. Mr Glyn Tucker, Senior Pensions and compensation Officer of the Royal British Legion, represented the appellant. The Secretary of State was represented by Mr Jonathan Lewis, of counsel. The appellant lives in Australia and did not attend the hearing.

2 This is one of a number of recent cases in which the F-tT decided, on a review of an assessment of disablement under the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pension Order 2006 ('SPO 2006')**,** to revise the assessment to the claimant's detriment by reducing the existing percentage of disablement. In doing so, the F-tT failed to refer to Article 44(4) of that Order. This is the ground upon which the appellant was granted permission to appeal by a judge of the First-tier.

3 Article 44(4) imposes important limitations on the powers of the Secretary of State (or tribunal on appeal) when exercising its power to revise an assessment to the detriment of a claimant. In this case, it decided to reduce the percentage of assessment from 40% to 30%.

4 Article 44 provides, as relevant to this decision, as follows:

> Review of decisions, assessments and awards
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> 44(4) Subject to the provisions of paragraph (9), following a review under paragraph (1) of any decision accepting a claim for pension or any assessment of the degree of disablement of a member of the armed forces, that decision or assessment may be revised by the Secretary of State to the detriment of a member of the armed forces only where the Secretary of State is satisfied that—

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

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

5 The purpose of these conditions is to 'ensure that a mere difference of opinion as to the proper level of the assessment cannot justify a reduction in the assessment or the consequent award'. It provides protection for claimants and it is incumbent on First-tier Tribunals to make it clear which condition in article 44(4) is satisfied, and if so, why - *JM v Secretary of State for Defence (WP)* [2014] UKUT 358 (AAC) at [14], Upper Tribunal Judge Rowland. This is *not* to say that a failure to refer to the article explicitly is inevitably fatal. That would amount to the triumph of form over substance. It may be possible to infer from the decision that a condition was fulfilled, but it is dangerously easy to go astray.

6 The conditions that need to be explored for the purposes of this decision are in Article 44(4)(a) - ignorance of, or mistake as to material fact. These can be very difficult to identify and generally require close analysis.

7 If a tribunal is relying on *ignorance of material fact* in order to revise an assessment, it needs to work out the fact of which the Secretary of State was said to be ignorant. The F-tT needs to identify the evidence that was before the Secretary of State and what it contained. If, for example, at the date of decision the Secretary of State actually possessed all of the medical reports said to be relevant, it would be difficult to find that he was ignorant of their contents. He may have underestimated or overestimated the significance of the evidence, but that does not mean he was ignorant of facts. Equally, he may simply have made a controversial judgement call in a difficult situation. That does not display ignorance of fact, either.

8 Where a tribunal seeks to rely on a *mistake of fact*, it must take care to distinguish between fact and opinion. An opinion is a belief which may, or may not, be based on rational analysis or objective facts. Where it is based on matters that are objectively provable, so much the better. Sometimes, however, the basis of an opinion will not be easy to discern. In this case, as will be seen, a medical report indicated that the appellant would not be able to walk more than 50 metres, but it was difficult to see how the GP arrived at that figure.

9 In order to classify what otherwise appears to be a mere opinion as a statement of fact, it would be necessary to find that the person putting the opinion forward was impliedly stating that he had reasonable grounds for believing his opinion to be correct. So, if a tribunal is dealing with an expert opinion, or the opinion of someone who claims to have particular knowledge of a matter in issue, that person may be making an implied statement that he has reason grounds on which to base that opinion. An expert opinion from, say, *Dr A,* which is devoid of clinical findings to support his opinion, or sparse on how he arrived at his opinion, may be little better than an assertion. Even though *Dr A* is a professional, his opinion may be rejected where

another doctor, *Dr B,* has set out how and why he has arrived at a different conclusion for the patient.

10 There are some matters, such as judging distances, that are usually treated as no more than statements of opinion. This is because distance is notoriously difficult for laymen to judge and it may well be that by saying 'I can only walk *x* metres' the individual is just saying 'I can't walk very far'. The tribunal may, however, be able to give 'not very far' some content by asking the right questions.

11 More complex facts may also provide a basis for finding a mistake under article 44. An adverse credibility finding that 'the witness's evidence was not reliable' or 'the witness was not credible' is generally based on instances in the evidence where the tribunal finds that, for example, the witness's memory was faulty or his evidence contains inconsistencies that lead it to find that the witness is not telling the truth. Flawed memory and/or inconsistency may taint the witness's evidence on one or more issues. In extreme cases, the witness's credibility may be entirely undermined, but that is unusual. In each instance, the tribunal has to explain why the evidence was rejected. In so doing, it may need to find that, whilst *x* did not happen, *y* did happen.

Failure to refer to the Article 44

12 Given the protective nature of the provision and its complexity, it is plainly wise for a First-tier Tribunal to refer expressly to Article 44(4) when it wishes to reduce an assessment. That way, it can keep the conditions clear in its Statement of Reasons and make sure that it has dealt with them fully.

13 An F-tT undoubtedly had the power to increase, decrease or maintain the assessment subject to establishing that one or more of the conditions in Article 44 were satisfied.

14 In this appeal, the Records of Proceedings of all three members show that the F-tT informed the appellant and his previous representative that the assessment could increase, decrease or stay the same. It properly offered the them the opportunity (which they declined) to take a break to discuss whether they wished to proceed.

15 It was not, however, clear from this 'warning' whether the F-tT had anything other than natural justice or fairness in mind. The appellant has rightly not argued that there was any procedural fairness in the proceedings. But it did not show, on the face of it, that the F-tT had Article 44(4) in mind, and this is the problem.

16 So can it be *inferred* that the F-tT had Article 44(4) in mind? Alternatively, if it cannot be inferred, did the F-tT nevertheless make all the findings necessary for Article 44(4) and come to the only conclusion it could have come to on the evidence before it?

Brief background of the appeal

17 The appellant was a private in the Army from 1986 – 89, serving in the ACC (Army Catering Corp) as a chef. He would have had to participate in fitness training. He was discharged from the Army in 1989 as medically unfit for any service. He made a claim for a war pension in or around 1990 on the basis of one injury, thoraco-lumbar rotational scoliosis ('AC1'). The injury was assessed at 6 – 14%. In 1999, the appellant requested a review. The Secretary of State accepted that a second condition of 'left knee syndrome' (AC2). This did not result in any increase in the assessment. 6 – 14% for given in composite.

18 In 2009 the appellant requested a review. His *lower* back was painful. He blamed this on his period of service 20 years earlier. His back surgeon, Dr Parkinson, did not consider AC1 (rotational scoliosis) to have anything to do with his lower back pain (106, 22 November 2014). Medical reports carried out for the Secretary of State in Australia, and for the appellant by various specialists indicate degenerative changes.

18 In 2010 the assessment was increased to 15 – 19% for the composite of both conditions. He blamed this condition, as well as osteoarthritis in other parts of his body, to his 3 years in service 24 years earlier. In November 2013, the appellant had anterior lumbar interbody fusion surgery at L4/5 and L5/S1.

19 The assessment of 2010 was upheld by a tribunal which heard the case on 17/3/15. The percentage was rounded up to 20% (p107), effective from 13/06/13.

20 On 18/9/15, another tribunal accepted a third injury, severe lower back injury (p108). From the evidence in the present bundle, it is not possible to see service basis of that condition. There is no Statement of Reasons for the decision and the Secretary of State did not appeal the decision.

21 On 30/9/15, the Secretary of State reassessed all 3 injuries at 40% from 13/06/13. The two back injuries (AC1 and AC3) were combined for assessment purposes. The appellant appealed because he considered that the assessment did not adequately reflect his lost career, employment prospects, and lost earnings, nor his constant pain, suffering and disability.

22 There was a large body of medical evidence. It indicated very little by way of clinical signs to account for the levels of disablement and pain asserted by the appellant. The thoraco-lumbar scoliosis was generally considered by practitioners to be of minimal, or no significance. Indeed, until 2013 the appellant continued his career as an HGV driver/instructor, driving heavy vehicles with manual gears and clutch despite complaining of severe upper back and neck, and knee pain. He was reported to have no problem walking at that time and to be exercising regularly in a medical report from Western Australia.

23 The appellant had also begun to complain of pain in both of his knees. However, his orthopaedic surgeon in Australia, Mr Baddeley, reported that the appellant's right knee was completely normal and his left was normal apart from an old slightly attenuated ACL injury which on clinical examination resulted in no instability. His conclusions were based on physical examination and MRIs carried out at the time.

What the Secretary of State argued

24 Mr Lewis argued that the Secretary of State was either ignorant of material facts or made a mistake of fact in reaching his conclusion on the level of assessment.

Ignorance of material fact

25 I do not consider that the Secretary of State can be said to be ignorant of material facts. He appears to have had all of the medical reports in the bundle before him at the material decision-making times and the medical practitioner acting on the Secretary of State's behalf referred to them in making his decision. The medical advisers who reviewed the reports did not have the advantage of the appellant's oral evidence and, unsurprisingly, did not consider the reports in the same detail as the F-tT, but I cannot see any ignorance of material fact.

26 It is notable that, by the time that the third injury was accepted by the F-tT, the appellant was asserting that the training he undertook included far more than the Secretary of State had accepted, including frequent parachute jumps and two jumps from walls of 12 feet and 15 metres to hard surfaces. Yet the only jump documented in the medical records took place some 2 ½ years after his discharge from service, from a 6 foot wall (p23 – 25). But these claims were made in documents available to the Secretary of State and his medical advisers, so ignorance of them is out of the question.

27 It might be said that the Secretary of State was ignorant of the fact that the appellant was not being candid, or was not reporting his disability reliably. But those were inferences that could have been made from evidence openly available to the Secretary of State. Ignorance of fact

Mistake of material fact

28 Mr Lewis referred to the exposition of evidence and its analysis by the F-tT, which led them to make a number of findings of fact on the basis of which (i) it found the appellant an unreliable witness and (ii) considered it necessary to reduce the award.

29 The F-tT's analysis of the evidence was thorough. It made findings of fact on troubling inconsistencies in the appellant's evidence, amongst them inconsistencies between what it observed during the hearing and the appellant's claims. These properly put to the appellant, who was unable to answer them satisfactorily. provide an y or any satisfactory answer. They are in paragraphs 14 – 19 of the Statement of Reasons, which cover three closely typed pages.

30 On the evidence before it, the F-tT was certainly entitled to reject the appellant's claim that his disability had worsened. But this still does not answer the important question of whether the F-tT had referred inferentially to Article 14 in their fact finding and reasoning.

31 I am satisfied by the closeness of the analysis of the evidence that the F-tT must have had Article 44(4) in mind. There would have been no reason to go to the trouble the F-tT went to in dissecting the evidence in the way it did, had it not been considering its power under Article 44(4).

32 A War Pensions tribunal is, of course, also an expert or, at the very least a highly specialist, tribunal. Its decisions should be respected unless

> '… *it is quite clear that they have misdirected themselves in law.'* –

AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49 at [30] per Baroness Hale of Richmond.

33 I consider it unlikely that a F-tT that dealt with this complex evidence so skilfully and took such procedural care, would overlook such a fundamental Article of the SPO.

34 It follows that I accept that it is implicit in the F-tT's decision that the Secretary of State made a mistake of fact in reaching the assessment that he did. I agree with Mr Lewis that it is possible to work out how the F-tT reached its conclusions, which cumulatively imply a mistake of fact.

35 Had I not come to this conclusion, I would have found that despite its error, the F-tT came to the only conclusion that it could have come to on the evidence.

36 I do not accept that F-tTs should necessarily draw back from exercising their power under Article 44(4) by remitting the matter to the Secretary of State. Certainly in cases where the appellant attends an oral hearing, the specialist F-tT is uniquely placed to explore the evidence in a way that the Secretary of State simply cannot.

[Signed on original]

S M Lane
Judge of the Upper Tribunal

[Date]

31 October 2017