

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CAF/942/2017

Before Upper Tribunal Judge Rowland

Attendances:

The Appellant was represented by her husband.

The Respondent was represented by Mr Adam Heppinstall of counsel, instructed by the Government Legal Department.

Decision: The claimant's appeal is dismissed.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 25 January 2017, whereby it struck out her appeal against a decision of the Secretary of State in respect of awards under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) ("the 2011 Order") of a lump sum of £15,500 and a guaranteed income payment ("GIP") of £1,250.20 per year from 21 January 2016.

The facts and procedural history

2. The claimant was an officer in the Army from 2000 until she was medically discharged on 2 May 2012. She had then been ill for some time, suffering from various conditions including chronic fatigue syndrome, and had been off work altogether from May 2009 until her discharge. It is not necessary to set out the underlying facts in more detail than that but it is necessary to set out the procedural history of her claim under the 2011 Order and, later in this decision, I will also mention related decisions made under the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 2006 (SI 2006/606) ("the 2006 Order").

3. The claimant's claim for benefit under the 2011 Order was received by the Secretary of State on 5 July 2011. It was initially rejected by the Secretary of State on the ground that service since 6 April 2005 was neither the predominant cause of any of her conditions so as to make benefit payable under article 8 nor the predominant cause of any worsening of a condition so as to make benefit payable under article 9. The claimant's appeal was at first dismissed by the First-tier Tribunal but I set that decision aside and remitted the case to the First-tier Tribunal (*NH v Secretary of State for Defence (WP & AFCS) [2015] UKUT 35 (AAC)*). It heard the appeal on 20 and 21 January 2016. In a reserved decision dated 7 March 2016, the First-tier Tribunal decided (a) that the claimant's chronic fatigue syndrome had developed in late 2007, (b) that, although it was not predominantly caused by service so as to make benefit payable under article 8, service had been the predominant cause of a worsening of that condition from about the end of January 2009 and (c)

that, although the claimant had already been downgraded before then, the worsening had in turn been the predominant cause of the claimant being further downgraded from October 2009 until her discharge.

4. On 28 July 2016, the claimant's husband wrote to Sir Michael Fallon MP, then the Secretary of State for Defence, complaining that the decision of the First-tier Tribunal had not been implemented. He copied his letter to his Member of Parliament (who was, of course, also the claimant's Member of Parliament) and the Head of Veterans UK, who administer the Armed Forces Compensation Scheme on behalf of the Secretary of State. His Member of Parliament wrote a letter to the Secretary of State on the following day.

5. On 1 August 2016, Veterans UK informed the claimant that it had been decided that she would "receive a lump sum payment of £15,500 as an interim award which will be reviewed in 18 months" and a GIP from 21 January 2016 at the rate of £1,250.20 per year.

6. Provision for interim awards is made by article 52 of the 2011 Order, which provides –

"52.—(1) An interim award may be made where the Secretary of State is satisfied that a person is entitled to injury benefit but—

- (a) the prognosis for the injury in that particular case is uncertain; and
- (b) it is not possible to determine which descriptor is applicable to it.

(2) The Secretary of State is to select the descriptor considered to be the most appropriate descriptor at the date of the decision.

(3) The Secretary of State must specify the period which the interim award has effect in accordance with paragraphs (4) and (5).

(4) The period referred to in paragraph (3) is to be a maximum of 2 years starting from the date the award was first made.

(5) Where the period specified is less than 2 years, the Secretary of State may extend and further extend the award but, subject to paragraph (6), a final award must be made within the period of 2 years starting with the date on which an interim award was first made.

(6) Where paragraph (7) applies—

- (a) the interim award may be extended and further extended for a period not exceeding 2 years; and
- (b) a final award must be made within the period of 4 years starting with the date on which an interim award was first made.

(7) This paragraph applies where—

- (a) the prognosis remains uncertain at the end of the initial 2 year period; and
- (b) the Secretary of State considers the extension just and equitable having regard to all the circumstances of the case.

(8) Where the final decision is to award a descriptor at a tariff level which is—

- (a) at the same level or higher than the tariff level awarded in the interim award, account is to be taken of the amount of benefit paid in accordance with the interim award and only the difference between the amount of benefit paid in accordance with the interim award and the amount of the final decision is payable;
- (b) lower than the tariff level of the tariff awarded in the interim award, no further amount of benefit will be paid in accordance with the final decision, and no amount of benefit paid in accordance with the interim award is recoverable."

By virtue of article 2(1), “injury benefit” means “a lump sum, a supplementary award and guaranteed income payment”.

7. The lump sum awarded was at tariff level 11 (see Table 10 of Schedule 3 as in force at the date of claim) and so the claimant was eligible for GIP under article 24. She was told that she did not have a right of appeal against the decision to make an interim award of a lump sum but that she did have a right of appeal against the decision awarding GIP.

8. On 7 August 2016, the claimant’s husband wrote again to Sir Michael Fallon MP, saying that his wife had now been notified of the decision and arguing that the decision was wrong insofar as the lump sum award was made at tariff level 11, the GIP was awarded only from 21 January 2016 and the award was only interim. His letter was headed “Application for Review ...”. Again, he copied his letter to his Member of Parliament and to the head of Veterans UK.

9. On 12 September 2016, the Parliamentary Under Secretary of State and Minister for Defence Veterans, Reserves and Personnel wrote to the claimant’s Member of Parliament in reply to her letter to the Secretary of State, saying that he was also taking into account the points raised in the claimant’s husband’s second letter. In his letter, the Minister explained the decision given on 1 August 2016 and the delay in making it and he also addressed some other points that the claimant’s husband had made.

10. Meanwhile the claimant’s husband’s first letter of 28 July 2016 had been forwarded to Defence Business Services who wrote to him by email on 27 September 2016, sending him a copy of the Minister’s letter of 12 September 2016 and telling him that his “formal complaint” had been referred to the Veterans UK Customer Services Team.

11. On the following day, 28 September 2016, the claimant’s husband submitted, by an email to Veterans UK, an appeal by the claimant. In the email, he identified the decision being challenged as the Minister’s letter of 12 September 2016.

12. On 10 October 2016, Veterans UK wrote to the claimant saying that, “[o]n 7 August you asked us to carry out an Ignorance or Mistake Review of the Armed Forces Compensation Scheme (AFCS) decision notified to you on 1 August 2016” and that the Secretary of State was not satisfied that there were grounds for review. (An identical letter was sent four days later and the claimant’s husband told me that there had also been a third. Mr Heppinstall said that he had come across the phenomenon of multiple decisions before.)

13. On or about 19 October 2016, the First-tier Tribunal received from Veterans UK a bundle of documents and a request, headed “Request for Tribunal Direction”, that the claimant’s appeal be struck out under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (SI 2008/2686) on the ground that there was no right of appeal against an interim award and so the First-tier Tribunal had no jurisdiction to hear the appeal.

14. In his request, the Secretary of State referred to the decision notified on 1 August 2016 as “the revised decision”, presumably having in mind the earlier decision against which the First-tier Tribunal had allowed the appeal. Oddly, although he referred to articles 52 and 53 of the 2011 Order, the Secretary of State did not make any specific reference to the legislation governing rights of appeal which was obviously material to his application.

15. The relevant provisions are section 5A of the Pensions Appeal Tribunals Act 1943, which provides for an appeal against a “specified decision”, and regulation 3 of the Pensions Appeal Tribunals Act 1943 (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Regulations 2011 (SI 2011/1240) (“the 2011 Regulations”), which provides –

“Specified decisions capable of appeal

3.—(1) Subject to paragraph (2), the following decisions are specified for the purposes of section 5A(2) of the Pensions Appeal Tribunals Act 1943, that is a decision which—

- (a) determines whether a benefit is payable;
- (b) determines the amount payable under an award of benefit; and
- (c) is issued under article 26(6) (refusal to make a temporary award permanent etc.) or 26(8) (addition of new descriptor) of the 2011 Order, relating to the making of a permanent award.

(2) The following decisions are not specified decisions, that is a decision which—

- (a) makes or arises from the making of an interim award under article 52(1) of the 2011 Order;
- (b) suspends the payment of an award of benefit;
- (c) makes or arises from the making of a temporary award under article 26(2) of the 2011 Order;
- (d) determines whether a fast payment is made under article 27(1) of the 2011 Order;
- (e) relates to the payment, in whole or in part, of medical expenses under article 28(1) of the 2011 Order.”

By virtue of regulation 2, “benefit” means “a benefit payable under the 2011 Order”.

16. Among the documents accompanying the “Request for Tribunal Direction” was a “comment” inviting the First-tier Tribunal also to consider striking the case out under rule 8(3)(c) on the ground that it had no prospect of success because the letter from the Minister dated 12 September 2016 was not notification of a decision.

17. Veterans UK sent the claimant’s husband a copy of the request that the appeal be struck out but not the accompanying documents. Therefore, on 26 October 2016, the claimant’s husband sent an email to the First-tier Tribunal, saying that he had not received all the documents and opposing the request for the striking out of the appeal on the ground that the appeal was not against an interim award but against the outcome of a review under article 59 of the 2011 Order notified in the Minister’s letter of 12 September 2016. The First-tier Tribunal sought further comments from the Secretary of State, which were sent on 15 December 2016.

18. On 25 January 2017, a judge of the First-tier Tribunal struck the appeal out the appeal on the ground that the First-tier Tribunal had no jurisdiction to hear the appeal. She referred to regulation 3 of the 2011 Regulations and said –

“7. ... the making of the interim decision cannot be appealed nor anything ‘arising out of’ that decision which includes the tariff level and the commencement date of the GIP.

8. The question of the commencement date is not only excluded as above, but is also not *included* in regulation 3(1)(a) – *whether* a benefit is payable or (b) determines the *amount* payable under an award of benefit.

9. The decision of the SoS dated 1/8/2016 is made as a result of implementing the Tribunal decision, and, as such, cannot be a review decision falling within articles 55-59 and is expressly excluded as a reconsideration decision by article 53(2)(d).”

She also rejected the claimant’s submission that the Minister’s letter of 12 September 2016 amounted to a decision under the 2011 Order against which he could appeal.

19. The claimant applied for permission to appeal. The First-tier Tribunal refused permission but I granted it, saying that, while I had doubts about the prospects of success of the appeal, it raised issues that merited consideration by the Upper Tribunal. The Secretary of State resists the appeal but accepts that there are respects in which the First-tier Tribunal erred.

20. I understand that, while the appeal has been pending, the period of the interim award has been extended to two years under article 52(5).

Failure to provide the claimant with documents

21. One of the claimant’s grounds of appeal is that her husband was never provided with all the documents that were before the First-tier Tribunal. This ground has become academic because he now has all the documents and the case turns entirely on points of law that can be argued before me in the light of the documents. I have therefore not investigated what happened. It is possible that there was an isolated error. If not, there may be a need for Veterans UK and the First-tier Tribunal to reach an agreement as to which of them should provide documents to a claimant where the Secretary of State makes an application for an appeal to be struck out.

The nature of the decision notified on 1 August 2016

22. It is common ground that the First-tier Tribunal was correct to say that the decision notified on 1 August 2016 was not made either on review or on reconsideration. It follows that the Secretary of State had been wrong to describe it as a “revised decision” in its request for the striking out. However, article 53(2)(d) was not the reason that the decision had not been given on reconsideration and, as the Secretary of State accepts, the First-tier Tribunal was, strictly speaking, wrong to say that the decision was “made as a result of implementing” the decision of the First-

tier Tribunal given on 7 March 2016. It would have been better to say that it was made in consequence of the First-tier Tribunal's decision.

23. The distinction is important. This was not a case where the First-tier Tribunal had awarded benefit but had left the Secretary of State to do an arithmetical calculation or check the amount appropriate at a date that it had identified to a tariff level that it had also identified. Leaving the Secretary of State to complete a decision in such a way is perfectly appropriate, provided that the parties are told that they may refer any dispute back to the tribunal (see R(SB) 11/86, decided in relation to the civilian social security scheme).

24. Here, however, the First-tier Tribunal's decision no doubt had the effect that the claimant would be entitled to an award but the First-tier Tribunal had not purported to make an award itself. That was left to the Secretary of State, who had to make a separate decision that was the initial decision on that question. As Mr Heppinstall put it, although the 2011 Order appears to anticipate that there will be a single decision awarding or refusing benefit, on a detailed analysis of what is really involved such a decision is made up of a number of decisions on separate issues and not every imaginable issue needs determining in every case. Thus, to take a common example, which indeed is what occurred here, if the Secretary of State decides that a condition has been neither caused nor worsened by service, it is not necessary for him to consider the size of the lump sum appropriate to the condition. If, an appeal is allowed in such a case, it becomes necessary for the first time to decide what lump sum should be awarded. Having allowed the appeal on the original issue, the First-tier Tribunal is entitled to make that new decision on the issue that now arises for the first time, but will often not be able to do so either because it will not have the relevant evidence before it or because neither party is ready to make representations on the issue. As long as it deals with all the issues that arose on the original appeal, it is therefore equally entitled to leave such a new issue to be decided for the first time by the Secretary of State. In the event of a dispute as regards the Secretary of State's decision on that new issue, a fresh appeal will be necessary. In deciding whether to leave issues to the Secretary of State, a pragmatic approach should be taken, having regard to the views of both parties (see R(IS) 2/08, again decided in the context of the civilian social security scheme).

Identifying the decision under appeal in this case

25. The Secretary of State submits that the only decision against which the claimant could have appealed was that notified to her on 1 August 2016. However, her husband recognises that, insofar as that was an interim award, no appeal lies against it. It was for that reason that he identified the Minister's letter of 12 September 2016 as the relevant decision, which he submits was a refusal to review the decision of 1 August 2016 and was appealable. The Secretary of State submits that the letter of 12 September 2016 was not notification of a separate decision, pointing out that it did not comply with the requirements specified in article 51(3)(b) and (c) of the 2011 Order because it was not given or sent to the claimant herself and it did not inform her of any right to reconsideration or appeal. The claimant's husband replies that a decision may be defective but nonetheless be a decision.

26. I accept that a failure to comply with the requirements of article 51(2) or (3) does not necessarily show that no decision has been made. Nonetheless, I am satisfied that the First-tier Tribunal did not err in law in holding that the letter of 12 September 2016 was not a decision or notice of a decision. In my judgment, it was plainly an explanation for the benefit of the claimant's Member of Parliament of the decision of 1 August 2016. It is true that the intellectual process gone through to explain a decision that has already been made is similar to that involved in considering whether to review a decision and deciding not to do so and I think that that is why Mr Heppinstall suggested that it was understandable that the claimant's husband should have thought the letter was a refusal to review. However, there is a conceptual difference between giving reasons for a decision and refusing to review it and I consider it obvious that the letter was not intended to be a decision or notification of a decision. First, it would be extraordinary for a decision to be conveyed to a claimant in the roundabout way in which that letter reached her. Secondly, there is an established process for issuing decisions and not only did that letter not conform to it but, whether prompted by the appeal or merely as a result of a copy of the letter having been sent to Veterans UK, Veterans UK did eventually treat the letter of 7 August 2016 addressed to Sir Michael Fallon MP as an application for review and a decision in the conventional form was issued on 10 October 2016.

27. If the claimant wished to appeal against the refusal to review, that decision of 10 October 2016 was the decision that needed to be challenged. Given that the claimant's husband had, in his email of 26 October 2016, made it plain that she wished to appeal against the refusal to review the decision of 1 August 2016, it seems to me that the First-tier Tribunal ought to have treated her as having appealed against the decision of 10 October 2016 as well as, or instead of, the decision of 1 August 2016. It had been made clear that the claimant disagreed with the decision and the First-tier Tribunal was entitled to treat the email of 26 October 2016 as an appeal and waive the formalities. Mr Heppinstall argued that such a decision was a matter in the discretion of the First-tier Tribunal and that the Upper Tribunal should not interfere with such an exercise of discretion, but it seems to me that the First-tier Tribunal failed to address the issue at all and would have erred in law if the claimant's arguments were good ones, because justice would plainly have been served by regarding her as having appealed against the actual refusal to review. However, for reasons to which I now turn, I am not in fact persuaded that it makes any difference whether the claimant was appealing against the decision of 1 August 2016 or the decision of 26 October 2016.

Jurisdiction – refusal to review an interim award

28. As I have indicated, the claimant accepts that, insofar as it was an interim award, no appeal lies against the decision of 1 August 2016 by virtue of regulation 3(2)(a) of the 2011 Regulations. However, her husband argues that a refusal to review an interim award is not a decision that “arises from the making of an interim award”.

29. In his initial response to this appeal, the Secretary of State argued that a refusal to review a decision was never appealable because it was not a decision that “determines whether a benefit is payable” or “determines the amount payable under

an award of benefit” and so did not fall within the scope of regulation 3(1). However, Mr Heppinstall told me that, having regard particularly to the Court of Appeal’s reasoning in *Wood v Secretary of State for Work and Pensions* [2003] EWCA Civ 53 (reported as R(DLA) 1/03), the Secretary of State no longer took that view and accepted that regulation 3(1) was to be construed broadly. I consider his change of stance to be well made. It is supported by paragraphs 7.2 and 7.3 of the explanatory memorandum to the 2011 Regulations, which is cited in *FA* at paragraph [33]. Plainly a decision reviewing an award or a refusal of an award is generally appealable and it is difficult to imagine that it was intended that a refusal to review should not be equally appealable.

30. The Secretary of State now merely submits that there is no appeal against a refusal to review an interim award because, contrary to the claimant’s argument, such a refusal to review necessarily “arises from the making of an interim award”.

31. I accept that, on one analysis, a review or refusal to review is a distinct decision that does not “arise from” the making of the original decision, but I do not accept that that is the right analysis in this case because it would undermine the exclusion by enabling a collateral attack on the original interim award to be brought before the First-tier Tribunal. Articles 53(2)(d) and 55(10) of the 2011 Order have the effect that an interim decision may not be reconsidered under article 53 and may be reviewed only under either article 58 or 59. However, article 59 enables such a decision to be reviewed on the ground that it “was given in ignorance of, or was based on, a mistake as to a material fact or of a mistake as to the law” – the drafting is dire but one can see what was meant – and so an appeal against a decision to review or not to review an interim award would require consideration of the merits of the original decision. Mr Heppinstall submits that the whole point of the exclusion under regulation 3(2)(a) is to avoid the expense of appeals that may well turn out to be academic, or might be duplicated, when interim awards are replaced by final awards.

32. The claimant’s husband submits that *FA* and *JB v Secretary of State for Defence (AFCS)* [2016] UKUT 248 (AAC) in which I followed *FA* are authority for the proposition that there is a right of appeal on the question whether the threshold conditions for a review have been satisfied. *FA* was concerned with the question whether, in the light of regulation 3(2)(c) of the 2011 Regulations, there was a right of appeal against a refusal to make a temporary award under article 26(2) of the 2011 Order. It was held that regulation 3(2)(c), which prohibits an appeal against a decision which “makes ... a temporary award”, did not prohibit an appeal against a refusal to make such an award (see paragraph [35] of the decision) although, on such an appeal, the appropriate tribunal was limited to considering whether the conditions precedent for making a temporary award were satisfied and could not go further and actually make such an award. As the claimant recognises, even if the approach taken in *FA* to regulation 3(2)(c) applies equally to regulation 3(2)(a), she is not assisted in the present case as far as the decision notified on 1 August 2016 is concerned because that decision was one that “makes” an interim award, rather than refusing one, and so is clearly caught by the exclusion. What, her husband seeks to do is apply the reasoning to review decisions under article 59.

33. However, although decisions under appeal in both *FA* and *JB* had been made on reconsideration or review and, for reasons given in *JB*, that was relevant to the question whether the 2011 Order and the 2011 Regulations applied at all in those cases or whether earlier legislation did, no distinction was otherwise drawn between original decisions refusing temporary awards and decisions given on reconsideration or review, or between original decisions and refusals to review. That should not be regarded as surprising. A decision reviewing, or refusing to review, a decision within the scope of regulation 3(2)(a) or (c) must, in my view, be regarded as a decision “arising from the making of” the interim award or temporary award, as the case may be. Otherwise, the exclusion would be completely undermined because the condition precedent for a review under article 59 is that the original decision is considered to be wrong and, rather than excluding a right of appeal, the legislation would merely make the right conditional on first applying for a review. Had that been intended, the legislation would have been drafted in a different form. I accept Mr Heppinstall’s submission that the purpose of the exclusion in regulation 3(2)(a) is simply to avoid the expense of appeals on issues that may well become academic once a final decision is made. That submission is again supported by paragraph 7.2 of the explanatory memorandum to the 2011 Regulations. In any event, given the relatively short-term nature of interim decisions, it seems to me to be inconceivable that the legislator intended to introduce a provision that would prolong the procedure for bringing an appeal.

Jurisdiction – guaranteed income payment

34. The Secretary of State argues that there is also no right of appeal against the refusal to review the award of GIP. Again, he has somewhat changed his position, because he originally argued that there no appeal could ever be brought as regards the date from which GIP was payable on the ground that such an appeal would not fall within the scope of regulation 3(1) of the 2011 regulations. However, rightly, he now merely argues that it falls within the scope of the exclusion in regulation 3(2)(a). Consequently, he submits that the Veterans UK had been wrong to tell the claimant she had a right of appeal against the award of GIP in this case.

35. This potentially raises two questions. The first is whether an award of GIP based on an interim tariff award is itself an interim award. If not, the second question is whether such an award arises from the making of such an award. The argument before me focused mainly on the second of those questions, but I have come to the conclusion that the first is more important.

36. Whether there is entitlement to GIP under article 24 of the 2011 Order, and, if so, the amount of GIP, depends on the amount of the tariff award and I accept that, insofar as the amount of an interim tariff award affects entitlement to, or the amount of, a GIP, the GIP decision made on 1 August 2016 cannot be challenged because, if it is not actually an interim award itself, it “arises from the making of an interim award” for the purposes of regulation 3 of the 2011 Regulations. For the reasons I have given above, it makes no difference that there was subsequently a refusal to review

37. However, the claimant’s husband argues that it does not necessarily follow that other aspects of a GIP award can be said to arise from an interim award. Clearly

there is a temporal relationship between an interim tariff award and GIP, because GIP cannot be awarded until there is a tariff award of an appropriate amount, but the commencement date for payment of GIP is the same whether an award is interim or final. If the exclusion in regulation 3(2)(a) applies and, as is usually the case, a final award of a lump sum is made at the same, or a higher, tariff level than the interim award, the effect of the exclusion is simply to defer the possibility of bringing an appeal for a period of up to four years.

38. Mr Heppinstall, on the other hand, points out that where an interim award is made at a level that entitles the claimant to GIP, a final award may be at a lower level that does not entitle the claimant to GIP. In that event, he submits, article 52(8)(b) applies and GIP ceases to be payable, although the amount already paid is not recoverable. Since the amount will have been revealed to be in substance an overpayment, it is appropriate, he argues, that there should be no right of appeal to determine whether the right amount had been overpaid. That, as he put it, is a *quid pro quo* for the overpayment not being recoverable and thus, he submitted, the possibility of a final tariff award having that effect justified construing article 3(2)(a) as excluding a right of appeal in respect of any aspect of GIP made following an interim tariff award. I am not wholly persuaded by that argument because, although the legislation rightly allows for the possibility of a final award being lower than an interim award, it seems to me unlikely that it was expected that it would occur very often.

39. However, Mr Heppinstall's reference to article 52(8) points to a more fundamental difficulty with the claimant's argument. If the claimant is right and it were the case that GIP awarded as a result of an interim award of a lump sum was not itself an interim award, the 2011 Order would provide no mechanism for altering the amount of GIP, either upwards or downwards, following the making of a final award. Article 59 would not apply, because there would have been no mistake of fact involved if GIP had been awarded on a correct understanding of the tariff level of the interim award of the lump sum. In my judgment, therefore, article 52 must be construed as having the effect that, where GIP is awarded in the light of an interim award of a lump sum, the award of GIP is also an interim award or is part of the same interim award. That approach is consistent with the drafting of article 52 – in particular the use in paragraph (1) of the term “injury benefit” (which, by virtue of article 2(1) includes GIP) – and it has the effect that when a final award of a lump sum is made, a final award of GIP (or a decision refusing such an award) is made and paragraph (8) comes into play. (Despite the terminology used by both parties in the course of this appeal, neither extending the period for which an interim award has effect (under article 52(5) or (6)(a)) nor the making of a final award involves a “review” in the sense in which that term is used in articles 55 to 59.)

40. I am therefore satisfied that the claimant did not have a right of appeal to the First-tier Tribunal on the question of the starting date for GIP.

Conclusion

41. It follows that, even though it may have erred in law in failing to provide documents to the claimant and in parts of its reasoning, the First-tier Tribunal reached the only conclusion open to it when it found that it did not have jurisdiction to

consider any aspect of the claimant's appeal and struck it out. I therefore refuse to set aside its decision and I dismiss the claimant's appeal.

The commencement date of guaranteed income payment

42. It also follows that it is unnecessary for me to express a view on the other issues that were argued before me. I declined at the hearing to hear argument on any question as to the propriety of making an interim award because I was not persuaded that it was arguable that there was a right of appeal to the First-tier Tribunal against a refusal to review an interim award of a lump sum, but I did hear argument as to the commencement date of the award of GIP. Mr Heppinstall submitted that, even if I found that the First-tier Tribunal had erred in striking out the claimant's appeal, I did not have power to do more than reverse that decision and so did not have the power to determine the substantive appeal that had been made to the First-tier Tribunal. Nonetheless, he invited me to rule on the issue of the commencement date and said that the Secretary of State would give effect to my decision. The claimant, of course, also wishes me to rule on the issue.

43. I incline to the view that the Secretary of State is right as to the power of the Upper Tribunal when allowing an appeal to the Upper Tribunal against the striking of an appeal to the First-tier Tribunal. However, had I held the First-tier Tribunal to have been wrong to strike out the claimant's appeal insofar as it was concerned with the issue of the commencement date of GIP, I could properly have considered the issue of the commencement date in the context of deciding whether to give any relief because, at least in the present case, the issue is one of pure law. Thus, in the event of deciding the issue against the claimant, I could have refused to set aside the First-tier Tribunal's decision on the ground that, although the First-tier Tribunal had wrongly refused jurisdiction, the claimant's appeal to the First-tier Tribunal could have been struck out on the ground that it had no reasonable prospect of success. In the event of deciding the issue in the claimant's favour, I would have been bound to remit the case but would have been able to do so in the expectation that the Secretary of State would revise the decision under appeal on the ground that it was based on a mistake of law, thus causing the appeal to the First-tier Tribunal to lapse.

44. However, since I have decided that the First-tier Tribunal did not have jurisdiction to consider the issue of the commencement date of GIP, plainly the Upper Tribunal also lacks any jurisdiction. Nonetheless, as I have heard full argument on the point and my expressing a view is likely in practice to end the dispute for this particular claimant, I will address the issue even though what I say on the subject will have no precedential status. (Were I not to do so and were the period of the interim award to be extended for a further two years, it might be three years before the Upper Tribunal was able to give a decision on the issue.) This will also enable the Secretary of State to consider my comments on the drafting of the legislation

45. Articles 64 to 65A of the 2011 Order appear in Part 8, under the heading "Payment". They provide –

“Date on which awards of benefit become payable

64.—(1) A lump sum, a fast payment, medical expenses and a bereavement grant are to be paid as soon as is reasonably practicable after the award has been made.

(2) Subject to paragraphs (5) and (6) an award of guaranteed income payment becomes payable—

- (a) where a member is discharged from the forces on medical grounds and the award is for the injury which caused the member to be discharged on medical grounds, on the day after the discharge;
- (b) where a member is awarded injury benefit which includes an award of guaranteed income payment, on the day after the day on which the member's service ends;
- (c) in any case where sub-paragraph (a) or (b) does not apply, on the date of claim.

(2A) Subject to paragraph (2B) and notwithstanding paragraph (8), where a person becomes entitled to armed forces independence payment, that allowance becomes payable on—

- (a) subject to paragraph (b), the date of claim; or
- (b) where the date of claim is no later than 3 months after the date an award of guaranteed income payment has been determined or revised—
 - (i) the date of claim for that award; or
 - (ii) where paragraph (5) applies, the date on which the guaranteed income payment is, or, but for article 16(10) would have been, payable.

(2B) No armed forces independence payment is payable for any period before 8th April 2013.

(3) Where a person who is entitled to a pension for disablement or death under the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 2006 (“the 2006 Order”) subsequently becomes entitled to benefit under this Order for the same injury or death for which there was entitlement under the 2006 Order, the date on which benefit under this Order becomes payable is the date on which—

- (a) a claim for benefit is determined under article 51;
- (b) a final award is made under article 54;
- (c) a decision of the Secretary of State is reconsidered under article 53 or revised under article 55, 56, 57 or 59;
- (d) a decision relating to benefit is revised by an appropriate tribunal, the Upper Tribunal, an appropriate Social Security Commissioner or a court, as the case may be.

(4) Subject to paragraph (6), an award of survivor's guaranteed income payment and an award of child's payment become payable—

- (a) on the day following the date of death where—
 - (i) a member dies in service; or
 - (ii) a former member dies and a claim for benefit is made within 3 months of the date of death; or
- (b) on the date of claim where sub-paragraph (a) does not apply.

(5) Subject to article 16(10), an award—

- (a) revised under article 53 becomes payable on the date of claim;
- (b) revised under article 55 becomes payable on the day after the member's service ends;
- (c) revised under article 56 or 57 becomes payable on the date the application for review is sent to the Secretary of State;
- (d) subject to paragraph (6), revised under 59 becomes payable—
 - (i) on the date the application for review is sent to the Secretary of State;
 - or

- (ii) where no application for a review has been made, the date on which the decision in relation to the revised award is sent to the claimant.

(6) Subject to paragraph (8), where a decision of the Secretary of State is revised under article 59 so as to award benefit or increase the amount of benefit awarded, guaranteed income payment, survivor's guaranteed income payment or child's payment becomes payable from the beginning of the period starting 6 years—

- (a) before the date on which the application for review is sent to the Secretary of State; or
(b) where no application for a review has been made, before the date on which the decision in relation to the revised award is sent to the claimant.

(7) Where the amount of an award is reduced following a review under article 58 or 59, the reduced amount becomes payable on the date on which notification of the revised award is given or sent to the claimant.

(8) Except where paragraph (4)(a)(ii) applies, no benefit is payable for any period before the date of claim.

Time of payment

65. Guaranteed income payment, survivor's guaranteed income payment and child's payment are paid monthly in arrears unless, in any particular case, the Secretary of State arranges otherwise.

Time of payment for armed forces independence payment

65A. Armed forces independence payment is paid every 4 weeks in arrears, unless in any particular case the Secretary of State arranges otherwise.”

46. Since article 64(1) seems in fact to be concerned with the time of payment (which is a matter relating to the administration of payments), rather than the date on which awards of benefit become payable (which is really a matter of entitlement), it seems odd that it is included within article 64 at all, rather than in or with the two following articles, but nothing turns on that drafting issue. Article 64(1) is concerned with one-off awards (although there may be repeated awards of medical expenses), whereas articles 65 and 65A are concerned with periodical payments. (There is no reference in any of these provisions to a supplementary award, which is treated as a separate benefit under article 15, but that may be because it is always paid with a lump sum.) Article 64(2) to (8) also appears to be concerned with, or to be of practical importance only in relation to, periodical payments, save that paragraph (3) appears also to apply to medical expenses. One-off payments under the 2011 Order other than medical expenses are not paid in respect of any particular period or in respect of expenses incurred on a particular date.

47. In the present case, I am concerned primarily with article 64(2) and (3). The claimant argues that her case is clearly governed by paragraph (2), so that GIP should have been awarded from 3 May 2012. The Secretary of State decided, however, that paragraph (3) applied and that GIP was payable from the date on which the First-tier Tribunal decided that the claimant's chronic fatigue syndrome had been worsened by service since 6 April 2005. The Secretary of State now submits that the correct date would have been 1 August 2016, when he made the award of GIP.

48. The background to the Secretary of State's decision is that, because she was discharged on medical grounds, the claimant's possible entitlement to retired pay under article 6 of the 2006 Order was automatically considered upon her discharge

without her having made a claim (see article 35(2)). The Secretary of State accepted that the claimant was suffering from chronic fatigue syndrome and decided that that condition was attributable to service before 6 April 2005 and he did so on the basis that “multiple musculoskeletal joint pains” were part and parcel of the condition. He assessed disablement at 20% and retired pay was awarded accordingly. The claimant’s appeals against those entitlement and assessment decisions were heard at the same time as her initial appeal against the decision under the 2011 Order. She was substantially successful in her appeal against the entitlement decision, in that the First-tier Tribunal held that chronic neck pain, right shoulder impingement and right hip impingement from which the claimant had been suffering were separate from the chronic fatigue syndrome and were attributable to service before 6 April 2005. Her assessment appeal was successful only to the extent that the First-tier Tribunal increased the assessment in respect of chronic fatigue syndrome to 30%. Therefore, when she appealed against the First-tier Tribunal’s dismissal of her appeal under the 2011 order, she appealed also against its assessment decision but did not appeal against the entitlement decision. Consequently, after I had allowed both appeals and remitted the cases, the First-tier Tribunal sitting on 20 and 21 January 2016 had before it the assessment appeal under the 2006 Order and the case under the 2011 Order, but did not have before it an entitlement appeal under the 2006 Order. Because, at the earlier hearing, the First-tier Tribunal had not made an assessment in respect of the separate conditions it had found, the Secretary of State had subsequently done so, although the composite assessment was still 30%. The claimant appealed against that decision too. The First-tier Tribunal allowed both assessment appeals to the extent of making a composite assessment of 70% from 3 May 2012 to 31 December 2013, 40% for the whole of 2014 and 2015 and an interim assessment of 30% from 1 January 2016. During the course of those proceedings, the claimant raised the question of entitlement to supplementary allowances. The First-tier Tribunal correctly stated that those were not in issue before it because the Secretary of State had not made any decision in respect of such allowances because no claim for them had been made.

49. It is perhaps not surprising that, even if not necessarily inconsistent, the earlier entitlement decision under the 2006 Order and the First-tier Tribunal’s new decision under the 2011 Order do not sit easily together. Perhaps more surprising is the lack of any consideration of the possible relevance of the findings in the 2011 Order decision in the assessment decision under the 2006 Order. However, notwithstanding any possible inconsistencies, all three currently effective decisions must, in the absence of any appeal, be taken at face value for present purposes. Moreover, such inconsistencies in decisions may be of little real significance given the rough and ready nature of the scheme under the 2011 Order, which appears to provide the same amount of benefit whether an injury is wholly caused by service on or after 6 April 2005 or is partly caused by service before 6 April 2005 and is either only predominantly caused by later service or, as in the present case, is worsened by later service.

50. The Secretary of State submits that article 64(3) applies to GIP, since that is a form of “benefit”, and that therefore that paragraph must be read as modifying the effect of paragraph (2). If that is so, it seems very odd that paragraph (2), which is expressly made subject to paragraphs (5) and (6), is not also expressly made subject to paragraph (3). I therefore raised the question whether the lack of reference to

paragraph (3) in the opening words of paragraph (2) had the effect that paragraph (3) had to be construed as not applying to GIP. That would not be altogether absurd because, as I have suggested, it is difficult to see how paragraph (3) could actually have any effect in respect of a lump sum payment, a fast payment or a bereavement grant and so “benefit” in that paragraph plainly does not in practice apply to all the benefits that are listed in articles 15(1) and 29(1) as payable under the 2011 Order.

51. However, Mr Heppinstall argued that there is no good reason why paragraph (3) should not apply to GIP because the paragraph is designed to prevent payments under the 2011 Order from duplicating payments under the 2006 Order. The claimant’s husband, on the other hand, argued that paragraph (3) produced an unfair result in her case and could not have been intended to apply to GIP. She had not received any supplementary awards under the 2006 Order and, if the Secretary of State’s decision was correct, the delay in making any award in her case, which was no fault of hers, had had the effect that she had lost over three and a half years’ worth of GIP and would have lost even more if the Secretary of State’s current submission as to the date from which GIP should have been paid is correct.

52. Paragraph (3) is plainly, as Mr Heppinstall submits, there to prevent the duplication of payments in the event of an overlap between the scheme under the 2006 Order and the scheme under the 2011 Order. The claim under the 2011 Order in this case was made before article 12(2) was inserted and so I need not consider the implications, if any, of that insertion. At the time of the claim, there was provision for adjusting benefit payable under the 2006 Order in the light of an award of compensation under the 2011 Order but not *vice versa*. It seems to me that article 64(3) is designed to supplement that provision in a case where payments under the 2006 Order are being made following an assessment of disablement of at least 20% and an award is then made under the 2011 Order that would, in the absence of that provision, result in arrears of periodical payments or payments of medical expenses being made. The reason is, presumably, that it is simpler to withhold the arrears that would otherwise be due under the 2011 Order, rather than pay the arrears and then make an adjustment to future payments under the 2006 Order in order to take the arrears into account.

53. However, although payments made under the 2006 Order are generally adjusted under article 52 of that Order only to the extent that an element of another payment of compensation is made for the same purpose, article 64(3) applies whether or not payments under the 2006 Order, made in respect of the period between the date of a claim under the 2011 Order and the date of the determination of the claim, were made for the same purpose as benefits awarded under the 2011 Order.

54. I do not consider that the omission from the opening words of paragraph (2) of any reference to paragraph (3) can by itself be sufficient to show that paragraph (3) was not intended to apply to GIP and that the word “benefit” in paragraph (3) is therefore to be construed as not including GIP. If paragraphs (5) and (6) did not exist and there was therefore no express wording requiring paragraph (2) to be read subject to any other paragraph, it would, in the absence of any other indication of the legislator’s intent, still have to be read as being subject to paragraph (3) simply because where there are two apparently conflicting provisions it is natural to read the

more general one as being subject to the more specific one. The reference to paragraphs (5) and (6) cannot make any difference, although it seems to me to be poor drafting not to have included a reference to paragraph (3) as well if that paragraph does apply to GIP. However, if there were some other reason for supposing that the legislator intended that paragraph (3) should not apply to GIP, the lack of reference to paragraph (3) in paragraph (2) would tend to confirm that that was indeed the intention.

55. That paragraph (3) produced obviously unfair results if applied to GIP might be such an indication. However, insofar as the unfairness of which the claimant complains may have arisen from her not having claimed supplementary allowances under the 2006 Order, it seems to me that, if there is any unfairness at all, it arises out of, or out of the administration of, the 2006 Order rather than out of article 64(3) of the 2011 Order. The claimant was potentially eligible for an allowance for lowered standard of occupation under article 15 of the 2006 Order for the period from 3 May 2012 to 31 December 2015 (in respect of which the 2016 assessment of her disablement in respect of chronic fatigue syndrome was at least 40%). Schedule 3 to the 2006 Order makes provision for the date from which claims are effective and, despite some odd drafting, has the effect that a claim for such an allowance in a case like this should be made within three months of the termination of the claimant's service. Otherwise a claim is generally effective only from the date it is made, although there are provisions for backdating a claim in some circumstances. (I have not considered whether any of those provisions might have applied, or might still apply, in this case.) I accept that the Secretary of State's original assessment of disablement was too low to justify an award of an allowance for lowered standard of occupation but the 2006 Order does not make express provision to the effect that a person may delay making a claim for the allowance until an adequate assessment is made. That is not necessarily unfair, provided that sufficient information is available to potential claimants as to the time when a claim should be made. Whether or not that is generally so, or was so in this case, I need not consider.

56. However, as was the position in the present case for the brief period from 1 January 2016, it is quite possible for a person to be entitled to "a pension for disablement", which presumably includes retired pay in this context and implies an assessment of disablement of at least 20%, but not be eligible for either an unemployability supplement or an allowance for lowered standard of occupation, which are the payments made under the 2006 Order made in respect of the loss of earning capacity of a former member of the Armed Forces and are the elements with which GIP most obviously overlaps. In particular, eligibility for an allowance for lowered standard of occupation requires disablement to have been assessed at at least 40% and an unemployability supplement requires disablement to have been assessed at at least 60% (quite apart from the fact that an unemployability supplement overlaps with benefits under the civilian social security scheme). Moreover, in this case, it might have been arguable that the claimant's loss of earning capacity arose out of the worsening caused by service on or after 6 April 2005, rather than being caused by service before that date, although the level of the assessment of disablement under the 2006 Order would have weakened that argument.

57. It is therefore arguable that article 64(3) is capable of producing unfair results if it applies to GIP. It is also arguable that it is unlikely to do so as regards medical expenses, survivors guaranteed income payment (which arguably can be taken into account against a survivor's pension under article 23 of the 2006 Order, whereas it is arguably not appropriate to take GIP payable until death into account against retired pay or a pension under article 6 because such retired pay or pension is paid in respect of disablement rather than loss of income), a child's payment or, now, armed forces independence payment.

58. However, even if article 64(3) is capable of producing unfair results if applied to GIP and does not in other cases, I am not persuaded that it does not apply to GIP. I must give effect to the intention of the legislator. The draftsman can hardly have overlooked the fact that that paragraph was something of a blunt instrument, because the conditions for entitlement to benefit under the 2011 Order are not the same as the conditions for entitlement to benefit under the 2006 Order. He or she could have made, but did not make, more precise provision by either giving the Secretary of State a right to withhold from arrears due under the 2011 Order a sum equal to the adjustment to be made to the payments under the 2006 Order in consequence of the arrears or (which might have been administratively simpler) by providing that arrears due under the 2011 Order should simply be reduced by the amount of any relevant payments under the 2006 Order that had actually been made. Given the limited circumstances in which it can apply and the likely degree of double payment that there may be in cases where it does apply (since there is no reduction in the amount of the main one-off payments payable under the 2011 Order where an injury or death is partly caused by service before 6 April 2005), it may be thought that article 64(3) is consistent with the rough and ready nature of the scheme under the 2011 Order, to which I have alluded above.

59. It also has to be borne in mind that the application of article 64(3) to GIP will often not cause any unfairness at all. That it had a particularly severe effect in the present case because, not only was the claimant not receiving a supplementary allowance under the 2006 Order for which she may have been eligible for much of the relevant period, but also over five years elapsed between her claim under the 2011 Order and the interim award made on that claim, does not by itself indicate that it was not intended that the article should not apply to GIP at all. It seems quite likely that the draftsman simply did not anticipate that adjudication might take so long. Had consideration been given to exactly how the paragraph might operate in relation to each type of benefit and had it been intended to exclude GIP, it seems most unlikely that the draftsman would have used the word "benefit" rather than specifying the individual types of benefit to which it was intended the paragraph should apply.

60. Accordingly, I accept the Secretary of State's argument that paragraph (2) of the 2011 Order must be read as being subject to paragraph (3). The same presumably applies to paragraph (4) and quite possibly paragraphs (2A) and (6) as well.

61. As to the date from which GIP was payable in this case, the Secretary of State now argues that paragraph (3)(a) applies and that the date on which the claim for benefit was determined was 1 August 2016, when he awarded GIP. It seems likely that, when the award was made, the decision-maker considered that paragraph

(3)(d) applied. Given the drafting of paragraph (3), such an approach would be understandable, because the claimant's claim for benefit had originally been determined in, I think, 2012 and, insofar as it is ever correct to refer to a decision being "revised" by an appropriate tribunal, that determination was revised by the tribunal that sat on 20 and 21 January 2016 (although the decision-maker was wrong in assuming that, as would usually have been the case, the First-tier Tribunal had announced its decision at the end of the hearing).

62. However, as a payment cannot be made unless there has been an award and as the first award must include the commencement date for payments, it seems to me to be obvious that, given the context, paragraph (3) must be construed as providing that the date from which benefit is payable in the cases to which it applies is the date on which a decision is made to award benefit and that subparagraphs (a) to (d) are intended to make it clear that that is so whether the award is made on the determination of a claim (which in this context, and at least some other contexts in the Order, includes the making of an interim award or a temporary award), on the making of a final award under article 52, on reconsideration, on review or on appeal. (The reference to article 54, rather than article 52, in subparagraph (b) appears to be a mistake, since article 54 does not actually provide for the making of final awards and, given subparagraphs (a) and (c), it seems unlikely that the draftsman meant to say "a final award within the meaning of article 54 is made".)

63. As I have explained in paragraph 24 above, the award in this case was made by the Secretary of State on 1 August 2016, rather than by the First-tier Tribunal. Accordingly, I accept the Secretary of State's submission that GIP ought to have been awarded to the claimant only from 1 August 2016.

Mark Rowland
29 June 2018