Neutral Citation Number: [2025] UKUT 037 (AAC)
Appeal No. UA-2024-SCO-000007-AFCS

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

MW

Appellant

- v -

Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wikeley
Hearing date: 15 January 2025

Representation:
Appellant: In person
Respondent: Ms Megan Dewart, advocate, instructed by Morton Fraser MacRoberts LLP

On appeal from:
Tribunal: Pensions Appeal Tribunal (Scotland)
Tribunal Case No: PATS/CS/22/0116
Tribunal Venue: Edinburgh
Hearing Date: 27 July 2023
Decision Date: 8 August 2023

Anonymity: The appellant in this case is anonymised in accordance with the practice of the Upper Tribunal approved in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.

SUMMARY OF DECISION

Armed Forces Compensation Scheme (56.5)

Judicial summary

The Appellant, who suffered from PTSD as a result of his service in the RAF, made a claim for compensation under the Armed Forces Compensation Scheme (AFCS). The Secretary of State made an award at Table 3, Item 3, Level 10. This was confirmed on appeal by the Pensions Appeal Tribunal for Scotland (PAT(S)). The Appellant appealed to the Upper Tribunal, arguing that the award should be at least at Table 3, Item 2, Level 8. The Upper Tribunal dismissed the further appeal, finding that the PAT(S) had correctly interpreted and applied the test for assessing whether a mental disorder was "permanent" for the purposes of the Table 3 descriptors.

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 dismiss the appeal. The decision of the First-tier Tribunal did not involve an error of law.

REASONS FOR DECISION

Introduction

1. This appeal concerns a claim for compensation made under the Armed Forces Compensation Scheme ('AFCS') for Post-Traumatic Stress Disorder ('PTSD').

The Upper Tribunal oral hearing of the appeal

2. I held an oral hearing of this appeal in Edinburgh on 15 January 2025. The Appellant appeared in person, ably representing himself. The Respondent, the Secretary of State for Defence, was represented by Ms Megan Dewart, advocate, instructed by Morton Fraser MacRoberts LLP on behalf of Veterans UK. I am grateful to both the Appellant and Ms Dewart for their clear and helpful oral and written submissions.

A summary of the Upper Tribunal's decision

3. I dismiss the claimant's further appeal to the Upper Tribunal. This is because the decision of the Pensions Appeal Tribunal does not involve any material legal error.

4. To protect the Appellant's privacy, I refer to him in this decision in those terms, rather than by name. To avoid the risk of 'jigsaw identification', I also provide only the barest information about the factual background to the appeal.

The factual background to this appeal

5. The Appellant is now aged 45. He served in the Royal Air Force between 1979 and 2017. He had deployed to Afghanistan and also as a Reaper pilot working out of Las Vegas, USA. His rank on discharge was Flight Lieutenant and he had served as a fast jet pilot, instructor and examiner. The Veterans UK decision-maker, acting on behalf of the Secretary of State for Defence, decided that the Appellant was entitled to an AFCS award on the basis of his PTSD at Table 3, Item 3, Level 10 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517, 'the 2011 Order'). The Appellant, arguing

that he qualified for an award for PTSD at either Table 3, Item 2, Level 8 or Table 3, Item 1, Level 6, appealed to the Pensions Appeal Tribunal, which refused his appeal. The Appellant now appeals to the Upper Tribunal against the decision of the Pensions Appeal Tribunal ('the Tribunal').

The legal framework

6. Schedule 3 to the 2011 Order includes nine Tables which list the categories of injury for which compensation may be awarded under the AFCS, from Table 1 (Burns) through to Table 9 (Musculoskeletal disorders). The Tables identify different levels of severity of category of injury, in descending order (so a Level 8 injury is more serious than a Level 10 injury). For each level, the Table relies upon a short "Description of injury and its effects" (known as the "descriptor"). Each level then provides for a tariff lump sum payment for that descriptor or "Item", the amount of which varies significantly between different levels of injury (as set out in Table 10 of Schedule 4; see also Article 16(2)). Thus, Table 3 of Schedule 3 to the 2011 Order, together with its footnotes, provides as follows for the purpose of compensation for mental disorders:

Table 3 - Mental disorders(*)

Item	Column (a)	Column (b)
	Level	***Description of injury and its effects ("descriptor")***
A1	4	Permanent mental disorder causing very severe functional limitation or restriction[(aa)]
1	6	Permanent mental disorder, causing severe functional limitation or restriction[(a)]
2	8	Permanent mental disorder, causing moderate functional limitation or restriction[(b)]
3	10	Mental disorder, causing functional limitation or

		restriction, which has continued, or is expected to continue for 5 years
4	12	Mental disorder, which has caused, or is expected to cause functional limitation or restriction at 2 years, from which the claimant has made, or is expected to make, a substantial recovery within 5 years
5	13	Mental disorder, which has caused, or is expected to cause, functional limitation or restriction at 26 weeks, from which the claimant has made, or is expected to make, a substantial recovery within 2 years
6	14	Mental disorder, which has caused or is expected to cause, functional limitation or restriction at 6 weeks, from which the claimant has made, or is expected to make, a substantial recovery within 26 weeks

(*) In assessing functional limitation or restriction in accordance with article 5(6) account is to be taken of the claimant's psychological, social and occupational function.

(*) Mental disorders must be diagnosed by a clinical psychologist or psychiatrist at consultant grade.

(aa) Functional limitation or restriction is very severe where the claimant's residual functional impairment after undertaking adequate courses of best practice treatment, including specialist tertiary interventions, is judged by the senior treating consultant psychiatrist to remain incompatible with any paid employment until state pension age.

> [(a)] Functional limitation or restriction is severe where the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of onset of the illness and over time able to work only in less demanding.jobs.
>
> [(b)] Functional limitation or restriction is moderate where the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of onset of the illness but able to work regularly in a less demanding job.

7. There are several other provisions of particular note in the 2011 Order. Article 16(1) provides as follows:

> **16.**—(1) Subject to articles 25 and 26—
>
> (a) benefit for injury is payable only in respect of an injury for which there is a descriptor;
>
> (b) where an injury may be described by more than one descriptor, the descriptor is that which best describes the injury and its effects for which benefit has been claimed; and
>
> (c) more than one injury may be described by one descriptor.

8. The proper application of Article 16 was considered by the Court of Appeal in *Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043 (especially at [56] and [57]). As the Court stated, it "requires a careful analysis of the facts and then a consideration of which descriptor is the most appropriate".

9. In addition, Table 3 must be read in the context of Article 5, which provides further interpretative provisions for descriptors. Thus, Article 5(3) provides that:

> (3) The term "functional limitation or restriction" in relation to a descriptor means that, as a result of an impairment arising from the primary injury or its effects, a person—
>
> (a) has difficulty in executing a task or action; or

(b) is required to avoid a task or action because of the risk of recurrence, delayed recovery, or injury to self or others.

10. Furthermore, Article 5(6) specifies that:

(6) Functional limitation or restriction is to be assessed by—

(a) taking account of the primary injury and its effects; and

(b) making a comparison between the limitation and restriction of the claimant and the capacity of a healthy person of the same age and sex who is not injured or suffering a health condition.

11. Finally, and most relevantly, Article 5(7)(a) provides as follows:

(7) Functional limitation or restriction is —

(a) "permanent" where following appropriate clinical management of adequate duration—

(i) an injury has reached steady or stable state at maximum medical improvement; and

(ii) no further improvement is expected.

12. It will be noted that Article 5(7)(a) defines "permanent" where it is used in the context of a "functional limitation or restriction" being permanent rather than in the context of a "permanent mental disorder". That said, there is undoubtedly a degree of overlap in the respective meanings, as identified in *JH v Secretary of State for Defence (AFCS)* [2024] UKUT 191 (AAC):

> 23. Both counsel confirmed in the course of the Upper Tribunal proceedings that neither party sought to challenge the Tribunal's approach to the meaning of "permanent" for the purpose of Table 3. This agreed approach is relevant to understanding the context of the appeal. The Tribunal declined to adopt a prescriptive definition of the term "permanent" (as in "permanent mental disorder", in effect the gateway to an award at levels 4, 6 or 8, namely Items A1, 1 and 2) but expressed the following views.

24.

First, the dictionary definition of "permanent" implied something that lasted indefinitely without change, whereas mental disorders "commonly change as people respond to treatment and medication". The dictionary definition, applied in isolation, was therefore too "simplistic" (paragraph 54).

25. Second, the definition of "permanent" in Article 5(7)(a) of the 2011 Order was not directly applicable, because that definition governed the meaning of "permanent functional limitation or restriction" in Table 3 and not the permanence or otherwise of the mental disorder itself (paragraph 50).

26. Third, however, the Tribunal considered that the Article 5(7)(a) definition provided a "useful guide", noting that "It stands to reason that if there has not been appropriate clinical management of the mental disorder, maximum medical improvement has [not] been reached, and that common treatment options are available but have not been undertaken, then those are relevant factors in deciding if a mental disorder is permanent or not" (paragraph 54).

The Pensions Appeal Tribunal's decision in this case

13. In the reasons for its decision in the instant case, the Pensions Appeal Tribunal set out the Appellant's case and his evidence in some detail (paras 4-6). I would only note in passing that paragraph 5 of the Tribunal's reasons is over one page in length, making it somewhat dense and rather difficult to follow. The observation by Sedley LJ in *Jasim v Secretary of State for the Home Department* [2006] EWCA Civ 342 at [4], namely that a tribunal's reasons need to be set out in "manageable paragraphs" is very much in point here. However, I recognise this is a question of presentation rather than substance. The Tribunal then briskly summarised the case as made by the Secretary of State (paras 7-8) before setting out its findings of fact in admirably concise terms (paras 9-20). Having also set out the relevant and central legislative provisions (para 21), as also noted above, the Tribunal then explained the reasoning for its decision as follows:

22. The tribunal considered the evidence and the submissions having regard to the requirements of tariff Table 3. The tribunal was satisfied on the evidence that the appellant has functional limitation due to the accepted condition. He left service in 2017 and continued to have treatment for PTSD post service with V1P [Veterans First Point]. The tribunal accepted that there was evidence contained in the SOC [Statement of Case] that entitled it to reach the view that the due to treatment both in service and after service the appellant's condition has improved however the condition has continued for five years and fluctuates. The tribunal noted that the appellant has continued with the same antidepressant treatment for several years which reduces his symptoms. The appellant said that he was waiting for a psychiatric referral which he suggested had been outstanding for a couple of years. At his most recent G.P. appointment, the patient did not ask for the referral to be followed up and his G.P. did not refer to any outstanding referral in her most recent report which had been added to the SOC. In his evidence the appellant was unclear about how the psychiatric assessment might be progressed and had taken no steps to chase it up. The appellant had previously disengaged with treatment and said that with hindsight he might have benefitted further treatment. The appellant ruled out changing his current medication even though that might enable him to be considered for a flying role. The tribunal was not satisfied that the evidence supported a finding that the appellant has a permanent mental disorder.

23. It was clear from listening to the appellant that he is very proud of his military achievements and not being able to fly has been a source of sadness and disappointment for him. The appellant referred broadly to some previous military colleagues' progress post service and he compares his civilian role less favourably to theirs. Such comparisons cannot be considered by the tribunal reaching a decision which must be decided on the evidence.

24. In considering the submissions from Ms Gale that the appellant had a permanent mental disorder (either severe or moderate), the tribunal decided that the test of permanence had not been met on the evidence. There was an initial course of EMDR in service with a CPN with reported benefit. The second planned trauma focused treatment in 2020 did not take place and in the view of the therapist at the time was necessary to address symptoms of PTSD and functioning (SOC 128). The appellant has been referred by his GP to an NHS consultant psychiatrist for assessment around any further requirement for treatment but this has not taken place. For these reasons the tribunal did not find that appropriate clinical management of adequate duration had taken place thus far or that no further improvement is expected.

25.The degree of functional limitation or restriction is not such to bring the appellant into items 1 or 2 on Table 3. The appellant gave evidence that he is working in a management role. The tribunal noted that the appellant has been employed by the Civil Aviation Board since 2020. He gave evidence about the nature of his employment which the tribunal decided was one with a significant degree of responsibility and oversight.

26. For the above reasons, the tribunal decided that the appellant's condition is correctly placed on table 3 item 4 level 10.

The Appellant's grounds of appeal

14. In his original application to the Pensions Appeal Tribunal for permission to appeal, the Appellant advanced two principal grounds of appeal. The first was that the Tribunal had failed to have proper regard to the first footnote to Table 3, namely the need to consider the claimant's psychological, social and occupational function in assessing functional limitation or restriction for the purposes of Article 5(6). The second was that the Tribunal had incorrectly applied Article 5(7) with respect to both the permanent nature of his mental health condition and also his functional limitation. In the light of those grounds of

appeal the President of Pensions Appeal Tribunals for Scotland granted permission to appeal to the Upper Tribunal.

15. In the course of the Upper Tribunal proceedings, the Appellant further developed his grounds of appeal. As set out in his skeleton argument for the oral hearing, his refined grounds of appeal were four-fold. Ground 1 focussed on what was contended to be the Tribunal's misapplication of Article 5(7) and the issue of permanence. Ground 2 alleged a failure to correctly apply the Table 3 descriptors and in particular footnotes (a) and (b). Ground 3 argued that insufficient weight had been given by the Tribunal to the Appellant's psychological, social and occupational functioning, while Ground 4 submitted that the Tribunal had failed to provide adequate reasons for its decision. The Appellant expanded on these grounds of appeal in his carefully argued and eloquent oral submissions. The Appellant gave a very clear account of his PTSD symptoms and explained why, so far as he (and, he sought to emphasise, his treating physicians) was concerned, he suffered from a permanent mental disorder.

The Respondent's submissions in outline

16. The Respondent's core submission was that the Tribunal had correctly identified the question which it was required to answer, namely which single descriptor was the most appropriate for the Appellant's condition. In doing so, Ms Dewart submitted, it had carried out a detailed and careful analysis of the facts and had correctly directed itself on the legal test for permanence of mental disorder, which it was required to consider for the purposes of the descriptor in Item 2. Once the Tribunal had determined that the appellant's mental disorder was not permanent, on the basis of the evidence which was before it, and having regard to whether there had been appropriate clinical management and whether common treatment options were available but had not been undertaken, the appropriate descriptor could not be Item 2 of Table 3 but was at best Item 3, as awarded.

Analysis

17. Realistically the key descriptors potentially at issue in this appeal before the Pensions Appeal Tribunal were Item 2 and Item 3 from Table 3. The distinguishing feature between those two descriptors is the issue of the permanence (or otherwise) of the mental disorder. The requirement for a "permanent mental disorder" thus acts as a gateway for entitlement to Item 2 (and above) in Table 3. If permanence cannot be established, the award must

be at Item 3 (or lower, depending on the satisfaction of further criteria). It follows that the central question on this further appeal is whether there was any error of law in the Pensions Appeal Tribunal's decision which concluded that the Appellant's mental disorder was not "permanent". A disagreement over the facts is insufficient. It also follows that the fate of Ground 1 will be decisive for this further appeal – the question of the permanence of the mental disorder is the crux of the case. If Ground 1 cannot be made out, the other grounds of appeal necessarily fall away as they will not be material to the outcome of the appeal.

18. In practice, as Ms Dewart submitted, there may be two ways of approaching the question as to whether a case falls on the Item 2 or Item 3 side of the line, which may be conveniently referred to as a 'bottom up' approach and a 'top down' approach. The 'bottom up' method is to ask first whether there is a mental disorder causing a functional limitation or restriction and then secondly to assess whether that mental disorder is permanent. The 'top down' approach is to determine first whether there is a permanent mental disorder and, if not, to decide whether the mental disorder "has continued, or is expected to continue for 5 years". Ms Dewart suggested that the first method, as adopted by the Tribunal in this case, was arguably the more appropriate approach. I am not sure that will necessarily be right in every case, as much must depend on the factual matrix. It may be that on the facts of any given case it is clear from the outset that the mental disorder cannot be characterised as permanent, in which event it may be simplest to adopt the top down approach. However, I do agree with Ms Dewart that nothing turns on the order of enquiry that is adopted. What matters is that the relevant decision-maker (be that the Veterans UK officer or the tribunal) ask themselves whatever are the relevant questions which then go to justify their selection of the appropriate descriptor as per Article 16(1).

19. So what then was the approach of the Tribunal in this case? As already noted, the Tribunal recorded a comprehensive narrative account of the Appellant's evidence (at para 5). The Tribunal went on to make findings of fact in relation to the permanency of his medical condition and the treatment he had undergone (paras 9-20). These were helpfully summarised by Ms Dewart in her skeleton argument as follows:

> (i) The appellant was first referred to DCMH Cranwell in 2015. He was referred for CBT. He completed EMDR with a CPN (para 11);
>
> (ii) The appellant is prescribed an anti-depressant (Venlafaxine) which stabilises his symptoms. He does not wish to change to

another medication which may allow him to return to flying while treating the symptoms of his illness (para 12);

(iii) the appellant had ongoing symptoms of low self-esteem, anxiety, disturbed sleep and avoidance (para 13);

(iv) the appellant had been referred to V1P and a further course of EMDR was planned but did not happen (para 14);

(v) The V1P counsellor considered that the aim of the EMDR was to "address current PTSD symptomology related to past military events which are currently impairing the client within work, social and general functioning." The planned treatment did not take place due to the relocation of the therapist (para 15);

(vi) His treatment was interrupted due to the Covid-19 pandemic restrictions; his new therapist did not think that he required further EMDR sessions as he had the tools to deal with ongoing symptoms. The appellant was offered ongoing support for low self-esteem and anxiety. The appellant disengaged with further treatment through V1P (para 16);

(vii) The appellant is prohibited from flying due to the medication he is receiving. He does not wish to change to another medication which may allow him to return to flying while treating the symptoms of his illness (para 18).

20. At paragraph 22 the Tribunal then set out its reasoning on the appropriate descriptor under Table 3 for the Appellant's mental disorder. As Ms Dewart submitted, paragraph 22 of the Tribunal's reasons did five things. In short, it decided that the Appellant's functional limitation was due to his PTSD, it decided that his condition had lasted for more than 5 years and fluctuated, it considered the clinical management of his condition, it considered the treatment options he had had, and it identified the key evidence in relation to both the clinical management and treatment options. The Tribunal provided further reasoning on its decision that the Appellant's mental disorder was not permanent at paragraph 24. It relied upon the evidence that there had been an

initial course of EMDR with a reported benefit; that a second planned trauma focussed treatment in 2020 had not taken place and in the view of the therapist at the time was necessary to address symptoms of PTSD and functioning, and that his GP had referred him to an NHS consultant psychiatrist for an assessment for further treatment but this had not taken place. The Tribunal concluded that "for these reasons the tribunal did not find that appropriate clinical management of adequate duration had taken place thus far or that no further improvement is expected".

21. As such, I am satisfied the Tribunal applied the correct legal test for assessing whether the Appellant's mental disorder was permanent. The findings that it made – both in terms of primary fact and in terms of evaluative judgement – were ones that were reasonably open to the Tribunal on the evidence before it. At their heart the Appellant's arguments in support of Ground 1 boiled down to a disagreement with the findings of fact made by the Tribunal and the conclusions it drew from the evidence. As Ms Dewart observed, it is possible, given the multi-factorial nature of the exercise, that a different tribunal *might* (and I put it no higher than that) have reached a different conclusion on the central question as to the permanence of the Appellant's mental disorder. However, that is not the test that is to be applied in an error of law jurisdiction. As Lord Hoffmann observed in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 1 WLR 1929 at [20], "In any case in which a tribunal has to apply a standard with a greater or lesser degree of imprecision and to take a number of factors into account, there are bound to be cases in which it will be impossible for a reviewing court to say that the tribunal must have erred in law in deciding the case either way: see *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, 815-816." Thus, in order to succeed on Ground 1, the Appellant would need to show that no reasonable tribunal, properly directing itself as to the relevant law, could have reached the same conclusion on the evidence before it. However, the Appellant does not come close to surmounting that demanding hurdle.

22. That being so, Ground 1 fails and so the appeal must be refused. In those circumstances the remaining three grounds of appeal fall away and need not be addressed in any detail. Grounds 2 and 3 are both concerned with the Tribunal's assessment of the degree of functional limitation or restriction. The Tribunal concluded this was not 'severe' or 'moderate' for the purposes of Items 1 and 2 of Table 3, giving brief reasons at paragraph 25. However, given its conclusion on the issue of permanence, there was in practice no need for the Tribunal to have considered this issue. Nor does the reasons challenge in

Ground 4 assist. The test for adequacy of reasons is well-established and is the same on both sides of the border. Thus, in Scotland, as Lord President Emslie explained in *Wordie Property Co Limited v Secretary of State for Scotland* 1983 SLT 345 (at 348), "The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it." There is ample authority to support the proposition that reasons have to be adequate, not perfect or optimal, and the Tribunal's reasons in this case meet that standard.

Conclusion

23. I therefore conclude that the decision of the First-tier Tribunal does not involve any error of law. I accordingly must dismiss the appeal.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised by the Judge for issue on 31 January 2025