GM v SSD (WP)
[2024] UKUT 45 (AAC)

IN THE UPPER TRIBUNAL **UT Refs: UA-2023-SCO-000075+76-WP**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from Pensions Appeal Tribunals for Scotland

Between:

GM

Appellant

- and –

The Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 7 February 2024

Decided after a remote oral hearing on 22 November 2023.

Representation: The appellant represented himself
Mr Blair, advocate, represented the respondent

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the Pensions Appeal Tribunals for Scotland made on 12 June 2023 under case numbers PATS/A/20/0209 and PATS/A/22/0047 involved making of material errors of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the appeals to be reconsidered by a completely freshly constituted tribunal, at an oral hearing.

REASONS FOR DECISION

1. These are two appeals from a combined decision of the Pensions Appeal Tribunals for Scotland ("PATS") dated 12 June 2023, following a hearing on 15 May 2023, from decisions of the Secretary of State for Defence. By its decision, the PATS refused the appeals and upheld, as the PATS described it, the Secretary of State's decision of 12 November 2020 as revised on 26 July 2022. The effect of those Secretary of State decisions, again as described by the PATS, was:

- a final assessment of nil % for the condition Bilateral Noise Induced Sensorineural Hearing Loss (1998-2003) accepted as attributable to service for the periods from 3 August 2020, and
- an interim assessment of 70% for the conditions Lumbar Disc Disease, Rectal Polyp, Post Traumatic Stress Disorder, Bilateral Knee Pain, Injury to Ribs (2000) and Inversion Injury Right Ankle (1999) and Non-Freezing Cold Injury Foot – Bilateral, accepted as attributable to service for the period 3 August 2020 to 30 August 2021.

It was noted by the PATS that a separate assessment appeal was lodged for the period 31 August 2021.

2. The PATS recorded in paragraph 4 of its decision that the matters the appellant took issue with "were the level of assessment awarded did not properly reflect the degree of disability for PTSD and Bilateral Knee Pain". For the reasons which follow, I am satisfied that was material misdescription of the issues the appellant was raising on the two appeals. It is trite law that a PATS must deal with all issues raised by the appeal: see section 5B(a) of the Pensions Appeal Tribunals Act 1943.

3. The PATS noted, under the "Service and Claims Record" part of its decision, that the appellant had separate outstanding appeals before the PATS concerning (i) a War Pensions Mobility Supplement, (ii) Abatement of Unemployed Supplement, and (iii) entitlement in respect of rejected conditions including, by way of example, weak left ankle and osteoarthritis to both hips. Care therefore needed to be taken to make sure that what was under appeal in the two appeals before the PATS in these proceedings was properly identified and kept clearly in focus. My essential reason for allowing these two appeals is the failure of the PATS to do this.

4. The structure of the PATS combined decision then set out the appellant's case, as described by the PATS. This covered the appellant's arguments and evidence about his bilateral knee pain and his PTSD. I need not set out all of this evidence as recorded by the PATS. Excerpts from it will suffice. The appellant told the PATS he was no longer able to do straight line exercises in the gym and had not been able to do so "at the time of the Secretary of State's determination and revised decision". In July 2021 he had moved to a house which had fewer stairs than the flat he had lived in before. At the time of the decision he had driven a manual car, but had since sold it. He had sleep disturbance caused by his PTSD and was still taking 2 tramadol and 2 quetiapine tablets to help his sleep. The appellant "did not have and does not have a coping strategy". Reference was made by the appellant to a letter from a consultant psychiatrist dated 28 January 2021 which described the appellant's complaint of sleep disturbance related to nightmares about his time in service and that he slept for about an hour and he would become very agitated in bed. The letter went on to say that the appellant struggled to get back to sleep and would spend much of the day feeling exhausted from the lack of sleep. The letter asked the GP to prescribe quetiapine. A further letter, of 30 June 2021, repeated the problems caused by PTSD but said that the appellant was feeling great relief from the nocturnal symptoms of PTSD, seemingly because quetiapine had been prescribed. The appellant accepted there had been a temporary relief "but that was no longer the case". He told the PATS he experienced daily flashbacks.

5. The PATS next set out its description of the Secretary of State's case. The Secretary of State's representative had no questions for the appellant. He submitted that the 70% assessment was the correct assessment and of the two main conditions

principally discussed (knees and PTSD), PTSD accounted for the lion's share at 40%. The Secretary of State's representative submitted that the appellant's "condition had not improved nor was there any significant increase in symptoms since the Secretary of State's decision on revisal".

6. The PATS consideration in deciding the appeal (i.e. its central reasoning) was, insofar as immediately relevant, as follows:

> "55. The appellant had more than one injury and we made a composite assessment of the degree of disablement by reference to the combined effect of his injuries as required by Article 42(2)(c) of the SPO 2006.
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> 56. We followed the guidance… in [*NH v SSD* [2015] UKUT 35 (AAC)] taking into account the prescribed degrees of disablement in Part V of Schedule I of the SPO 2006.
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> 57. We also followed the guidance provided….in [*AM v SSD* (WP) [2013] UKUT 97 (AAC)] on the assessment of disablement in cases where there are interacting or overlapping disablements…..
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> 59. We applied the degree of disablement as at 22 July 2022 being the date of the last review by the Secretary of State.
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> 60. Disablement is defined in para 27 of Schedule 6 to the SPO 2006 as "physical or mental injury or damage or loss of physical or mental capacity".
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> 61. We assessed the appellant's disablement not on conditions or injuries.
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> 62. As [the appellant] suffers from a number of injuries we assessed the degree of disability as a composite assessment as required by Article 42(2)(c).
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> 63. We recognised that disabilities may interact or overlap with each other so the composite assessment reflects our finding and may be greater or less than the assessments that would have been made if we had assessed each condition or injury separately.
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> 64. We believe there was some exaggeration on the part of [the appellant], for example, his daily water consumption, but were of the view that this flowed from his keenness to communicate his level of suffering in relation to PTSD and knee problems and no other reason. When asked about his other conditions he indicated they were not causing him any particular problems. We accordingly formed the view that [the appellant] was a credible and reliable witness.
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> 65. Mr Ferguson for Veterans UK maintained that the 70% composite assessment was the appropriate assessment and no attempt was made to suggest a lower assessment should be awarded.
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> 66. We took into account the interaction between the accepted conditions and the unaccepted condition Hip injury problems.
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> 67. We considered the 70% assessment to more than adequately reflect the level of [the appellant's] disability when the Secretary of Stater made the decision to award that assessment."

7. This is largely about the 'how' of the PATS's approach to the making of its decision and says very little, if anything, of 'why' the PATS concluded that the 70% assessments were correct on the evidence before it at the time of the two decisions before it.

8. This is reflected in Upper Tribunal Judge Hemingway's grant of permission to appeal of 31 July 2023, where he said the following of relevance:

> "3. In seeking permission from the F-tT the applicant set out his contentions in various e-mails. But the bulk of what he had to say amounted to and did not go beyond factual assertion and re-argument with the F-tT's conclusions. Such material, of itself, is not capable of showing legal error on the part of the F-tT. In his renewed application to the Upper Tribunal, the appellant asserted the F-tT had erred through failing to give adequate reasons; through failing to resolve conflicts "of fact or opinion"; and through attaching weight to immaterial matters. made its decision.
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> 4. I cannot see any arguable basis for thinking the F-tT might have attached weight to immaterial matters and the appellant does not, in his grounds to the Upper Tribunal, identify the matters he has in mind. Nor can I see any unresolved conflicts with respect to the F-tT's findings or conclusions and, again, the appellant does not specify any. But with respect to the F-tT's conclusion that the interim assessment of 70% was correct, I consider it arguably erred through failing to adequately explain how its findings (set out from paragraph 45 to 52 of the written reasons) and its understanding of how the law was to be applied and its explanation of the evaluative processes it went through (paragraphs 53 to 63) led to that conclusion. On one view, what was said from paragraph 64 to 67 amounted to a statement of a conclusion but not an explanation for it."

9. Despite the arguments of the Secretary of State, I consider the PATS did err in law in failing to provide any adequate reasons for its decision(s) upholding the Secretary of State's decisions of, what were said to be, 12 November 2020 and 22 July 2022.

10. The essence of the Secretary of State's argument that the PATS reasoning is adequate is an argument based on *DS v SSD* (WP) [2016] UKUT 0051 (AAC) (at paragraph [23]) and *CT v SSD* [2009] UKUT 167 (AAC) (at paragraphs [33] and [36]). It is an argument that the PATS is an expert tribunal in whose expert judgment the Upper Tribunal should be slow to interfere and that it may not be possible to explain percentage assessments with any precision.

11. The relevant passage in *DS* reads as follows:

> "24…. the First-tier Tribunal has its own expertise and the Upper Tribunal should be slow to interfere with its assessments provided it has made clear findings of fact and its decisions do not appear to be aberrant or its reasoning to suggest that it has misapplied the law. As Judge Jacobs said in *CT* when considering the adequacy of reasoning in an assessment case, "[i]n some cases, the facts will speak for themselves and it will not be necessary as a matter of law to say more". That may in practice be true in most assessment cases, <u>unless some specific argument about the</u>

appropriate assessment has been advanced and ought to have been addressed by the First-tier Tribunal. In this case, I do not consider that further reasoning was required.

(The underlining is mine and has been added for emphasis.)

12. It is worth putting the passages relied on by the Secretary of State in *CT* in the slightly wider context of what was said in that decision.

> "24. The making of an assessment cannot be done with precision and does not have to be. For assessments over 20%, it is only necessary to assess within 10% bands (article 42(5)). Even choosing between those bands involves deciding in relatively broad terms. And the assessment may involve an element of impression. However, the tribunal must avoid the temptation to decide solely on its impression without appropriate findings of fact and analysis of all relevant aspects of the claimant's disablement. It must approach its task methodically and in a structured way. If it does not, the presiding judge will not be able to provide adequate reasons to explain how and why the tribunal made its decision.
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> 25. An assessment of disablement is a judicial decision. As such, a tribunal must have reasons for making the assessment. If it does not, its decision is arbitrary, which is contrary to the nature of a judicial decision. Since the reasons are integral to the decision-making, it should be easy to give adequate reasons, provided that the tribunal made its decision correctly. The presiding judge then need only record what has been done. That is why I have devoted some time to dealing with the nature of disablement and its assessment……
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> 29. The law may be summed up in this single proposition: the reasons must be sufficient to show how and why the tribunal made the decision that it did and that, in doing so, it acted within the law. Anything else concerns the application of the standard in a particular case…….
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> 31. The reasons must record must findings on all relevant matters in dispute. They must be sufficient to identify the full nature of the disablement that the tribunal has taken into account. If the tribunal has rejected evidence, it must be clear why. It may be self-evident that particular evidence was irrelevant or unreliable, but it is always good practice to deal with it expressly. Failure to do so all too often leaves the claimant dissatisfied and generates unnecessary applications for permission.
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> 32. [Counsel for the Secretary of State] argued that the tribunal had only to make findings on the claimant's disablement. It is correct that it must do that, but I do not understand how in practice it can do that without identifying the component parts. Still less do I understand how it can give reasons to show that it has properly applied article 42 without doing so.
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> 33. It is impossible to explain percentage assessments with precision. They involve, as I have said, a degree of impression. But it will usually be possible to give some explanation, albeit in general terms. In some cases, the facts will speak for themselves and it will not be necessary as a matter of law to say more. For example: a claimant who experiences only occasional and very mild symptoms of stress that have no impact

whatever on everyday life cannot expect an assessment of more than a few percent. It may, though, be helpful to the claimant, and avoid an application for permission to appeal, to point out the significant feature of the disablement that it has only a very limited impact on the claimant's ability to function. In other cases, it may be helpful to balance the claimant's disablement against the positive aspects of the claimant's life, pointing out the aspects that are close or equivalent to those of 'a normal healthy person'. And in other cases, it may be appropriate to draw attention to the limitations or restrictions that even 'a normal healthy person' would be likely to experience at the claimant's age.

34. Consistency is obviously desirable. But each assessment must be made on the basis of the tribunal's assessment of the evidence before it. That may lead to reductions in assessments when the claimant believes that nothing has changed or only for the worse. The tribunal has to explain why it has made that decision. <u>The explanation must meet the arguments put to the tribunal.</u> If the claimant has argued that the disablement has not changed, the tribunal's reasons must be sufficient to justify its assessment. That may require some explanation of why the assessment has changed: R(M) 1/96 at [15]. However, the scope for this is limited. Given the 10% bands in which assessments over 20% are made, a tribunal will not know with precision what the previous assessment was. It is only in the clearest cases, such as a reduction from 60% to 20% without any change in the relevant facts (to take an obvious example), that the sort of explanation envisaged by R(M) 1/96 will be possible…..

36. It is clear from the record of proceedings and the reasons, whether taken individually or collectively, that the tribunal approached the case in a methodical and structured way. That structure shows that the tribunal correctly directed itself on the law. It made findings of fact on all matters relevant to the conditions that were in dispute. It was entitled to accept the concessions that the disablement attributable to three conditions remained as in the report of the medical board. The presiding judge did not attempt any explanation, however broad, of the 30%. However, the clear findings speak for themselves. All of the disablements are relatively mild, some are only intermittent, and most are more of a nuisance that a major impact on the claimant's life. Even taking their cumulative effect into account, an assessment of 30% was the maximum that could be justified. The tribunal also had the benefit of the claimant's own evidence that the disablement from the head injury was the worst. That provided a scale for the assessment of the other disablement. The head injury only causes a short-term headache on most days of the week that is susceptible to over-the-counter medication and some blurred vision. With those relatively mild disablements as the worst, the addition of the others would not allow a higher assessment than 30%. The judge could have commented on the disablements, as I have done, but that was not necessary as a matter of law. All I have done is to spell out what is in the findings anyway."

(Again, the underling is mine and has been added for emphasis.)

13. Based on this case law, the Secretary of State argues that read with the PATS factual findings, the reasons were adequate. I do not accept this. This is for the following reasons.

14. First, taking the appellant's PTSD as the key focus, as it was in the oral hearing before me, I find little or nothing in the findings and reasons as a whole which, per *CT*, shows a structured approach which addressed the PTSD as one 'component part' to the overall percentage assessment and explains why the 40% remained the correct percentage assessment at both decision dates. The PATS findings of fact relevant to PTSD, at least as I read them, were that (i) the appellant had moved [in July 2021] to a house with an additional bedroom which provided him with a safe space for his PTSD symptoms, (ii) he has a small dog which he found helped him with his mental state, (iii) he has no obvious coping strategy for his PTSD symptoms, (iv) he had not had any high level therapy, and (v) he suffered flashbacks, nightmares and associated sleep disturbance. These findings are not then related to why 40% was a correct percentage assessment on the two decision dates the PATS considered it had before it. Most obviously, the move to the house in July 2021 falls after the decision date of 12 November 2020 but before 22 July 2022. Even ignoring what the appellant's case may have been on his appeals, this finding raises an (unaddressed) possible issue of whether the appellant's PTSD symptoms were different before the move.

15. Second, the Secretary of State relies on what he characterises as 'findings' – namely, (i) at the time of the decision the appellant said he drove a manual car and (ii) he was feeling great relief from the nocturnal symptoms of PTSD – but which on the face of it were no more than aspects of the appellant's evidence as recorded by the PATS under "the appellant's case". In circumstances where neither of these pieces of evidence appeared in the PATS 'findings of material facts' and where the PATS had found aspects of appellant's evidence to be exaggerated (exaggeration which was *not* limited to what he had said about his daily water consumption), I cannot find any secure basis for reading these two pieces of evidence as amounting to findings made by the PATS.

16. However, even if these were findings made by the PATS, I struggle to understand what they say about the correct percentage assessment for PTSD at the time of **both** decisions under appeal to the PATS, given (a) that the relief from the nocturnal symptoms of PTSD seemingly only came about after 28 January 2021 (even ignoring the appellant's argument that the relief was only fleeting), and (b) the lack of clarity about at which of the two decisions the appellant had been driving a manual car. If the appellant had been driving a manual car on 12 November 2020 but not by 22 July 2022, that *might* have suggested (though I would have expected some reasoning to explain this) that the PTSD symptom were less acute and of less functional effect in November 2020. On the other hand, the relief (if it was such) from the nocturnal PTSD symptoms would seem only to have occurred sometime after 28 January 2021, and so would not have been in place in 12 November 2020.

17. This last point leads on to the third reason I consider the reasons are inadequate: because they fail to give any focused consideration to the dates of the two decisions under appeal and the appellant's circumstances on both of those dates.

18. The PATS in my judgment failed to adequately address what the content of the two decisions under appeal was and what the appellant's grounds for appealing each

of those decisions were. It is perhaps a matter of regret that Mr Blair was unable to help me with these two areas of interest at the hearing before me because he had not been provided with the either of the PATS appeal bundles for the two appeals. I have since the oral hearing gone through each of the (large) PATS appeal bundles to ascertain, as best I can, what the two decisions are that were (and by this decision remain) under appeal to the PATS.

19. This last concern about the approach of the PATS to the two appeals before it obtained a particular focus at the oral hearing before me. This is because it became apparent at the hearing that a key aspect of the appellant's concern about the adequacy of the PATS's reasoning was that he had previous percentage assessments within which his PTSD had been assessed as being at 30%, but the PTSD had then increased to 40%. Moreover, and more importantly, the appellant told me that at least part of his grounds of appeal to the PATS in these two appeals had been that since his PTSD had first been assessed at 40%, his circumstances had changed for the worse in that he had become no longer able to work, he had been put on new medication, and he was having increasing numbers of flashbacks and was up all night due to his PTSD. In addition, the appellant told me that he had made a specific argument to the PATS in these two appeals about drawing an analogy with guidance of the Secretary of State about percentage assessments for psychiatric disorders. Nowhere is either the 'I've got worse' or 'guidance analogy' argument addressed in the PATS's reasoning. Mr Blair (rightly) accepted that if either such argument had been made by the appellant to the PATS, its reasons were inadequate for failing to address the argument(s). If any authority is needed for this legal proposition see the underlined sentences in paragraph 24 of *DS* and paragraph 34 of *CT* above and also section 5B(a) of the Pensions Appeal Tribunals Act 1943. As I have said above, Mr Blair was not able to help me any further given he did not have the PATS's appeal papers in these appeals.

20. A related issue on the above two arguments said to have been made by the appellant to the PATS is whether they were made on <u>these</u> two appeals (as noted above the appellant has a number of other appeals to the PATS) and, if they were made on these two appeals, whether the 'worsening' argument was relevant to the two decisions under appeal to the PATS in these cases.

21. In trying to answer these points I have sought to make sense of the two PATS appeal bundles for these two appeals. That has not been an altogether easy task given the extent of both bundles and given that the PATS appeal bundle in PATS/A/20/0209 is described as a "Master Copy" and contains papers and evidence which may be relevant to other decisions and appeals made by the appellant

22. The PATS appeal bundle for PATS/A/22/0047 appears from digital page five, handwritten page 1, of that bundle to be against the Secretary of State's decision of 12 November 2020 (see the middle of that page 5/1). However, confusingly, the date of claim is written higher up that page as being 31 August 2021 with a date of decision of 9 March 2022, which seemingly (but even more confusingly) led to an appeal received on 17 March 2021. None of these last three dates bear any relationship to the dates the PATS considered it was concerned with. Handwritten page 2/digital page 7 of this '0047 bundle' is for an "Event type" called "Review of Entitlement and Assessment" and is about, inter alia, an interim percentage assessment of 70% which includes 40% for PTSD. Handwritten page 3/digital page 7 of this bundle refers to a claim form received on 31 August 2021 in which, in

respect of PTSD, the appellant is said to have raised that he has had “changes since the last tribunal”, including being deemed a danger in the work place, being signed off for life by the GP, being on quetiapine for life, and that the PTSD had not got better since 2011 and had got worse. Digital page 10 (typed page 4 of the WPS1669 form) then records the Secretary of State as accepting there are grounds to review the assessment dated 12/11/20, and the assessment is to be reviewed from 17 February 2021. It appears from the Medical Advisor’s certificate further down typed page 4 of WPS1669, of 7 March 2022, that an assessment was made as to whether the appellant’s PTSD had worsened, but they advised it had not and that the percentage assessment at 40% for the PTSD should be maintained. See further handwritten page 5/digital page 13 of the 0047 bundle. It is possible that this led to the decision said to have been made on 9 March 2022 not to review the 40% for PTSD from, it would appear, 17 February 2021. The index to the 0047 bundle also shows (digital page 3) a decision of 9 March 2022. This is said to be on page 119 of the statement of case. Quite how this relates to the interim of assessment of 70% from 3 August 2020 to 30 August 2021, which the PATS considered it was addressing, is unclear (and unexplained).

23. Page 119 (digital page 241) shows a decision letter dated 9 March 2022. It appears to cover two decisions. The first is a separate decision that the appellant is not entitled to an award for degeneration of the left knee. The second decision is that the interim assessment of 70% is maintained. From when it is maintained is not stated. However, the decision letter does show that the appellant was seeking a change in the assessment because his “accepted disablements had got worse”. The decision must be a rejection of the appellant’s argument that he had got worse. The appellant appealed against this decision on 16 March 2022 (pages 140-144 of the 0047 bundle). It appears (the documents are difficult to read) that he may also have sought a review of this decision (see (handwritten) pages 133-139 of the 0047 bundle). However, the index to the 0047 bundles provides these review request documents ‘for information only’, which at least suggests the Secretary of State did not think they were relevant to the appeal.

24. Pages 221-224 of the 0047 bundle then show two decision letters. The first is dated 21 July 2022 and is about an earlier appeal made by the appellant against a decision that he was not entitled to any award in respect of non-freezing cold injury to both feet. The decision letter of 21 July 2022 explains that in the light of further evidence the Secretary of State has reviewed and changed that decision and accepted that the non-freezing cold injury is attributable to service, however including it does not change the assessment of 70%. The letter goes on to tell the appellant that he does not need to do anything to appeal this new decision on the non-freezing cold injury because he already has an appeal against the 70% assessment, which will now cover whether the non-freezing cold injury has been accurately assessed. Interestingly, the 70% assessment is said in this letter to be from 3 August 2020 and not 17 February 2021. Quite why that is so is not explained. It appears from page 222 of the 00047 bundle that a decision was then formally made on 22 July 2022 not to increase the percentage assessment from 70%, (even) with the non-freezing cold injury to both feet added in to the accepted disabling conditions.

25. None of this history relevant to the 9 March 2022 and 22 July 2022 decisions is grappled with or explained by the PATS. More importantly, the PATS fails to reason out what it made of the appellant’s argument that his conditions, and particularly his PTSD, had worsened since he had last been assessed at 40% for the PTSD. I

cannot with any confidence tell from the papers before me when that last assessment of 40% for PTSD was made and what that assessment took into account, and therefore whether matters had got worse for the appellant since then. Nor can I tell what relevance this argument had to the period 3 August 2020 to 30 August 2021. However, this was the job of the PATS, given the evidence shows the appellant had raised as an issue on the appeal that his PTSD had worsened (seemingly) since the assessment decision of 12 November 2020, and its failure to 'do its job' and explain (as it must have found) that the appellant's PTSD had not worsened, or if it had it was not worsening which could be relevant to the decisions and periods in issue before the PATS, was a material error of law.

26. The PATS appeal bundle in the other, PATS/A/20/0209, bundle is much longer than the 0047 bundle, at 4,161 digital pages. Given the date of appeal is identified on (digital) page 1 of the 0209 bundle as being 12 November 2020, it would appear on first impression to be the bundle for the 12 November 2020 assessment decision. However, this is contradicted by handwritten page 1 (digital page 21) of the 0209 bundle, which records that the appeal is against the decision of 9 March 2022 as revised on 22 August 2022. Importantly, what is said on that page about the 9 March 2022 and 22 August 2022 decisions may answer the queries I have raised above when discussing the 0047 bundle about from when and until the 2022 decisions took effect. The handwritten page 1 of the 0209 PATS appeal bundle states that the interim assessment of 70% is for the period 31 August 2021 to 13 March 2022. This period on the face of it is nowhere addressed by the PATS. It seemingly considered that the two appeals before it were limited to the period 3 August 2020 to 30 August 2021. In so doing, the PATS therefore (further) erred in law in failing to properly satisfy itself as to the periods which were in issue before it on the two appeals; and, if appropriate, in failing to explain why the period from 31 August 2021 to 13 March 2022 was not in issue on either appeal notwithstanding the scope of the revisal decision described on (handwritten) page 1 of the 0209 bundle.

27. Moreover, the scope of the two appeals covering a combined period of 3 August 2020 to 13 March 2022 has an obvious relevance to the appellant's argument that his PTSD had worsened if only because of the greater period over which that worsening argument stood to be judged, albeit in respect of each discrete period covered by the decisions under appeal.

28. The above is sufficient to dispose of these two appeals to the Upper Tribunal. However, having considered the PATS appeal bundle in 0209 in some detail, I highlight the following (i) insofar as it may assist the new PATS faced with dealing with these two appeals and (ii) as possibly being relevant to the appellant's case before me that he had raised his PTSD having worsened and the guidance analogy on both of these PATS appeals. I then, and lastly, identify a further area where the PATS erred in law (concerning the appellant's argument by analogy).

29. The second page of handwritten page 989 (digital page 2005) of the PATS bundle 0209 may show that the appellant made a further claim/request for review on 16 March 2022 in respect of deterioration of his PTSD. Such a claim/request may fall outwith the scope of these two appeals and may explain why the (second?) interim assessment of 70% ended on 13 March 2022.

30. Handwritten pages 7-8 (digital pages 35-37) of bundle 0209 would appear to show that on 18 July 2017 the appellant had an interim assessment of 60% which included 30% for PTSD. Handwritten page 4 (digital page 29) of the same bundle

indicates that this assessment had increased to 70% overall, with 40% attributable to PTSD, by 3 August 2020, and this may not have been changed by 6 November 2020 (handwritten second page 5, digital page 32).

31. Further, it may be important to establish the awarding decision to which the appellant was referring when he said in an email of 5 April 2022, following a PATS hearing the previous day, (see handwritten page 956, digital page 1938 of the 0209 bundle), that he was happy with the award of 40% for PTSD but since that award had been made his PTSD had deteriorated (sometime) in 2021. The awarding decision referred to here may be the awarding decision of 12 November 2020, given what the PATS of 4 April 2022 sets out in paragraph 39-42 of its adjournment decision, which begins on handwritten page 907. It is perhaps noteworthy that the PATS on 4 April 2002 did <u>not</u> have before it the appeal PATS/A/22/0047: see handwritten page 907. This might be explained by (handwritten) page 906 (digital page 1034) stating that the appeal against the 9 March 2022 decision was a separate appeal. On the face of it, the most likely explanation, despite how the PATS appeals bundles have been constructed, is that the appeal against the 9 March 2022/22 July 2022 decision is the one with the PATS reference PATS/A/22/0047, and concerns the 70% assessment for the period from 31 August 2021 to 13 March 2022: see, relatedly, paragraph 8 of the PATS's adjournment decision on (handwritten) page 1137 of the 0209 bundle, given that that PATS was not then dealing with PATS/A/22/0047. (The decision of 22 July 2022 appears at (handwritten) page 1077 (digital page 2206) of the 0209 PATS bundle.)

32. It may be of importance, in terms of the periods in issue before the PATS on these two appeals, that (handwritten) page 1104 (digital page 2260) of the 0209 bundle refers to a further deterioration claim made by the appellant which had still to be decided on 8 August 2022 (i.e. after any of the decisions under appeal in these two appeals): see further section 5B(b) of the Pensions Appeal Tribunals Act 1943. (And see in addition on further deterioration claims made by the appellant, (handwritten) pages 2037 and 2039 in 0209 dealing with, respectively, 70% assessment decisions dated 30 November 2022 (and from 14 March 2022) and 7 December 2022 (from 7 November 2022), with perhaps a yet further decision made on 10 February 2023 (2041).

33. The only other page to which I consider I should refer is page 2047 (digital 4154) which on its face supports the appellant's argument that he raised with the PATS on (at least one of) these appeals an argument by analogy with guidance on percentage assessments for psychiatric disorders. The email on the second page of handwritten page 2049 (digital page 4159) indicates this 'analogy' submission was put before the PATS on 15 May 2023. It is therefore a matter it should have addressed in reasoning out why 40% remained the appropriate assessment for PTSD at the effective dates of the decisions under appeal to it. The PATS's failure to do so amounted to a material error of law.

34. It is for all these reasons that these two appeals are allowed. My reasons, in summary, are that the PATS failed to grapple at all (as least as far as its reasons show) with the complicated history of the claims and decisions before it and, therefore, the scope of the arguments and periods in issue on the appeals before it. The PATS decision reads as if it was dealing with an appeal against a one-off assessment decision without any history of previous decisions and where the only

argument made by the appellant was a very general one that a 70% assessment was not correct, when that was far from the case.

35. The Upper Tribunal is not able to re-decide the first instance appeals. The appeals will therefore have to be re-decided afresh by a completely differently constituted PATS.

36. The appellant's success on these appeals to the Upper Tribunal on error of law says nothing one way or the other about whether his two appeals will succeed on the facts before the PATS. That will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence which properly bears on the two decisions under appeal to the PATS and the issues and periods with which those two decisions are concerned.

37. Given the complicated history within which these two assessment appeals are placed and given that it would seem there are later assessment decisions under appeal, as well as entitlement appeals which, if successful, may have a bearing on the correct overall percentage assessment, it may be appropriate for case management directions to be made to ensure all relevant appeals are heard together or at least in an appropriate sequence. That, however, is a matter for the President of the PATS.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 7 February 2024