IN THE UPPER TRIBUNAL **Appeal No. UA-2023-SCO-000139-WP**

ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 78 (AAC)**

On appeal from Pensions Appeal Tribunal (Scotland)

Between:

G.A.M.

Appellant

– v –

Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wikeley

Hearing Date: 22 February 2024
Decision date: 19 March 2024

Representation:

Applicant: In person
Respondent: Mr David Blair of Axiom Advocates, instructed by Morton Fraser MacRoberts LLP

THE UPPER TRIBUNAL'S DECISION

The appeal to the Upper Tribunal is dismissed. The decision of the Pensions Appeal Tribunal (Scotland) dated 27 September 2023 under file reference PATS/E/23/0025 does not involve any material error of law.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rule 40 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS FOR DECISION

The outcome of this appeal to the Upper Tribunal

1. The Appellant's appeal against the decision of the Pensions Appeal Tribunal (Scotland) dated 27 September 2023 is refused.

The oral hearing of the Upper Tribunal appeal

2. I held a remote oral hearing of this appeal on 22 February 2024, using the CVP platform. I am satisfied it was a fair and just way of proceeding. There were no technical hiccups or glitches. The Appellant ably represented himself. Mr David Blair, Advocate, appeared for the Respondent, the Secretary of State for Defence (in practice Veterans UK). I am grateful to both the Appellant and Mr Blair for their helpful and well-focussed submissions.

3. The Appellant has had two other recent appeals to the Upper Tribunal on other issues (*GAM v Secretary of State for Defence (WP)* [2024] UKUT 10 (AAC) and *GM v Secretary of State for Defence (WP)* [2024] UKUT 45 (AAC). Accordingly, and to avoid confusion, I direct that this decision is to be known as *GAM v Secretary of State for Defence (No.3)*.

A summary of the issue raised by this appeal

4. The Pensions Appeal Tribunal (Scotland) (referred to in this decision as 'the PAT' or 'the Tribunal') (i) allowed the Appellant's appeal against the Secretary of State's refusal to undertake an any time review of an earlier decision; and (ii) directed the Secretary of State to carry out such a review. The issue raised by this further appeal to the Upper Tribunal is whether the PAT erred in law by not directing the Secretary of State to conduct that anytime review in a specific manner.

The background to this appeal

5. On 17 July 2007, the Appellant submitted a claim (dated 26 June 2007) under the war pensions scheme for two conditions, namely lower back pain and rectal polyp. On 7 February 2008, the Secretary of State accepted that both conditions were attributable to service and assessed the accepted conditions at 1-5%. The Appellant did not appeal that assessment at the time.

6. Since then, the Appellant has submitted further claims for other conditions he claims were caused by service. Several of these, but not all of them, have been accepted as attributable to service. The conditions accepted are listed in the Table below. The effective dates of acceptance are noted, so far as they are evident from the papers.

Disablements attributable to service	Date accepted	Assessment
Lumbar disc disease	26 June 2007	15-19%
Rectal polyp	26 June 2007	1-5%
PTSD	8 January 2015	40%
Bilateral knee pain	8 January 2015	1-5%
Bilateral noise induced hearing loss	8 September 2016	Nil (final)

Injury to ribs	8 September 2016	1-5%
Inversion injury right ankle	8 August 2018	1-5%
Bilateral, non-freezing cold injury	9 July 2022	1-5%

7. The Appellant's (current) aggregate interim assessment for all these accepted conditions is 70%. There have also been two further accepted conditions accepted as attributable to service, namely degeneration right knee and bilateral osteoarthritis hips.

The chronology of this appeal

8. On 31 October 2022, the Appellant asked Veterans UK to review the original decision made on 7 February 2008 (in effect under article 44(1) of the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 2006 (SI 2006/606) ['the SPO']). In an e-mail he wrote:

> I require a full investigation into why the SPO wasn't followed when first claim is submitted within 7 years of leaving service, article 40 of the Service Pensions Order states the medical adviser must find all other injuries from my army medical file and this has not happened…

9. Veterans UK refused to carry out a review as requested and informed the Appellant of this by emails dated 9 and 13 February 2023. The latter e-mail asserted that "we can only consider conditions from the time they are actually claimed; we are not able to consider any condition before the date it was formally claimed… I regret you do not have any appeal rights against this as it is not a claim decision". Undeterred, the Appellant lodged an appeal with the Tribunal. Before the PAT the Secretary of State then submitted that the Appellant was out of time to appeal the 2008 decision and had no right of appeal against the e-mail dated 13 February 2023. The Secretary of State accordingly applied for the appeal to be struck out.

10. On 20 April 2023 the PAT ruled that a refusal to review under Article 44(1) and a decision to maintain an earlier decision under Article 44(6) carried appeal rights, citing *Secretary of State for Defence v RC (WP)* [2012] UUT 229 (AAC); [2013] AACR 4. The Tribunal therefore refused the Secretary of State's strike out application.

The decision of the Pensions Appeal Tribunal (Scotland)

11. The Tribunal held a video-hearing of the Appellant's appeal on 27 September 2023.

12. The Tribunal summarised the Appellant's case as follows:

> 25. He argues that, although he did not claim for conditions subsequently accepted as attributable to service, the Secretary of State's Medical Adviser should have discovered these and accepted them as attributable to service from the date of his original claim in 2007.

13. The Tribunal summarised the Secretary of State's case in the following terms:

28. [The Appellant] does not have any appeal rights against the refusal to carry out a review of the 7 February 2008 Decision, as the refusal is not a "claim decision". No formal decision has been issued, therefore, the Tribunal has no jurisdiction to hear the Appeal.

14. Having made a series of uncontroversial findings of fact about the chronology, the Tribunal went on to allow the Appellant's appeal against the Secretary of State's refusal to undertake an anytime review of the decision dated 7 February 2008 to assess the accepted conditions of lower back pain and rectal polyp at 1-5%. The Tribunal proceeded to explain its reasoning in the following terms (with a footnote omitted):

Discussion and Decision

35. The Appellant sought an anytime review of the Decision of 7 February 2008.

36. He argued that at the time of his original claim in 2007, the Secretary of State's Medical Adviser (MA) ought to have identified the conditions subsequently accepted as attributable to service, and that and these conditions ought to have been accepted from the date of his original 2007 claim.

37. The scope of the MA's duties and the merits of the review application were not matters for any detailed discussion at this hearing.

38. The Appellant maintains that he is entitled to an anytime review under Article 44(1) of the SPO.

39. In emails dated 7 & 13 February 2023, the Secretary of State refused to undertake an anytime review.

40. The Appellant seeks to appeal that refusal.

41. It is that refusal that is the central issue before the Tribunal.

42. Article 44 (1) of the SPO states:

"Subject to the provisions of paragraphs (3), (4) and (5) and to the provisions of paragraph (8): (a) any decision accepting or rejecting a claim for pension; or (b) any assessment of the degree of disablement of a member of the armed forces; or (c) any final decision that there is no disablement or that the disablement has come to an end may be reviewed by the Secretary of State at any time on any ground."

43. On the face of it, therefore, the Appellant is entitled to an anytime review under subparagraph (1)(b).

44. The basis of the Secretary of State's refusal to carry out a review is that the refusal was not a formal decision and, therefore, it does not carry a right of appeal.

45. It is argued that the Tribunal, therefore, has no jurisdiction in the matter.

46. The construction of Article 44 was discussed in the case of *Secretary of State for Defence v RC (WP)* [2012] UKUT 229 (AAC).

47. A right of appeal to the Tribunal can only arise by legislation.

> 48. The Pension Appeal Tribunals Act 1943 makes provision for appeals against decisions of the Secretary of State to be brought before the Tribunal.
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> 49. Section 5(1) makes provision for appeals in respect of interim assessments of disablement, as follows:
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> *"Where, in the case of any such claim as is referred to in section one, section two or section three of this Act in respect of the disablement of any person, the Minister makes an interim assessment of the degree of the disablement, he shall notify the claimant thereof and an appeal shall lie to the appropriate tribunal from the interim assessment and from any subsequent interim assessment…"*
>
> 50. The 1943 Act does not make any reference to appeals against decisions made on an application for review.
>
> 51. In the case of *RC*, the majority on the Upper Tribunal determined that an application for review under Article 44(1) should always lead to a review and, therefore, a decision under Article 44(6). A decision under Article 44(6) to maintain a previous decision, assessment or award is appealable. The absence of an arguable ground for revision should lead to a decision to maintain the original assessment.
>
> 52. It was decided that *"there is always a right of appeal against a decision that there are no grounds for review and, indeed, against any decision under Article 44."*
>
> 53. The refusal to carry out a review in this Appeal was not, of course, that there were no grounds for review – it was a simple refusal to carry out a review.
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> 54. However, in the opinion of the Tribunal, the refusal to review is, in effect, also a decision to maintain the original 2008 decision and that was accepted by Mr Ferguson in the course of the hearing.
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> 55. The Tribunal clearly does have jurisdiction in this matter and the Appeal is allowed.
>
> 56. The Secretary of State shall carry out a review of the decision of 7 February 2008 as soon as reasonably practicable.

15. I should add, by way of explanation, that Mr Ferguson (who is referred to in paragraph [54] of the Tribunal's decision), represented Veterans UK at the PAT hearing.

The grant of permission to appeal to the Upper Tribunal

16. Judge Caldwell KC, the President of the Pensions Appeal Tribunals for Scotland, summarised the Appellant's grounds of appeal in the following terms:

> The applicant's grounds appear to be that he argued that the review should include not only a review of the conditions accepted on 7 February 2008, but should be a much more wide-ranging inquiry and should consider whether there was evidence available at that time to put the SSD on notice that the applicant suffered conditions, in addition to those claimed by him at that time, which were attributable to service. In particular, the conditions which were subsequently accepted. It is his submission that, in the

> circumstances of his case, no claim was required for these other conditions which were subsequently accepted.

17. Granting permission to appeal, the President also observed as follows:

> The applicant's dissatisfaction with the tribunal's decision appears to be that it does not specifically direct the SSD to carry out such a wide-ranging review and has not dealt with his arguments to that effect.

An outline of the parties' submissions before the Upper Tribunal

18. I hope I do both parties' no disrespect when I say I need only summarise their respective submissions before the Upper Tribunal. I have, of course, taken all their arguments into consideration.

19. The principal thrust of the Appellant's case was his submission that there was sufficient evidence on his service medical file in 2007 to support findings at the time that he suffered from other conditions in addition to the two specific conditions in respect of which he had made his original war pensions claim. The Appellant emphasised that it had been the duty of the Veterans UK Medical Adviser (MA) to look at all the conditions which he could potentially claim for on the basis of the medical evidence on file (see *AL v Secretary of State for Defence (WP)* [2016] UKUT 141 (AAC)). He argued, in short, that if "the MA had done his job properly in 2007 we wouldn't have needed to have this conversation now". As such, the Appellant contended, the Tribunal should have had regard to the wider issues. Accordingly, the PAT should have directed the Secretary of State on review to consider all the potential conditions disclosed by the available evidence in 2007, and not just the two conditions claimed for.

20. Mr Blair, for the Respondent, adopted a much narrower approach. Building on the Secretary of State's written response to the appeal, he submitted that there were essentially just two issues before the PAT, namely (1) whether it had jurisdiction to hear the appeal; and (2) if it did, whether the Secretary of State was entitled to refuse to carry out a review in terms of Article 44 of the SPO. The Tribunal answered both of those questions in the Appellant's favour and directed the Secretary of State to carry out a review of the decision of 7 February 2008 under Article 44. Having taken that step, that exhausted the appellate function of the Tribunal. Mr Blair submitted it was not within the scope of the Tribunal's powers to make orders as to the manner of any review which ought to take place. If the Secretary of State duly carries out a review and the Appellant considers that his approach was unlawful, that is a matter which can be raised by way of fresh appeal to the Tribunal at that stage. It is not the role of the PAT to enter into the regulation or choreography of procedure before the Secretary of State.

21. In reply, the Appellant questioned why the Secretary of State's consideration of the 2007 claim had ignored evidence on his service file of other medical conditions. He argued that Mr Blair's submission was a recipe for further dithering and delay, with the inevitable result that we would be back in the Upper Tribunal in three years' time arguing about the same issues, given the likely outcome of the Secretary of State's review and any subsequent appeal to the PAT.

Discussion and analysis

22. I start with an observation about an unusual feature of this appeal. This is a case in which the Appellant succeeded before the PAT. As Mr Blair noted, the Appellant succeeded on both points – first, that the Tribunal had jurisdiction to hear his appeal and, secondly, that it directed the Secretary of State to conduct an anytime review. The general rule is that because an appeal only lies against a judgment or order, a successful party may not appeal in order to challenge particular findings or aspects of the court or tribunal's reasoning (*Lake v Lake* [1955] P 336). At first sight the Appellant's case does not fall within any of the recognised exceptions to that principle, unless possibly it is one of those exceptional cases that goes to jurisdiction (cf *Secretary of State for Work and Pensions v Morina* [2007] 1 WLR 3033). However, we are where we are. The PAT has given permission to appeal. Mr Blair for the Respondent has not taken the point that I have belatedly raised and it was not canvassed during the oral hearing. As such, it is only fair and just to consider the appeal as having been properly made.

23. Having done so, however, I am satisfied that the PAT's decision does not disclose any material error of law. The Tribunal correctly identified the narrow issue raised by the appeal as being the Secretary of State's refusal (dated 9 and 13 February 2023) to undertake an anytime review of the original decision of 7 February 2008 (reasons at [23]; see also [41]). As such, the Tribunal ruled that the scope of the MA's duties (in 2008) and the merits of the anytime review application (in 2023) "were not matters for any detailed discussion at this hearing" (reasons at [37]). I agree with Mr Blair that the Tribunal was accordingly not concerned with how that review was to be carried out and/or its lawfulness. It was both inappropriate and premature for the PAT to have undertaken any assessment of the potential lawfulness of a review decision which had yet to be taken. Indeed, it would have been an error of law for the PAT to have proceeded in that manner. As Mr Blair put it, the prolonged procedural history of this case could not justify the PAT dealing with matters ahead of the Secretary of State – for the Tribunal to make an order directing that the review be conducted in a particular way would be to pre-empt a decision that would carry its own appeal rights.

24. The fundamental point is that the PAT determines appeals against particular decisions by Veterans UK, no more and no less. In the present case that was a decision refusing to conduct an anytime review. The Tribunal does not have an ongoing supervisory function in relation to the way that the Secretary of State discharges his statutory functions. The primary focus of the PAT is therefore on the particular decision under appeal, and not the individual's case in the round. It follows that the war pensions adjudication and appeals machinery is concerned with specific decisions on entitlement and assessment, rather than on the individual veterans whose cases are the subject of those decisions. The same distinction is evident in the wider civilian benefits system. As I have explained in a social security decision (*GJ v Secretary of State for Work and Pensions (PIP)* [2022] UKUT 334):

> 10. The Appellant's statement in his notice of appeal in 2020 that "the appeal has been going on since May 2017" needs to be unpacked a little. It is entirely understandable that he sees the question of his entitlement to PIP as being a single discrete issue starting with his original claim for benefit. However, the benefits appeals system takes a different approach, which focusses more on specific decisions than just on the claimant as an

individual. Mr Commissioner Powell explained the decision-based system in the unreported Social Security Commissioner's decision *CA/1020/2007* (at paragraph 12) as follows:

> "What is meant by this is that the system proceeds, or is based, on formal decisions being given. If a benefit is awarded it must be awarded by a formal and identifiable decision. If that decision is to be altered by, for example, increasing or decreasing the amount involved, it can only be done by another formal and identifiable decision. Likewise a decision is required if the period of the award is to be terminated, shortened or extended."

11. The present appeal shows the importance of identifying the precise nature of the decision under appeal.

25. The PAT in the present appeal did precisely that and its decision discloses no material error of law.

Conclusion

26. I therefore dismiss the Appellant's appeal.

Nicholas Wikeley
Judge of the Upper Tribunal

Approved for issue on 19 March 2024