

**R(AF) 1/07**

**Mr J Mesher  
Commissioner  
3 October 2006**

**CAF/3326/2005**

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**War disablement pension – structure of the scheme – distinction between entitlement appeals and assessment appeals – burden of proof – precedential status of decisions of nominated judges**

The claimant claimed that his assessment for war disablement pension should take account of new conditions rotator cuff syndrome and degeneration of his hip joints, which he submitted were consequential on conditions which had been accepted by a previous tribunal as attributable to service. The Secretary of State issued decisions that the conditions rotator cuff syndrome left shoulder and soft tissue injury low back (post-service) were not attributable to or aggravated by service and refused to increase the existing assessment of disablement on review. On appeal the tribunal found that the claimant's "post service back injuries, if any, were not due to service factors" and did not mention his hips. The Secretary of State issued a subsequent decision in relation to hip problems, diagnosed as right trochanteric bursitis, which was the subject of a further appeal, pending at the time of the Commissioner's decision. In his appeal to the Commissioner, the claimant argued that the tribunal had erred in failing to explain why it did not deal with the claim in relation to hip problems. The appeal also raised issues as to whether an appeal against a decision on attributability of a condition consequential on an accepted decision was an entitlement decision (against which an appeal lies to a Pensions Appeal Commissioner) or an assessment decision (against which there is no appeal). The Commissioner also set out the status in appeals to the Pensions Appeal Commissioners of decisions of the nominated judges of the High Court and the Court of Session in appeals under the Pensions Appeal Tribunals Act 1943 from decisions of Pensions Appeal Tribunals given before 6 April 2005.

*Held*, allowing the appeal, that:

1. Pensions Appeal Commissioners have taken over the statutory appeal that previously lay to the nominated judges of the High Court and, while decisions of the nominated judges remain binding on pensions appeal tribunals, as are decisions of the Commissioners, decisions of the nominated judges are not binding on the Commissioners, but will normally be followed in the absence of strong reason to the contrary (paragraphs 18 to 21);
2. a claimant must prove injury and resulting disablement and the causal connection between them on the balance of probabilities before the question of the relationship of the injury to service is decided on the basis of giving the claimant the benefit of any reasonable doubt (*Royston v Minister of Pensions* [1948] 1 All ER 778, 3 War Pension Appeal Reports 1593 and *Secretary of State for Defence v Rusling* [2003] EWHC 1359 (QB), 13 June 2003 followed) (paragraphs 22 to 32);
3. the tribunal had erred in law by failing to explain why the appeal failed in relation to the condition soft tissue injury low back (post-service) (paragraphs 33 to 35);
4. while it was not necessary to decide the issue, the Commissioner inclined to the view that the tribunal had erred in failing to deal with the claimant's submission about hip problems, since those problems were included in his claim and *Rusling* was authority for the view that a claimant retained the right to continue to challenge on appeal a diagnostic label for a condition under which a claim was originally rejected, even though the Secretary of State had later accepted another condition as attributable to service and as a cause of all the symptoms complained of. It would also be consistent with the essential nature of an appeal as a rehearing of the issue before the person who made the decision under appeal (*Barratt v Minister of Pensions* (1948) 1 WPAR 1225 and R(IB) 2/04 cited) (paragraphs 36 to 39);
5. a contention that a claimant has a new disablement operates as a claim, as distinct from a contention that disablement already accepted has got worse, which operates as an application for review of the past award. It does not matter in principle that a new disablement is said to result from an injurious process that has already been accepted as connected to service, and where the existing

disablement either as expressly identified or as assumed to result from a defined injury is in the impairment of a particular organ or part of the body or mind, a contention that some different organ or part of the body or mind is now impaired is a claim in respect of a new disablement (paragraphs 40 to 47).

The Commissioner remitted the case to a differently constituted tribunal for rehearing at the same time as the appeal against the Secretary of State's decision in respect of the condition right trochanteric bursitis.

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## DECISION OF THE PENSIONS APPEAL COMMISSIONER

1. The claimant's appeal to the Commissioner is allowed. The decision of the Birmingham pensions appeal tribunal dated 8 June 2005 in respect of the Secretary of State's decision dated 14 April 2004 relating to the condition soft tissue injury low back (post-service) is erroneous in point of law, for the reasons given below, and I set it aside. The case is referred to a differently constituted pensions appeal tribunal for determination in accordance with the directions given in paragraph 52 below (Pensions Appeal Tribunals Act 1943, as amended, section 6A(4)(b)).

2. In this case the Treasury Solicitor, on behalf of the Secretary of State for Defence, supported the claimant's appeal to the Commissioner. In the amended submission dated 28 February 2006, it was accepted that the pensions appeal tribunal (PAT) of 8 June 2005 had given inadequate reasons for rejecting the case made for the claimant about the Secretary of State's decision on soft tissue injury low back (post-service). It was also accepted that the PAT's separate decision on the same day, notified on a separate decision notice, in relation to the condition rotator cuff syndrome left shoulder, stood unaffected by the present appeal and any setting aside of the other decision. I confirm that that is the position. It was submitted for the Secretary of State that the claimant's appeal against the decision of 14 April 2004 on the condition soft tissue injury low back (post-service) should be sent back to a new PAT for rehearing. Some other practical proposals were made (that I shall come back to below) for ensuring that the new PAT would be able to consider the full scope of the case being put forward for the claimant.

3. The claimant's representative, Mr John Rowlands of Solihull Citizens Advice Bureau, was in general content with the effect of the submission for the Secretary of State. But in his submission dated 4 April 2006 he submitted that there might remain confusion about whether the case to be remitted should properly be considered as an entitlement appeal (ie an appeal under section 1(1) of the Pensions Appeal Tribunals Act 1943 (the 1943 Act)) or as an assessment appeal (ie an appeal under section 5 of the 1943 Act, where there is no further appeal to the Commissioner) and that a definitive ruling was necessary. He also queried the necessity for the proposals in the Secretary of State's submission, especially that the Veterans Agency should issue a new decision. There was a request for an oral hearing to deal with those matters.

4. I granted that request because some issues identified in my ruling arose about the directions that would need to be given to the new PAT conducting the rehearing. The claimant did not attend the hearing on 23 August 2006, but was represented by Mr Rowlands. The Secretary of State was represented by Mr Steven Kovats of Counsel, instructed by the Treasury Solicitor on behalf of the Secretary of State. I am grateful to both representatives for their submissions, which did take matters forward, although without making the questions to be answered much less difficult.

### **The factual background**

5. The claimant served in the Coldstream Guards from 1964 to 1974. On 16 May 1999 he made a claim, under Article 5 of the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1983 (SI 1983/883) (the Service Pensions Order), in respect of disablement caused by lower back pain and by shrapnel wounds to arms, legs and shoulder. The shrapnel wounds were caused by a grenade incident while he was serving in Aden in 1965. That incident and his injuries were confirmed in service records. On 22 November 1999 the Secretary of State accepted that the condition multiple shrapnel wounds (1965) was attributable to service and assessed the percentage disablement at one to five per cent. The claimant had said that the low back pain was caused by an accident when he fell about three feet off the back of a lorry while serving in Belfast. He said that he picked up a jerry can that he expected to be full of petrol, but was in fact empty, so that he lost his balance and fell. The Secretary of State initially decided on 22 November 1999 that the condition causing disablement in the back was lumbar spondylosis and that that condition was not attributable to or aggravated by service. The Secretary of State did not accept that the claimed incident had happened, in the absence of evidence in the service records of the incident or of any back problem.

6. The claimant lodged an entitlement appeal against the decision rejecting the claim for lower back pain and an assessment appeal against the assessment for the multiple shrapnel wounds. I do not need to detail the success of the latter appeal or the later history of assessments including that condition. Following the making of the entitlement appeal, the Secretary of State gave a further decision that the condition injury to back (1964 to 1974) was not attributable to or aggravated by service. On 12 September 2001 a PAT allowed the claimant's appeal against the rejection of his claim on that ground. It accepted the claimant as a credible witness in relation to the occurrence of the jerry can incident, although he was hazy about dates. He had also got supporting statements from others serving with him at the time. The PAT accepted that the claimant had shown at least a reasonable doubt that injury to back (1964 to 1974) was attributable to service. But it found that, as the first time after service when his back problem became serious enough to consult a doctor was 1979 and in 1998 the disc degeneration was only mild, there was no reasonable doubt in his favour about a connection of the lumbar spondylosis with the jerry can incident. The appeal in relation to that condition was disallowed. The disablement resulting from the condition injury to back 1964 to 1974 was on 25 September 2001 assessed at nil. An appeal against that assessment seems to have produced a decision by a PAT on 3 April 2003 that some of the claimant's current back pain related to the service injury and that the combined assessment for the disablement resulting from the two accepted conditions should be 15 to 19 per cent (interim from 28 September 2001 to 6 December 2002). A further assessment first maintained that percentage, which was apparently later increased to 30 per cent, against which assessment an appeal is awaiting decision.

7. On 25 November 2002, the claimant had requested a "claim form for review". The form was returned on 17 January 2003. It asked the claimant to say why he thought that his disablement assessment should be increased. He mentioned problems with restriction of shoulder movements that he linked to his shrapnel wounds. That can I think be taken as a claim in respect of disablement resulting from the condition rotator cuff syndrome left shoulder, but not for any other new disablement.

8. On 2 May 2003 the claimant submitted a “claim form for further condition”. He said that the condition he wanted to claim for was hip problems and continued:

“I am having increased problems with my back which has lead to problems with my right hip. I have had xrays on my hips. The lumbosacral spine shows early degeneration of lumbosacral facet joints. I am now limited in how long I am able to stand. My hip is a consequential disability from my accepted condition.”

9. The Veterans Agency sought information from the claimant’s GP and obtained reports from a consultant rheumatologist about the claimant’s left shoulder (10 November 2003) and from the regional consultant in orthopaedics about his lower back problems (17 March 2004). The fairness of the terms of reference given to the regional consultant and the reliability of his report are matters of intense dispute between the claimant and the Agency. I say no more about those matters here. On 14 April 2004 the Secretary of State issued decisions that the conditions rotator cuff syndrome left shoulder and soft tissue injury low back (post-service) were not attributable to or aggravated by service. The same letter notified a refusal to increase the existing assessment of disablement on review.

10. I must interpose at this point a complaint about the papers supplied to the PAT of 8 June 2005 by the Veterans Agency on behalf of the Secretary of State. I am afraid that it is a complaint that has been made for many years by PATs. It is that there was no copy in the papers of the letter dated 14 April 2004 notifying the claimant of the decisions against which the claimant appealed to the PAT. Nor was there a copy of any contemporaneous document setting out the decision that had been made. There was merely the summary on the first page of the Statement of Case and the explanation of the reasons for the decision put together when the Statement of Case was prepared and after the Opinions of Medical Services had been given. Newman J in *Secretary of State for Defence v Rusling* [2003] EWHC 1359 (QB), 13 June 2003, stressed (at [4]) the critical importance to the resolution of the issues arising in that case of the formal notice of the decision to reject Mr Rusling’s claim. The terms of that notice and the accompanying statement of reasons for the decision were given a very particular significance in Newman J’s approach to the *Rusling* case. However, in any case in which there is some dispute about the scope of a decision in relation to what has been claimed, or about the scope of an appeal from a decision, the terms of the formal notice of decision and the reasons for it or of the decision itself could be critical. It would have been helpful for the PAT to have had those documents in the present case. A copy of the letter of 14 April 2004 has now been produced on my direction. As it is impossible to predict in advance in which cases such issues might arise, good practice should dictate the provision of a copy of the formal notice of the decision under appeal and of any explanation given to the claimant with the formal notice in the Statement of Case in every case.

### **The appeal to the PAT**

11. On 6 May 2004 the claimant lodged an appeal on an “assessment reasons for appeal” form, on which he also said that he wished to appeal about the “refusal properly to recognise effects of injury to shoulder and hip (letter 14.4.04)”. He lodged an entitlement reasons for appeal form, apparently on 23 September 2004, on which the conditions rotator cuff syndrome left shoulder and soft tissue injury low

back (post-service) had apparently been written in before the form was sent out to the claimant (see the letter dated 31 January 2006 from the Veterans Agency to the claimant: page 170 of the papers).

12. The claimant attended the hearing on 8 June 2005 with Mr Rowlands. The notes kept by the service member as well as the chairman's notes indicate that Mr Rowlands submitted that the PAT should consider the claimant's hip condition as part of the claim of 2 May 2003, which had been rejected in the decisions of 14 April 2004. It appears that there was some opposition to that from Mr Frith, the representative of the Secretary of State. He may (the notes are not clear) have submitted that the hip problems were referred pain from the back and could be taken into account as part of the assessment of disablement from the accepted condition of injury to back (1964 to 1974).

13. The PAT allowed the appeal in relation to rotator cuff syndrome left shoulder and found that that condition was attributable to service. It found reasonable doubt in the claimant's favour that it might have originated with the trauma experienced in the serious service accident in 1965. I need say no more about that decision as it is common ground that that decision of the PAT stands independently of the outcome of the present appeal to the Commissioner. The PAT disallowed the appeal in relation to soft tissue injury low back (post-service). In the chairman's statement of reasons for decision he left unamended the standard printed sentence adopting the medical labels used by the Veterans Agency as a proper interpretation of the claimed disablement. The PAT was said to have adopted as credible and relevant evidence a consultant orthopaedic surgeon's letter dated 19 August 2003 to the claimant's GP (in which he gave the opinion that the claimant's current low back symptoms were the direct result of a "severe soft tissue injury" in service and not of lumbar spondylosis, where the degree of degeneration shown by MRI scan could not explain the degree of pain and associated disability). The other evidence accepted related to the rotator cuff condition. Having assessed all the evidence, the PAT found that the claimant's "post service back injuries, if any, were not due to service factors". There was no mention whatsoever of his hips.

### **The appeal to the Commissioner**

14. Mr Rowlands applied to the chairman of the PAT in a letter dated 7 September 2005 for leave to appeal to the Commissioner. That was after some exchange of correspondence with the President of PATs. As I do not know when the statement of reasons was sent to the claimant (and the Secretary of State has taken no point on time limits) I shall assume that the application was within time under rule 25(1) of the Pensions Appeal Tribunals (England and Wales) Rule 1980 (SI 1980/1120, as amended from 6 April 2005). The ground of the application was that the PAT refused to consider a change in the diagnostic label used to deal with his claim of 2 May 2003 – to hip problems as claimed rather than the inaccurate and prejudicial soft tissue injury low back (post-service). The chairman granted leave to appeal, saying this:

"The Appellant's claim has been rejected under the label 'Soft Tissue Injury Low Back (Post Service)'; the Tribunal upheld this rejection and dismissed this part of the Appeal. [The claimant] 'does not dispute the decision' (see letter 15/8/05). However, this part of the Appellant's claim had originally been made for 'hip problems' as a consequence of the accepted condition of Service Back Injury (1964-74). The issue was canvassed at our Appeal

hearing as to whether this was in reality an assessment issue arising from the accepted injury, or a new entitlement claim. This would have required a change of 'label' by us. In the event we found the existing label was appropriate (see paragraph 5 of our Decision).

It is at least arguable that this finding is open to challenge.”

15. When giving directions on the appeal on 22 November 2005, Mr Commissioner Bano asked for the Secretary of State's observations on whether the issues arising should have been dealt with as an assessment or an entitlement appeal. As noted above, the written submission on behalf of the Secretary of State (in the initial submission dated 13 January 2006 and the amended submission dated 28 February 2006) supported the appeal to the Commissioner and suggested that the decision in relation to soft tissue injury low back (post-service) be set aside, and the case reheard by a new PAT as an entitlement appeal. Paragraph 1(a) and (b) of the submission was as follows:

“a. There was a dispute between the parties as to whether the Appellant's condition was appropriately described by the label used by the Secretary of State, or whether the label 'hip problem' should have been substituted. The Pensions Appeal Tribunal adopted the label given by the Secretary of State, but gave no reasons for this in the decision given.

b. The Pensions Appeal Tribunal failed to give adequate reasons to explain its decision that the Appellant's post service soft tissue injury was not attributable to the Appellant's military service.”

16. The submission went on to say that the Veterans Agency intended to issue a further decision refusing to accept that any hip problems were attributable to the accepted condition of back injury. The claimant would then be invited to appeal against that decision and the appeal could be heard at the same time as the case remitted for rehearing by the Commissioner. A decision was notified to the claimant by a letter dated 1 March 2006 that the diagnosed condition right trochanteric bursitis was not attributable to or aggravated by service, and that the condition right hip pain had been taken into account in looking at the claim. The claimant has appealed against that decision by a notice signed on 31 July 2006.

#### **Did the PAT of 8 June 2005 err in law?**

17. There are two general issues to be dealt with before looking at the specific issues of law arising in this case. The first, which is not in dispute, is the status in appeals to the Social Security Commissioners in their role as Pensions Appeal Commissioners of decisions of the nominated judges of the High Court and the Court of Session in appeals under the 1943 Act from decisions of PATs given before 6 April 2005. Since I need to refer to a number of such decisions, it is helpful to say how they should be regarded as precedents even though no-one in the present case has argued that any of them were wrongly decided. And a statement of general principles may be useful for future cases. The second issue is the overall structure of entitlement under the Service Pensions Order, which forms the basis from which I approach the later specific issues. In particular, the meaning and place of "disablement" in that structure is important in distinguishing entitlement appeals from assessment appeals.

**(a) Decisions of the nominated judges**

18. In his skeleton argument, Mr Kovats helpfully drew attention to *Minister of Pensions v Higham* [1948] 2 KB 153, where Denning J said at 155 that:

“the doctrine of *stare decisis* [ie that a legal principle necessary to the decision in a case must be applied in later cases by a court at the same level] does not apply in its full rigour to this branch of the law. The decisions of the Superior Courts (The High Court in England, the Court of Session in Scotland and the Supreme Court in Northern Ireland) are binding on the Pensions Appeal Tribunals. They are not absolutely binding on the Superior Court itself or on the courts of co-ordinate jurisdiction but will be followed in the absence of strong reason to the contrary.”

19. Mr Kovats submitted that the Commissioners are to be regarded as now exercising a jurisdiction that is co-ordinate with that previously exercised by the nominated judge of the High Court (or equivalent), so that decisions of the nominated judges are no more binding on the Commissioners than they were on each other. The Commissioners have simply taken over the statutory appeal that previously lay to the nominated judge. The result is entirely consistent with the approach taken by the Court of Appeal in *Chief Supplementary Benefit Officer v Leary* [1985] 1 WLR 84, appendix to Commissioner’s decision R(SB) 6/85, when the Commissioners took over in 1980 the statutory appeal that had from 1978 to 1980 lain from supplementary benefit appeal tribunals to the High Court (and see the more wide-ranging discussion in Commissioner’s decision R(IS) 15/99).

20. It follows that Commissioners will regard previous decisions of the nominated judge on the statutory appeal under the 1943 Act in the same way as previous decisions of individual Commissioners, without the complication of the distinction between Commissioners’ decisions which have been reported and those which have not been reported. The extent to which Commissioners’ decisions on questions of legal principle bind other Commissioners is set out in paragraph 21 of Tribunal of Commissioners’ decision R(I) 12/75:

“[A] single Commissioner follows a decision of a Tribunal of Commissioners unless there are compelling reasons why he should not, as, for instance, a decision of superior Courts affecting the legal principles involved. A single Commissioner in the interests of comity and to secure certainty and avoid confusion on questions of legal principle normally follows the decisions of other single Commissioners (see Decisions R(G) 3/62 and R(I) 23/63). It is recognised however that a slavish adherence to this could lead to the perpetuation of error and he is not bound to do so.”

There is practical guidance in Chief Commissioner’s Practice Memorandum No 2 (31 December 2004). For the avoidance of any possible doubt, decisions of the nominated judges remain binding on PATs, as will be decisions of the Pensions Appeal Commissioners.

21. That is the basic position. Things will of course be more complicated in practice. Commissioners will accord great respect to the views of distinguished nominated judges reached after full arguments from Counsel, bearing in mind the difference between conclusions of law that were necessary to the decision in the case concerned and other expressions of view on the law. The weight to be given to a line of decisions all going the same way or to a decision that has been approved many

times over the years will be greater than that given to an isolated decision. If there are conflicting decisions of courts of co-ordinate jurisdiction there will no doubt be room, for PATs as well as Commissioners, for the general rule applied by Denning J in *Higham* that the later decision was to be preferred if it was reached after full consideration of the earlier decision (see also Commissioners' decisions R1/00(FC), a Northern Ireland decision, and CIB/1205/2005). But it is clear that many other factors could be relevant, including in particular the words of the legislation that are being interpreted (see *Judd v Minister of Pensions and National Insurance* [1966] 2 QB 580 (Edmund Davies J)). Much of that will have to be worked out case by case in the future as the issues arise.

**(b) The overall structure of entitlement under the Service Pensions Order**

22. I have found it necessary, in seeking to understand the nature of the issues in this case to look in some detail at the stages that must be worked through in considering whether a disablement is due to service under the Service Pensions Order and whether an award of pension or gratuity can be made in respect of that disablement. What I say in this section is somewhat tentative. It should not be taken as establishing any definitive principles unless approved in future cases.

23. For simplicity, I set out here only the main provisions of Article 5 of the Service Pensions Order as in force in 2003 (the same basic stages arise under the provisions of Article 4 where the claim or death is within seven years of the end of service, although the burden of proof is more favourable to the claimant):

“(1) Where, after the expiration of the period of 7 years beginning with the termination of the service of a member of the armed forces, a claim is made in respect of a disablement of that member, or in respect of the death of that member (being a death occurring after the expiration of the said period), such disablement or death, as the case may be, shall be accepted as due to service for the purposes of this Order provided it is certified that –

- (a) the disablement is due to an injury which –
  - (i) is attributable to service after 2nd September 1939; or
  - (ii) existed before or arose during such service and has been and remains aggravated thereby; or
- (b) the death was due to or substantially hastened by –
  - (i) an injury which was attributed to service; or
  - (ii) the aggravation by service of an injury which existed before or arose during service.

(4) Where, upon reliable evidence, a reasonable doubt exists whether the conditions set out in paragraph (1) are fulfilled, the benefit of that reasonable doubt shall be given to the claimant.”

Article 3 makes it a condition of any award under the Service Pensions Order that the disablement or death was due to service (now confined to service before 6 April 2005).

24. Disablement is defined in Schedule 4 to the Order, unless the context otherwise requires, as:

“Physical or mental injury or damage, or loss of physical or mental capacity”.

Injury is defined to include “wound or disease”.

25. Section 1(1) of the 1943 Act provides:

“(1) Where any claim in respect of the disablement of any person made under any such Royal Warrant, Order in Council or Order of His Majesty as is administered by the Minister or under a scheme made under section 1 of the Polish Resettlement Act 1947 is rejected by the Minister on the ground that the injury on which the claim is based –

- (a) is not attributable to any relevant service; and
- (b) does not fulfil the following conditions, namely, that it existed before or arose during any relevant service and has been and remains aggravated thereby;

the Minister shall notify the claimant of his decision, specifying that it is made on that ground, and thereupon an appeal shall lie to a Pensions Appeal Tribunal constituted under this Act (hereafter in this Act referred to as ‘the Tribunal’) on the issue whether the claim was rightly rejected on that ground.”

Section 5(1) and (2) provides:

“(1) 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 Tribunal from the interim assessment and from any subsequent interim assessment, and the Tribunal on any such appeal may uphold the Minister’s assessment or may alter the assessment in one or both of the following ways, namely –

- (a) by increasing or reducing the degree of disablement it specifies; and
- (b) by reducing the period for which the assessment is to be in force.

In this section the expression “interim assessment” means any assessment other than such a final assessment as is referred to in the next following subsection.

(2) 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, it appears to the Minister that the circumstances of the case permit a final settlement of the question to what extent, if any, the said person is disabled, and accordingly –

- (a) he decides that there is no disablement or that the disablement has come to an end or, in the case of any such claim as is referred to in section three of this Act, that the disablement is not or is no longer serious and prolonged; or
- (b) he makes a final assessment of the degree or nature of the disablement;

he shall notify the claimant of the decision or assessment, stating that it is a final one, and thereupon an appeal shall lie to the Tribunal on the following issues, namely –

- (i) whether the circumstances of the case permit a final settlement of the question aforesaid;
- (ii) whether the Minister's decision referred to in paragraph (a) hereof or, as the case may be, the final assessment of the degree or nature of the disablement was right;

and the Tribunal on any such appeal may set aside the said decision or assessment on the ground that the circumstances of the case do not permit of such a final settlement, or may uphold that decision or assessment, or may make such final assessment of the degree or nature of the disablement as they think proper, which may be either higher or lower than the Minister's assessment, if any, and if the Tribunal so set aside the Minister's decision or assessment they may, if they think fit, make such interim assessment of the degree or nature of the disablement, to be in force until such date not later than two years after the making of the Tribunal's assessment, as they think proper."

26. The essential stages start with "disablement". Both Articles 4 and 5 and sections 1 and 5 of the 1943 Act talk, outside cases where the service member has died, of claims in respect of a disablement. As a finding that disablement or death was due to service is a pre-condition of any award under the Service Pensions Order, a claim, for example, seeking an award of a pension under Article 10, will be a claim in respect of a disablement. Disablement in this context is some impairment of the proper functioning of part of the body or mind, including by virtue of the two alternative parts of the definition a case where there is damage to a part of the body without there currently being any loss of capacity in that part (eg a shell splinter embedded in a person's arm that is causing no loss of capacity: *Harris v Minister of Pensions* [1948] 1 KB 422). Disablement is to be distinguished analytically from what the person is prevented from or restricted in doing as a result. That is to be taken into account in assessing the degree of disablement in accordance with Article 9. It is also behind the proposition that decisions cannot be made in respect of mere symptoms. Disablement is also to be distinguished analytically from the "injury" that must be a cause of the disablement, and whose meaning is explored in paragraphs 27 and 28 below. That is so even though the definition of "disablement" includes an injury. In my judgment, "injury" is included there to cover the case where the impairment cannot be described in any way separately from the injury that caused it (eg loss of a limb that is blown off in an explosion, a gunshot wound or blast injury to an ear). It does not mean that the two stages can be collapsed into one analytically.

27. The second stage is to identify the injury or injuries, including "wound or disease", that are causes of the disablement in respect of which the claim was made. That must include a finding of a causal connection because of the use of the phrase "due to" between "disablement" and "an injury" in Articles 4 and 5. Injury has been interpreted so as effectively to cover any pathological process that could possibly cause a disablement. In the terms traditionally used by the Veterans Agency (see the extracts from the Manual for Medical Advisers extensively set out in *Rusling*), it is

the basic injurious process or processes underlying the claimed disablement that must be identified. It is each identified injurious process, often described or “labelled” as a particular “condition”, that has to be found to be attributable to or aggravated by service for a claim to be successful. It seems to me that the administrative guidance given by the Veterans Agency is right in its insistence on an analytical separation between disablement and the injurious process and on the proper identification of all causally relevant injurious processes, leading to decisions on whether each condition is related to service, so as to ensure that the service member has the opportunity to raise every possible connection on appeal. Nonetheless, it is common for even the most experienced and distinguished judges and members of PATs to talk of whether a disablement is attributable to or aggravated by service, collapsing what I consider to be an essential analytical distinction. But sometimes the use of the word “disablement” can be taken as covering the package of a disablement due to a particular injurious process. I come back below to some of the practical difficulties that arise from the fact that the Veterans Agency in its entitlement decisions commonly does not specifically identify the disablement that it regards as due to any particular injury, despite the requirement in Articles 4 and 5 for a certificate that a claimed disablement is due to an injury which is attributable to or aggravated by service.

28. “Injury” is also to be distinguished from any incident in service that is said to have caused the injury. I understood Mr Kovats to have submitted at one point that in the present case the “injury” was the jerry can incident. That cannot be right. The jerry can incident was something that has now been found by the PAT of 12 September 2001 to have occurred during the claimant’s service. But the “injury” for the purposes of the Service Pensions Order is something that happened to the claimant in that incident or as a sufficiently connected result (leaving aside cases of aggravation). In some cases there will be a very small interval between the incident and the injury, and very similar words may be used to describe both, but the two must be kept separate analytically.

29. The final link in the chain is that the injury (condition) is attributable to or aggravated by service. This is usually the crucial and/or disputed link. It is only on this issue that the advantageous burden of proof under Article 5(4), and the even more advantageous placing of the onus of proof on the Secretary of State under Article 4(2) and (3), applies. At first sight, Article 5(4) would appear to give a claimant the benefit of any reasonable doubt on all the conditions contained in paragraph (1), including the question of whether the claimant’s disablement is due to an injury as well as the question of whether the injury is related to service. However, in paragraph 22 of *Rusling*, Newman J said this (bearing in mind that he was concerned with an Article 4 case):

“These matters [service and disablement], if established on a balance of probabilities, shift the onus of proof in connection with attribution or causation to the Secretary of State. Since disablement is defined as ‘physical or mental injury or damage, or loss of physical or mental capacity’ and ‘injury includes wound or disease’, a claimant must establish an ‘injury’. Section 1(1) of the 1943 Act refers to this as the ‘injury upon which the claim is based’. Put another way it is for the claimant to establish the injurious process upon which he bases his claim. Once he has done so the issue of attribution or causation will fall to be decided in connection with the injurious process upon which he founds his claim.”

For the reasons sketched in above, I am not at all sure that the inclusion of “injury” in the definition of disablement is in itself enough to require the claimant to establish the injurious process, and the causative link to disablement, on the balance of probabilities rather than by merely showing that a reasonable doubt exists in his favour. However, in paragraphs 30, 38 and 78, Newman J traced those propositions back to the famous decision of Denning J in *Royston v Minister of Pensions* [1948] 1 All ER 778, 3 War Pension Appeal Reports 1593.

30. Denning J’s judgment in *Royston* was very short (two paragraphs) and was apparently given at the end of the hearing. A PAT had decided that the injury, wound or disease “injury to spine” was not attributable to or aggravated by service. It was an Article 4 case. The claimant had said that she had been knocked over by a truck, or possibly that the truck had run over her foot, and that she had been in hospital for some days. There was nothing in her service records about the accident or any medical treatment for it, but some evidence in post-service medical examinations of pain or reduced movement in the back. The chairman of the PAT said when refusing the claimant leave to appeal to the nominated judge that the PAT:

“consider[ed] there was onus on the applicant as regards showing that there was some injury and resulting disablement and that it was only then for the Minister to show same was not due to or aggravated by war service. The Tribunal was not satisfied with the applicant’s evidence as regards the injury and disablement alleged.”

Denning J said this:

“The question on which I give leave to appeal is, whether the Tribunal were right in holding that there was an onus on her to show some disablement. I am quite satisfied that there is an onus on a claimant to show a disablement. Once she shows a disablement, there is afterwards no onus on her to prove the fulfilment of the conditions under Article 4 of the Warrant, and the benefit of any reasonable doubt has got to be given to her. That is provided by Sub-section 2 of Article 4; but Sub-section 2 does not come into operation until she first shows a disablement, and ‘disablement’ is defined as ‘a physical or mental injury or damage or loss of physical or mental capacity’. I think the Tribunal were quite right in saying that the onus of proving a disablement was upon her and they were quite satisfied that she had not discharged that onus. Indeed, they were satisfied that there was no injury at all as she alleged. In these circumstances, the appeal is dismissed.”

31. It seems that where Mrs Royston’s evidence fell short was on the issue of whether her spine was damaged in any way during service (ie injury), rather than whether she had ever had any disablement in the back. And Denning J was plainly endorsing the principle relied on by the PAT. I therefore consider that his saying that there was an onus on the claimant to show a disablement must be taken as meaning that there is an onus on the claimant to show some injury and resulting disablement. Both those elements and a causal connection must be shown by a claimant on the balance of probabilities before the question of the relationship of the injury to service is decided on the basis of giving the claimant the benefit of any reasonable doubt. Denning J’s judgment really contains no reasoning and his reference to the definition of “disablement” in my judgment does not help. However, the twin principles of *Royston* have been relied on countless times and, indeed, a submission that a claimant was entitled to the benefit of reasonable doubt in establishing disablement

was specifically rejected by Allott J in *Secretary of State for Social Security v Bennett and others*, 17 October 1997. Successive Service Pensions Orders have been enacted keeping the identical structure of Articles 4 and 5 in the knowledge of what had been decided in *Royston*. There can be no possibility now of not applying the principles as restated by Newman J in *Rusling*.

32. Section 1(1) of the 1943 Act on the face of it confers a right of appeal on the rejection of a claim in respect of a disablement only where the rejection is on the ground that the injury on which the claim is based is not attributable to or aggravated by service. However, *Rusling* specifically decided what had long been assumed in practice, that section 1(1) also applies when a claim is rejected on the ground that the claimant has not shown that he suffers from the disablement or injury on which the claim is based, including cases where the Secretary of State takes the view that that claimed injury (in *Rusling*, Gulf War syndrome) does not exist. That is so even though the letter notifying the claimant of the decision under appeal uses the statutory formula referring to the ground of the decision having been that mentioned in section 1(1). If the true ground is the failure to show disablement and injury (as identified, for instance, in any explanation given with the formal notification of decision or by a reliance on *Royston* in the Secretary of State's submissions), that issue forms part of the appeal under section 1(1). It must follow from those conclusions that, although a decision on a claim that the claimant has not suffered the disablement claimed might seem to fall within the words of section 5(2) of the 1943 Act, section 5(2) cannot be interpreted to have that effect.

**(c) Did the PAT err in law by failing to explain why the appeal failed in relation to soft tissue injury low back (post-service)?**

33. It was agreed by the Secretary of State there was a failure in this respect. The only element of the medical evidence specifically relied on by the PAT that was relevant to this issue was the consultant orthopaedic surgeon's report of 19 August 2003. But the opinion expressed there, that the claimant's current low back symptoms were the direct result of a serious soft tissue injury in service, is of no help on the issue of whether a soft tissue injury to the low back post-service could be connected to service. It is possible that there was a slip of the pen and that the chairman of the PAT meant to refer to and rely on the regional consultant's report of 17 March 2004. That would have made more sense, as the regional consultant's opinion was that the claimant's current low back symptoms were not connected at all to any injury in service, but stemmed from an injury appearing in the GP records in 1993. However, the PAT's reasons as they actually appeared, with no express reference to or adoption of the reasoning in the Opinion of Medical Services, left an absence of explanation of the failure of the appeal in relation to this particular condition.

34. It could be argued that the PAT needed to go further than explaining why a soft tissue injury to the low back post-service was not connected to service and to explain how a decision on that condition came to be made on 14 April 2004. Neither what the claimant wrote on the review form requested on 25 November 2002 nor what he wrote on the claim form of 2 May 2003 can be interpreted as a claim based on disablement from a soft tissue injury post-service. It seems to me that that condition must have been identified as one on which a decision should be made as a result of the regional consultant's report and the Veterans Agency's policy that all pathological processes underlying a claimed disablement should be considered

separately and a decision about connection with service given. The claimant was not claiming any different disablement in relation to his low back (rather than a worsening of his current disablement). However, the regional consultant's opinion raised the argument that one of the causes of his already accepted disablement was the injury to the back in 1993. Accordingly, it could be argued that a decision needed to be given on the connection of that injury, under the label soft tissue injury low back (post-service), to service. I am not sure what difference the decision that there was no connection would have made to the claimant's case. If it was possible to separate disablement due to the injury in service from disablement due to an unconnected injury post-service, I think that that could have been given effect on assessment, without an entitlement decision. But making the decision did give the claimant the opportunity to argue that there was some connection with service. I do not need to explore whether there is power to give a decision on entitlement in such circumstances, when no claim in respect of the particular injury has been made. The decision of 14 April 2004 was in fact made and was in fact appealed to the PAT. Whether or not the PAT needed to explore the legal power to make the decision under appeal, it needed to give some explanation of how the decision came to be made in order to explain why the appeal was disallowed.

35. In Mr Commissioner Bano's observations when giving directions on 22 November 2005 and in the Secretary of State's submissions it is said that the relevant provision of the Pensions Appeal Tribunals (England and Wales) Rules 1980, as amended from 6 April 2005 (SI 1980/1120) (the PAT Rules), was rule 19 on the making of a record of proceedings by the chairman of a PAT. I fear that the new rules 18 and 19 are in a bit of a muddle and do not correspond with the practice of PATs before and after 6 April 2005 or with the ordinary practice of tribunals in other jurisdictions. It seems to me that rule 19 more naturally applies to the chairman's duty to keep a record of submissions made, evidence given and procedural events at the PAT hearing. I am not sure what was then intended to be covered by the duty in rule 19(1)(c) to record any determination of the PAT on any question of law or evidence, but it does not expressly require the giving of reasons. It is rule 18(1)(b) and (2) which requires the chairman to record a written statement of the reasons for the PAT's decision in every case. The time limits under rule 25 for applying for leave to appeal to a Commissioner start with the date on which the written statement of reasons was given or sent to the party concerned. The statement of reasons in the present case was given under that rule 18(1)(b). By necessary implication that provision requires that reasons be given which (to use the well-known general principle) are adequate in the circumstances for the losing party to understand why he or she has lost. It is that provision which was contravened in the present case.

**(d) Did the PAT err in law by failing to explain why it did not deal with the claim in relation to hip problems?**

36. The written submission of 28 February 2006 on behalf of the Secretary of State agreed that this had been an error of law, but Mr Kovats put a somewhat different view. He submitted that, although the claimant had claimed a new disablement and a new injurious process in relation to the problems with his right hip, no decision had been made on that claim when the PAT sat in June 2005. A decision should have been made by the Secretary of State in order to encompass all that had been claimed, but was not made until 1 March 2006. Mr Kovats submitted that therefore the PAT had no jurisdiction to make any determination whether the condition underlying the problems in the right hip was attributable to or aggravated

by service. It only had jurisdiction to determine the appeal against the decision that had been made, on soft tissue injury low back (post-service). Although I omitted to pin Mr Kovats down on the issue, it would seem to follow from his submission that, even if it was an error of law for the PAT not to explain why it rejected the submission made for the claimant that it should decide on the connection of right hip problems with service, the error would not in itself justify setting the PAT's decision aside.

37. I do not need to reach a final conclusion on this rather difficult issue. It is agreed that the appeal against the decision of 14 April 2004 on soft tissue injury low back (post-service) must be referred to a new PAT for rehearing. The decision of 1 March 2006 has now been made on the condition right trochanteric bursitis and has been appealed by the claimant. In the course of that appeal the claimant can if he wishes challenge that identification of the basic injurious process underlying his disablement. Those two appeals can be heard at the same time. Even if I had definitely concluded that the PAT of 8 June 2005 should have dealt with the claim for right hip problems, so that normally the issues arising would form part of the "case" referred to a new PAT under section 6A(4)(b) of the 1943 Act, that would not be proper when an appeal against the decision eventually given on that claim already falls to be decided by a PAT.

38. Therefore I merely record fairly briefly that I would have been very reluctant to accept Mr Kovats's submission on the jurisdiction point. That is fundamentally because the right of appeal under section 1(1) of the 1943 Act is against the rejection of "any claim in respect of disablement" on the ground set out by the Secretary of State. Here, it is now accepted that the claim made on 2 May 2003 included a claim in respect of the disablement represented by right hip problems and the underlying injurious process. The letter of 14 April 2004 was headed "Results of your claim". It did not identify what claim it was referring to any more precisely and is slightly confusing by also notifying a refusal to review a percentage assessment after the claimant had said that his disablement had got worse, before notifying a rejection of the conditions rotator cuff syndrome left shoulder and soft tissue injury low back (post-service). As the only claims for a new condition that the claimant had made were for right hip problems and earlier for the left shoulder problems, the clear implication was that the decision of 14 April 2004 was a complete answer to those claims and did not leave any element of those claims yet to be decided. When the claimant appealed against the decisions notified in the letter of 14 April 2004, he immediately raised the point that they did not properly recognise the effects of the injury to his hip. The use of the terms of the conditions rejected in the letter of 14 April 2004 in the reasons for entitlement appeal form takes nothing away from that. Accordingly, I would have been inclined to hold that the appeal against the decisions of 14 April 2004 did encompass the implied rejection of the claim for right hip problems.

39. Such a conclusion would I think have been supported by the approach taken in *Rusling*, especially to the importance of a claimant retaining the right to continue to challenge on appeal a diagnostic label for a condition under which a claim was originally rejected, even though the Secretary of State has later accepted another condition as attributable to service and as a cause of all the symptoms complained of. It would also be consistent with the essential nature of an appeal as a rehearing of the issue before the person who made the decision under appeal (see *Barratt v Minister*

*of Pensions* (1948) 1 WPAR 1225 and Tribunal of Commissioners' decision R(IB) 2/04).

**(e) Are the appeals to be heard by a new PAT entitlement appeals or assessment appeals?**

40. This question arises in relation both to the appeal against the rejection of the condition soft tissue injury low back (post-service) and the appeal against the rejection of right trochanteric bursitis. It does not affect the new PAT, except in so far as the President of PATs has a policy as to membership of PATs deciding different sorts of appeals, and I discuss the burden of proof in the following section. But it does make a significant difference in that there is no further appeal to a Commissioner from a PAT's decision on an assessment appeal under section 5 of the 1943 Act. It was agreed at the oral hearing that, even though the appeal against the rejection of right trochanteric bursitis would not be before the new PAT as a result of a reference back from the Commissioner, it would be proper for me to give some guidance on the nature of the appeals. What the claimant wants an answer to (and I think does not mind which way it goes so long as there is an answer) is whether his contention that his hip problems are a consequence of his accepted condition injury to back (1964 to 1974) is to be determined as a matter of assessment or entitlement.

41. Mr Kovats's answer in his skeleton argument was a very simple one. This was that assessment appeals under section 5(1) of the 1943 Act lie only when there had been an assessment of disablement and that everything else, including in particular any "claim concerning what is disabled", falls under section 1 as an entitlement appeal. That of course was to overlook section 5(2). However, at the oral hearing Mr Kovats maintained that section 5(2) and its references to decisions about disablement only applied once a case had got beyond the stage of an injury and resulting disablement being accepted as due to service. Any rejection of a claim at the earlier stage fell within section 1(1). At the later stage any assessment of disablement, including a nil assessment, attracted a right of appeal under section 5(1) if an interim assessment or section 5(2) if a final assessment. Mr Kovats submitted that the demarcation line should be simple and easy to understand, so that it could be applied by non-legally qualified administrators and by the PATs. That is obviously very attractive, but I am not sure that the legislative scheme provides such clear lines, and that has prompted me to restrict myself to the issues that arise in the present case. The principles may have to be examined properly in later cases.

42. To go back a few stages, as Mr Kovats suggested, does help to answer the claimant's question. Claims are made in respect of a disablement. It must follow, from the need to distinguish in terms of the date of claim between cases falling under Article 4 of the Service Pensions Order and cases falling under Article 5, that if a claimant has in the past made a claim in respect of one or more disablements and been awarded a pension or gratuity, a contention that he has a new disablement operates as a claim, not as an application for review of the past award. The crucial line is between a new disablement and a contention that disablement already accepted has got worse, although, as Mr Kovats accepted, there will depending on the circumstances be grey areas where cases could go into either category. A particular practical difficulty, as mentioned in paragraph 27 above, is that often the precise disablement is not identified when a claim is allowed, despite the scope of the certification required under Article 4 or 5. The entitlement decision often only finds the injury (condition) to be attributable to or aggravated by service. Then, when the

Secretary of State makes an assessment of disablement there may be no further identification, although sometimes (as in the case of the decision of 1 March 2006 here) there is an indication that some symptoms or conditions have been taken into account. That can make it difficult in practice, if the nature of the disablement due to an injury has simply been assumed, to work out when a new disablement is being claimed.

43. Two further propositions follow from the proper meaning to be given to “disablement” (see paragraph 26 above). First, it does not matter in principle that the new disablement is said to result from an injurious process that has already been accepted as connected to service. If the new claim is rejected, an appeal lies under section 1(1). Second, where the existing disablement either as expressly identified or as assumed to result from a defined injury is in the impairment of a particular organ or part of the body or mind, a contention that some different organ or part of the body or mind is now impaired is a claim in respect of a new disablement. But it appears that the mere suffering of the symptom of pain in some other part of the body is not enough (*Secretary of State for Social Services v Yates* (1969) 5 WPAR 765). A claimant must show something that amounts to a disablement as defined. Both those propositions are consistent with and also follow from the restricted meaning that must be given to section 5(2) of the 1943 Act in the light of the proper meaning of section 1 (see paragraph 32 above). If the issue that arises is whether a newly identified injury is connected with service, a rejection of the connection must produce a right of appeal under section 1(1) regardless of how that injury might relate to disablement already accepted as caused at least to some extent by an injury already accepted as connected to service.

44. Mr Kovats did not refer me to any decisions of the nominated judge, but did submit that in the past the Veterans Agency (and its predecessors) and the PATs may have taken too relaxed a view in regarding what were properly claims for new disablements as contentions that an existing disablement had worsened. At page 774 of Wikeley, Ogus & Barendt’s *Law of Social Security* (5th ed), the case of *Goodman v Minister of Pensions* (1951) 5 WPAR 13 is cited to support the proposition that, if an acute anxiety state is brought about by worry over a disease in respect of which a pension is already being paid, the appropriate course is to apply for an increase in the assessment for the first disease, not to make an entirely new claim.

45. In my judgment, *Goodman* does not stand for that proposition. It was not a case of a new claim after a pension had been awarded. The dispute arose out of one claim. The Minister first rejected the condition thrombophilia (a tendency for blood-clots) and the condition anxiety state as not connected to service at all, but in the course of an appeal later accepted that the thrombophilia had been aggravated by service. However, the condition was accepted as thrombophilia with associated nervous symptoms, the opinion of the Medical Services Division being that it was not medically possible to separate the symptoms of anxiety and the organic condition. The PAT then gave a decision that the condition anxiety state, notified as thrombophilia with associated nervous symptoms, was not attributable to or aggravated by service. The claimant appealed. In dismissing the appeal Ormerod J noted that the PAT had taken the view that the psychoneurosis was part and parcel of the condition of thrombophilia and held that the case was not one where it could be said that the aggravation of an existing condition by service sets up an entirely separate condition, which is then to be found attributable to service. I do not find the decision easy to understand and I do not know if it is the origin of the confusing

practice of linking other conditions as “part and parcel” of an accepted condition. But it is about the identification of the basic injurious process and the resulting disablement, rather than the circumstances mentioned in *Wikeley, Ogus & Barendt*. The result, because of the definition of the basic injurious process as including associated mental symptoms, was that the assessment of disablement would include the effect of those symptoms, to the extent that they were due to the service aggravation as provided in Article 9(2)(b) of the Service Pensions Order. The judge’s remarks about assessment not having been a matter for the PAT merely reflected that. They do not support the wide proposition in *Wikeley, Ogus & Barendt*.

46. A much more straightforward example of the correct approach is *Owen v Minister of Pensions and National Insurance* (1966) 5 WPAR 699. The claimant had the condition osteoarthritis right hip accepted as aggravated by service (as his Perthes’ disease had been made worse by his nine months’ service). Twenty or so years later he claimed for osteoarthritis of the left knee, which was accepted as consequential on the impairment of his right hip. Edmund Davies J held that the PAT had not erred in law in deciding that the osteoarthritis of the left knee was not attributable to or aggravated by service, having accepted the opinion of the Medical Department that the development of the osteoarthritis in the left knee was due to the natural progress of the Perthes’ disease and not to the service aggravation. For present purposes, it is enough to note that there was no question of the case being anything other than an entitlement appeal. If the PAT had accepted that there was at least a reasonable doubt in the claimant’s favour that the left knee condition resulted from the service aggravation it would have been found attributable to service. As it was, the claimant could raise an issue on review of his assessment on the basis that the disablement from his accepted condition had been made worse by the interaction of the new condition.

47. It seems to me that the claimant’s case here in respect of his right hip is essentially the same as in *Owen* so far as the line between entitlement and assessment is concerned. He has made a claim in respect of a disablement in the right hip, in the sense of an impairment that goes beyond the mere suffering of the symptom of pain. That is a separate condition, a separate disablement and a separate injurious process, from that accepted under the label injury to back (1964 to 1974). The Secretary of State has identified what he considers the basic injurious process to be in the decision of 1 March 2006. The claimant can challenge that labelling in the course of his appeal against the decision of 1 March 2006, which is an entitlement appeal under section 1(1) of the 1943 Act.

**(f) What does the claimant have to prove in the two appeals to be heard by the new PAT?**

48. This was an issue on which I directed specific submissions, before I had fully appreciated the Secretary of State’s view of the scope of the appeal before the PAT of 8 June 2005. But again, there was no objection to my giving guidance in relation to the appeal against the decision of 1 March 2006.

49. There is no special problem about the appeal against the decision on soft tissue injury low back (post-service). The claimant may no doubt feel that no post-service back injury, eg in 1993 or in 1979 (a date that also features in the GP records), is relevant to his current disablement and resulting restrictions. However, it is very probable that at the time of the 1993 and possibly the 1979 incidents, serious enough for the claimant to seek medical advice or treatment, he did suffer

disablement as the result of the injurious process of soft tissue injury to the low back. That would be enough to form a basis under *Royston* for an entitlement decision despite the claimant's likely lack of enthusiasm. The question of whether there was any continuing disablement resulting from that injurious process as at and after May 2003 would then be decided as a matter of assessment of the degree of disablement, either in relation to both low back injury (1964 to 1974) and soft tissue injury low back (post-service), if the latter condition were accepted as attributable to service, or, if it were not, in relation to the former condition and the issue of what disablement currently results from that injury. The Secretary of State having made the decision of 14 April 2004, the claimant's practical challenge is probably to be directed against the finding of no connection with service. That question has not inevitably been decided against the claimant by the use of "post-service" in the label. It is quite possible in the abstract for a post-service injury to be attributable to service, for instance if the attribution could be traced back to a service factor through the effects of another accepted condition. On that question, the burden on the claimant under Article 5 of the Service Pensions Order is to show at least a reasonable doubt in his favour about the connection with service. I say nothing about how the evidence in the present case could be evaluated against those tests.

50. In relation to the appeal against the decision of 1 March 2006, the Secretary of State appears to have accepted that the claimant has had a disablement in the right hip and that that results from the injurious process of right trochanteric bursitis. Unless the Secretary of State changes his opinion in the later course of the appeal, the claimant therefore needs do no more to establish those elements of entitlement (contrary to a suggestion that I made during the oral hearing), except in so far as he wishes to argue that a different injurious process should be found to underlie his disablement in the right hip. I then accept Mr Kovats's submission, not objected to by Mr Rowlands, that there is nothing in the circumstances of the case to displace the ordinary burden on the claimant then to show at least a reasonable doubt in his favour on the connection of the injury or injuries accepted by the PAT with service. That burden is not affected by the circumstance that part of the causative chain on which the claimant relies is the injurious process of low back injury (1964 to 1974) that has already been found both to be attributable to service and to have given rise to back disablement. Although in relation to that condition the burden was on the claimant to show on the balance of probabilities that the disablement and injury, and the causal connection between them, existed, once he has shown the new disablement and injury claimed in respect of his right hip on a balance of probabilities, he only has to raise a reasonable doubt about the connection of that condition with the condition of low back injury (1964 to 1974) to show a connection with service.

51. I think that what troubled me when I directed the specific submissions was the feeling that a claimant who was putting forward a separate condition that he said was consequent on some other condition already accepted as attributable to or aggravated by service was somehow put in a more advantageous position as to the benefit of a reasonable doubt than someone who was simply putting forward the same condition without having had any other conditions accepted. However, Mr Kovats has satisfied me that the approach set out in the previous paragraph follows from the logic of the Service Pensions Order scheme. That approach is consistent with that taken in similar "consequential condition" cases such as *Pilbeam v Minister of Pensions* (1948) 4 WPAR 129, although Denning J said nothing there about the

burden of proof, and *Owen*, where Edmund Davies J expressly mentioned Article 5(4). And in *Yeardley v Secretary of State for Social Services* (Drake J, 11 December 1987) and *Butterfield v Secretary of State for Defence* [2002] EWHC 2247 (Admin). (Park J, 8 October 2002) the substituted decisions given by the nominated judges gave the benefit of the reasonable doubt to claimants in similar circumstances (although the precise nature of the injurious process found in *Butterfield* to have been attributable to service remains obscure).

### **Conclusion**

52. For the reasons given in paragraphs 33 to 35 above, the decision of the PAT of 8 June 2005 in respect of the condition soft tissue injury low back (post-service) is set aside as erroneous in point of law. The claimant's appeal against the Secretary of State's decision of 14 April 2004 in respect of that condition is referred to a differently constituted PAT for determination in accordance with the following directions. The rehearing is to take place at the same time as the hearing of the claimant's appeal against the Secretary of State's decision dated 1 March 2006 in respect of the condition right trochanteric bursitis. There must be a complete rehearing by the new PAT, which will not be bound by any findings made or conclusions expressed by the PAT of 8 July 2005. For the reasons given in paragraphs 40 to 47 above, both of those appeals are entitlement appeals under section 1(1) of the 1943 Act. The new PAT must apply the approach to the burden of proof set out in paragraphs 48 to 51 above, and bear in mind my more general discussion of the structure of Article 5 of the Service Pensions Order. I need give no further directions of law. The evaluation of all the evidence will be entirely a matter for the judgment of the members of the new PAT. The claimant must not assume that, just because he has been successful in this appeal to the Commissioner on a point of law, he will be successful on the merits of his appeals before the new PAT. My decision is entirely neutral on that. The decision on the facts in this case is still open.