R(AF) 1/08

Mr E A L Bano
Commissioner
25 June 2007

CAF/2867/2006

War disablement pension – commencement date of award on review – acceptance of additional condition as attributable to service – whether award made on new claim or review

The claimant suffered gunshot wounds while serving in the Army in 1954. His discharge in 1957 was not on medical grounds, so there was no deemed claim for pension in 1954. He later went to live abroad and did not claim a war pension until 1997. The conditions "gunshot wound to chest and abdomen" and "generalised anxiety disorder" were accepted as attributable to service and on 24 September 1998 he was awarded a pension with effect from December 1996 on an assessment of 20 per cent. That award was increased to 40 per cent by an appeal tribunal on 17 August 2001. In July 2004 the claimant made a claim in respect of post-traumatic stress disorder (PTSD). The Veterans Agency accepted PTSD as an additional condition attributable to service and made an award on that basis with effect from 16 July 2004, but maintaining the assessment of disablement at 40 per cent. The claimant appealed against the commencement date of the award. It was argued on his behalf that the Secretary of State's failure to take reasonable steps to make available war pensions information to ex-service personnel abroad had caused the claimant's delay in claiming a pension, and that (following *Secretary of State for Defence v Reid* [2004] EWHC 1271) the award should therefore be backdated under paragraph 10 of Schedule 3 to the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 (since replaced by the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006). The tribunal dismissed his appeal and he appealed to the Commissioner.

Held, allowing the appeal, that:

1. paragraph 10 of Schedule 3 required that the act or omission of the Secretary of State was and continued to be the dominant cause of the delay up to the moment the claim or application was made, and since the appellant must have been aware of the war pensions scheme when he made his claim in 1997, any failure by the Secretary of State to make ex-servicemen living abroad aware of the scheme could not have caused the appellant's failure to make a claim in respect of PTSD until July 2004 (paragraph 16);

2. however, the decision in 2004 must have been made in the exercise of the Secretary of State's review powers rather than on a new claim, since the claimant was alleging a misdiagnosis or misdescription of his original disablement, rather than any new or additional impairment of body or mind (R(AF) 1/07 followed), and the award could therefore be backdated to the date of effect of the original decision on the ground of official error under the provisions now contained in paragraph 1(7) of Schedule 3 to the 2006 Service Pensions Order (paragraph 23);

3. the appeal tribunal of 17 August 2001 was concerned only with the assessment issue and therefore article 44(3) of the 2006 Service Pensions Order did not operate to limit the grounds for a subsequent review of the entitlement decision (paragraph 24);

4. the tribunal had therefore erred in law in failing to consider whether the decision of 24 September 1998 was, or should have been, reviewed on the ground of official error, so as to entitle the appellant to backdating of his award in respect of PTSD to the date of the original awarding decision (although that would not lead to an increase of pension) (paragraph 25).

The Commissioner remitted the case to a differently constituted tribunal to decide the issue of whether the failure to diagnose the appellant as suffering from post-traumatic stress disorder arose from official error, in accordance with the principles set out in R(AF) 5/07.

DECISION OF THE PENSIONS APPEAL COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, in exercise of the power conferred on me by section 6A(4) of the Pensions Appeal Tribunals Act 1943, I refer the case for re-determination by a differently constituted tribunal.

2. This is a former service member's appeal against a decision of the pensions appeal tribunal made on 4 April 2006, dismissing the claimant's appeal against a decision of the Secretary of State relating to the commencement date of an award which was made on 13 April 2005. The relevant decision accepted "post-traumatic stress disorder" as a condition attributable to service, in addition to previously accepted conditions of "gunshot wound to chest and abdomen" and "generalised anxiety disorder", and specified the commencement date of the award as 16 July 2004, that is, the date when the applicant made the claim which resulted in the new award. The appellant contends that the award should have commenced on 18 December 1996, which was the commencement date of his existing award, or alternatively on the date of his discharge from service in 1954.

3. The appellant was born on 11 July 1934. He commenced National Service on 2 October 1952, but on 27 June 1953 he was commissioned as a Second Lieutenant in the Black Watch. He served in Kenya during the Mau Mau insurrection and in 1954, while leading his patrol through terrain at high altitude, he sustained a gunshot wound to his chest and abdomen. Following his injury, the appellant was able to return to combat duties for only a short time, although the way in which he had performed his duties on patrol was recognised by the award of a Queen's Commendation. He was eventually discharged from the Regular Army on 23 September 1954, and then served as a reservist until 4 March 1957.

4. The appellant's injury and his service in Kenya had a profound psychological effect on him, which has been very graphically and helpfully described in a report prepared by his SSAFA case worker. Following his discharge from the Army, the appellant led an unsettled life, working first as a ship's boy and then in other undemanding jobs, mostly abroad, before moving to Canada.

5. On 18 December 1996 the Royal Canadian Legion notified the War Pensions Agency of the appellant's intention to claim a war pension, and on 2 July 1997 a claim was made in respect of gunshot wounds to the appellant's internal organs. The appellant has stated that he did not become aware of the war pension scheme until 1996, and has furnished corroborative evidence to that effect from his former partner.

6. After his Medical Board in connection with his 1997 claim, the appellant expressed surprise that the psychological effects of his injury had not been considered by the Board, and his claim was therefore amended to include a claim for psychiatric injury. On 24 September 1998 the conditions "gunshot wound to chest and abdomen" and "generalised anxiety disorder" were accepted as attributable to service and disablement was assessed at 20 per cent. The commencement date of the award was specified as 18 December 1996, which was the date on which the Royal Canadian Legion had first notified the Agency of the appellant's intention to claim.

7. The appellant appealed against the assessment, and on 17 August 2001 an assessment tribunal increased the overall assessment of disablement to 40 per cent for the period from 18 December 1996 to 16 February 2002, that is, the period starting on the commencement date of the award and ending six months from the

date of the hearing. Because the appeal was made late, the War Pensions Agency initially decided to implement the revised assessment only from the date of the appeal, but on 15 July 2002 the appellant was notified that it had been decided to backdate the revised assessment to cover the full period of the award.

8. The assessment of 40 per cent was maintained at the end of the assessment period and I am told that the appellant was notified of his rights of appeal against that decision. However, the appellant did not appeal against the new assessment, but on 17 July 2002 he made a claim for an allowance for lowered standard of occupation. The claim was rejected, but the appellant again appealed, and the appeal was allowed on 16 July 2004. In its reasons for allowing the appeal, the tribunal stated that, following the incident in which he was wounded, the appellant might have suffered damage from hypoxia as a result of loss of blood caused by the length of time before he received medical treatment. In a claim referring specifically to the tribunal's decision, which was treated as having been made on 16 July 2004, the appellant made a claim for further conditions described as "PTSD" and "possible brain damage caused by loss of blood at high altitude after medivac."

9. The appellant was medically examined on 25 November 2004. In the course of the examination, he stated that he believed that his symptoms of generalised anxiety disorder were actually post-traumatic stress disorder, and that he had suffered brain damage as a result of loss of blood caused by his injuries. The examining doctor expressed the following view:

> "Post-traumatic stress disorder. I believe the former diagnosis of Generalised Anxiety Disorder to be incorrect and that the symptoms disclosed are actually consistent with Post-traumatic stress disorder. In addition to the intellectual impairment caused by the presumed cerebral anoxia, these additional symptoms have caused him severe problems in his life since the (gunshot wounds) in service and still affect him to this day."

10. On 13 April 2005 the appellant was notified that the condition "post-traumatic stress disorder" had been accepted as attributable to service, in addition to the previously accepted conditions of "gunshot wound to chest and abdomen" and "generalised anxiety disorder", but that the condition "cerebral anoxia (1953)" had been rejected. The assessment of disablement was maintained at 40 per cent. The appellant had previously indicated his intention to appeal against the commencement date of his allowance for lowered standard of occupation, and in a letter dated 5 May 2005 he asked for his appeal to be treated also as an appeal against the commencement date of the 40 per cent assessment of disablement, which he gave as 18 December 2006. In an appeal form submitted on 8 June 2005, the appellant stated that his reason for disputing the commencement date of the assessment was that he had been prevented by his condition from making a claim at the appropriate time. On the basis of that ground of appeal, the Secretary of State obtained medical advice to the effect that the appellant's injuries had not affected his mental capacity or emotional stability. However, in the reasons for the decision the Secretary of State also pointed out that the commencement date of the new award, which included post-traumatic stress disorder as an accepted condition, was in fact 16 July 2004.

11. In his reply to the statement of case, the appellant referred to scientific material relating to PTSD and attached newspaper cuttings relating to awards for PTSD made to servicemen serving in Northern Ireland, stating that he considered that the Secretary of State's decision was wrong because "it is not in line with current

understanding". However, the Secretary of State maintained the decision with regard to the commencement date of the award, and the appeal proceeded to a hearing on 10 February 2006. At that hearing the friend who accompanied the appellant (who was also his SSAFA case-worker) indicated that he wished to rely on the case of *Secretary of State for Defence v Reid* [2004] EWHC 1271, and the appeal was adjourned to enable the appellant to seek representation to put his case on that basis.

12. The *Reid* case was concerned with the provisions now contained in paragraph 10 of Schedule 3 to the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 (SI 2006/606) (the 2006 Service Pensions Order), which allow awards to be backdated if the claimant would have made a claim or an application for a review on an earlier date than he actually did but for an act or omission of the Secretary of State, or certain specified officials, which wrongly caused the claimant to delay the claim or application, and the act or omission was and continued to be the dominant cause of the delay up to the moment the claim or application was made. In *Reid* Newman J held that the legislation imposed a duty on the Secretary of State to take reasonable steps to inform service personnel of the existence of the war pensions scheme, and upheld the decision of a tribunal which made a backdated award on the basis that the Secretary of State had failed to take reasonable steps to make available war pensions information to ex-service personnel abroad. In response to the notice of adjournment, the Secretary of State issued additional reasons for maintaining the decision, attaching a copy of the leaflet containing information about war pensions which was routinely issued to servicemen in 1954 on their discharge from the Army. The submission also described the other steps taken by the Ministry of Defence to make former servicemen aware of the war pensions scheme.

13. The tribunal took evidence about events surrounding the appellant's discharge from the Army. In its reasons for dismissing the appeal, the tribunal stated that it considered it implausible that the appellant had not received the leaflet enclosed with the Secretary of State's supplementary statement of case, and concluded that the appellant must have simply forgotten that he had been given the document. Having made that finding, the tribunal went on to find that "there was sufficient information about the Scheme after the Appellant's National Service to satisfy the obligation on wh(at) subsequently became the Ministry of Defence to take reasonable steps to make the scheme known to ex-service personnel." In the alternative, the tribunal found that any breach by the Secretary of State of his duty to make the appellant aware of the war pensions scheme could not be the dominant cause of the appellant's failure to make a claim in respect of PTSD until 2004, since he must have been aware of the existence of the scheme when he made a claim in 1996.

14. Following the chairman's refusal of leave to appeal, I gave leave to appeal on 26 September 2006, observing that in addition to the backdating issue it might be necessary to consider whether the tribunal was also concerned with an entitlement issue, that is, whether the claimant suffered brain damage due to blood loss resulting from gunshot wounds. I also observed that it was arguable that the tribunal ought to have considered what advice the appellant was given when he left the Reserves in 1957, and that it might also be necessary to consider whether the PTSD claim should have been treated as a claim for a new condition, or as an application for a review of the tribunal decision of 17 August 2001.

15. I am satisfied however that the only issue which the tribunal had to consider was the commencement date of the award in respect of PTSD. Neither the appellant's letter of 5 April 2005, in which he stated that he wished to appeal against the commencement date of the award, nor the appeal form itself, made any reference to the rejection of cerebral anoxia (1953) as an accepted condition, and the statement of case, which the appellant did not challenge, defined the issue for the tribunal as the commencing date of the award. The record of proceedings of the first tribunal hearing on 10 February 2006 shows that the only ground for backdating put forward by the appellant's representative was on the basis of the decision in *Reid*, and the statement of reasons for the tribunal's decision at the second hearing records a statement by the appellant's representative that the argument under paragraph 5 of Schedule 3 to the 2006 Service Pensions Order (claimant prevented from claiming by illness or disability) was not being pursued. In those circumstances, I consider that the tribunal did not have to consider the effects of cerebral anorexia, either in relation to the rejection of that condition as attributable to service, or as a ground for backdating.

16. I am also satisfied that it is not in fact necessary for me to decide whether the tribunal erred in rejecting the appellant's argument for backdating on the basis of a breach by the Secretary of State of the duty to take reasonable steps to make former servicemen aware of the provisions of the war pensions scheme. The appellant disputes the tribunal's finding that he was probably given a leaflet describing the war pensions scheme when he left the regular Army, because he considers that the tribunal did not take full account of the unusual circumstances of his discharge. In *Reid* Newman J held ([50]) that "having regard to the recognition, recorded in *Coull* [*R (Coull) v Secretary of State for Social Security*, Carnwath J. (transcript 7 November 2000)] that at the time of discharge 'soldiers may elect not to read the information', there may be a need to consider whether giving information at discharge is sufficient". It seems to me to be very arguable that the tribunal's reasons did not deal adequately with what steps the Ministry of Defence took to publicise the war pensions scheme abroad, particularly since in *Reid* itself the High Court upheld the tribunal's finding that the Ministry of Defence had failed to take sufficient steps to publicise the scheme abroad in a claim also brought by an ex-serviceman living in Canada. However, as the chairman recognised when refusing leave to appeal, paragraph 10(b) of Schedule 3 to the 2006 Service Pensions Order applies only if the act or omission of the Secretary of State continued to be the dominant cause of the delay "up to the moment the claim or application [for review] was made". Since the appellant must have been aware of the war pensions scheme when he made his claim in 1997, any failure by the Secretary of State to make ex-servicemen living abroad aware of the scheme cannot have caused the appellant's failure to make a claim in respect of PTSD until July 2004. The question of what information the appellant was given when he left the reserves therefore did not arise.

17. The last issue which I identified when granting leave to appeal was whether it was necessary to consider whether the decision accepting PTSD as attributable to service resulted from a new claim by the appellant, or whether it resulted from the exercise of the Secretary of State's review powers. The reasons given by the Secretary of State for the decision under appeal were that:

> "On 13/4/05 the Secretary of State decided that the award of War Disablement Pension should commence from the date of claim or the date of

> application for review as provided for by paragraph 1-11 of Schedule 3 (to the 1983 Service Pensions Order)
>
> On 13/04/05 the Secretary of State also considered whether any of the provisions under the other paragraphs of Schedule 3 applied and decided they did not."

In order for the tribunal to decide under section 5A of the Pensions Appeal Tribunals Act 1943 whether the claim for backdating was correctly rejected on the ground given by the Secretary of State, it was therefore necessary for the tribunal to consider whether any of the backdating provisions in Schedule 3, in addition to those specifically referred to in the reasons for decision, were applicable in the appellant's case.

18. Although the decision in this case was in fact made under the 1983 Service Pensions Order (SI 1983/883), article 71(5) of the 2006 Order provides that anything done or begun under a provision of the 1983 Order which has been re-enacted under the 2006 Order shall be treated as having been done under the corresponding provision of the 2006 Order, and I shall therefore refer to the relevant provisions as they appear in that Order. Paragraph 1(7) of Schedule 3 provides:

> "Where an award is reviewed as a result of a decision ('the original decision') which arose from an official error, the reviewed decision shall take effect from the date of the original decision and for this purpose 'official error' means an error by the Secretary of State or any officer of his carrying out functions in connection with war pensions, defence or foreign and commonwealth affairs, to which no other person materially contributed, including reliance on erroneous medical advice, but excluding any error of law which is only shown to have been an error by virtue of a subsequent decision of a court."

Paragraph 6(1) provides:

> "Where, upon a review of a decision rejecting a claim for pension, the Secretary of State makes an award on the basis that medical opinion has developed since the date of the decision which is the subject of the review, no payment shall be made in respect of any period preceding whichever is the later of –
>
> (a) the date on which the Secretary of State considers that medical opinion had developed to the extent that an award in the claimant's case was justified; and
>
> (b) the date three years before the date of application for a review or, where the review is instigated by the Secretary of State, the date three years before the date of the Secretary of State's review decision."

19. It seems clear that the Secretary of State accepted PTSD as an additional condition attributable to service on the basis of the medical examiner's opinion that the previous diagnosis of generalised anxiety disorder was incorrect, and that the appellant's symptoms were in fact consistent with post-traumatic stress disorder. Paragraph 6(1) of Schedule 3 applies only where there has been a review of a decision rejecting a claim for pension and, although the medical examiner may have concluded that the appellant was suffering from PTSD on the basis of the

development of medical opinion since the original diagnosis of generalised anxiety disorder was made in 1997, no claim for pension had ever been rejected. For that reason, it was not open to the tribunal to backdate the award in respect of PTSD under paragraph 6(1) of Schedule 3, and the tribunal were therefore not in error in failing to consider whether it was the development of medical opinion since the original award was made which was the basis of the acceptance of PTSD as attributable to service.

20. However, the medical examiner's opinion was also consistent with the possibility that the diagnosis of generalised anxiety disorder was erroneous on the basis of medical knowledge and the information available to the medical authorities at the time when the original decision was made. Under paragraph 1(7) of Schedule 3, the applicant would be entitled on review to have his award in respect of PTSD backdated to 24 September 1998 (the date of the original decision) if the reason for the failure to diagnose him as suffering from PTSD at that time was some clear and obvious mistake by the medical or decision making authorities – see paragraphs 20 and 21 of my recent decision CAF/857/2006 (now reported as R(AF) 5/07).

21. The backdating provisions specifically considered by each of the two tribunals which dealt with this case (delay caused by act or omission of the Secretary of State and delay caused by illness or disability) are applicable both to new claims and applications for review. However, backdating under paragraph 1(7) of Schedule 3 is permitted only if there has been a review of an earlier decision, and for that reason I consider that it was necessary for the tribunal to consider whether the review powers under article 44 of the 2006 Service Pensions Order were exercisable in this case. In accordance with what appears to be normal Veterans Agency practice, neither the decision letter of 13 April 2005 nor the reasons for the Secretary of State's decision give any indication of whether the decision accepting PTSD as attributable to service was taken in exercise of the Secretary of State's review powers.

22. The difference between a claim and an application for a review was recently considered by Mr Commissioner Mesher in CAF/3326/2005 (now reported as R(AF) 1/07). The Commissioner held (at paragraph 26) that "disablement" is some impairment of the proper functioning of the body or mind (to be distinguished from what the claimant is prevented from doing as a result of the disablement and the injury from which the disablement resulted), and (at paragraph 27) that it is each underlying injurious process, often described or labelled as a "condition", which must be found to be attributable to or aggravated by service for a claim to be successful. However, the Commissioner made clear (at paragraph 42) that it is disablement which is relevant when deciding what constitutes a claim:

> "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."

23. It seems to me to follow from the rejection by the Commissioner in R(AF) 1/07 of clear dividing lines between claims and applications for review that the difference between a new claim and an application for a review is necessarily one of substance rather than form. Although the appellant made a claim on a form headed "Further Condition–Claim Form", his claim in respect of PTSD (in contrast to his claim in respect of brain damage caused by anoxia) did not allege any new or additional impairment of the functioning of his body or mind. His contention was not that he had some additional or new disablement which was not encompassed within the original award, but that he should have been diagnosed originally as suffering from post-traumatic stress disorder, rather than generalised anxiety disorder. The decision notified to the appellant on 13 April 2005 clearly accepted that contention, and did not increase the assessment of disablement. Although expressed in terms of acceptance of an additional condition as attributable to service, the decision letter in substance accepted the appellant's contention that there had been a misdiagnosis, or misdescription, of his psychiatric condition when the original award was made, without accepting that he suffered from any additional impairment of his body or mind. The decision notified in the letter was therefore, in my view, properly to be regarded as a review decision.

24. In cases where entitlement to backdating depends on the valid review of an earlier decision, it may also be necessary to consider whether there is any statutory impediment to the exercise of the review power. Although article 44(1) of the 2006 Service Pensions Order permits review of a decision accepting or rejecting a claim for pension at any time on any ground, article 44(3) provides:

> "Any assessment or decision made, given or upheld by the Pensions Appeal Tribunal under section 8 of the War Pensions (Administrative Provisions) Act 1919 or the Pensions Appeal Tribunals Act 1943 may be reviewed by the Secretary of State at any time if the Secretary of State is satisfied that there has been a relevant change of circumstances since the assessment or decision was made, including any improvement or deterioration in the disablement in respect of which the disablement was made."

In this case the assessment tribunal which sat on 17 August 2001 increased the assessment of disablement from 20 per cent to 40 per cent, but since that tribunal was not concerned with any entitlement issues, there was in my view nothing to prevent an "any ground" review of the entitlement decision.

25. I therefore consider that the tribunal erred in law in failing to consider whether the decision of 24 September 1998 was, or should have been, reviewed on the ground of official error, so as to entitle the appellant to backdating of his award in respect of post-traumatic stress disorder to the date of the original awarding decision, under paragraph 1(7) of Schedule 3 to the 2006 Service Pensions Order. For the reasons I have given, I consider that the decision notified on 13 April 2005 was a review decision, so that all that remains to be decided is whether the failure to diagnose the appellant as suffering from post-traumatic stress disorder arose from official error, in accordance with the principles in R(AF) 5/07. However, since the state of medical knowledge in 1998 in relation to post-traumatic stress disorder is a matter of expert medical knowledge, I refer that question for decision by a new tribunal.

26. Although the appellant has succeeded in his appeal, I am afraid that he is unlikely to gain any practical benefit from his success. Since the appellant was not

medically discharged from the Army, there was no deemed claim for pension in 1954, and in the absence of an actual claim at that time there is therefore no mechanism by which an award for post-traumatic stress disorder can be backdated to 1954. The appellant's assessment of disablement was not increased as a result of the acceptance of post-traumatic stress disorder as attributable to service, and his pension will therefore not be increased even if his award for post-traumatic stress disorder is backdated on the ground of official error. However, for the reasons I have given, the appellant is entitled to succeed on this appeal, and my decision is therefore as set out in paragraph 1.