

**R(AF) 5/07**

**Mr E A L Bano**  
**Commissioner**  
**2 April 2007**

**CAF/857/2006**

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**War disablement pension – commencement date of award on review – official error – reliance on erroneous medical advice**

The claimant was medically discharged from the Royal Air Force in 1965 on a diagnosis of “simple schizophrenia” and was notified that his deemed claim for war disablement pension had been refused on the ground that his condition was not attributable to or aggravated by service. In 2004 that decision was reviewed and he was awarded a war disablement pension from 1 February 1976 for the condition of “depressive episode” accepted as attributable to service. The review decision cited *R v Secretary of State for Social Security ex parte Edwards* (10 July 1992) (CO/2281/90) as authority for treating 1 February 1976 as the date when medical opinion changed in respect to the link between schizophrenia and ordinary life events. He appealed on the issue of the commencement date. No evidence of the development of medical opinion was provided for the tribunal and it dismissed his appeal, simply recording its agreement with the Secretary of State’s written reasons for choice of commencement date. The claimant appealed to the Commissioner.

*Held*, allowing the appeal, that:

1. in the absence of any references to the relevant scientific material in the statement of case the tribunal’s statement of reasons in this case was manifestly inadequate (paragraph 12);
2. if the stated basis of the review decision as a change in medical opinion within paragraph 6(1) of Schedule 3 was correct, the award should have been backdated by no more than three years under paragraph 6(1)(b) of Schedule 3 (paragraph 16);
3. however, the acceptance of the condition of “depressive episode” made it improbable that the review in this case was connected to the development of scientific understanding in relation to the severity of stress required to precipitate schizophrenia and backdating was possible only if there was reliance on erroneous medical advice constituting “official error” within sub-paragraph 6A of paragraph 1 of Schedule 3 (paragraphs 17 and 18);
4. the question of whether the decision arose from an official error must be decided on the basis of medical knowledge as it was at the time the decision was made (*R v Secretary of State for Social Security ex parte Foe* (7 November 1995) followed) and applying the standards to be expected of a reasonably competent medical practitioner in the light of psychiatric knowledge in 1965, it would be necessary to demonstrate some clear and obvious mistake which resulted in the decision refusing entitlement (R(SB) 2/93 and R(H) 2/04 followed) (paragraphs 19 to 21).

The Commissioner remitted the case to a differently constituted tribunal for rehearing.

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**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)(b) of the Pensions Appeal Tribunals Act 1943, I refer the case for re-determination to a differently constituted tribunal.
2. This is an appeal by a former service member against the decision of a tribunal under section 5A(1) of the Pensions Appeal Tribunals Act 1943, dismissing the appellant’s appeal against a review decision made on behalf of the Secretary of State on 5 July 2004. That decision specified 1 February 1976 as the commencement date of an award in respect of a condition described as “depressive episode”. The

appellant contends that the award should have commenced on the date on which his service ended, that is to say, 2 February 1965. I held an oral hearing of the appeal on 7 September 2006, at which the appellant appeared in person and the Secretary of State was represented by Mr Jonathan Auburn, of Counsel, instructed by the Treasury Solicitor.

3. The appellant joined the Royal Air Force on 24 February 1959. He served as an aircraft fitter until 1 February 1965, when he was medically discharged on the basis of a disablement described in the record of the Medical Board as “simple schizophrenia”. The appellant’s discharge followed a period of service in Kenya under very stressful conditions which the appellant has described in graphic and moving detail in correspondence during the course of these proceedings.

4. After falling ill, the appellant was examined on 22 October 1964 by a civilian psychiatrist in Nairobi. The psychiatrist made a diagnosis of reactive depression and recommended that the appellant should be flown to Aden for further treatment. He was admitted to the RAF Hospital at Steamer Point, where he was treated with high doses of psychotropic medication and electro-convulsive therapy. The report by the psychiatrist who treated the appellant in Aden stated:

“On admission he presented the picture of simple schizophrenia with severe retardation anergia, thought blocking with flat affective responses of an endogenous type. The picture contained little true depressive material and was of a sudden bizarre onset without rational aetiology.”

On that basis, the psychiatrist diagnosed the appellant as suffering from “simple schizophrenia”.

5. The appellant was then repatriated and underwent further treatment at RAF Wroughton, where the diagnosis of simple schizophrenia was confirmed. Following a Medical Board on 4 December 1964, which concurred with the findings of the psychiatrist at RAF Wroughton, the appellant was medically discharged on 1 February 1965. Since the claimant had been medically discharged, he was not required to make a claim for pension and was treated as having made a claim in respect of “psychosis”. However, on 22 April 1965 he was notified that the deemed claim had been rejected.

6. The term “simple schizophrenia” has largely passed out of medical usage. In connection with the reconsideration of the decision under appeal in this case, an RAF consultant psychiatrist advised that:

“Simple schizophrenia is an outmoded term and rarely used today. However, the diagnosis has a long history, and was one of the traditional schizophrenic sub-types. It is still retained in ICD10 because of its use in some countries. It is now described as a disorder in which there is an insidious but progressive development over a period of at least a year with features of loss of drive and interest, the gradual appearance of symptoms such as marked apathy, under activity etc. and a marked decline in performance, but without the psychotic symptoms generally associated with the conditions of schizophrenia.”

The advice also makes the point that in 1965 the term “psychosis” was used in a generic sense as signifying a class of disorders, rather than the more specific usage of today. However, whatever the sense in which the terms “simple schizophrenia” and “psychosis” were used at the time of the appellant’s discharge from service, the fact that his condition was found to be neither attributable to nor aggravated by service

indicates that the Medical Board considered that environmental factors played no part in the aetiology of the appellant's condition.

7. Although he was advised of his rights of appeal, the appellant states that he believed that there was no basis on which he could challenge the refusal to award him a pension. However, on 1 March 2004 he submitted a claim form in respect of a condition which he described as "mental injury caused by unreasonable unfair conditions of service" and "memory and reaction injury caused by the treatment I received". That claim was treated as an application for a review of the 1965 decision refusing entitlement, and medical reports were obtained from the claimant's general practitioner and a consultant psychiatrist. On **5 July 2004** the appellant was notified of the acceptance of a condition described as "depressive episode" as attributable to service, with disablement assessed as 6 to 14 per cent from 1 February 1976.

8. The choice of 1 February 1976 as the commencement date of the award has its origin in *R v Secretary of State for Social Security ex parte Edwards* (10 July 1992) (CO/2281/90). Prior to 1997, Schedule 3 to the Naval, Military and Air Forces Etc (Disablement and Death) Service Pension Order 1983 (SI 1983/883) (the 1983 Service Pension Order) provided that "except in so far as the Secretary of State may otherwise direct with respect to any particular case or class of case", no payment of a pension could be made in respect of any period before the date of the claim to pension. In cases where the Secretary of State considered that the original decision to reject a claim was reasonable at the time it was made, but a decision favourable to a claimant was made on review because of a change in medical opinion, the Secretary of State exercised his discretion to backdate the award to the date of change in medical opinion.

9. In 1976 a paper by Brown and Birley suggested that an ordinary life event, as opposed to severe and overwhelming stress, was sufficient to precipitate schizophrenia. In exercising the discretion to backdate, the Secretary of State took 1980 as the commencement date for awards in respect of schizophrenia, on the basis that it was then that a medical consensus began to emerge agreeing with Brown and Birley's hypothesis. However, in *Edwards* the Divisional Court held that in exercising his discretion to backdate the Secretary of State ought to have considered at what point in time there was reliable evidence of a link between schizophrenia and ordinary life events, which could be before the emergence of a medical consensus on the question. Following *Edwards*, the Secretary of State accepted the date of change of medical opinion in relation to schizophrenia as 1 February 1976, which is the first day of the month in which a paper by Jacobs and Myers was published providing confirmation of the Brown and Birley hypothesis. Although the power to backdate is no longer discretionary, and was governed in this case by Schedule 3 to the 1983 Service Pensions Order, the date of 1 February 1976 is still taken as the date on which medical knowledge justified an award of pension in respect of schizophrenia.

10. In his appeal, brought on 9 February 2005, the appellant challenged the commencement date of the award, but did not dispute the description of his accepted disablement as "depressive episode". Although the reason given in the Secretary of State's reasons for the decision for the commencement date of 1 February 1976 was "a change in medical opinion over the years", there was no further elaboration of that statement and no evidence of the development of medical opinion was provided for the tribunal. The record of proceedings of the tribunal held on 19 October 2005 shows that the Veterans Agency representative explained that at the time of the

appellant's discharge the prevailing medical opinion was that very stressful conditions were required to cause conditions such as those suffered by the appellant, but in their reasons for dismissing the appeal the tribunal simply recorded its agreement with the Secretary of State's written reasons for deciding that the commencement date of the award should be 1 February 1976.

11. I granted leave to appeal in order to investigate a suggestion in the documents that the appellant had made a fresh claim on 1 February 1976, but it is now clear that that was a mistake and that no such claim was made on that date. However, in his skeleton argument and at the hearing before me Mr Auburn virtually conceded that the tribunal's statement of reasons was inadequate to explain why the date of 1 February 1976 had been chosen as the commencement date of the award. In a supplementary submission dated 12 June 2006, the Veterans Agency provided me with an explanation of the development of medical thought with regard to the severity of stress required to precipitate schizophrenia, and I have also been provided with a copy of the policy statement regarding the exercise of the Secretary of State's discretion to backdate awards in pre-1997 cases. However, even if the tribunal was aware of the policy statement, it seems to me almost inevitable that the Veterans Agency's failure to include any references to the relevant scientific material in the statement of case would have made it impossible for the tribunal to provide an adequate statement of reasons. I consider that the statement of reasons in this case was manifestly inadequate, and that accordingly the decision of the tribunal must be set aside for that reason.

12. That, however, leaves the question of how the Secretary of State's review powers ought to have been exercised in this case. The relevant review powers are now contained in the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 2006 (SI 2006/606), but at the relevant time the power to review was conferred by article 67 of the 1983 Service Pensions Order. Although article 71(5) of the 2006 Order requires that anything done under a provision of the 1983 Order shall be treated as having been done under the 2006 Order, in order to avoid unnecessary cross-referencing I shall refer to the provisions as they appeared in the 1983 Service Pensions Order. So far as relevant, article 67 provided:

“(1) Subject to the provisions of paragraphs (2A), (3) and (4) and to the provisions of paragraph (8), any decision accepting or rejecting a claim for pension or any assessment of the degree of disablement of a member of the armed forces or any final decision that there is no disablement or that the disablement has come to an end may be reviewed by the Secretary of State at any time on any ground.”

The review powers are subject to restrictions in cases where the review is to the detriment of the service member, but those restrictions are not relevant in this case.

13. Article 65 of the 1983 Service Pensions Order provided that Schedule 3 had effect with respect to commencing dates of awards under the Order. So far as relevant, Schedule 3 provided as follows:

“1. (1) Subject to the following provisions of this Schedule, an award or an adjustment of an award shall have effect from such date as may be specified in the award, being a date not earlier than the date specified in sub-paragraph (2) which is relevant in the claimant's case.

(2) The date specified in this sub-paragraph is whichever date is the latest in time of the date –

- (a) following date of termination of service or, in a case under Part IV, following the date of death of the member;
- (b) of the claim;
- (c) of the last application for review ...

(3) ...

(4) ...

(5) ...

(6) Subject to sub-paragraph (6A) where an award is adjusted upon review instigated by the Secretary of State, the adjustment shall take effect from the date of the review.

(6A) 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 made 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.

...

**6.** (1) Where, upon 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."

14. The decision under review in this case was a decision rejecting the deemed claim for pension made when the appellant was discharged from service on medical grounds on 1 February 1965, and therefore fell within article 67(1). However, although article 67(1) empowers a review on any ground at any time, it is nevertheless necessary to identify the factual basis of the review in order to apply the provisions in Schedule 3 for determining the commencement date of the award made in consequence of the review decision.

15. The stated basis for the review decision in this case was a change in medical opinion, within paragraph 6(1) of Schedule 3. On that basis, Mr Auburn submitted that the decision made on review was in fact too generous to the appellant because it

took no account of the time limit for backdating of three years before the review application imposed by paragraph 6(1)(b) of Schedule 3. If the review decision fell within that paragraph, I see no answer to Mr Auburn's submission that there was no power to backdate the award to any date earlier than 1 March 2001.

16. However, I very much doubt if that was the correct basis for the review decision. As the Veterans Agency submission of 12 June 2006 makes clear, the medical debate which began with the paper by Brown and Burley in 1968 was with regard to the severity of stress required to precipitate schizophrenia, ie a life event, as opposed to severe and overwhelming stress. It is now accepted that the appellant was at no stage suffering from schizophrenia in the currently accepted sense of that term. The review process in this case resulted in the acceptance of a condition described as "depressive episode" (the episode in 1964) as attributable to service, and seems to me to be probably unconnected to the development of scientific understanding in relation to the severity of stress required to precipitate schizophrenia. If the appellant's refusal of an award in 1965 was, as he has consistently maintained, the result of a misdiagnosis of his condition, the accepted date of the change of medical opinion in relation to the aetiology of schizophrenia is not relevant in his case.

17. If paragraph 6 of Schedule 3 does not apply, paragraph 1(2)(c) of Schedule 3 prevents the appellant's award from being backdated to a date earlier than 1 March 2004 unless it can be shown that the decision refusing entitlement in February 1965 arose from official error, within sub-paragraph 6A of paragraph 1 of Schedule 3. However, although official error may include reliance on erroneous medical advice, I agree with Mr Auburn that not all erroneous medical advice constitutes official error.

18. Under the pre-1997 discretionary powers, awards were backdated by five years (the maximum period then allowed by Schedule 3 to the 1983 Service Pensions Order) in cases where the original refusal of a claim was considered reasonable on the basis of the information available to the decision-maker at the time when the original decision was made. That approach was held to be lawful by Macpherson of Cluny J in *R v Secretary of State for Social Security ex parte Foe* (7 November 1995). However, where the Secretary of State considered that there had been a change in medical opinion so as to justify an award, the award was backdated to the date of change of medical opinion, in accordance with the approach in *Edwards*. Paragraph 6(1) of Schedule 3 must have been intended to codify the previous discretionary approach in cases where medical opinion had developed with regard to the aetiology of a particular condition, but with the addition of a maximum period of backdating of three years. Since paragraph 6(1) makes specific provision for backdating in those cases where there has been a development of medical opinion, it seems to me to follow that sub-paragraph 6A of paragraph 1 of Schedule 3 (which was inserted in 2001 by SI 2001/409) must be applied on the basis of medical knowledge at the time when the original decision was made.

19. In social security law, regulation 72(1)(a) of the Social Security (Adjudication) Regulations 1986 (SI no 1986/2218) formerly empowered backdating of an award on review if a mistake had been made in refusing an award. In R(SB) 2/93 Mr Commissioner Skinner held that the mistake envisaged by the Regulation was a "clear and obvious mistake made by the officer of the Department on the facts disclosed to him or which he had reason to believe were relevant". In R(H) 2/04 Mr Commissioner Howell applied the same test in considering whether there had been

official error under regulation 99 of the Housing Benefit (General) Regulations 1987 (SI no 1987/1971), and I see no reason to depart from that approach in construing the identical words in paragraph 1(6A) of Schedule 3 to the 1983 Service Pensions Order.

20. I therefore consider that the question of whether the refusal of an award in 1965 resulted from an official error must be decided on the basis of medical knowledge as it was at that time. It will not be sufficient to show merely that there was a misdiagnosis of the appellant's condition. Applying the standards to be expected of a reasonably competent medical practitioner in the light of psychiatric knowledge in 1965, it will be necessary to demonstrate some clear and obvious mistake which resulted in the decision refusing entitlement. For that purpose, the relevant issue will be not so much the actual terms of the appellant's diagnosis, but whether the authorities were correct in excluding conditions of service as a factor in the claimant's disablement. However, in deciding the effect of any official error in this case, it must be borne in mind that the appellant's deemed claim in 1965 was governed by the predecessor provisions of article 4 of the 1983 Service Pensions Order. There was therefore no onus of proof on the appellant and he was entitled to the benefit of any reasonable doubt in relation to whether he satisfied the conditions of entitlement.

21. Although I have considered substituting my own decision for that of the tribunal in this case, I have concluded that Mr Auburn is correct in submitting that the medical issues involved in deciding whether the original decision refusing benefit resulted from official error make it necessary for me to refer this case for rehearing to a new tribunal. That tribunal will no doubt take into account the original diagnosis by the civilian doctor in Nairobi and will of course have regard to the appellant's symptoms as recorded in the contemporaneous medical record. It will also be relevant to have regard to the appellant's evidence regarding the events preceding his medical discharge. In considering the state of medical knowledge in 1965, the tribunal may also be assisted by the extract from the 1961 edition of "Clinical Aspects of Entitlement" which I have included in the papers. If the tribunal considers that the rejection of the appellant's deemed claim in 1965 was the result of a clear and obvious mistake by the authorities, having regard to medical knowledge at that time, they should find that that decision was the result of an official error and backdate the award to the appellant's date of medical discharge accordingly. It will also be open to the tribunal to decide that an award should be made on the basis of development of medical opinion in relation to schizophrenia, although for the reasons I have given I regard such a finding as problematical.

22. Since the appellant received a lump sum gratuity in respect of his assessment of 6 to 14 per cent disablement, this appeal will only be of practical benefit to him if that assessment is increased. His appeal against the assessment has already been dismissed (a decision from which no appeal lies to a Commissioner), but the Secretary of State should review the assessment if the new tribunal allows the appellant's appeal.

23. For those reasons, my decision is as set out in paragraph 1.

