[2025] UKUT 215 (AAC)
Appeal No. UA-2024-SCO-000019-WP

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

WJ

Appellant

- v -

Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wright

Decided after an oral hearing on 11 February 2025

Representation:

Appellant: Tim Haddow, Advocate
Respondent: Megan Dewart, Advocate

On appeal from:
Tribunal: Pensions Appeal Tribunals for Scotland
Tribunal Case No: PATS/E/19/0018
Tribunal Venue: George House, Edinburgh
Decision Date: 13 October 2023

SUMMARY OF DECISION

The PATS's decision on the evidence before it that Gulf War Illness (aka Gulf War Syndrome) is not a physical injury/an organic disease was not in error of law.

KEYWORD NAME (Keyword Number) 56 (war pensions); 56.1 (entitlement)

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judges follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

The decision of the Pensions Appeal Tribunals for Scotland made on 13 October 2023 under case number PATS/E/19/0018 did not involve the making of any material error of law.

REASONS FOR DECISION

Introduction

1. The key issue on this appeal is whether the Pensions Appeal Tribunals for Scotland ("the PATS") correctly approached whether Gulf War Illness ("GWI") affected the appellant's claim to be entitled to a war disablement pension.

2. I apologise for the time it has taken me to make this decision after the oral hearing in February of this year. The delay arose due to pressure of other work. The appellant's claim for a war pension was made as long ago as 2008 and I am sorry I have added to the delay in him having that claim decided.

Relevant background

The appellant's service and claim for a war disablement pension

3. The appellant is a former member of the Royal Fleet Auxiliary who saw active service at sea during the 1991 Gulf War.

4. On 7 October 2008 the appellant made a claim for a war disablement pension under the War Pensions (Mercantile Marine Scheme) 1964 ("the 1964 Scheme). In his claim, the appellant stated that the illness, disease or other condition for which he was claiming was "Gulf War Syndrome". He then described four ways in which he was affected by this condition: (i) lack of sex drive and impotence, (ii) severe joint and muscle pains, (iii) chronic fatigue, and (iv) depression and memory loss. The appellant attributed his condition and what he described as its effects to his service during the 1991 Gulf War. The appellant's claim set out three possible causes of the condition: (i) multiple vaccinations; (ii) administration of nerve agent pre-treatment tablets ("NAPs"); and (iii) frequent exposure to thick black smoke whilst on the upper deck of his vessel.

5. The Secretary of State refused the claim in 2009. However, after appeals against that decision which extended over many years, the Secretary of State issued a fresh decision on the claim on 11 December 2018. This decision on entitlement also refused the claim. It is this 11 December 2018 decision which the appellant appealed to the PATS.

6. It would seem that the Secretary of State's decision neither accepted or rejected the appellant's claim to suffer from Gulf War Syndrome. (Gulf War Syndrome has also been referred to as Gulf War Illness (GWI) in these proceedings, and I will refer to it as the latter. Nothing turns on the nomenclature). It was the appellant's case that the Secretary of State took this position because of his view that GWI "is not a syndrome in medical terms but may be used as an umbrella term to cover other conditions".

The PATS's proceedings and decision

7. The PATS heard the appeal on 10 October 2023. By its decision of 13 October 2023 it dismissed the appeal. Both the Secretary of State and the PATS

proceeded on the basis that appellant's claim for a war disablement pension was based on the following "injuries, wounds or diseases": (i) lack of sex drive and impotence, (ii) severe joint and muscle pains, (iii) chronic fatigue, and (iv) depression and memory loss" ("the injuries"). Both the Secretary of State (in dismissing the claim) and the PATS (in dismissing the appeal) found that none of these injuries were attributable to service or had been aggravated by service.

8. An aspect of the claim and the appeal concerned whether GWI should be recognised as a discrete medical condition. On 23 April 2023 the PATS had directed that the appellant's appeal to it should be subject of a one day hearing. Those directions also included that the following issues were to be determined by the PATS on the entitlement appeal:

    1. is GWI a qualifying injury under the War Pensions (Mercantile Marine Scheme) 1964?;
    2. if so, does the appellant have GWI?;
    3. if so, is there a reasonable doubt that his GWI is related to service?; and
    4. in particular, is there a reasonable doubt that his GWI is caused by (i) exposure to smoke; and/or (ii) the administration of vaccines?

9. The issue about the administration of vaccines arose on a separate appeal against another decision of the Secretary of State, which is dated 14 March 2019. That appeal was not before the PATS in this appeal, it having been sisted pending the outcome of the PATS's decision on this appeal. I therefore say no more about it or vaccines.

10. The appellant's case before the PATS, as summarised by the PATS, was as follows. First, GWI was a single diagnostic entity, he had GWI and he had raised a reasonable doubt that his GWI related to his service. He argued that recent research had established that GWI is a single entity medical condition, and he satisfied the relevant diagnostic criteria. And he contended that there was a valid analogy between GWI and chronic fatigue syndrome ("CFS") as CFS is also a diagnosis of exclusion and covers a wide range of symptoms with unknown aetiology.

11. The PATS commented that although the appellant relied on the notion that GWI is a single diagnostic injury:

> "it is clear that this is neither a necessary or sufficient condition for succeeding in the appeal. What matters is whether the individual symptoms complained of are related to service."

12. The Secretary of State's case before the PATS, again as summarised by the PATS, was that GWI did not qualify as a physical injury under 1964 Scheme. This was because it was an umbrella term for a number of different symptoms with a number of different causes, no underlying pathological process had been identified despite a huge amount of research, and as such GWI did not meet the generally accepted definition of a medical syndrome. The qualifying injuries were therefore the four individual symptoms on which the claim had been based (as identified in paragraph 7 above). Further, as the claim had been made more

than seven years after the termination of the appellant's service, the onus was on the appellant to raise a reasonable doubt that his symptoms were related to service. As to this last point, the Secretary of State's case to the PATS was that there were numerous co-existing medical conditions which better explained the appellant's symptoms and there was no medical evidence to support a causal connection with service. The appellant had therefore failed to raise a reasonable doubt that any of his four symptoms were related to service.

13. The PATS's heard evidence from the appellant. It found him to be a credible witness, but it considered his reliability had clearly been affected by the passage of time. For this reason, the PATS relied more on contemporaneous documentary evidence. The appellant's evidence to the PATS was that he had joined a ship in Bahrain in February 1991 and had remained on board that ship until August 1991. The appellant had been exposed to smoke when it was anchored off Kuwait for a period, when the was on the ship's upper deck. When the appellant was exposed to smoke, he would have been wearing chemical warfare protection suits and a smoke mask. The appellant remembered chemical warfare alarms going off, but not how often this occurred save for it perhaps being twice a week. In his normal work on board the ship, he was below deck for most of his deployment. The appellant did not notice any problems during this deployment.

14. The PATS also had before it written and oral medical evidence from a jointly instructed expert, Dr Madhok, a consultant physician and rheumatologist. He had been instructed to provide an opinion on the medical issue in the case. Dr Madhok accepted he was not an expert in GWI, but he was an expert in chronic fatigue syndrome. The PATS summarised the rest of Dr Madhok's evidence as follows in its decision:

> "24. [Dr Madhok] demonstrated a full understanding of the Kansas or Centre for Disease Control criteria. In particular, he made the important distinction between diagnostic criteria and classification or case criteria. Diagnostic criteria are a set of signs, symptoms and tests for use in routine clinical care to guide the care of the individual patient. Classification criteria are simply standardised definitions to define homogenous cohorts for clinical research. Importantly, there are no accepted diagnostic criteria for GWI. Even more importantly, classification criteria cannot be used as diagnostic criteria.
>
> 25. He also recognised the important distinction between establishing a relationship and establishing causality. Neither the Kansas nor the Centre for Disease Control established a causal connection between service in the Gulf war and symptoms, merely an association.
>
> 26. Turning to the facts of this appeal, Dr Madhok noted the appellant's extensive co-morbidities. He did not identify any inflammatory arthritis, unexplained chronic regional pain syndrome or peripheral neuropathy.
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> 27. In his oral testimony, Dr Madhok explained that CFS is a psychosocial disorder of unknown aetiology where the underlying biology was not fully understood. It was a diagnosis of exclusion. NICE and SIGN have both produced guidelines for the management of CFS.

28. The appellant's severe osteoarthritis and in particular his cervical spondylosis was an obvious explanation of his symptoms. If Dr Madhok saw the appellant in his clinic, that is what he would attribute the symptoms to. There were no features of fibromyalgia. Dr Madhok was not qualified to speak to psychological or psychiatric features of the presentation. However, he had not noted any reference to such features in the medical records.

29. Dr Madhok could not identify any factors in service that might have contributed to the appellant's symptoms. In a clinical setting, he would not have entertained service in the Gulf War as a contributory feature."

15. The PATs then addressed in its decision the medical literature which had been put before it, and did so as follows:

"30. The appellant placed great emphasis in the appeal on whether GWI is a single diagnostic entity. As noted above, this is something of an academic question as the answer is not determinative of the appeal. However, the question has been posed and has to be answered.

31. The first article is *Gulf War Illness: Lessons from medically unexplained symptoms* (Iverson et al, Clinical Psychology Review 27 (2007) 842-854). This report notes that although service in the Gulf War is associated with increased reporting of symptoms and distress, research has failed to generate a plausible aetiological mechanism for veterans' ill-health.

32. The appellant placed particular reliance on the US Institute of Medicine reviews in 2006, 2010 and 2016. The history of these reviews shows a change from the position that there were a number of Gulf War illnesses (plural) – the position of the UK Medical Research Council in 2003 – to a position that there is a single Gulf War illness, albeit with a multitude of symptoms and no underlying pathological cause. Although it is easy to see why the appellant would attach importance to this significant change in terminology, the fact remains that this is only relevant to research, not diagnostic, purposes.

33. The appellant also referred to an article by Chen et al (2017) *Role of mitochondrial DNA damage and dysfunction in veterans with Gulf War Illness* (PLoS One 12(9):e0184832), which explores the hypothesis that veterans with GWI exhibit greater mtDNA damage which is consistent with mitochondrial dysfunction. A number of caveats need to be given to this article. The most obvious is that it had a tiny study sample of only 21 patients. As such it is not statistically significant. This can be seen from the underlying hypothesis that such dysfunction was caused by exposure to agents such as carbamates and organophosphates….. There is no suggestion of such exposure here. Equally, there is no evidence that the appellant has mtDNA damage. Finally, it should be noted that the article recognises that "GWI is a chronic multi-symptom illness not currently diagnosed by standard medical or laboratory test…"

34. The appellant also referred to an article by Fukuda et al Chronic *Multisymptom Illness Affecting Air Force Veterans of the Gulf War* (JAMA 1998; 280:981-988) as defining diagnostic criteria for GWI. However, the objective of the article was "To organize symptoms reported by US Air Force GW veterans into a case definition, to characterize clinical features, and to evaluate risk factors". In other words, it was designed to provide case or classification criteria, not diagnostic criteria. Indeed, the introduction to the article notes that "no

specific disorder has been identified, and the etiological basis and clinical significance of their symptoms remain unclear".

35. The most recent article relied on is Haley R et al (2022) *Evaluation of a Gene-Environment Interaction of PON1 and Low-Level Nerve Agent Exposure with Gulf War Illness: A Prevalance Case-Control Study Drawn from the US Military Health Survey's National Population Sample* Environmental health perspectives, 130(5), 57001. Dr Anne Braidwood provides a number of criticisms of this research at page 966 of the bundle, but the most obvious problem for the appellant is the absence of any evidence that he was exposed to nerve agent during his brief time in theatre. Although the appellant did give evidence that he heard chemical alarms, he did not suggest that there was ever any exposure to agents such as organophosphates.

36. In summary, the literature raises the reasonable possibility that a number of unrelated symptoms are related to service in the Gulf war. However, the possible causes of those symptoms are diverse and no unifying underlying pathology has been identified.

37. The main problem with the appellant's approach is that it treats the classification criteria of the Kansas and CDC studies as diagnostic criteria (see paras 44-48 of the Answers to the Statement of Case). As explained above, this is inappropriate. In the absence of diagnostic criteria, it is difficult for a tribunal, in the absence of any medical diagnosis, to make the finding the appellant has GWI.

38. Furthermore, GWI is a diagnosis of exclusion, and there are co-existing medical conditions that explain the condition.

39. Finally, even if it was accepted that the appellant has GWI, it would still be necessary to go on and demonstrate that the individual symptoms claimed are related to service. Accordingly, the medical literature is of little more than academic interest in this appeal."

16. Based on the evidence before it, the PATS made the following relevant findings in fact:

    (i) the appellant had been administered with NAPS and there was no contemporaneous report of any adverse reaction;
    (ii) he had been exposed to smoke on a handful of occasions. On each occasion he was wearing full chemical warfare protection including a mask, and he had not noticed or reported any problems following those exposures;
    (iii) the appellant was not exposed to any chemicals or nerve agents whilst in theatre; and
    (iv) on the balance of probabilities, the appellant did not suffer from chronic fatigue syndrome or depression or memory loss, but he did suffer from impotence and loss of libido, and generalised joint and muscle pains.

17. The PATS then went on to set out what it termed its considerations in deciding the appeal. That involved it answering two questions.

18. The **first question** to be answered was whether the appellant had the conditions for which he had claimed. The PATS directed itself that it was for the appellant to prove on the balance of probabilities that he had the disablement for which he was claiming. In relation to GWI the PATS concluded the answer was 'no'. This was because GWI is a diagnosis of exclusion and there were several co-existing medical conditions that could explain the appellant's symptoms. The PATS stated that this answer, however, was not determinative of the appeal as each of the symptoms claimed for had to be considered in turn.

19. Turning to those symptoms, the PATS's view was that in respect of both the lack of sex drive and impotence, and severe generalised joint and muscle pain, there was clear evidence that the appellant had suffered from these symptoms. However, the PATS considered that the same was not true for chronic fatigue syndrome ("CFS") or depression and memory loss. Dr Madhok did not consider that the diagnosis of CFS applied and, as a diagnosis of exclusion, there were other co-existing morbidities which explained the appellant's symptoms. As for depression and memory loss, the PATS's view was that there was no evidence of any recognised psychiatric illness, including depression, and indeed the appellant's GP had confirmed the same. Nor had the appellant reported memory loss to his GP, which was to be contrasted with the action the appellant had taken in respect of sexual dysfunction. In any event, the appellant had accepted that he could not raise a reasonable doubt that any depression and memory, as a standalone condition, had been caused by a war injury or war risk injury.

20. The **second question** the PATS had to address was whether the symptoms which it accepted the appellant had were related to service. Having set out relevant case law, the PATS set out its conclusions on this second question as follows.

> "78. Turning first to the question of loss of libido and impotence, there is a clear alternative explanation in the letter from Dr Shennan at pages 208-210. That explanation has nothing to do with service but instead relates to his cervical surgery in 1995. Given that the appellant did not suffer any acute symptoms in relation to any of the claimed stressors (smoke exposure, administration of vaccine and NAPs), there is no plausible biological explanation of how those stressors could have caused the symptoms many years later. Accordingly, there is no reasonable doubt that the symptoms are attributable to service.
>
> 79. The position is not quite so clear cut in relation to the last remaining symptom, severe joint and muscle pain. However, there is again a far more likely explanation, in the form of the severe osteoarthritis which is – quite properly - accepted as unrelated to service…. Again there is no plausible biological explanation for how service could have caused these symptoms. Accordingly, we find that there is no reasonable doubt that the symptoms are attributable to service."

The grant of permission to appeal

21. The then President of the PATS, Judge Caldwell KC, gave the appellant permission to appeal to the Upper Tribunal. Judge Caldwell said she could see no obvious error of law in the PATS's decision, but she nevertheless considered

that the grounds of appeal were arguable and worthy of consideration by the Upper Tribunal. Why the grounds were worthy of consideration by the Upper Tribunal was not explained.

The grounds of appeal

22. The appellant brings this appeal to the Upper Tribunal on six grounds. I take the six grounds from the appellant's Notice of Appeal. The six grounds a set out in the Notice of Appeal are:

    (i) Ground 1: whether GWI is a qualifying injury?;
    (ii) Ground 2: whether the status of GWI as a diagnostic entity is academic?
    (iii) Ground 3: does the appellant meet the criteria for GWI?
    (iv) Ground 4: findings relating to cognitive difficulties;
    (v) Ground 5: findings related to loss of libido; and
    (vi) Ground 6: causation.

23. At the hearing, Mr Haddow for the appellant took grounds 1, 2 and 6 together, followed by ground 3 and then grounds 4 and 5 (which he described as covering conditions other than GWI).

24. Although the above are only the headings for each of the grounds, on their face none of them raise any argument that the PATS erred **in law** in its decision. Taken at face value the questions about whether GWI is a qualifying injury and whether the appellant met the criteria for having GWI are issues of fact which it is not for the Upper Tribunal to decide in the exercise of its error of law jurisdiction. However, as will become apparent, at least to an extent the grounds when unpacked further did raise what were said by the appellant to be errors of law in the PATS's approach to his appeal.

The legislative scheme

25. To properly frame the analysis of the above grounds, it is necessary to set out the relevant parts of the legislative scheme.

26. Section 2 of the Pensions Appeal Tribunals Act 1943 deals with appeals under the 1964 Scheme. It provides as follows:

> "**Appeals against rejection of war pension claims made in respect of mariners, pilots, etc.**
> 2. (1) Where any claim in respect of the disablement or death of any person made under any scheme made under section three, section four or section five of the Pensions (Navy, Army, Air Force and Mercantile Marine) Act 1939, as amended by the Pensions (Mercantile Marine) Act 1942, is rejected by the Minister on either or both of the following grounds, namely—
>
> (a) that the disablement or death of the said person is not directly attributable to a war injury, war risk injury or detention;

(b) that the case is not one in which—

(i) the said person is to be treated for the purpose of the said section three as having sustained the injury or suffered the detention by reason of his service as a mariner in a British ship; or

(ii) the said person is to be treated for the purpose of the said section four as having sustained the injury or suffered the detention by reason of his service; or

(iii) the injury was sustained in the circumstances specified in a scheme made under the said section five or the detention was caused by reason of his service in a ship forming part of His Majesty's navy;

the Minister shall notify the claimant of his decision, specifying the ground or grounds of the rejection, and thereupon an appeal shall lie to the appropriate tribunal on the issue whether the claim was rightly rejected on that ground or those grounds.

(2) Where the Minister rejects any such claim as aforesaid on one of the grounds specified in the last foregoing subsection and an appeal is brought from his decision,—

(a) the Minister may notify the appellant before the hearing of the appeal that he also rejects the said claim on the other ground so specified, and thereupon the appropriate tribunal shall treat the appeal as an appeal on the issue whether the claim was rightly rejected on both the said grounds;

(b) unless the Minister notifies the appellant as aforesaid, he shall not be entitled, if the appeal is allowed, subsequently to reject the said claim on the said other ground."

27. The 1964 Scheme is made under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act 1939, as amended by the Pensions (Mercantile Marine) Act 1942 ("the 1939 Act").

28. Section 3(1) of the 1939 Act provides as follows:

"**Awards to mariners in respect of war injuries and detention.**
3.- (1)The Minister may, with the consent of the Treasury, make a scheme for—
(a) applying the provisions of any Naval War Pensions Order to persons in cases where their death or disablement is directly attributable to their having sustained war injuries, or suffered detention, by reason of their service as mariners in British ships;
(b) the payment of allowances to or for the benefit of persons who have suffered detention as aforesaid or to or for the benefit of their dependants."

29. The relevant aspects of the 1964 Scheme are as follows.

30. Paragraph 1 and 2 of Schedule 1 to the 1964 Scheme provide, insofar as relevant, as follows:

"1. A war injury is a physical injury—

> (a) caused by—
> (i) the discharge of any missile (including liquids and gas); or
> (ii) the use of any weapon, explosive or other noxious thing; or
> (iii) the doing of any other injurious act;
> either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy; or
> (b) caused by the impact on any person or property of any enemy aircraft, or any aircraft belonging to, or held by any person on behalf of or for the benefit of, Her Majesty or any allied power, or any part of, or anything dropped from, any such aircraft.
>
> 2. A war risk injury is a physical injury sustained on or after 3rd September 1939 at sea or in any other tidal water or in the waters of any harbour and attributable to—
> (a) the taking of measures with a view to avoiding, preventing or hindering enemy action against ships, or as a precaution in anticipation of enemy action against ships, or for rescue or salvage purposes in consequence of enemy action against ships; or….
> (d) the existence on board ship of any other conditions arising out of any such war as aforesaid which would be abnormal in time of peace…"

31. Paragraphs 1 and 2 of Schedule 1 to the 1964 Scheme has to be read with paragraph 4(b) in the same Schedule as paragraph 4(b) sets out that:

> "the expression "physical injury" includes tuberculosis and any other organic disease, and the aggravation thereof".

32. Article 3(4) and (5) of the 1964 Scheme are in the following terms:

> "3.(4) Where a claim under this Scheme other than one specified in the following paragraph of this Article is made, there shall be no onus on the claimant to prove that disablement or death is directly attributable to the relevant qualifying injury or detention and the benefit of any reasonable doubt on those questions shall be given to the claimant.
>
> (5) Where a claim under this Scheme—
> (a) in respect of disablement is made more than 7 years after the date of the relevant qualifying injury or end of detention; or
> (b) is made in respect of the death of a person, such death having occurred more than 7 years after the date of the relevant qualifying injury or end of detention;
> and, upon reliable evidence, a reasonable doubt exists whether the disablement is, or the death was, directly attributable to the relevant qualifying injury or detention, the benefit of that reasonable doubt shall be given to the claimant."

33. Lastly, article 17(1) extends the reach of the (naval) war pension scheme to members of the Merchant Navy (which includes the Royal Fleet Auxiliary) thus:

> "Application of the Naval Order
> 17.-(1) Where the disablement or death of a member of the Merchant Navy is directly attributable to a qualifying injury sustained or detention suffered by reason of his service as a mariner in a British ship, the Naval Order shall apply to his case in accordance with the following provisions of this Article."

Discussion and conclusion

34. Before turning to discuss in more detail the particulars of the grounds of appeal, I start by setting out my overall view and making some more general observations on the appeal.
35. Overall, I consider that when the PATS's decision is read as whole, as it must be, it provides the parties to the appeal and the appellant in particular with an adequate explanation for why the appeal did not succeed; and reading the reasons as a whole includes the PATS's acceptance of the evidence of Dr Madhok. The PATS's explanation for why the appeal did not succeed, in short, was either that the appellant did not have the conditions for which he claimed (including GWI), or, for those conditions which the PATS found he did have, they were not related to service. The appellant may disagree with these conclusions, but, in the absence of the PATS having material erred in law in coming to those conclusions, it is not for the Upper Tribunal to set aside the PATS's decision on the basis that GWI should have been treated as an organic disease or that the PATS was wrong to place weight on the evidence of Dr Madhok. The evaluation of the evidence and the weight to be attached to the evidence was a matter for the expert membership of the PATS.

36. The first general observation concerns what was said by the appellant to be the PATS's wrong reference to "Article 41 of the SPO", at paragraph 62 of its decision. It was argued that the PATS should instead have referred to article 3 of the 1964 Scheme. However, even assuming this was a mistake by the PATS, it was not argued before me that this error had had any material effect on the PATS's application of the law to the evidence and arguments before it.

37. Whether under article 41 of the SPO (i.e., the Naval, Military and Air Forces ETC (Disablement and Death) Service Pensions Order 2006) or under the 1964 Scheme, it was common ground before the PATS and accepted before me that it was for the appellant to establish, on the balance of probabilities, that he had the disablement for which he had claimed: see *Royston v The Minister of Pensions 1948 1 All ER 778*. That, as the PATS said at paragraph 61 of its decision, was the first question it had to address and answer. The second question, which the PATS asked itself at paragraph 69 of its decision, is whether the conditions it accepted the appellant had were related to service (i.e., causation). It was not disputed before me that the PATS correctly directed itself by way of reference to, amongst other cases, *Abdale and others v SSD (WP)* [2014] UKUT 477 (AAC); [2015] AACR 20, when addressing that second question. Moreover, where a condition is of unknown aetiology, *Coe v Minister of Pensions* [1967] 1 QB 238 establishes that if there is evidence that, although the aetiology is unknown, the disease is one which arises and progresses independently of service factors and the fact-finding tribunal is convinced thereby and accordingly refuses a pension, the court should not interfere. The PATS also correctly directed itself as to the effect of *Coe*, and there is no challenge to it decision in this respect.

38. The second general observation is, accordingly, that the appeal does not challenge the law which the PATS directed itself to apply. Rather, the appeal

challenges the PATS's application of that law to the evidence it had before it. The key challenge advanced on the appeal is to the PATS's consideration of the various medical papers it had before it about whether GWI was a qualifying injury (i.e., an organic disease) under the 1964 scheme and whether the appellant was suffering from GWI. That evidential consideration arose under the first question, and it did not proceed to the second question because of the answer the PATS gave to the first question in relation to GWI (and, relatedly, whether the appellant had GWI).

39. The third general observation concerns the change in focus of the appellant's case as it proceeded before the PATS and the Upper Tribunal . The first argument before me, as I have indicated above, covered the first, second and sixth grounds of appeal. In making that argument the appellant through Mr Haddow accepted that there was no error of law in the PATS approach of addressing GWI first before it addressed the symptoms of, for example, depression and memory loss. However, in then arguing about whether the PATS had erred in law in its view (including as set out in paragraph 39 of its decision) that whether GWI exists and whether the appellant had GWI was academic, the appellant accepted before me that if GWI was an injury/organic disease then it was not necessary to consider the individual symptoms (e.g., depression and memory loss). Given what I have said above about it being the PATS, and not the Upper Tribunal, having the fact -finding role, this must mean 'acceptance' and 'consideration' by the PATS. When I then asked Mr Haddow whether this therefore meant it would not have been necessary for the PATS to consider the individual symptoms at all, I understood him to accept this. However, he then qualified this by submitting that the PATS had to consider the individual symptoms as part of whether the appellant had GWI or anything that could be called GWI.

40. As Ms Dewart for the Secretary of State (rightly) pointed out to me, this is a different argument to the one the appellant put before the PATS. The appellant's position before me appeared to be that the only issues the PATS had to decide was whether GWI is an organic disease and whether the appellant had it. At paragraphs 16 and 17 of the appellant's Answer to the Statement of Case to the PATS, his arguments, relevantly, were as follows:

> "16……the issues for appeal are:
>
> 16.1. Was the Respondent right to decide that the Appellant does not suffer from Gulf War Syndrome, in so far as this is a medical syndrome which can be a qualifying injury under the 1964 Scheme? If the Respondent is wrong about this, does the Appellant suffer from such an illness and is there a causal link to the Respondent's service?
>
> 16.2. Was the Respondent right to decide that causation was not established in the case of each of the four conditions suffered by the Appellant?....
>
> 17. The Appellant contends that:
>
> 17.1. The scientific consensus is now that Gulf War illness ("GWI") is now recognised as a single diagnostic entity whose association with

> various service factors has been subject to significant and meaningful amounts of medical and scientific research. The tribunal should find that the Appellant has GWI and that he has raised a reasonable doubt that this is attributable to his service in the 1991 Gulf War.
>
> 17.2. That the tribunal should find that, in the case of two of the conditions recognised by the Respondent, the Appellant has raised a reasonable doubt that these are attributable to his service in the 1991 Gulf War…"

41. The arguments the appellant made before the PATS therefore separated out the individual symptoms from GWI, rather than subsuming them within GWI. It is not surprising in these circumstances that the PATS structured its decision in the way that it did. Moreover, its decision at paragraph 39 of the decision has to be read in the light of the case or issues the appellant had put before it to decide.

42. Staying with paragraph 39 of the PATS's decision, I cannot identify any material misdirection by the PATS in the counterfactual which it addressed in that paragraph. In circumstances where the PATS was to find (at paragraph 64 of its decision) that the appellant did not have GWI, on the appellant's own case to the PATS the tribunal had to go and decide whether the appellant had the four individual symptoms which he claimed and, if he did, whether they were related to service.

43. With these important observations, I turn to address the grounds of appeal, though what I have said in the immediately preceding paragraph may in large part answer the second ground of appeal.

Whether GWI is an organic disease, was GWI academic and causation (of GWI)

44. As I have indicated above, the appellant took his first, second and sixth grounds of appeal together.

45. The appellant argued under his first ground of appeal that the PATS ought to have treated GWI as an organic disease. Absent a pure perversity challenge, which is not made, that is not an issue of law.

46. The appellant's argument under his first ground of appeal involved a quite detailed consideration of the medical literature which was before the PATS and an argument that the PATs had misunderstood this evidence. There are various flaws and problems with this argument, not the least of which might be said to be the basis on which an error of law tribunal judges whether the expert fact-finding tribunal "misunderstood" the evidence.

47. The key flaw, however, is the failure to locate the PATS's consideration of this medical literature in the context of its acceptance of Dr Madhok's evidence. I will return to this once I have addressed the flaws in the arguments the appellant made about the PAT's approach to the medical literature.

48. The first flaw in the argument is that the PATS plainly did not misunderstand the *Fukuda* report. That report, as the PATS stated in paragraph 34 of its decision,

was designed to provide case or classification criteria not diagnostic criteria. Moreover, the PATS was also right in noting that the introduction to the *Fukuda* report stated that, in terms of GWI, no specific disorder had been identified and the etiological basis and clinical significance of the symptoms remain unclear. Nor is it open to any reasonable argument that the PATS failed to take into account that the article was from 1998. Paragraph 34 of the PATS's decision expressly stated that the report was published in 1998. The PATS were on the face of it aware that this report was from 1998 and it was rationally entitled to take it into account as part of the history of understanding relating to GWI.

49. The second argument the appellant made about the medical literature concerned how the PATS dealt with the *Chen* article at paragraph 33 of its decision. The PATS said it had a number of caveats about this report. The most obvious caveat was that the report had a tiny study sample of only 21 patients and as such it was not statistically significant. The PATS considered this could be seen from the underlying hypothesis that such dysfunction was caused by exposure to agents such as carbamates and organophosphates, whereas there was no suggestion of such exposure in the appellant's case and equally there was no evidence the appellant had mitochondrial DNA damage. The PATS finally noted that the *Chen* article recognised that:

> "GWI is a chronic multi-symptom illness not currently diagnosed by standard medical or laboratory test…"

50. The appellant took me to the *Chen* article and argued by reference to the "(p)" in it that this showed that it did contain statistically significant information. This was another instance of the argument seeming perhaps to move into evidential reargument. Moreover, the PATS may have been using 'statistically significant' in a way different from the statistical sign of (p). Be all of this as it may, I am satisfied that PATS committed no material error of law in its understanding of the *Chen* article. The PATS in my judgement was entitled to take the view that the report was not relevant evidence in respect of the appellant because, even outwith its small sample of patients (and the statistical significance (or not) of the same), its underlying hypothesis was that mtDNA damage was caused by exposure to carbamates and organophosphates, and there was no evidence of that the appellant had mtDNA damage. Even if, as the appellant argued, the PATS was wrong about him not having been exposed to carbamates and organophosphates, because his evidence was that taking the NAPS tables was equivalent to taking carbamates and organophosphates, that still leaves the article lacking relevance for the appellant because there was no evidence that he had mtDNA damage.

51. In addition, these criticisms by the appellant of the PATS's understanding of the *Chen* article leaves undisturbed the quotation set out at the end of paragraph 49 above. And the PATS was entitled to take that view expressed in the *Chen* article into account in deciding whether GWI is an organic disease.

52. The last piece of the medical literature in respect of which the appellant criticised the PATS's approach is the *Haley* article, which the PATS addressed at

paragraph 35 of its decision. As set out above, the PATS found this article lacked relevance to the appellant because of:

> "the absence of any evidence that he was exposed to nerve agent during his brief time in theatre. Although the appellant did give evidence that he heard chemical alarms, he did not suggest that there was ever any exposure to agents such as organophosphates."

53. The main criticism the appellant highlighted before about the PATS here is that it was wrong to consider there was no evidence of low level exposure as there may have been a sufficiently low level of exposure which could not be detected alarms. There is nothing in this point, even if it is not just evidential argument. If no alarm could detect the nerve agent then there simply was no positive evidence that the appellant had been exposed to nerve agents. As I understood it, Mr Haddow accepted this, but he argued that this argument and criticism was relevant for the causation, and the 'reasonable doubt' stage of the analysis. This cannot help the appellant either as the PATS having found that GWI is not an organic disease, and that therefore the appellant did not (and could not) have GWI, never got to that stage of the analysis. Putting this another way, the criticism the appellant makes of paragraph 35 in the PATS's decision does not assist him in his arguments about the PATS's approach to whether GWI is an organic disease.

54. These arguments therefore take the appellant no further. However, as I have said above, a crucial omission is the failure to see the PATS's approach to the medical literature in the context of Dr Madhok's evidence.

55. I accept the Secretary of State's argument that the PATS accepted, and was entitled to accept, Dr Madhok's evidence of the importance of having accepted diagnostic criteria in terms of identifying whether something is an organic disease. It was also entitled to take from Dr Madhok's evidence (i) that it was important to distinguish between diagnostic criteria and classification or case criteria, (ii) that there were no accepted diagnostic criteria for GWI, and (ii) that classification criteria cannot be used as diagnostic criteria. It is worth remembering that it was the appellant case to the PATS (see paragraph 40 above) that "*GWI is now recognised as a single diagnostic entity*". Dr Madhok's evidence plainly stood contrary to that case. Moreover, the medical literature did not stand against this evidence of Dr Madhok.

56. In addition, and focussing on what I have said is the omission in the appellant's argument about the PATS's approach to the medical literature, PATS's approach to that literature has to read in the light of its acceptance of Dr Madhok's evidence. It is in this sense, in my judgement, that the PATS then found that the overall problem with the medical literature was: that no unifying underlying pathology had been identified (paragraph 36 of the PATS's decision); it was wrong to treat classification criteria as diagnostic criteria (para. 37); in the absence of diagnostic criteria, it was difficult for the PATS, in the absence of a medical diagnosis, to find the appellant had GWI (para. 37); and GWI was a diagnosis of exclusion and there were co-existing medical conditions which explained the condition (para. 38). Those were findings the PATS was entitled to take on the totality of the evidence before it.

57. There was an attempt by the appellant to argue in his reply that the PATS ought not to have relied on Dr Madhok's evidence. As far as I could see, these were either arguments that were made to the PATS or should have been made to it. For example, Mr Haddow told me that the appellant had argued before the PATS that Dr Madhok's evidence should be excluded in its entirety but the PATS did not accept this. That was a matter for the PATS to decide. Mr Haddow accepted that he had not made a submission to the PATS that Dr Madhok was giving evidence outside his instructions, but he had argued to the PATS that Dr Madhok was not an expert in GWI. This last point takes the appellant nowhere as paragraph 23 of the PATS's decision shows Dr Madhok accepted that he was not an expert in GWI. In any event, there is no ground of appeal before the Upper Tribunal which argues that the PATS was wrong to allow Dr Madhok to give evidence.

58. I have dealt to some extent with the appellant's second ground of appeal (was the status of GWI academic) at paragraphs 41 and 42 above. I should add to those paragraphs that the appellant's Notice of Appeal to the Upper Tribunal argued, contrary to this case before the PATS, that the PATS was wrong to direct itself as it did in paragraph 39 of its decision. However, in so doing he argued as follows (at paragraph 26 of his Notice of Appeal):

> "If GWI is an organic disease and the Appellant demonstrates on the balance of probabilities that he has that condition (which, in the absence of any definitive diagnostic scientific test, will necessarily require consideration of his symptoms), then he need not demonstrate that each individual symptom is caused by his service. The only further necessary step is for the tribunal to consider causation; that is: whether there is a reasonable doubt GWI may be related to his service."

59. I make two observations about this. First, and as I have said before, as the PATS found GWI is not an organic disease, and it therefore must follow that whatever medical conditions or symptoms the appellant had he did not have (indeed could not have) GWI, the issue of whether GWI was related to service did not arise. Second, on the appellant's own argument in the brackets in paragraph 26 of the Notice of Appeal, it is accepted that absent a diagnostic test for GWI, the appellant's individual symptoms would need to be considered. That was the position the PATS reached, and was entitled to reach for the reasons I have given above, and in proceeding as it did it was also answering the case the appellant had expressly asked it to address. In so doing, and in these circumstance, it did not materially err in law in what it set out in paragraph 39 of its decision.

60. Another way of looking at paragraph 39, which comes to the same result, is that having accepted Dr Madhok's evidence, and so accepted that there were no diagnostic criteria for GWI, the PATS had to consider the individual symptoms claimed (e.g., depression and memory loss).

61. As for the sixth ground of appeal and causation, save for the conditional argument made in paragraph 26 of his Notice of Appeal which does not arise and the point I have addressed in paragraph 53 above, the arguments made by the appellant are about the PATS's approach to causation in relation to the individual

symptoms which it accepted the appellant had. I will therefore deal with causation in that context later.

Did the appellant meet the criteria for GWI?

62. This is the heading to the third ground of appeal. Again, read alone it asks a question of evidence or fact and is not about whether the PATS erred in law. Furthermore, I struggle to see why this is not simply the reverse of the same coin about whether GWI is an organic disease, to which the PATS answered 'No'. If there is no physical injury or organic disease of GWI for the purposes of the 1964 Scheme, I do not see (error of law arguments apart) on what basis the appellant could have GWI or separately meet the criteria for GWI. This perspective accords with the questions the PATS had directed itself to consider (see paragraph 8 above). There was and is not challenge to those directions. However, point (2) in those directions – 'does the appellant have GWI' – only arose *if*, under point (1) in the directions - GWI was a physical injury/organic disease under the 1964 Scheme. Having answered that first question with a 'No', on the basis of the directions the question at (2) in those directions simply did not arise. None of the appellant's arguments persuaded me that addressing (and answering) the question whether the appellant had GWI could have any useful content or application if, as the PATS found, GWI was not a qualifying injury under the 1964 Scheme.

63. The appellant argued under the third ground of appeal that the PATS had been wrong to place such weight on the distinction case or classification criteria and diagnostic criteria and that the PATS had misdirected itself that there needed to be diagnostic criteria. For the appellant, case criteria were the best practical definition of GWI. This is no more than a rerun of the arguments I have addressed under the first ground of appeal and, moreover, is no more than evidential reargument. It was for the PATS as the expert fact-finding body (and not the Upper Tribunal) to decide what was needed to decide if something was a physical injury/organic disease, and it was entitled on the basis of Dr Madhok's evidence to decide that diagnostic criteria were needed (but were not in place) to identify a symptom or collection of symptoms as GWI.

64. Another focus of the appellant's argument under the third ground of appeal was on paragraph 37 of the PATS's decision and its statement that "*[i]n the absence of diagnostic criteria, it is difficult for a tribunal, in the absence of any medical diagnosis, to make the finding the appellant has GWI*". The appellant argued that this was a circular argument as without diagnostic criteria there can be no medical diagnosis. This is not, with respect, a misdirection of the law. As the Secretary of State argued, it is no more than a statement of the obvious.

65. The final argument the appellant made under his third ground of appeal is an argument that the PATS's reliance on a need for diagnostic criteria, and not case criteria, for GWI was, so the appellant argued, fatally undermined by the evidence before it relating to CFS. As I understood the argument, it is that CFS is recognised as an organic disease but identifying whether someone has CFS depended on applying case, and not diagnostic, criteria. Again, this has all the flavour of evidential reargument, and one which may well be based on a

misunderstanding of the role the "synopsis of causation" plays in the Secretary of State's determination of war pension claims, including those with CFS.

66. Evidential reargument concerns apart, the PATS had Dr Madhok's evidence before it, he was an expert in CFS, and his evidence was that CFS is a "psychosocial disorder" (paragraph 26 of the PATS's decision) and that there is a diagnosis for it which did not apply in the appellant's case (paragraph 67). On that evidence the PATS was entitled to proceed on the basis that there was not an analogy between GWI and CFS.

67. The argument of the appellant here depends on reading paragraph 38 of the PATS's decision in isolation and as the sole determinant for its finding that GWI is not an organic disease (and that the appellant did not have GWI). That approach is not correct. It ignores paragraph 37 of the decision and the preceding paragraphs and most particularly Dr Madhok's evidence in 24 that there are no accepted diagnostic criteria for GWI and that classification (or case) criteria cannot be used as diagnostic criteria. Nothing in Dr Madhok's evidence, moreover, was to the effect that case criteria are used for identifying if someone has CFS.

The PATS's findings relating to cognitive difficulties and loss of libido

68. I approach the fourth and fifth grounds of appeal with some circumspection because Mr Haddow accepted before me that if I was to decide against the appellant on the GWI grounds of appeal, as I have, the fourth and fifth grounds of appeal were not separate material errors of law grounds. Given this, I will address them somewhat briefly.

69. I also bear in mind in relation to these grounds, and the sixth ground of appeal, the appellant's stance that the individual symptoms he claimed were (only) relevant to deciding whether he had GWI. If that remained his position, and given I have found the PATS was entitled to find the appellant did not have GWI (as there is no such organic disease), the relevance of these grounds may at least be questionable.

70. The appellant uses the term 'cognitive difficulties' to cover memory loss and depression. He argued that the PATS's reasoning was not adequate to explain why it had found he did not suffer from depression or memory loss. The key to appellant's argument is paragraph 55 of the PATS's decision, in which it found that in 2009 the appellant's GP noted that there was no record of depression or memory loss. It is said that what was found in paragraph 55 also applied to loss of libido, but the PATS did accept the appellant as having loss of libido. It is argued that this was contradictory and needed further explanation. The short answer to this is that the PATS's finding that the appellant had loss of libido was not just based on the medical records (see paragraph 65 of the PATS's decision). In any event, the premise for this argument is not sound as the PATS found that the loss of libido (i.e., the lack of sex drive) **was** evidenced in the GP records and the investigation at the urology department (see again paragraph 65 of the PATS's decision). Given this, in my judgement the reasons the PATS gave at paragraphs 55, 56 and 68 adequately explained why it did not accept the

appellant had memory loss or depression. Even if this was not the case, no material error of law would have arisen given the appellant's acceptance before the PATS that he could not raise a reasonable doubt that any depression and memory loss had been caused by a war injury or war risk injury.

71. The fifth ground of appeal is about loss of libido and impotence and is really an argument about causation. The PATS accepted that the appellant had the physical injuries of loss of libido and impotence. However, as set out in paragraph 20 above, it concluded that there was a clear alternative cause for these set out in Dr Shennan's letter, which had nothing to do with service and related to the appellant having had cervical surgery in 1995. Moreover, given the appellant had not had any acute symptoms in relation to any of the claimed stressors (such as smoke exposure) in service (see further paragraph 20 of the PATS's decision), there was no plausible explanation of how those stressors could have caused the loss of libido and impotence many years later. As such, the PATS found there was no reasonable doubt that the loss of libido and impotence were attributable to service.

72. The appellant argues that in coming to this conclusion the PATS left out of account evidence that would have passed the reasonable doubt threshold and that in consequence the reasoning of the PATS did not add up. There is no merit in my judgement in this argument. The reasoning of the PATS is clear in paragraph 78: the obvious cause was the cervical surgery in 1995 and nothing in the appellant's service raised a reasonable doubt against this.

Causation and smoke exposure

73. The sixth ground of appeal concerns the seventh question the PATS had been directed to consider by the directions of 23 April 2023. I did not set out the fifth to seventh questions of those directions in paragraph 8 above. Those questions read:

> "5. Does the appellant have Chronic Fatigue Syndrome and/or loss of libido and/or impotence?
> 6. If so, is there a reasonable doubt that all or any of those conditions is related to service?
> 7. In particular, is there a reasonable doubt that those conditions are caused by (i) exposure to smoke; and/or (ii) the administration of vaccines?"

74. Having found that the appellant did not have GWI, CFS, or depression and memory loss, the issue of whether these claimed for conditions were caused by service did not arise, and so the question of whether they were caused by smoke exposure in service likewise did not arise. Nor was the administration of vaccines in issue on this appeal at all, as it remains to be decided on the other appeal which has been sisted.

75. The appellant's argument in his Notice of Appeal is that the PATS should have limited itself to asking itself the questions at points 3 and 6 in the 23 April 2023

directions. If that is the argument, then the PATS asked (and answered) question 6 in relation to loss of libido, and I have decided that it did not err in law in so doing. On the appellant's case it ought not to have also asked itself question 7 in relation to loss of libido, but I do not identify any material error of law in its having done so. The PATS's analysis in paragraph 78 of its decision on the face of it wrapped questions 6 and 7 together and looked at service factors outside of smoke exposure. The directions did not ask the same question(s) in relation to severe muscle and joint pain, but there is no ground of appeal before me concerning that claimed for condition. In any event the PATS also addressed the reasonable doubt issue in relation the muscle and joint pain and whether they were related to service. And the PATS did not answer questions 3 and 4 in relation to GWI, but that is because it decided the appellant did not have GWI, and so those questions did not apply.

76. This then left an argument, as I understood it, about whether the PATS had been limited by directions (at page 954 of the PATS bundle) not to consider wider service related factors. This seemed a somewhat arid argument. The PATS directed itself on the directions dated 23 April 2023. No error of law challenge was or is made about those directions. On their face those directions only gave smoke exposure as one particular potential service cause (at questions 4 and 7) and did not restrict consideration to service causes more generally (see questions 3 and 6). And, as I have said above, no material error of law arose from the PATS looking at smoke exposure as part of all potential service related causes more generally.

Conclusion

77. For the reasons given above, the PATS made no material error of law in its decision of 13 October 2023 and the appeal is, accordingly, dismissed.

Stewart Wright
Judge of the Upper Tribunal

Authorised for issue on 25 June 2025