

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CAF/1897/2016

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. By consent, the decision of the First-tier Tribunal dated 15 March 2016 is set aside and there is substituted a decision that the claimant is entitled to a lump sum award under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) at 180% of a tariff level 13 award.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with permission granted by the First-tier Tribunal, against a decision of the First-tier Tribunal dated 15 March 2016, whereby it allowed the claimant's appeal against a decision of the Secretary of State refusing to make any award under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) but, having found that the claimant satisfied the terms of the descriptor for item 55 in Table 2 in Schedule 3 in respect of both his hands and his feet, made a single award at tariff level 13.

2. At the material time, item 55 was in the following terms –

“Non-freezing cold injury which has caused or is expected to cause neuropathic pain and significant functional limitation or restriction at 26 weeks, with substantial recovery beyond that date”

An award in respect of an injury described by that descriptor is made at tariff level 13. However, a footnote to the descriptor provided –

“A descriptor for a non-freezing cold injury refers to either unilateral or bilateral damage to the upper or lower extremities”

It is common ground that the First-tier Tribunal erred in law in making one award at tariff level 13, given the word “either” in that footnote.

3. It was originally submitted to the Upper Tribunal by both parties that the First-tier Tribunal should have made two awards at tariff level 13, one in respect of the injuries to the claimant's hands and one in respect of the injuries to his feet, on the basis that the terms of the descriptor for item 55 were satisfied twice. However, it is now accepted by both parties that, in those circumstances, article 22 applies. Article 22 provides –

“22.—(1) This article applies where either paragraph (2) or (3) is satisfied.

(2) This paragraph applies where—

- (a) one injury or more which is described by more than one descriptor is sustained in or arises from one incident;
- (b) the descriptors of the injury or injuries relate to one or more body zones;
- (c) the relevant percentage for the purpose of calculating the amount of a guaranteed income payment is less than 100%; and

- (d) the descriptor or descriptors which give rise to an entitlement within tariff levels 1 to 11 are in a single body zone.
- (3) This paragraph applies where there are no injuries described by a descriptor which give rise to an entitlement within tariff levels 1 to 11.
- (4) Subject to article 17(2) the amount payable is to be calculated as follows—
 - (a) for the first descriptor, 100% of the relevant amount applicable to that descriptor;
 - (b) for the second descriptor, 80% of the relevant amount applicable to that descriptor;
 - (c) for the third descriptor, 60% of the relevant amount applicable to that descriptor;
 - (d) for the fourth descriptor, 40% of the relevant amount applicable to that descriptor;
 - (e) for the fifth and subsequent descriptors, 20% of the relevant amount applicable to each descriptor.
- (5) In this article—
 - (a) “first descriptor” means the descriptor in relation to which the highest relevant amount would, but for this article, be payable,
 - (b) where the same amount is payable for each of two descriptors one is the “first descriptor” and the other is to be the “second descriptor”,and references to the second, third, fourth, fifth descriptor and subsequent descriptors are to be construed accordingly.”

4. Paragraph (3) is very poorly drafted but it seems reasonably plain from its context that it is intended to apply where paragraph (2)(a) – one injury or more which is described by more than one descriptor is sustained in or arises from one incident – is satisfied and none of *those* descriptors is within tariff levels 1 to 11.

5. In those circumstances, it is now common ground that the proper decision in this case is one award at 180% of a tariff level 13 award. I agree.

6. The 2011 Order has been amended with effect from 31 May 2016 by the Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2016 (SI 2016/557), article 3(d) of which substituted a new item 55 of Table 2 in Schedule 3. I express no view as to the effect of that amendment.

7. When granting permission to appeal, the Temporary Chamber President said that the Upper Tribunal’s guidance on the extent to which (if at all) it is appropriate when interpreting descriptors to have regard to IMEG recommendations and suchlike would be helpful. However, as neither party has addressed that issue in their submissions in this case, I do not consider that I should express a view on it either.

Mark Rowland
5 May 2017