[2010] AACR 19

(*R (Viggers) v Secretary of State for Defence* [2009] EWCA 1321)

CA (Ward, Etherton, Sullivan LLJ)
10 November 2009

Tribunal practice – adequacy of reasons – assessment of war disablement – whether tribunal should explain why its percentage assessment for a past period is substantially lower than that for period immediately following

The claimant suffered severe injuries in an accident while serving in the Army in 1971. He was discharged from service in 1976. Shortly afterwards he was wrongly advised that he was ineligible for a war disablement pension. He eventually claimed successfully in May 1995 and an assessment of 40 per cent disablement was made in February 1996 with effect from May 1995. From December 1999, following an appeal, the overall assessment was increased to 60 per cent and in August 2004 it was increased to 70 per cent with effect from May 2004. In March 2004 a tribunal decided that he was entitled to the pension back to the date of discharge because of the incorrect information given to him in 1976. In June 2004 the Secretary of State decided that the correct assessment for the period March 1976 to May 1995 was 6–14 per cent. The claimant appealed and in March 2005 a tribunal upheld the Secretary of State's assessment. The claimant then sought judicial review and the Administrative Court quashed the decision ([2006] EWHC 1066 (Admin)). The tribunal that heard the decision in the remitted appeal decided to maintain the award of 6–14 per cent. The appellant again sought judicial review but his application was dismissed. The claimant appealed to the Court of Appeal.

Held, allowing the appeal, that:

1. it is an elementary principle of public law that there should be, so far as is possible, consistency in administrative decisions, and it was plain that the starting point, or perhaps more accurately the end point, for the consideration of the tribunal was the assessment of 40 per cent and absent any explanation of the event that could explain such a leap from 14 per cent to 40 per cent it was not possible to understand why it reached the decision it did (paragraphs 22, 23 and 30);

2. if the members of the tribunal, which included a medical expert, remained of the view that the proper assessment in the light of all the evidence adduced before it was 6–14 per cent for the period 1976 to 1995, then it would have been sufficient for the tribunal to say that, having had regard to and having taken into account the 40 per cent assessment, nonetheless in the light of all the evidence before it and its members' expertise it concluded that the assessment should be 6–14 per cent for the earlier period (paragraph 26);

3. it would not be appropriate for either side to adduce evidence to attempt to undermine the finding of 40 per cent disability for 1995/1996, as that assessment was final under article 42(14) of the 2006 Order (paragraph 27);

4. it would not be necessary in every case for a first-tier tribunal to take into consideration all assessments following the period in question. The extent to which such assessments are relevant and, if so, the weight to be attributed to them will be matters for the tribunal's expert judgment, but an assessment for the day after the period ended was plainly relevant and an explanation was required if it was not to be treated as the appropriate end point (paragraph 31).

The Court quashed the decision and remitted the case to the First-tier Tribunal for rehearing.

DECISION OF THE COURT OF APPEAL

Miss Kerry Bretherton (instructed by Messrs Linder Myers) appeared on behalf of the appellant.

Mr Daniel Beard (instructed by Treasury Solicitor) appeared on behalf of the respondent.

Judgment

LORD JUSTICE WARD:

1. This is an appeal against the order made by HHJ Curran QC, sitting as a deputy judge of the High Court on 18 December 2008, when he dismissed the application made by Mr Robert Viggers for judicial review of the decision of the pensions appeal tribunal dated 12 April 2007 by which it was held that the appellant's level of disablement should be in the 6–14 per cent bracket for the period from 27 March 1976 to 22 May 1995. Permission to appeal was granted by Hooper LJ.

2. The background is this. In May 1971, when 19 years old, the appellant joined the army, serving with the Lifeguards in the Household Cavalry. In 1973 he was sent with his unit on exercises in Canada. In the early hours of 19 July of that year he was walking back to his barracks when he was struck by a motor vehicle driven by some other British soldier. He suffered severe injuries. From a medical report prepared by the Army Senior Specialist in Surgery at the time I read that he had no recollection of the accident itself and awoke in hospital where he slipped between consciousness and unconsciousness. He had a compound fracture of the upper left femur with extensive peroneal and buttock wounds. There had been massive haemorrhage and no peripheral pulses had been felt in the leg distally on admission. After resuscitation, extensive debridement had to be carried out and his leg was placed on a skeletal traction with a Steinmann pin through the tibia. His wounds became grossly contaminated. He was transferred to the Army hospital in Woolwich on 17 August 1973. The buttock wound failed to heal properly and he was placed in a hip spica. By early October there were signs of clinical union of the fracture but unfortunately this re-fractured on 15 October 1973. The spica was therefore reapplied and maintained until January 1974 by which time the fracture appeared to be solid and the wound virtually healed. He was mobilised on 28 January 1974 and transferred to a rehabilitation unit in Chessington. He continued slow progress and was eventually discharged on 4 June 1974. His injuries had left him with a leg shortened by about three quarters of an inch. He had a stiff knee and hip and there were already signs of degenerative changes in the knee with a left leg discrepancy which meant he was likely to experience back pain in the long term. He remained in the Army but found life difficult and in March 1976 he was discharged.

3. Shortly after his discharge, he inquired of his local Department of Health and Social Security whether he was entitled to a war pension since the injuries he had suffered arose whilst he was in service, but he was wrongly informed that he was ineligible as he was off duty at the actual time of the accident.

4. Having been told that he had "no chance", he accepted that advice and it was not until May 1995, when he was told by the Royal British Legion that he indeed might be entitled to a war pension, that he, accordingly, applied under the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 (SI 1983/883), now replaced by a comparable order promulgated in 2006, the SPO (SI 2006/606). In summary this provides that a degree of disablement due to service of a member of the armed forces shall be assessed by making a comparison between the condition of the member as so disabled and the condition of a normal healthy person of the same age and sex, without taking into account the earning capacity of the member in his disabled condition and without taking into account the effect of any individual factors or extraneous circumstances. The degree of disablement is certified by way of a percentage, total disablement being represented by 100 per cent and lesser degrees of disablement being assessed in bands each reducing by 10 per cent. Assessments at 20 per cent or more are awarded retirement pay or a pension at rates set out in the SPO. If, however, the assessment of disablement is less than 20 per cent, then the serviceman is only awarded a

gratuity: that is to say a lump sum payment, depending upon whether his disablement falls within the bracket of 1–5 per cent or 6–14 per cent or 15–19 per cent.

5. In Mr Viggers' case an assessment of 40 per cent disabled was made on 24 February 1996 with effect from 23 May 1995 based upon four features of his disability: being the head injury, the fracture to the left femur, the arthritis to the left knee and dysthymic disorder. We do not have a clear definition of dysthymia. It is, as I understand it, a milder but persistent form of chronic depression characterised by changes in appetite, sleep, energy levels and ability to concentrate.

6. In November 1999 the pensions appeal tribunal determined that the appellant's obesity was not attributable to military service but nonetheless it arose during service and had been aggravated by service. On 6 December 1999 the overall assessment was increased to 60 per cent to take account of that obesity and osteoarthritis which was appearing in his left hip.

7. By 2004 the appellant had begun to suffer arthritis in the right knee and a chronic strain to the left ankle, with the result that on 26 August 2004 the assessment was increased to 70 per cent with effect from 4 May 2004. By 2004 the appellant was pressing the Veterans Agency, which despite its name is no more than an executive agency of the Ministry of Defence formerly known as the War Pensions Agency, for his entitlement to be backdated to the date of his discharge from the Army. The Secretary of State refused that request, primarily on the ground that there was no corroboration of the claimant's version of events, a stand subsequently criticised by the pensions appeal tribunal. It needed an appeal to the tribunal to establish that entitlement, the tribunal holding on 31 March 2004 that the appellant had discharged the burden of proving that he was incorrectly informed in 1976 that he would not be eligible for such a pension.

8. On 17 June 2004 the Veterans Agency determined that:

> "The correct assessment of your accepted conditions fractured left femur, osteoarthritis left knee, Dysthemic Disorder, and head injury (1973) for the period from 27th March 1976 to 22nd May 1995 is 6-14 per cent. This takes account of the fact that the osteoarthritis left knee only became manifest in 1997 and the Dysthemic Disorder was not manifest until 1993."

9. He was accordingly awarded a gratuity of £4,422. The appellant appealed that determination. He also appealed the assessment of 70 per cent disablement made on 26 August 2004, as I have already set out. On 18 March 2005 the pensions appeal tribunal upheld the Secretary of State's assessment that the level of disablement for the period 1996 to 1995 be assessed at 6–14 per cent, and with regard to the level of disablement from May 2004 to March 2008 this was reduced from 70 per cent to 40 per cent.

10. The appellant then sought a judicial review of both those decisions and succeeded before Crane J on 26 April 2006 ([2006] EWHC 1066 (Admin)). Crane J held that the reasons for the latter decision, the reduction to 40 per cent, were not only very brief but wholly inadequate. As to the former decision, that had to be quashed essentially for these reasons. I quote from [26] to [28] of that judgment:

> "26. If one goes back to the reasons given by the Tribunal there is nothing in the reasoning about the physical condition. If they accepted that there was a measure of physical disablement then that should at least have been recorded. It was an issue before the Tribunal
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> 27. What is more important is that the reasons given, which all relate to the mental condition, leave it unclear whether the Tribunal were accepting some measure of depressive condition or not. The implication of the penultimate sentence, 'we find this type of conduct inconsistent with any significant depressive condition', is that they did not accept any significant depressive condition, but they did not say so. There is no indication why they rejected the view of the VAMS [Veterans Agency Medical Service] that there was some depressive condition.
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> 28. Apart from that, they were, if one stands back in relation to the two decisions, finding that the 6 to 14 per condition applied up to May 1995 despite the fact that the initial and unchallenged assessment of disablement from that date was 40 per cent. It is true that that 40 per cent assessment was not directly in question before the Tribunal. Nevertheless this was not a straightforward case and the claimant was entitled to know what view was being taken of his degree of disablement prior to May 1995 and in the later period for the period 2004 to 2008. Again there is no indication as to whether the medical member's expertise was relied on as against VAMS."

Commenting on that judgment the Secretary of State noted "the requirement for the tribunal to provide full reasoning for its decision in this remitted appeal".

11. In that appeal the pensions appeal tribunal decided on 12 April 2007 to maintain the previous interim award of 6–14 per cent. I have omitted to give detail of the reduction from 70 per cent to 40 per cent, which does not directly arise in this appeal. I add in parenthesis simply that it has been accepted by the Secretary of State that that decision should now stand. So, concentrating on the interim award of 6–14 per cent from 1976 to 1995, the tribunal dealt with that in this way. They recorded having heard the appellant in person, his representative and two of his witnesses. They said they had considered the statement of case and the evidence produced at the hearing. They took into account the opinion of the medical services dated August 2004. In paragraph 9 they said this:

> "The appellant's case is that since discharge from Service at the end of the period now under consideration his physical condition (largely as to mobility) and his psychological wellbeing were subject to a gradual deterioration. This was borne out by his witnesses. But the evidence was equally clear that this was a gradual almost imperceptible, change. We accept this evidence. He told us of his working history after Service and his social and leisure activities during the relevant time. This evidence and, in particular, the evidence of the witness Mr Radford, gave us a picture of the Appellant following good employment much of the time, enjoying his hobbies and leisure interests among with a reasonable social life."

12. Then in paragraph 10 they accepted as persuasive and compelling evidence, which they regarded to be particularly relevant to the issues arising on the appeal, various categories of material placed before them, the first being service medical records, secondly, the release medical examination on discharge in March 1976 when he made no specific complaint except

that the left knee gives him occasional trouble. There was no evidence of his mental capacity or emotional stability being impaired. On the contrary it was recorded as apparently normal. The third category of evidence was the appellant's employment record. Fourthly, there was a report of a consultant physician dated 11 May 1973 indicating he had been offered group psychotherapy. Finally, the findings of the board examination in January 1996.

13. And so they reached their conclusions and expressed them in paragraph 11 in these terms:

> "11. In the light of the whole of the evidence we make the following findings in relation to each of the accepted conditions.
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> (a) Head Injury (1973)
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> There is no reference to any head injury in the contemporaneous medical records surrounding the appellant's admission and treatment after the road accident in Canada. The only reference to head injury is in the report of a 'short period of unconsciousness'. The medical records which detailed the Appellant's treatment and rehabilitation between 1973 and 1975 contain no reference to head injury. At Service release the appellant did not complain of any such injury. We find that in 1973 the appellant suffered minor head injury which soon resolved with no residual problems. This accepted condition makes no contribution to our composite assessment.
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> (b) Fracture Left Femur and Osteoarthritis Left Knee.
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> The Appellant made a good recovery from this serious leg injury in Service. The leg remained ¾ of an inch shorter and has interfered with the Appellant's gait. After Service the appellant has followed various employments as outlined above. His mobility has only very gradually deteriorated – and the Appellant's weight problem has played a significant part in that.
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> By the end of the period under consideration the Appellant's hips and lower limbs were subject to stiffness and some pain. According to the Board Medical (11/1/1996) he could walk without undue discomfort distances varying from 200 yards to 1 mile. All in all the Appellant has suffered a moderate disablement arising from these accepted conditions.
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> (c) Dysthymic disorder.
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> On release from service the Appellant's mental condition and psychological were normal. In the years following Service, the Appellant took employment in various responsible positions. He carried on an agreeable social life and indulged his hobby with the Model Railway Club and went on regular canal barge holidays with his friends: (see the evidence of Mr Radford). All in all he had a reasonably full life. In 1993 the Appellant went to the doctors because he was depressed. He has since been treated for his low moods and depression. We find that the condition Dysthymic Disorder has played a small part in the Appellant's life during the years under consideration. It has really only featured with any significance over the last few years of the period. In these circumstances, this accepted condition makes a moderate contribution to the composite assessment."

And so, taking into account the whole of the evidence, they were satisfied that the assessment of 6–14 per cent represented the proper measure of appropriate degree of disablement over the whole of the period under appeal.

14. The appellant then again sought the judicial review of that decision. It was dismissed, as I have said, by HHJ Curran, very broadly for these reasons. He found that Mr Viggers was adopting a contention that the judge himself put forward, which was that to tell an appellant that the evidence of his witnesses is accepted on reconsideration and to accept that a previously rejected medical condition, the dysthymic disorder, had been established by that evidence, but then to fail to explain why the tribunal had not arrived at a different conclusion as to the bracket in which to place the assessment does little to satisfy him the decision is a rational one. But the judge concluded that, although it would have been much better if the tribunal had given a clearer explanation for its reasons for making an assessment which placed the case in the same bracket as it had been left by the previous tribunal, who appeared to discount the dysthymic disorder completely, nonetheless that was a conclusion to which they were entitled to come.

15. Essentially, when one looked at the state of affairs overall there was evidence of little ill effect so far as the physical injuries are concerned, and the finding of depression was only significant over the last few years of the period. And thus the judge concluded that making all allowance for the evidence of Mr Viggers and Mr Perrat, that was a finding open to the tribunal on the whole of the evidence, even though another tribunal might have come to a different conclusion. Measures of percentages were not a scientific exercise. It was a matter of judgment on the evidence they heard. It was a decision the tribunal were entitled to reach.

16. In her written submissions Miss Kerry Bretherton, for the appellant, submitted firstly, and this has not really been the subject of any dispute, that we should focus on the tribunal's decision not that of the judge. Her second and her main point was that it was entirely unclear why the tribunal considered the appropriate assessment to be 6–14 per cent throughout the period in the light of the sudden increase to 40 per cent despite Crane J having directed attention to that very problem. Thirdly, she submitted it was unclear why the tribunal considered that the percentage range of disability was within the same range as was held by the previous tribunal when the two tribunals reached entirely different findings of fact in respect of the dysthymic disorder. Fourthly, the tribunal had failed to address the appellant's evidence that he had suffered for many years without knowing what the problem was. They failed to have regard to the evidence of the appellant and his witness, who had been found by the tribunal in 2004 to be totally honest and careful not to mislead.

17. Mr Daniel Beard, for the Secretary of State for Defence, who has intervened, submits that the tribunal must have been well aware of the assessment of 40 per cent, increasing thereafter, but it was [not] irrational for it to conclude that the appropriate assessment for the preceding period was 6–14 per cent, especially bearing in mind this was a specialist tribunal with a medically qualified member and with whose decision this court should be very slow to interfere. He pointed out that the appellant's condition was deteriorating and it must follow that the level of disability at the end of the period would necessarily be higher than the 6–14 per cent overall conclusion, and of course that it was lower at the beginning of the period. As for the dysthymia, he submitted the tribunal were entitled, on its assessment of the evidence, to conclude that the condition was not as severe or as long-running as the appellant maintained. The decision was, he submitted, therefore sufficiently reasoned and was certainly not irrational.

18. The oral submissions addressed to us have been more narrowly focussed. Miss Bretherton makes as her main point the argument that, absent evidence and a finding of some dramatic deterioration in his condition, then the difference between the 6–14 per cent level and the 40 per cent level has to be explained. That is the more so because of the finding that this is a case of gradual deterioration and there is therefore no evidence of any dramatic or sudden acceleration of the ill effect of his injury.

19. Mr Beard rose valiantly to the challenge as to whether or not it was relevant or irrelevant for the tribunal to pay regard to the 40 per cent assessment from 1995 onwards. He submitted that they did not need to take that 40 per cent figure into account because it was irrelevant in that it was concerned with a period other than the period which was before them. He submitted that their task was limited to the period to which their attention was directed, from 1976 to 1995, and to require them to investigate how and why a different decision had been reached in 1999 would so add to the complexity of their decision-making and would undermine the fairness of the process, with the result it should not be permitted.

20. He drew our attention very properly to the court's approach. There was at the end of the argument perhaps little real dispute between Miss Bretherton and Mr Beard about the court's approach in dealing with reasons. In essence, this court has to be satisfied that the tribunal dealt with the principal issues in dispute before them, that is to say those that were critical to their decision and, having identified those issues, then explained why they had come to their conclusion, so that the persons affected by their judgment, in this case of course the appellant, should know why they found against him and whether in their reasoning there was some flaw in their decision making.

21. Mr Beard also spent time taking us to those authorities, now oft cited in this court beginning with *Cooke v Secretary of State for Social Security* in this court reported at [2001] EWCA Civ 734; [2002] 3 All ER 279 (also as R(DLA) 6/01) and paragraph 16 in particular, that being the judgment of Hale LJ as she then was. But as the Baroness Hale of Richmond her Ladyship has since told us in *AH (Sudan) v SSHD* [2007] UKHL 49; [2008] 1 AC 678 at paragraph 30 that, and she was dealing with the decision of that expert tribunal:

> "Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

I of course wholly accept and I hope pay due respect not only to that judgment but to the judgment of this expert panel, one of the members being legally qualified.

22. And so Mr Beard warns us to avoid the charge (which I imagine would never be proved against this particular member of the Court of Appeal), namely to avoid "exegetal sophistication" or indeed any sophistication because I regard this case as fairly plain and obvious. It is not in dispute that an assessment of 40 per cent was made by the appropriate panel in 1996, and that assessment was not reviewed by the Secretary of State. It is elementary for the principle of public law that there should be, so far as is possible, consistency in administrative decisions. It seems to me therefore to be plain that the starting point, or perhaps more accurately the end point for the consideration of the tribunal in this case was that assessment of 40 per cent.

I do not say that they were bound by it. There was some debate erroneously started by me, as I shamefully admit, as to the effect of regulation 42(14) of the Service Pensions Order which provides that:

> "The degree of disablement certified under this article shall be the degree of disablement for any purposes of any award made under this Order."

And I speculated whether that had some binding effect. On reflection I do not believe it does. What it is saying is that the degree of disablement certified is binding for the purpose of deciding which of the several awards set out in Part 2 of the order are appropriate to the awards in the particular case.

23. Thus, if the tribunal looking at the 1976 to 1995 period were conscientiously to conclude that the degree of disability would never have matched the 40 per cent, or, bearing in mind that 40 per cent is spread over a period, within a degree or two of 40 per cent, it was not precluded from saying so. But if it did come to such a conclusion it behoved it to spell out precisely why it was driven to disagree with the earlier assessment. There is no hint of any such reasoning in this decision and thus one is faced with the extraordinary position that at the end of this 19 years of assessment the level, which may have gone up and may have gone down, remained on average at 6–14 per cent, yet the following day it would have been at or about 40 per cent. That was the very error identified by Crane J and it has not been explained at all. I simply do not understand how there can be that disparity given that their apparent conclusions are for a gradual increase in mobility and a moderate degree of psychiatric or psychological impairment, but only over the very last few years of the period. There is lacking in that judgment any explanation of the event, the dramatic event, to use Miss Bretherton's terms, that could explain such a leap from 14 per cent to 40 per cent. Absent that explanation, I do not understand why they have reached the decision they have and for that reason I would quash their decision and remit the decision back to the pensions appeal tribunal, [or] whatever level of tribunal now takes its place in the brave new world of [Carnwath] LJ.

24. As for the other grounds advanced by Miss Bretherton, although I see their force, I do not need to resolve them. I am inclined to think that they are misplaced. Much of her submission relates to evidence which it was within the power of the tribunal to accept or reject and upon which they were entitled to place such weight as they saw fit. But the decision was not properly reasoned and that is enough to allow the appeal.

LORD JUSTICE ETHERTON:

25. I agree with the order proposed by Ward LJ, but will add a few words on the first ground of appeal, namely whether the pensions appeal tribunal (the tribunal) when assessing disability for the period 1976 to 1995 at 6–14 per cent should have taken, and did take, into account that in 1996 the appellant was assessed as 40 per cent disabled, with the assessment backdated to run from 23 May 1995. The effect of Article 42(14) of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 was that, subject to any review by the Secretary of State, judicial review or other appeal, the 40 per cent assessment was final in respect of the period from 23 May 1995 to the date of the 1996 assessment. That assessment for 1995/1996 was plainly relevant to the assessment for the earlier period 1976 to 1995. It was in that respect no different from any other relevant evidence for the period after 1995 which might throw some light on the level of disability for the earlier period.

26. Accordingly, since an assessment of 6–14 per cent for the earlier period appears to throw up a discrepancy or inconsistency with the assessment of 40 per cent for 1995/1996, that was a matter to which the tribunal should have had regard. If the tribunal was satisfied that, notwithstanding that apparent discrepancy, its assessment of 6–14 per cent should remain, it should have explained its view. The discrepancy does not mean that the tribunal was plainly wrong in its assessment of the earlier period. If its members, which included a medical expert, remained of the view that the proper assessment in the light of all the evidence adduced before it was 6–14 per cent for the period 1976 to 1995, then it would have been sufficient for the tribunal to say that, having had regard to and having taken into account the 40 per cent assessment, nonetheless in the light of all the evidence before it and its members' expertise it concluded that the assessment should be that of 6–14 per cent for the earlier period.

27. Furthermore, it would not be appropriate for either side to adduce evidence to attempt to undermine the finding of 40 per cent disability for 1995/1996. That assessment is, as I have said, final under article 42(14) of the 2006 Order.

28. In this particular case, it is not at all clear that the tribunal took any account of the 40 per cent assessment for 1995/1996. It did not explain why, notwithstanding that assessment, it considered that the appropriate assessment for 1976 to 1995 was the much lower average figure of 6–14 per cent, Accordingly, for that reason, I would allow this appeal.

LORD JUSTICE SULLIVAN:

29. I agree with both judgments and add a few words of my own out of deference to the submissions of Miss Bretherton and Mr Beard. The tribunal was required to have regard to all relevant considerations when reaching its conclusion as to what was the appropriate assessment of the appellant's degree of disablement for the period from 27 March 1976 to 22 May 1995. The assessment in February 1996, backdated to 23 May 1995, that the appellant was 40 per cent disabled was clearly a relevant consideration which the tribunal should have taken into account. I say that the assessment of 40 per cent was clearly relevant because, as a matter of common sense, an assessment of the extent of the appellant's disablement for the period beginning on the day after the end of the period in issue before the tribunal could not rationally have been dismissed as irrelevant in the absence of any evidence of a significant change of circumstances between 22 and 23 May 1995. That does not mean that the tribunal was bound to accept the 40 per cent figure as the appropriate assessment immediately upon exploration of the period in question. The tribunal was required to use its own expertise, including that of the medical member, when determining the appropriate assessment for the period in question.

30. However, bearing in mind the need for consistency in administrative decision-making, if the tribunal was going to depart from the 40 per cent assessment as the appropriate end point it had to explain why in the reasons for its decision. Looking at the reasons given by the tribunal for its decision in the present case, it does not appear, as Mr Beard accepted on behalf of the Secretary of State, that the tribunal did take account of the fact that there was an assessment of 40 per cent backdated to 23 May 1995. If the tribunal did take account of that factor, certainly there is no explanation as to how the tribunal reconciled its assessment of 6–14 per cent for the period in question with the 40 per cent assessment for the period starting immediately after the end of the period with which it was concerned.

31. I would emphasise that this conclusion does not mean that in every case it would be necessary for first-tier tribunals to take into consideration all assessments following the period in question. The extent to which such assessments are relevant and, if so, the weight to be attributed to them will be matters for the tribunal's expert judgment, but an assessment for the day after the period ended was plainly relevant and an explanation was required if it was not to be treated as the appropriate end point.

32. I too therefore would allow the appeal on the twin bases that the tribunal either failed to have regard to a material consideration and/or failed to give adequate reasons for its decision.

Order: Appeal allowed