

Ombudsman's Determination

Applicant: Mr M
Scheme: Armed Forces Pension Scheme 2005 (**AFPS 05**)
Respondent: Veterans UK

Outcome

1. I do not uphold Mr M's complaint and no further action is required by Veterans UK.

Complaint summary

2. Mr M has complained that he has not been awarded the appropriate tier of ill health retirement benefits.

Background information, including submissions from the parties

Background

3. Mr M was medically discharged from the Army in 2014. He was awarded Tier 1 ill health retirement benefits; that is, a preserved pension for payment at his normal retirement age and an immediate lump sum.
4. At the time of Mr M's discharge, the relevant provisions were contained in:-
 - The Armed Forces Pension Scheme Order 2005 (SI2005/438) (as amended) (**AFPS 05 Order**).
 - The Armed Forces Early Departure Payments Scheme Order 2005 (SI2005/437) (as amended) (**EDPS Order 05**)¹.
5. Three tiers of benefit are available for members of the AFPS 05 who leave the Armed Forces as a result of ill health. The level of benefit is related to the severity of the impact the individual's condition has on their capacity for civilian employment. Tiers 2 and 3 are awarded under the AFPS 05. Tier 2 is awarded to those whose ability to undertake other gainful employment is significantly impaired (Rule D.6). Tier 3 is

¹ The EDPS 05 Order has since been replaced by The Armed Forces Early Departure Payments Scheme Regulations 2014 (SI2014/2328) which came into force with effect from 1 April 2015.

awarded to those who are permanently incapable of any full-time employment (Rule D.5). At the time of Mr M's discharge, Tier 1 was awarded under Article 16 of the EDPS Order to those who were unable to do their service job, but whose ability to undertake other gainful employment was not considered to be significantly impaired. Extracts from the AFPS 05 Order and the EDPS Order are provided in Appendix 2.

6. Mr M was awarded a Personal Independence Payment (**PIP**) in 2017 at the standard rate for both daily living needs and mobility needs.
7. AFPS 05 members who have been awarded Tier 1 or Tier 2 benefits can request a review within five years of their date of discharge (Rule D.8). Mr M requested a review of his award in March 2018. He said his GP had been certifying him as unfit for work since September 2017 and he enclosed copies of correspondence from the rheumatology department he was attending, together with details of his PIP award.
8. Veterans UK obtained a copy of Mr M's GP records and referred his case to one of its medical advisers (**MA**). In September 2018, the MA advised that, in their opinion, the Tier 1 award had been appropriate and there was no medical evidence to support an increase in award. A summary of and extracts from the MA's report and other medical evidence relating to Mr M's case are provided in Appendix 1.
9. Veterans UK wrote to Mr M, on 14 September 2018, declining his request for review. It quoted the advice it had received from its MA.
10. In January 2019, Mr M submitted an appeal. He said:-
 - He was not able to work in the driving trade because of his condition.
 - He suffered flare-ups which lasted months. As a result, employers would not take him on full time or part time. He had been told that companies would not be able to employ someone with his condition because of insurance concerns. He was required to declare his condition when applying for work.
 - Driving and being seated in one position for more than a couple of hours caused him to seize up. This made it impossible for him to climb in and out of the driver's cab or to load and offload goods. This was the case even when he was not suffering from a flare-up. During a flare-up, he was unable to get out of bed.
 - He was constantly fatigued because of lack of sleep.
 - He had contacted The Poppy Factory² to seek help with retraining. They had helped him obtain a coach driver's licence when he had found a company which would employ him as a part-time driver doing small local tours. He had not wanted another driving job but he was getting further into debt and this was the quickest way for him to get back to work.

² The Poppy Factory is a charity which supports veterans in seeking employment.

- He had been medically discharged from the Army because he could no longer continue his trade as a driver. He had been led to believe that he would be awarded Tier 2 benefits and had intended to retrain as a physiotherapist.
 - His condition was not getting any better. During a recent check-up, it was discovered that the toes on his right foot were dislocated, which caused his foot to swell up. He also found it difficult to turn his head. He was only able to work for short periods of the day.
11. Veterans UK obtained further evidence from Mr M's GP and referred his case to an MA. The MA responded, on 30 April 2019, advising that the Tier 1 award remained appropriate. They said the evidence suggested that Mr M's medication was very effective in controlling his condition and he should be able to undertake many occupations, including driving. The MA noted that Mr M's condition could deteriorate over time and there was the possibility that he might develop additional conditions in the future. They suggested that, if there was evidence of deterioration, Mr M could appeal in the future.
12. Veterans UK wrote to Mr M, on 7 May 2019, declining his appeal. It quoted the advice it had received from its MA and said:
- “You have stated that you have found work in the coach driving trade, it is not clear as to whether you continue to be employed in this employment.
- It is the long-term permanent outcome that determines whether this case meets the medical criteria for a tier two award and to date there is no evidence that suggests you [*sic*] condition is permanent.
- It is disappointing that you were led to believe that your discharge would lead to a tier 2 award allowing you to retrain in your second-choice career as a physiotherapist, however the tier awarded is [the] role of the MOD Authority and is based on your ability to achieve gainful employment.”
13. Mr M was informed that he could appeal this decision via the internal dispute resolution procedure (**IDRP**). He submitted an appeal in June 2019. He said his capacity for work had been drastically reduced and he was only able to work part-time. Mr M said he had only been using the gym for mobility work and could no longer afford membership. He said he was no longer able to swim because holding his head out of the water made his spine stiff.
14. Veterans UK sought further advice from the MA who had first reviewed Mr M's case in September 2018. The MA provided an opinion on 14 October 2019. On receipt of the MA's opinion, Mr M's case was reviewed by a Deciding Officer (**DO**). The DO said they had reviewed the evidence relating to Mr M's case and taken account of the MA's opinion, the medical board report at discharge and Mr M's hospital notes. The DO did not uphold Mr M's appeal. They said:

"[Mr M] ... does suffer from Ankylosing Spondylitis, but the symptoms of this condition are treatable with medication and therapy. In his appeal he claims his capacity for work has been drastically reduced and he is only able to work part-time as a result of his condition and associated pain. Since his discharge in 2014 he has had periods of employment as a lorry driver.

A Tier 2 award is made when the evidence supports that the member is likely to have significant functional limitations for working in a civilian role up until normal scheme retirement age, in his case this would be age 65.

The evidence does not support that he would have significant limitations for the next 27 years that prevent him from engaging in a range of employment roles. He has previously responded well to treatment and medication was controlling the symptoms, but his condition flared up again when he stopped taking his medication. His condition is lifelong, but it is a condition that can be managed with both medication and exercise. I am not disputing that he has a condition that does cause him pain and restriction when it flares up but this is a manageable condition and I do not consider it to limit his work capability to reduced hours only. When it flares up appropriate medication and pain relief can be used to get the symptoms under control and medication and regular exercise can keep the symptoms at bay. In his Hospital report it states that the medication ... has improved his symptoms considerably and that he was doing well with this and is not having any side effects. Although this condition is permanent, I do not accept that it will significantly affect his functional capacity continuously for the next 27 years."

Mr M's position

15. Mr M submits:-

- He first started experiencing symptoms whilst serving in Iraq. The medical officer suggested it was Ankylosing Spondylitis. He received treatment in Iraq but did not improve. He was subsequently admitted to a hospital in Germany which specialised in this condition and was diagnosed with Ankylosing Spondylitis. He was eventually transferred to Headley Court³ and received a new medication, which enabled him to return to his unit.
- He found it difficult to progress his career because of the restrictions associated with taking his medication. However, if he attempted to come off the medication, his condition flared up. He only stopped taking his medication when advised to. He also experienced flare-ups if under stress. Eventually, he was put forward for a medical discharge.
- He was informed by the medical officer that, if he accepted medical discharge, he would receive a pension and a "pay-out".

³ The former site of the Defence Medical Rehabilitation Centre.

- At the time of his discharge, he was not provided with information. When he contacted the Army, he was told to speak to “manning records”. He discovered that he had been recorded as having left under normal circumstances. He was subsequently notified that he had been given a Tier 1 award.
- At the time of his discharge, his condition was not improving; it was getting worse.
- He is on constant medication and has to be monitored for this. A recent check-up at his rheumatology department revealed that the toes on his right foot are dislocated. This causes swelling in his foot. He also has a stiff neck and finds turning his head difficult. He is a driver by trade but worries that he has only a limited time in this occupation because his condition is worsening.
- He can no longer work full time and has had to change his trade and his lifestyle. He can now only work part time. Employers are unwilling to offer him full time employment because of his condition. Since he left the Army, only one company has been willing to offer him full time employment. Unfortunately, he had to leave this employment after one year because of flare-ups and being deemed unfit for work by his doctor. He has not worked for the company which had employed him as a coach driver since the end of 2019. He is currently homeless and staying with friends.

Adjudicator’s Opinion

16. Mr M’s complaint was considered by one of our Adjudicators who concluded that no further action was required by Veterans UK. The Adjudicator’s findings are summarised below:-
 - 16.1 Members’ entitlements to benefits when taking early retirement due to ill health were determined by the relevant scheme rules or regulations. The scheme rules or regulations determined the circumstances in which members were eligible for ill health benefits, the conditions which they had to satisfy, and the way in which decisions about ill health benefits had to be taken.
 - 16.2 Mr M’s complaint concerned Veterans UK’s decision not to revise his AFPS 05 award on review under Rule D.8. In his case, the relevant rules were Rules D.5 and D.6, and D.8 in the AFPS 05 Order. The Adjudicator explained that she had referred to both D.5 and D.6 because the Pensions Ombudsman had previously determined that Rule D.5 assisted in the interpretation of Rule D.6, which was relevant to the review under Rule D.8. However, under Rule D.8, because Mr M had been awarded Tier 1 benefits on discharge, the review was limited to considering whether he satisfied the conditions set out in Rule D.6; that is, the conditions for Tier 2 benefits.

- 16.3 In order to be eligible for Tier 2 benefits under Rule D.6/D.8, Mr M would have to have “suffered a breakdown in health as a result of which his capacity for gainful employment is significantly impaired”.
- 16.4 Unlike some public sector pension scheme regulations, the AFPS 05 Order did not include a definition of “gainful employment”. The Pensions Ombudsman had previously determined that gainful employment, for the purposes of Rule D.6, had to include some capacity for full-time employment. This was because Rule D.5 applied if a member had suffered a permanent breakdown in health involving incapacity for any full-time employment. Rule D.6 provided for a lower level of benefits than Rule D.5 and, logically, must be intended to provide benefits in respect of a lower level of impairment. Mr M would not need to be incapable of all full-time employment to qualify for benefits under Rule D.6/D.8.
- 16.5 Nor did the AFPS 05 Order define “significantly impaired”. This too had been considered in previous Determinations. The Pensions Ombudsman had found that significantly impaired must envisage something more than simply being unable to do the full range of jobs previously open to the member. There had to be a significant reduction in Mr M’s employment options such that very many of those roles he would otherwise have been able to consider were no longer viable for him because of his health. This meant considering Mr M’s capacity for employment across the board and not just his capacity for driving jobs.
- 16.6 The decision as to whether Mr M satisfied the conditions for Tier 2 benefits was for Veterans UK (on behalf of the Secretary of State) to make. Before making its decision, Rule D.8 required Veterans UK to have consulted with the Scheme medical adviser as to Mr M’s capacity for gainful employment. Veterans UK was not, however, bound by any advice it received from its MA. It was still expected to reach a decision of its own. That being said, the weight which Veterans UK placed on any evidence relating to Mr M’s case was for it to decide. It was open to Veterans UK to accept the advice of its MA; unless there was good reason for it not to do so. The Adjudicator explained that the kind of things she had in mind were errors or omissions of fact or a misunderstanding of the relevant rules by the MA.
- 16.7 The Adjudicator explained that the MAs themselves did not come within the Pensions Ombudsman’s jurisdiction as far as their medical opinions were concerned. They were answerable to their own professional bodies and the General Medical Council. The Pensions Ombudsman would simply consider whether the MAs had provided sufficient and appropriate advice on which it was reasonable for Veterans UK to rely when making its decision. It was accepted that Veterans UK could only review medical advice from a lay perspective and could not be expected to challenge a medical opinion as such.

- 16.8 Because Veterans UK had decided to accept the advice it received from its MAs, it was appropriate to now review that advice.
- 16.9 The first MA, in September 2018, had advised that Mr M's condition had been well controlled by medication at the time of his discharge and he had worked as a lorry driver until March 2017. They said Mr M had experienced a flare-up as a result of the withdrawal of his medication but had since resumed medication and was reported to be doing extremely well. The MA had said Mr M had demonstrated that he was fit to undertake employment as a lorry driver when on medication and this had only been compromised when the medication was unavailable. They had expressed the view that it would be reasonable to expect Mr M's employment opportunities not to be significantly impaired with continuing specialist support and medication. They had acknowledged that, in the long term, Mr M might need to avoid heavy manual labour, but had thought that reasonable workplace adjustments would accommodate his symptoms.
- 16.10 The Adjudicator said she had not identified any error or omission of fact or misunderstanding of Rule D.6/D.8 which might have required Veterans UK to seek clarification before relying on the report. In her view, its decision to accept the advice it had received from its MA in September 2018 did not amount to maladministration.
- 16.11 In April 2019, Veterans UK had obtained another MA's report. This had referred to a rheumatology report which had said Mr M was doing well on his medication. The MA had advised that the evidence indicated that the biological therapy which Mr M was receiving was very effective in controlling his symptoms. They had expressed the view that Mr M should be able to undertake many occupations, including driving. The MA had acknowledged that Ankylosing Spondylitis could deteriorate over time and suggested that, if this was the case, Mr M could appeal.
- 16.12 The Adjudicator said it was not entirely clear what the MA had meant by Mr M appealing if his condition deteriorated in the future. The option for a review of a Tier 1 award arose only before the fifth anniversary of the day on which the member had become entitled to the award; unless the Secretary of State was prepared to exercise their discretion to extend this timeframe. Mr M, therefore, had had until 2019 to request a review of his Tier 1 award. Thereafter, Mr M's only option was to request the early payment of his preserved pension, under Rule D.7, on the grounds that his condition had deteriorated such that he had suffered a permanent breakdown in health involving incapacity for any full-time employment. This option remained open to Mr M.
- 16.13 However, the Adjudicator was of the view that the MA's reference to a future appeal had not impacted adversely on their advice as to whether a Tier 1 award remained appropriate.

- 16.14 Mr M's case had been further reviewed in October 2019. The same MA who had provided a report in 2018 had reviewed his case again. This was perhaps less than ideal. It was generally preferable for a different MA to review a case on appeal to give a fresh pair of eyes. However, the Adjudicator noted that the MA had had the benefit of a report from Mr M's rheumatologist, Dr Mackay.
- 16.15 Dr Mackay had explained that Mr M fell into the worse 30% of those whom she looked after. Dr Mackay had also said that Mr M was doing well with his medication and his Ankylosing Spondylitis was relatively under control, but that he had additional pain due to mechanical problems in his back. She had explained that, even with biological therapy such as Mr M was receiving, most people with Ankylosing Spondylosis experienced symptoms and flare-ups; it was just that these were less severe than they would be without the therapy.
- 16.16 Veterans UK's MA had advised that Mr M had had a good response to medication but relapsed if this was omitted. They had advised that, during remission, Mr M would be able to consider a wide range of occupations. The MA had noted Mr M's mechanical back pain and had suggested that this could be managed by an orthopaedic referral. They had concluded that, at the time of his discharge, Mr M had had minimal functional limitation and had been able to work as a lorry driver. With regard to the position in 2019, the MA had advised that clinical remission should be maintained while Mr M's medication was regular and accompanied by appropriate exercise. They had acknowledged that flare-ups could occur but thought these could be accommodated by workplace adjustments.
- 16.17 The Adjudicator said she had not identified any errors or omissions of fact or misunderstanding of Rule D.6/D.8 on the part of the MA in the later review. Their reference to Dr Mackay's report appeared to be accurate and the view expressed was not inconsistent with Dr Mackay's explanation of Mr M's situation. In her view, Veterans UK's decision to accept its MA's advice in Mr M's case would not be considered maladministration.
17. Mr M did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr M provided some further comments which are summarised below. I have considered Mr M's comments but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

Mr M's further comments

18. Mr M submits:-

- His medical discharge was not handled correctly and he was led to believe that he would be awarded Tier 2 benefits.

- When his condition flares up, it not only affects his physical health but also his mental health. He has had flare-ups of his iritis and uveitis which have affected his vision. He suffers many other side effects, such as irritable bowel syndrome, skin conditions and pains in his elbows, forearms and both hands.
- He had a flare-up at the beginning of 2020 and was signed off work by his GP. When this eased off and he was able to walk again, he came to the conclusion that he would be unable to undertake any driving or labouring jobs, including factory jobs involving repetitive movements. He is unable to undertake office work because this involves being static for long periods of time. He has no qualifications other than for driving and labouring.
- Since leaving the Army, he has only been able to get agency work because of his condition. When he declares his condition, no-one will employ him.
- His condition is not going to get better; it will only deteriorate. He is concerned because this is his last opportunity to appeal and he worries about the position in five or ten years' time when he believes he will be in a wheelchair.

Ombudsman's decision

19. There are two initial questions to be answered when a member of the AFPS 05 who has been awarded Tier 1 benefits requests a review under Rule D.8. These relate to a breakdown in health as a result of which the member's capacity for gainful employment is significantly impaired. The questions are:-
 - Had the member suffered such a breakdown at the time when he became entitled to payment of the lump sum under article 16, or
 - Has the condition by virtue of which he became so entitled deteriorated so that he has suffered such a breakdown later?
20. In order to answer these questions, Veterans UK, on behalf of the Secretary of State, must consult with the Scheme's MA before coming to a decision.
21. Veterans UK consulted the Scheme's MA both at the time of Mr M's request for a review and on his appeal. The advice from the MA was that Mr M's Tier 1 award had been appropriate at the time of his discharge and remained appropriate.
22. It may help if I explain that it is not my role to review the medical evidence and come to a decision of my own as to Mr M's eligibility for a higher tier of benefits under the AFPS 05 Rules. I am primarily concerned with the decision-making process which Veterans UK has undertaken. The issues I consider include: whether the AFPS 05 Rules have been correctly applied; whether appropriate evidence has been obtained and considered; and whether Veterans UK's decision is supported by that evidence.
23. I will look at the medical (and other) evidence in order to decide whether it supports Veterans UK's decision. However, the weight which is attached to any of the

evidence is for Veterans UK to decide. It is open to Veterans UK to accept the opinions provided by the Scheme MAs; unless there is a good reason why it should not do so, or should not do so without first seeking clarification. The kind of things I have in mind are an error or omission of fact or a misunderstanding of the AFPS 05 Rules by the MA. If I find that the decision-making process was flawed, I will remit the decision to Veterans UK for it to reconsider.

24. In Mr M's case, Veterans UK accepted the opinion of its MA. I agree with my Adjudicator, that there is no evidence of an error or omission of fact by the MA. I am satisfied that the MA understood what was required under Rule D.8 and answered the relevant questions. Mr M had provided a letter from his treating specialist, Dr Mackay. I do not find that the opinion expressed by the MA concerning Mr M's capacity for employment at the relevant times was inconsistent with the information supplied by Dr Mackay. There was no reason why Veterans UK should not have relied on its MA's opinion in reaching its decision in Mr M's case.
25. Mr M has provided information about his current circumstances. He has described the effect which his condition has on his physical and mental health. He has explained that, following a flare-up of his condition in 2020, he feels he is no longer able to work; particularly in driving or labouring jobs.
26. I am in no doubt that Mr M's condition is having a serious impact on his life; not just on his capacity for employment. However, his case very much rests on the expectations for his capacity to work at particular times: (i) when he was first discharged from the Army; and (ii) at the time of the D.8 review. The advice from the Scheme's MA was that, at those times, Mr M's capacity for gainful employment was not significantly impaired. In order to uphold Mr M's complaint, I would have to find that Veterans UK's decision to accept on this advice amounted to maladministration. I have explained why I do not find that to be the case. Therefore, I do not uphold Mr M's complaint.
27. During the investigation of his complaint, Mr M proposed to seek updated information from Dr Mackay. It was explained to him that this would not assist me in determining his complaint because my Determination would be based on the evidence available at the time Veterans UK made its decision. However, Mr M still has the option to apply for the early payment of his preserved pension if he is now incapacitated for any full-time employment. If Mr M decides to submit such an application, up to date information from Dr Mackay would assist Veterans UK in making a decision about this.

Anthony Arter
Pensions Ombudsman

9 June 2022

Appendix 1

Medical evidence

28. The MA's report dated 5 September 2018

The MA referred to Mr M's diagnosis of Ankylosing Spondylitis in 2009 and noted that medication had resulted in a significant improvement in his symptoms. They said the Tier 1 award had been appropriate in view of the satisfactory response to medication, which Mr M would need indefinitely. The MA noted Mr M's PIP award and an Employment and Support Allowance (**ESA**) which was due to cease in September 2018. They referred to the GP's records and said Mr M appeared to have been well and managing to work as a lorry driver until March 2017 when he experienced a flare up of his symptoms. The MA noted that this had been precipitated by Mr M not taking his medication and that this had been restarted following a consultation with a rheumatologist in October 2017. They commented that the consultant had noted that Mr M was working as a lorry driver. The MA said Mr M's next review had been in March 2018 and he was noted as doing extremely well on the medication.

The MA said:

"At the time of discharge, [Mr M's] underlying medical condition was well-controlled with appropriate medication. He remained in employment as a lorry driver until Mar 2017 when he experienced a flare up of his symptoms on withdrawal of medication. This resulted in a prolonged period of incapacity until medication could be restarted. Treatment with ... and regular specialist consultations are now taking place and [Mr M] is reported as 'doing extremely well'.

I am therefore of the opinion that the original Tier 1 recommendation was appropriate in respect of the PC and there is no medical evidence to support an increase in the award. [Mr M] has demonstrated that, on medication, he was fit for his chosen career as a lorry driver and that this was only compromised by his inability to access medication. With appropriate continuing specialist advice, medication and specialist physiotherapy, it is reasonable to expect that his employment opportunities will not be significantly impaired on the balance of probabilities standard of proof. In the long term he may need to avoid heavy manual work although reasonable workplace adjustments should allow any joint symptoms to be accommodated."

29. The MA's report dated 30 April 2019

The MA referred to a letter from the rheumatology department dated 19 November 2018. They quoted this as follows:

"He is doing well on the above medications. Blood tests have been fine, there have been no side effects to the medication and BASDAI ... is good. [BASDAI is a scoring system for judging the activity of the ankylosing spondylitis.] He

does have some ongoing neck stiffness, but he is still using the gym and swimming on a regular basis. He was seen by our Specialist AS Physiotherapist who felt that his symptoms were more mechanical than inflammatory.”

The MA said it had been noted, on 27 March 2018, that Mr M was doing extremely well with his medication. They concluded:

“The evidence would therefore suggest that the biological therapy is very effective in controlling his condition. He should therefore be able to undertake many occupations including driving. I would therefore advise that a Tier 1 award remains appropriate. Ankylosing Spondylitis can deteriorate over time and there is the possibility of developing additional autoimmune conditions in the future. Therefore, if there is evidence of deterioration, [Mr M] can appeal this decision in the future.”

30. Dr Mackay, Consultant Rheumatologist, 13 August 2019

In an open letter, Dr Mackay confirmed Mr M’s diagnosis of Ankylosing Spondylitis and explained that this was a long term inflammatory and permanent condition. She explained that people with inflammatory conditions experienced variety in the severity of their symptoms and flares were common. Dr Mackay said around 30% of the people she looked after who had Ankylosing Spondylitis were given biological therapy and Mr M was one of these. She said this had helped control his underlying inflammation and improved his symptoms considerably. She said Mr M was doing well with the medication and was not having any side effects. Dr Mackay explained that the necessity of taking the medication meant that Mr M was in the worse 30% of those people with Ankylosing Spondylitis whom she looked after.

Dr Mackay explained that people with Ankylosing Spondylitis could develop osteoarthritis and mechanical problems as they aged. She said, if someone with Ankylosing Spondylitis had fusion in their spine, they would also suffer from mechanical pain. Dr Mackay referred to the comment by the physiotherapist that Mr M had both Ankylosing Spondylitis and mechanical problems in his back. She explained that this did not mean that Mr M did not have Ankylosing Spondylitis; it meant that his Ankylosing Spondylitis was relatively under control with his medication and he also had additional pain due to mechanical problems.

Dr Mackay explained that, even when taking biological therapies to control their Ankylosing Spondylitis, most people experienced flares and most had symptoms from their Ankylosing Spondylitis; the symptoms were just less severe than they would be without the biological therapy.

31. The MA’s report dated 14 October 2019

The MA said they had reviewed Mr M’s medical board report. They said Mr M had been recommended for medical discharge on account of Ankylosing Spondylitis. The MA said the medical board had referred to back pain, but as a symptom of Mr M’s

Ankylosing Spondylitis; not as a separate clinical condition. They said the board had noted a dramatic and beneficial response to medication and an “equally moderately severe relapse” when Mr M decided not to take the medication. The MA noted that Mr M had failed to attend a review in June 2014 and suggested that this meant his symptoms were under control.

The MA said they had reviewed Mr M’s case in September 2018 and summarised their findings. They said another MA had reviewed his case in April 2019 and summarised that MA’s opinion. The MA said Mr M’s case was typical of Ankylosing Spondylitis with a good symptomatic response to medication but a relapse if this was omitted. They advised that, during remission, it would be expected that Mr M would be able to consider a wide range of occupations with appropriate minor adjustments relating to heavy manual work and the facility to stretch and exercise regularly.

The MA said it was recognised that Ankylosing Spondylitis was a lifelong condition, but one which could be well controlled with new medication and regular exercise. They noted that, in some cases, the condition progressively deteriorates but, in others, might “burn itself out”. The MA said it was reasonable for Mr M to avoid strenuous exercise but regular exercise and stretching were essential to maintain mobility. They said there was no evidence that part-time work was preferable to full-time employment. The MA commented that, if mechanical back pain was an additional factor in Mr M’s case, it could be managed by appropriate orthopaedic referral. They commented that compliance with medication and maintaining physical activity should normally control the symptoms of Ankylosing Spondylitis.

The MA referred to Dr Mackay’s letter and said that it gave a useful summary of Ankylosing Spondylitis. They said Dr Mackay had confirmed that 30% of sufferers were sufficiently severe to warrant treatment with biological therapies and that she had confirmed that this had improved Mr M’s symptoms considerably with no side effects. The MA said Dr Mackay’s letter had confirmed the benefits of exercise, the physiotherapist’s opinion that mechanical back problems might coexist with Ankylosing Spondylitis and that flares were still possible despite treatment. The MA concluded:

“The evidence confirms that [Mr M] is receiving appropriate treatment for his underlying medical condition and that this is proving to be effective with minimal side effects. Compliance has been an issue in the past, resulting in significant flares, but these should be kept to a minimum with regular medication and exercise.”

In answer to the question: “was the original Tier assessment appropriate at the time of medical discharge”, the MA said:

“At the time of discharge and with the reintroduction of medication [Mr M] had minimal functional limitation and was able to be employed as a lorry driver on his discharge.”

In answer to the question: "should the Tier assessment be increased, and if so, please state which assessment is appropriate for the relevant pension scheme", the MA said:

"Clinical remission should be maintained while medication is regular, and this is accompanied by appropriate exercise. Although flares (relapses) may still occur they should be able to be accommodated with minor workplace adjustments."

32. Mr M has submitted a letter from his GP dated 2 November 2021. This is noted, but it post-dates the decision which is the subject of Mr M's complaint and has not, therefore, been taken into account in assessing the decision-making process.

Appendix 2

The Armed Forces Pension Scheme Order 2005 (as amended)

34. Rule D.5 provides:

D.5. Early payment of benefits: active members with permanent serious ill-health

- (1) An active member who ceases to be in service by virtue of which he is eligible to be an active member of the Scheme is entitled to immediate payment of a pension and a lump sum before reaching pension age if -
 - (a) in the opinion of the Secretary of State the member has suffered a permanent breakdown in health involving incapacity for any full-time employment,
 - (aa) the Secretary of State has received evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on his occupation because of physical or mental impairment, and”.
 - (b) the member either -
 - (i) has at least two years' qualifying service, or
 - (ii) is entitled to short service benefit by virtue of section 71 of the Pension Schemes Act 1993 (basic principles as to short service benefit) because of a transfer value payment having been accepted.
- (2) For the purposes of this Rule and Rule D.8 a member's breakdown in health is “permanent” if, in the opinion of the Secretary of State, it will continue at least until the member reaches pension age.
- (3) For the purpose of these Rules a member's breakdown in health involves incapacity for any full-time employment if, in the opinion of the Secretary of State, as a result of the breakdown the member is incapable of any gainful full-time employment ...”

35. Rule D.6 provides:

“D.6. Early payment of benefits: active members with significant impairment of capacity for gainful employment

- (1) An active member who ceases to be in service by virtue of which he is eligible to be an active member of the Scheme is entitled to immediate payment of a pension and a lump sum before reaching pension age if -

- (a) in the opinion of the Secretary of State the member has suffered a breakdown in health as a result of which his capacity for gainful employment is significantly impaired,
- (aa) the Secretary of State has received evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on his occupation because of physical or mental impairment, and
- (b) the member either -
 - (i) has at least two years' qualifying service, or
 - (ii) is entitled to short service benefit by virtue of section 71 of the Pension Schemes Act 1993 (basic principles as to short service benefit) because of a transfer value payment having been accepted, and
- (c) the member is not entitled to a pension under rule D.5.(1) ...”

36. Rule D.8 provides:

“D.8. Member’s requests for review of ill-health awards

- (1) this rule applies if a member -
 - (a) is entitled to a pension under rule D.6, or
 - (b) has received a lump sum under article 16 of the Armed Forces Early Departure Payments Scheme Order 2005(25) (lump sum awards: incapacity for armed forces service) (“article 16”).
- (2) The member may request a review of his condition under this rule -
 - (a) at any time before the fifth anniversary of the day on which the member became entitled to the pension or lump sum, or
 - (b) after that time if in the opinion of the Secretary of State the circumstances are exceptional.
- (3) The request must be made by notice in writing in such form as the Secretary of State requires.
- (4) If a member within paragraph (1)(a) requests a review of his condition under this rule, the Secretary of State must ...
- (8) If a member within paragraph (1)(b) requests a review of his condition under this rule, the Secretary of State must -

- (a) review the question whether the member has suffered a breakdown in health as a result of which his capacity for gainful employment is significantly impaired, and
 - (b) if, after consultation with the Scheme medical adviser, he is of the opinion that the member has suffered such a breakdown, determine whether -
 - (i) the member had suffered such a breakdown at the time when he became entitled to payment of the lump sum under article 16, or
 - (ii) the condition by virtue of which he became so entitled has deteriorated so that he suffered such a breakdown later.
- (9) If -
- (a) on any review under paragraph (8), after consultation with the Scheme medical adviser, the Secretary of State is of the opinion that the member -
 - (i) has suffered such a breakdown as is mentioned in paragraph (8)(a), and
 - (ii) had done so at the time when he became entitled to payment of the lump sum under article 16, and
 - (b) the conditions in rule D.6(1)(aa) and (b) are met,
- then rule D.6 applies from the time when the ill-health condition (as defined in paragraph 1 of Schedule 28 to the Finance Act 2004) is first met, and accordingly the member is entitled to a lump sum under that rule and to a pension under that rule payable from that time (subject to paragraph (12)).
- (10) If -
- (a) on any review under paragraph (8), after consultation with the Scheme medical adviser, the Secretary of State is of the opinion that -
 - (i) the member has suffered such a breakdown as is mentioned in paragraph (8)(a), but
 - (ii) the condition by virtue of which he became entitled to payment of the lump sum under article 16 has deteriorated so that he suffered such a breakdown later, and
 - (b) the conditions in rule D.6(1)(aa) and (b) are met,

then rule D.6 applies from the date when the ill-health condition (as defined in paragraph 1 of Schedule 28 to the Finance Act 2004) is first met, and accordingly the member is entitled to a lump sum under that rule and to a pension under that rule payable from that date (subject to paragraph (12)).

- (11) If paragraph (9) or (10) applies and the lump sum paid to the member under article 16 was less than the lump sum to which he is entitled under rule D.6, the lump sum to which the member is so entitled is a lump sum equal to the difference.
- (12) If paragraph (9) or (10) applies and the lump sum paid to the member under article 16 exceeded the lump sum to which he is entitled under rule D.6, then the member is not entitled to a lump sum under D.6 and the excess must be repaid.”

The Armed Forces Early Departure Payments Scheme Order 2005 (as amended)

37. Article 16 provided:

“Lump sum awards: incapacity for armed forces service

- (1) A person who ceases to be in service as a member of the armed forces is entitled to immediate payment of a lump sum if -
 - (a) in the opinion of the Secretary of State the person is unfit for service as a member of the armed forces because of physical or mental impairment,
 - (aa) the Secretary of State has received evidence from a registered medical practitioner of that unfitness,
 - (b) the person has at least two years' relevant service,
 - (c) immediately before the service ceases the person is an active member of the AFPS 2005, and
 - (d) the person is not entitled to payments under article 9 of the Scheme or the immediate payment of a pension or lump sum under -
 - (i) rule D.1 of the AFPS 2005 (retirement after reaching pension age),
 - (ii) rule D.5 of that Scheme (early payment of benefits: active members with permanent serious ill-health),
 - (iii) rule D.6 of that Scheme (early payment of benefits: active members with significant impairment of capacity for gainful employment), or

- (iv) rule D.11 of that Scheme (option for members in serious ill-health to exchange whole pension for lump sum).
- (2) The amount of the lump sum payable under this article is calculated by multiplying one eighth of the person's final relevant earnings by his calculation service (expressed in years and fractions of a year), except where paragraph (3) or (4) applies.
- (3) If the amount calculated under paragraph (2) would be less than one-half of the person's final relevant earnings, that amount is payable instead.
- (4) If the amount calculated under paragraph (2) would be more than twice the person's final relevant earnings, that amount is payable instead.
- (5) This article is subject to rule D.8 of the AFPS 2005 (under which a person may ask for a review of his entitlement under rule D.6 of that Scheme and in some circumstances some of the amount paid under this article must be repaid)."