

Ombudsman's Determination

Applicant: Mr S

Scheme: Armed Forces Pension Scheme 1975 (**AFPS 75**)

Respondent: Veterans UK

Outcome

1. Mr S' complaint is upheld and, to put matters right, Veterans UK shall reconsider his application for the early payment of his AFPS 75 benefits.

Complaint summary

2. Mr S has complained that Veterans UK has declined to pay his deferred benefits in the AFPS 75 early on the grounds of ill health.

Background information, including submissions from the parties

Background

3. Mr S has previously complained about the early payment of his deferred benefits under the AFPS 75. The Pensions Ombudsman issued a Determination in June 2016. He upheld Mr S' complaint and directed Veterans UK to reconsider his application, having first sought further evidence from his GP and his consultant, Professor Lloyd. This investigation and opinion can only consider the subsequent decision by Veterans UK. It cannot reopen any matters which were the subject of the Pensions Ombudsman's 2016 Determination.
4. The relevant AFPS 75 rule is D.18, which states:

"Early payment of preserved pension in case of ill-health

 - (1) A deferred member who has not reached the age of 60 may claim early payment of the pensions and lump sums payable ... on grounds of ill health ...
 - (3) A claim under paragraph (1) ...
 - (a) must be made in writing to the Scheme administrator ...; and

- (b) must be supported by evidence from a registered medical practitioner that because of physical or mental impairment the member is, and at least until reaching ... the age of 60 ... will continue to be, incapable of any full-time employment.
- (4) If the Defence Council is satisfied of the matters mentioned in paragraph (3), and that the member has ceased to carry on the member's occupation –
 - (a) the pension or pensions are payable with effect from the date on which the claim was received by the Scheme administrator; and
 - (b) the lump sum or lump sums are payable immediately ...”
- 5. Veterans UK sought advice from its Senior Medical Adviser (**SMA**), who replied on 26 September 2016. The SMA said:

“We were instructed by the PO to review the case and decision related to the Jan 2012 claim is that right? As part of that we are to seek clarification of the then opinions of the GP (2013) and Mr Lloyd (2012) who did the hernia repair ... I have a GP report on the war pension file from Dr Perkins dated March 2013 when he says [Mr S] had been his patient for about six months. This means that when he wrote the letter “supportive” of the EPPP claim in Jan 2013 his knowledge of [Mr S] was even shorter.

...

I have now obtained his war pensions file and have a medical board dated March 2013 around the time of the AFPS determination and also a new one in connection with a war pension appeal dated August 2016. I am not sure whether strictly this evidence is admissible for EPPP.

When people have mega symptoms and little to find objectively I am always worried that something new and serious might suddenly come to light. Hence I have sought the updates.

The first board (2013) I think shows a level of function that supports the previous decision on EPPP. He had been working up to April 2012 but not since because of his operation. Observed activities are at Sec 9 of the report. The recent 2016 board shows static for most of his conditions and still able to walk about 160 m and to drive. He is attending a university course. New MRI has apparently shown a partial tear of the iliopsoas tendon right for which he is to have surgical opinion. Apart from pain he has reasonable function in the lower back upper limbs and hips and takes only paracetamol and amitriptyline at night.”

- 6. On 10 October 2016, Mr S' GP wrote to Veterans UK:

“Many thanks for your recent letter dated the 6th October 2016 ...

I can confirm that my letter dated 21st January 2013 referred purely to his ability to undertake any full-time military occupation.

[Mr S] is only 44 years of age, I am certainly unaware of any medical issues which would preclude him from any full-time civil employment, obviously depending on the role.”

7. Veterans UK wrote to Professor Lloyd, on 6 October 2016 and 4 January 2017, seeking clarification of his April 2012 report. Having telephoned his office, Veterans UK then emailed Professor Lloyd on 30 January 2017. Professor Lloyd responded on 31 January 2017. He apologised for the delay and said:

“To clarify the point in question as to whether [Mr S] could return to full time work. At the time I reviewed him I believed he could not return to full time work because of his ongoing pain issues which are exacerbated by physical activity, including prolonged periods of sitting and standing. He has chronic pain in his lower abdomen, groin and upper thighs which relates to his bilateral groin disruption which he had in 2012. Despite surgery ... he continues to have debilitating pain which I believe would prevent him working full-time. Clearly, time is often a good healer and this is why I stated he should consider part-time duties. I also suggested he has physiotherapy but there are some patients, and he may be one, who never fully recover from their physical complaint.

I would therefore support an application for part-time work but because his symptoms date back to 2012, you may want him re-assessed by your own medical officer.”

8. In December 2016, Mr S was assessed as 30% disabled for the purposes of the War Pension Scheme in respect of: injury to thoracic spine (1997); mechanical low back pain; osteoarthritis right hip; bilateral hallux valgus; and bilateral groin strain. He was assessed as between 1% and 5% disabled in respect of: inversion injury right ankle (1991); and dyspepsia. Certain other conditions were rejected as not attributable or not found.
9. Veterans UK referred Mr S' case back to its SMA in March 2017. Extracts from the SMA's subsequent report and other medical evidence relating to Mr S' case are provided in the Appendix.
10. On 7 April 2017, Veterans UK sent Mr S its decision. It informed Mr S that his appeal had been unsuccessful because its Deciding Officer had concluded that, on the balance of probabilities, he was not permanently incapable of some form of full-time employment prior to age 60. Veterans UK then set out the Deciding Officer's decision in more detail. It said, in order to authorise early payment of deferred benefits, it had to be satisfied that a claimant was permanently incapable of any suitable full-time employment until age 60 due to ill health. Veterans UK said its SMA had looked at all the available medical evidence and the Pensions Ombudsman's Determination. It said:

“[The SMA] noted that Professor Lloyd is not an occupational physician and seemed to identify pain as the limiting factor. There is no reference to a Pain Clinic or impact of any other intervention. At Pain Clinics in addition to medication a major intervention is cognitive behaviour therapy so that patients take charge of their pain. Pain is not by itself and without assessment and treatment usually considered a reason for employability [*sic*]. Given the increasing evidence that work is good for health and well-being and the requirements of employers to meet the Equality Act in terms of job modification.

[The SMA] noted that Professor Lloyd’s letter dated 19 April 2012 was written only days after bilateral groin surgery and at a time when [Mr S] would have been unlikely to have fully recovered from the acute effects of surgical intervention, never mind the on-going effect of the underlying pathology. At that date Professor Lloyd recorded improvement in the post-operative period with some on-going pain. While recording “some continuing disabilities” Professor Lloyd looked forward to further gradual improvement over the next few months. He supported the idea at that date i.e. 19 April 2012 of return to part time work. He was of the opinion that [Mr S] should undergo continuing physiotherapy. She noted the Ombudsman’s interpretation of Professor Lloyd’s reference to part time employment. With respect she did not think that this was the only possible interpretation. This is particularly because of the due date relative to surgery, the prognosis given and Professor Lloyd’s expectation of further improvement over the next few months.

The GP report dated 10 October 2016 sets out a slightly different picture from his 2012 letter and clarifies the intention of the 2012 letter which was limited to full time military employment. It is not clear whether or not Dr Perkins has recently seen [Mr S]. It is reasonable, however, to assume that primary care would be the first port of call for someone with [Mr S]’ disorder. It is also true that were he attending hospital, surgical or indeed any follow up, update letters would be being sent to his GP. The tone of Dr Perkins letter does not suggest that this is the case. He, however, emphatically identified nil at this date, 10 October 2016, which would preclude [Mr S] from full time civilian employment, depending on the role.

[The SMA] remains of the opinion that following scrutiny of the new reports and reconsideration of the case facts, that at the due date, the previous advice to reject your application was appropriate.

Taking account of the medical evidence the DAAR Deciding Officer concluded that you do not qualify for [early payment of deferred benefits].”

Mr S' position

11. Mr S submits:-

- Veterans UK has made a perverse decision regarding his application for the early payment of his deferred benefits.
- Veterans UK and its SMA included irrelevant information in the decision. This included irrelevant medical conditions and irrelevant treatment which is outside the scope of his 30% disability status and his attributable injury/condition.
- He would like the Pensions Ombudsman to direct Veterans UK to pay his pension, with arrears dating back to January 2012 and interest at 8% in line with the County Court Act 1984. He would also like the Pensions Ombudsman to award a payment for non-financial injustice.
- Veterans UK did not approach Mr Villar, Consultant Orthopaedic Surgeon, and he has since retired from orthopaedic surgery.
- In his 2012 application for early payment of his deferred benefits, he explained that he was unable to stand for more than five minutes. This situation has not improved since and he is only able to work part-time.
- In his 2017 email, Professor Lloyd referred to time being a healer, but he did not report any improvement in his condition such that he would be able to return to full-time employment before age 60.
- Veterans UK did not comply with the Pensions Ombudsman's direction to inform him of its decision within 21 days of receipt of the medical opinions. It received Professor Lloyd's email on 31 January 2017 and its decision is dated 7 April 2017.
- Veterans UK has asked itself the wrong questions.
- The Deciding Officer did not consider the Pensions Ombudsman's June 2016 Determination and the SMA did not consider Dr Perkins' 2012 and 2016 letters or Professor Lloyd's 2017 email.
- Dr Perkins did not consider Professor Lloyd's letter of 19 April 2012, which obviously relates to civilian employment because he had been discharged from the Army in 2003. In addition, Dr Perkins did not have sight of Professor Lloyd's 2017 email when he wrote his October 2016 letter. Dr Perkins' opinion regarding civilian and military employment is misconstrued. If Dr Perkins had considered Professor Lloyd's evidence of 19 April 2012 and 31 January 2017, he would have supported his appeal for the early payment of his benefits.
- The SMA based their decision on limited extracts from the medical evidence.
- The SMA acknowledged that Dr Perkins did not consider Professor Lloyd's letter of 19 April 2012.

- Neither Veterans UK nor its SMA have had a consultation with him; unlike Dr Perkins and Professor Lloyd.
- According to the War Pensions Scheme, he has been assessed as 30% disabled since May 2012 and has recently been assessed as 32% disabled.
- A CT scan in 2011 showed that there is osteoarthritis present in both his left and right hips. This should have been considered when assessing his ability to work full-time until age 60.
- In 2018, he was admitted to hospital with chest pains and has been prescribed a GTN spray and aspirin. He has had 20 episodes of feeling faint since.
- He has claimed various state benefits since ceasing employment in January 2012.
- In May 2020, his Personal Independence Payment (**PIP**) was increased. His score for the daily living component is 8 and he has been awarded the standard rate. His score for the mobility component is 10 and he has been awarded the standard rate. His PIP is due for review in 2026.
- He is of the view that an independent disability assessor should be appointed to make the decision as to whether his deferred benefits should be paid early on the grounds of ill health.

Adjudicator's Opinion

12. Mr S' complaint was considered by one of our Adjudicators who concluded that further action was required by Veterans UK on the grounds that it had not considered Mr S' application in a proper manner. The Adjudicator's findings are summarised below:-
- Members' entitlements to benefits when requesting early payment of their retirement benefits due to ill health were determined by the scheme rules. The scheme rules determined the circumstances in which members were eligible for the early payment of their benefits on the grounds of ill health, the conditions which they had to satisfy, and the way in which decisions about early payment of benefits had to be taken.
 - In Mr S' case, the relevant rule was D.18. Under rule D.18, Mr S had to be considered incapable of any full-time employment at least until his 60th birthday. If he satisfied this condition and had ceased to carry on his occupation, his retirement benefits were payable. Any decision, under rule D.18, had to be supported by evidence from a registered medical practitioner. The decision as to Mr S' eligibility for the early payment of his deferred benefits on the grounds of ill health was to be made by Veterans UK acting on behalf of the Defence Council.
 - Mr S' case was slightly complicated by the fact that Veterans UK was acting upon a direction from the Pensions Ombudsman to re-take its decision as to his

eligibility for early payment of his deferred benefits. Veterans UK was, therefore, required to make a retrospective decision. It could not, therefore, consider evidence relating to the progress of Mr S' health after 2012. The question for Veterans UK, and its SMA, was: what were the expectations for Mr S' future capacity for full-time employment as at 2012? In other words, Veterans UK was not required to apply the benefit of hindsight in making its decision.

- This position affected the evidence which Veterans UK and its SMA could be expected to consider. For example, Mr S had provided evidence relating to his 2016 War Pensions Scheme assessment and his PIP award in 2020. Because this evidence did not relate to the situation as it was in 2012, it was not relevant evidence to be considered in relation to Mr S' application for the early payment of his benefits in 2012. The Adjudicator noted that the SMA had touched on this in their September 2016 email when they had queried whether evidence from Mr S' War Pension assessment was admissible. The fact that a medical assessment had been carried out in connection with a War Pension Scheme claim would not, in and of itself, make it inadmissible for a claim under the AFPS 75. The date to which the evidence related, however, might mean that it was not relevant to the claim.
- A Deciding Officer at Veterans UK determined that Mr S did not satisfy the conditions for early payment of his deferred benefits under rule D.18. The explanation for the decision provided by Veterans UK indicated that it was largely based upon the advice it had received from its SMA. The Adjudicator commented that there were likely to be very few cases where Veterans UK took an opposing view to that of its medical advisers. However, this was not to say that it should simply accept the medical adviser's view; even if it was a view expressed by its SMA.
- The Adjudicator acknowledged that Veterans UK could only review the medical advice from a lay perspective; as did the Pensions Ombudsman. However, it could be expected to check that there had been no error or omission of fact by its medical adviser and that the medical adviser had applied the relevant rule correctly. If there was a difference of opinion between its medical adviser and the member's own doctors, Veterans UK should seek an explanation; if one had not already been provided. Having said this, it was for Veterans UK to decide what weight to give to any of the evidence, including giving little or no weight to some¹. It was open to Veterans UK to give greater weight to the advice from its own medical advisers; unless there was a good reason why it should not.
- The SMA had said they had had difficulty determining whether Professor Lloyd had recently seen Mr S and in disentangling his use of present and past tenses. They had said his support for an application for part-time work appeared to relate to the date of his January 2017 email. Given that the decision had been returned to Veterans UK because the Pensions Ombudsman had found that further

¹ *Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

clarification was required from Professor Lloyd and Dr Perkins, it was perhaps surprising that neither it nor its SMA took steps to address these difficulties. The SMA had later commented that there was more than one interpretation for Professor Lloyd's reference to part-time work. The sensible approach would surely have been to ask the Professor what he meant; rather than continue on the basis of speculation.

- The SMA had noted that Professor Lloyd had not provided specific reasons for his opinion. They had commented that Professor Lloyd was not an occupational physician and appeared to have identified pain as the limiting factor to Mr S' capacity for full-time employment. They had noted that there appeared to be no reference to referral to a pain clinic or the impact of any other intervention. However, neither Veterans UK nor its SMA took any steps to obtain further information about Mr S' treatment.
- The SMA had gone on to say that pain was not of itself and without assessment and treatment usually considered a reason for unemployability. They had explained what might be offered by way of treatment at a pain clinic. They had also commented that there was increasing evidence that work was good for health and well-being and had referred to the requirements for employers to meet the Equality Act in terms of job modification. These were generalisations, rather than an analysis of Mr S' particular circumstances.
- The SMA had referred to Professor Lloyd's 2012 letter. They had noted that it was written only days after Mr S' surgery and at a time when he would have been unlikely to have fully recovered from the effects of the surgery. The SMA had noted that Professor Lloyd had recorded improvement in the post-operative period with some ongoing pain. They had noted his reference to "some continuing disabilities" and also that he had anticipated further gradual improvement over the following few months. The SMA had said Professor Lloyd had supported the idea of Mr S returning to work on a part-time basis at the date of his letter; that is, 19 April 2012. The Adjudicator agreed, but said it did not address the question of whether Professor Lloyd had then thought Mr S was unlikely to be able to return to full-time work before age 60. In other words, the SMA's review of Professor Lloyd's 2012 letter had largely followed the same approach as had been taken previously.
- The SMA had then referred to Dr Perkins' letter of 10 October 2016. They had said Dr Perkins had set out a slightly different picture from his 2012 (*sic*) response and had clarified that his 2012 (*sic*) letter had been limited to full-time military employment. The SMA had said it was not clear whether Dr Perkins had recently seen Mr S. They had said Dr Perkins' response strongly suggested that Mr S was no longer being seen by Professor Lloyd and that he was not receiving any medical help. Whether Dr Perkins had seen Mr S recently was not relevant to assessing the position in 2012; nor was Mr S' current receipt of medical help. This

comment suggested that the SMA had lost track of the fact that they were concerned with the position in 2012; not 2016/17.

- The Adjudicator agreed with the SMA that Dr Perkins' comment, in his letter of 10 October 2016, was quite emphatic. He had noted that Mr S was aged "only 44" and said he was "certainly unaware" of any medical issues which would preclude Mr S from any full-time "civil employment", depending upon the role. However, this was a current view because, at the time of Dr Perkins' 2013 letter, Mr S had been aged 41. Dr Perkins may have been of the opinion, in 2016, that Mr S was not incapacitated for all full-time employment, but this was applying the benefit of hindsight. He should have been asked what his view would have been in 2012.
- The SMA had advised that, having scrutinised the new reports and reconsidered the case facts, the previous advice to reject Mr S' claim for the early payment of his deferred benefits was appropriate. However, it was clear that the SMA had failed to keep sight of the fact that they were being asked to consider the situation in 2012. They had taken into account Dr Perkins' updated view and failed to clarify Professor Lloyd's evidence.
- Veterans UK did not seek further clarification from its SMA before proceeding to a decision. In the Adjudicator's view, it was not possible to conclude that Veterans UK had made its decision to decline Mr S' application for the early payment of his deferred benefits on the grounds of ill health in a proper manner.
- The Adjudicator said that, in coming to this conclusion, she was not expressing any view as to whether Mr S satisfied the conditions for payment of his benefits early under rule D.18 in 2012. That decision remained for Veterans UK to make. The Adjudicator said she was aware that Mr S would like the Pensions Ombudsman to make a direction requiring Veterans UK to put his benefits into payment with effect from 2012. She explained that the Pensions Ombudsman only very rarely made a decision as to eligibility for a benefit himself. In her opinion, it was unlikely that he would do so in Mr S' case. It was more likely that he would direct Veterans UK to re-take the decision, having sought further appropriate medical advice.
- The Adjudicator said she was also aware that Mr S would like an independent disability assessor to be appointed to take the decision as to payment of his benefits. Under the rules of the AFPS 75, the decision fell to be made by Veterans UK acting on behalf of the Defence Council. There were no requirements within the AFPS 75 rules for such an assessor to be appointed. That was not to say that the Defence Council would be precluded from appointing such a body/person to act for it. However, in the Adjudicator's view, it was unlikely that the Pensions Ombudsman would direct it to do so. This was because the decision would be a matter for the Defence Council's discretion and, as such, not a decision which the Pensions Ombudsman could take for it.

- The Adjudicator suggested that Veterans UK should reconsider Mr S' case. Before doing so, it should ask Professor Lloyd and Dr Perkins to clarify what their views on Mr S' likely future capacity for full-time employment were in 2012. It should make it clear to Professor Lloyd and Dr Perkins, and to any of its own medical advisers, that the opinions should be given without the benefit of hindsight. In the circumstances, if Veterans UK required advice from one of its own medical advisers, it should approach a doctor who had not previously been involved in the case. This would serve to draw a line under what had gone before.
 - The Adjudicator was also of the view that it would be appropriate for Veterans UK to pay Mr S £500 for the significant non-financial injustice he had sustained as a consequence of the failure to consider his case in a proper manner.
13. Veterans UK did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Both Veterans UK and Mr S provided further comments which are summarised below. I have considered these comments but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

Veterans UK's further comments

14. Veterans UK submits:-

- At the time it reviewed Mr S' application in 2012, it had been following policy advice which had been issued in 2007. This allowed early payment of a preserved pension to members who worked or could work in a part-time capacity.
- In June 2020, it sought clarification as to what constituted part-time hours for the purposes of determining an application for the early payment of preserved pension.
- The advice it received was that the guidance it had been using had been superseded by legislation, which had been restated in the Royal Warrant. The legislation clearly stated that the member has to have ceased their occupation.
- The Royal Warrant is affected by primary legislation. The Finance Act 2004, in Schedule 28, dictates that the person has to have ceased to carry out their occupation in order to meet the ill health test.
- The rules have, therefore, been clarified so that for early payment of a preserved pension the member must be incapable of any form of employment up to the relevant age depending upon which scheme they are a member of; that is, age 60 for AFPS 75.
- Mr S has said that his condition has not improved since his application in 2012 and that he can only do part-time work. Under its revised policy advice extant from 2010, as Mr S has stated that he was capable of part-time employment in 2012, his application would be automatically rejected.

Mr S' further comments

15. Mr S submits:-

- He is concerned that his GP may have a conflict of interest because of previous involvement with the Armed Forces.
- He questions whether his GP read Professor Lloyd's letter of 19 April 2012, in which Professor Lloyd had said he might be able to return to part-time work in some capacity.
- Although Professor Lloyd has done his best for him, he has not returned to work since the operation in April 2012. Prior to this, he was working part-time as an operating theatre practitioner.
- He has experienced pain since his operation in 2012. He believes this to be related to the hernia mesh used in the operation. He is of the view that an allergic reaction to the hernia mesh led to him developing acute coronary syndrome.
- Neither his GP nor Veterans UK have the knowledge or experience which Professor Lloyd has in this particular field. Veterans UK has been misled by his GP's comments.
- He is of the view that the evidence submitted in connection with his War Pensions appeal would be pertinent to deciding on his eligibility for the early payment of his preserved pension. This evidence cannot be released to the Pensions Ombudsman until his appeals have been heard.
- He notes that the Pensions Ombudsman does not have jurisdiction over medical experts. He suggests that Section 114, Equality Act 2010, the Senior Courts Act 1981 and the County Court Act 1984 would be helpful. He suggests that the appointment of an independent disability assessor would reduce the time taken to consider cases like his.
- He has suggested that Veterans UK could pay his expenses for an operation in the United States under Article 21 of the Service Pensions Order 2006². He has provided information relating to a surgeon based in Las Vegas whom he considers appropriately experienced in the removal of hernia mesh.
- He has right-sided ulnar nerve neuritis for which he had decompression surgery in 2010. The operation did not completely cure his right-sided ulnar nerve neuritis and writing or typing makes the condition worse. This has an impact on his employability in any administrative or office-based job.

² The Naval, Military and Air Forces Etc. (Disablement and Death) Services Pensions Order 2006 (SI2006/606) (as amended).

- He has submitted medical reports relating to a right hip arthroscopy undertaken in January 2012 and more recent evidence relating to a right iliopsoas tear diagnosed in 2016.
- He is of the view that the suggested £500 for non-financial injustice does not reflect the seriousness of his case.

Ombudsman's decision

Jurisdiction

16. It might be helpful to begin by addressing some of Mr S' concerns and suggestions relating to my jurisdiction.
17. My office was created under Part X, Pension Schemes Act 1993 (**PSA93**). My functions and powers are set out in Sections 145 to 152 of PSA93 and regulations made by the Secretary of State under PSA93. Amongst other things, PSA93 sets out who can bring a complaint of maladministration or dispute of law to me and in respect of whom.
18. I can appreciate Mr S' concern that my jurisdiction does not extend to medical practitioners who provide medical opinions for pension schemes. They can, after all, have a significant role to play in determining a member's eligibility for benefit. However, there is already a body to oversee the conduct of medical practitioners; namely, the General Medical Council (**GMC**). Any concerns which Mr S might have as to the professional conduct of a medical practitioner is more properly referred to the GMC.
19. Mr S has suggested that I appoint an independent disability assessor. He has referred to the Senior Courts Act 1981, the County Courts Act 1984 and Section 114, Equality Act 2010.
20. Section 63(1), County Courts Act 1984 provides that a judge in a County Court may, if he thinks fit, appoint one or more persons with appropriate skill and experience to sit with him and act as assessors. A similar provision is contained in Section 70(1) of the Senior Courts Act 1981. Section 114(7), Equality Act 2010 provides:

"In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 ... must be exercised unless the judge is satisfied that there are good reasons for not doing so."
21. Subsection (1) lists the proceedings where a Court would need to appoint an assessor; unless the judge was satisfied that there were good reasons for not doing so. These relate to contraventions of the Equality Act 2010 in the areas of services and public functions, premises, education and associations. I do not have jurisdiction to consider a complaint relating to contravention of the Equality Act 2010 in these areas. Section 114(7) does not, therefore, require me to appoint an independent

assessor to assist me in considering a complaint of maladministration or dispute of law in relation to an occupational pension scheme.

22. Nor do Sections 145 to 152 of Part X of PSA93, or the rules and regulations made under PSA93 require me to appoint an independent disability assessor when considering complaints of maladministration or disputes of fact or law. In fact, Section 145 (4C)(a), PSA93 provides that I may delegate any of my functions “other than the determination of complaints made and disputes referred” to me. It is for this reason that, while my adjudicators may offer opinions on the merits of cases, ultimately, it is for me to make a Determination. It is for this reason that Mr S’ case has now been passed to me.
23. I note Mr S’ view that the appointment of an independent disability assessor might reduce the time taken for cases such as his to be considered. However, I am required to apply the terms of my office as they are currently set out in PSA93. Any changes to the legislation governing my office would be for the Government to decide.

Mr S’ application for the early payment of his AFPS 75 benefits

24. I think it is worth reiterating that the matter before me is the decision made by Veterans UK to decline Mr S’ 2012 application for the early payment of his AFPS 75 benefits. I say this because a significant part of the evidence submitted by Mr S relates to the development of his health after 2012. This does not assist me in determining his complaint because it is the evidence which relates to the situation in 2012 which is relevant.
25. Although Veterans UK took the most recent decision, to decline Mr S’ application, in 2017, it was re-taking the decision it had taken in 2012. It was required to take a retrospective view as to whether Mr S had satisfied the conditions for early payment of his AFPS 75 benefits in 2012. Any evidence relating to the subsequent course of Mr S’ health is not relevant for this purpose.
26. I note Mr S’ concern that evidence submitted in relation to his War Pension appeals should be considered. Veterans UK’s SMA indicated that they had had sight of Mr S’ War Pension file and considered evidence from around the time of his 2012 application. As with the other evidence submitted, it is the evidence relating to the situation in 2012 which is pertinent. In view of this, I do not consider it necessary for Veterans UK to obtain Mr S’ current appeal evidence.
27. I am aware that Mr S would like me to make a decision as to whether he satisfied the conditions for early payment of his benefits. However, that decision is for Veterans UK, acting on behalf of the Defence Council, to make under Rule D.18(4). My role is to consider whether Veterans UK made a decision in a proper manner. Briefly, this means looking at whether Veterans UK applied Rule D.18 correctly and whether its decision is supported by the relevant evidence.
28. Rule D.18 provides for the early payment of AFPS 75 benefits if the Defence Council (Veterans UK) is satisfied that the deferred member is, because of physical or mental

impairment, “incapable of any full-time employment” and is likely to continue to be so until at least age 60. The Defence Council must also be satisfied that the member “has ceased to carry on the member’s occupation”.

29. Veterans UK has referred to Schedule 28, the Finance Act 2004. This provides:

“For the purposes of this Part the ill-health condition is met if -

(a) the scheme administrator has received evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on the member's occupation because of physical or mental impairment, and

(b) the member has in fact ceased to carry on the member's occupation.”

30. Section 164, the Finance Act 2004 provides:

“No payment of pension may be made before the day on which the member reaches normal minimum pension age, unless the ill-health condition was met immediately before the member became entitled to a pension under the pension scheme.”

31. Veterans UK makes the point that the AFPS 75 is subject to the Finance Act 2004, and, therefore, Rule D.18 incorporates the reference to the member having ceased to carry on the member’s occupation. This is in order to comply with Section 164 and Schedule 28. Veterans UK takes the view that this means that, in order to satisfy Rule D.18, the member must be incapable of any form of employment up to the relevant age. It asserts that, because Mr S has stated that he was capable of part-time employment in 2012, his application for early payment of his AFPS 75 benefits must be declined.

32. There is no definition of “occupation” in the Finance Act 2004. Therefore, the word must be given its ordinary, everyday meaning; unless to do so would result in an absurd outcome. The dictionary definition of “occupation” is: “profession or employment”³. A member’s occupation means their profession or employment. It does not mean any employment. The “ill-health condition” set out in the Finance Act 2004, requires Mr S to have ceased his occupation; not all employment. If it had been intended that the ill health condition would only be met if the member was incapable of carrying on any employment, it would have said just that.

33. Moreover, Rule D.18 specifies that a member will be eligible for the early payment of their AFPS 75 benefits if they are incapable, at least to age 60, of “any **full-time** employment” (my emphasis). Thus, if Mr S was likely only to be capable of part-time employment up to age 60, he would meet the Rule D.18 requirements.

34. I find, therefore, that the interpretation of Rule D.18 and the Finance Act 2004, now put forward by Veterans UK is incorrect. However, I note that Veterans UK has explained that the guidance on which it is now relying was provided in 2020.

³ Oxford Dictionary.

Therefore, it did not influence its 2017 decision in Mr S' case. It is clear from the SMA's report and Veterans UK's April 2017 decision letter to Mr S that it had been considering whether he was capable of full-time work.

35. Veterans UK was acting under directions from me to reconsider its previous decision to decline Mr S' application for the early payment of his AFPS 75 benefits. I had directed Veterans UK to obtain further opinions from Mr S' GP and Professor Lloyd to address the flaws in its earlier decision-making process. In particular, Veterans UK was required to clarify whether Mr S' GP was referring only to military employment when he said Mr S was permanently unable to work full-time in any capacity. And it was required to obtain an opinion from Professor Lloyd as to Mr S' capacity for full-time employment. At the time of Veterans UK's earlier decision, Professor Lloyd had only gone as far as to say it might be reasonable for Mr S to return to part-time work.
36. Veterans UK received confirmation from Mr S' GP that he had been referring "purely to [Mr S'] ability to undertake any full-time military occupation". In fact, the GP went further and said that he was unaware of any medical issues which would prevent Mr S from undertaking full-time civilian employment. However, the latter comment was clearly a current assessment because he referred to Mr S being 44 years of age; that is, his age in 2016.
37. I am aware of Mr S' concerns about his GP. However, as I have explained, any such concerns are more properly referred to the GMC.
38. Professor Lloyd responded by saying that, at the time he had reviewed Mr S, he believed he could not return to full-time work because of chronic pain. He went on to say that, despite surgery, Mr S continued to have debilitating pain which he believed would prevent him from working full-time. Professor Lloyd concluded by saying he would support an application for part-time work but, because Mr S' symptoms dated back to 2012, Veterans UK might wish to have him reassessed by its own medical officer. I would tend to agree with Veterans UK's SMA that it is not easy to determine when Professor Lloyd is talking about the past and when he is referring to the present. His concluding sentence might suggest that he was under the impression Mr S was being considered for employment by Veterans UK. However, instead of seeking clarification from Professor Lloyd himself, Veterans UK proceeded on the basis of its SMA's interpretation of Professor Lloyd's comments.
39. Having noted the difficulties with Professor Lloyd's response, the SMA's report indicates that they, themselves, did not always remember that they were meant to be looking at the position in 2012. This was intended to be a retrospective assessment of Mr S' likely capacity for full-time employment based on the evidence which would, or could, have been available at that time. The SMA had to avoid applying hindsight. Their report indicates that their opinion was influenced by events after 2012; for example, the question of whether Mr S was still under Professor Lloyd's care and whether he was currently receiving any medical help. Neither of these factors were relevant to determining what might have been expected for Mr S' future capacity for full-time employment in 2012.

40. The evidence does not support a finding that Veterans UK reconsidered Mr S' 2012 application for the early payment of his AFPS 75 benefits in a proper manner. This amounts to maladministration on its part. Mr S has sustained injustice as a consequence because it has yet to be established whether he was eligible to receive his AFPS 75 in 2012.
41. I uphold Mr S' complaint.
42. In addition to the injustice referred to above, I find that the flawed decision-making process will have caused Mr S unnecessary distress and inconvenience. It would be appropriate for him to receive an award in respect of this.

Directions

43. Within 28 days of the date of my Determination, Veterans UK shall ask Professor Lloyd to clarify what his views on Mr S' likely future capacity for full-time employment were in 2012. It should make it clear to Professor Lloyd that the opinion should be given without the benefit of hindsight.
44. Within a further 28 days of receipt of Professor Lloyd's response, Veterans UK shall reconsider its decision as to whether Mr S satisfied the conditions for payment of his AFPS 75 benefits under Rule D.18 in 2012. If Veterans UK requires advice from one of its own medical advisers in order to reconsider its decision, it should approach a doctor who has not previously been involved in the case; again, making it clear that any opinion is to be given without applying hindsight.
45. In addition, within 28 days of the date of my Determination, Veterans UK shall pay Mr S £500 for the significant distress and inconvenience he has sustained. I note Mr S' views on the level of award but I find £500 to be appropriate in the circumstances.

Anthony Arter
Pensions Ombudsman

7 December 2021

Appendix

Medical evidence

46. Dr James, Consultant Radiologist, 8 November 2011

Dr James reported on the results of a CT scan of Mr S' right hip. He referred to there being some features to suggest early degenerative change.

47. Mr Lloyd, Consultant Surgeon, 19 April 2012

In an open letter, Mr Lloyd said Mr S had undergone surgery for groin pain in April 2012. He said Mr S was improving but still had pain on increased flexion of his hip joints and on standing. Mr Lloyd went on to say:

"Having said that, I am sure that he can gradually return to part-time work, perhaps working a few hours a day in a sitting position. If he stands for any length of time this does seem to increase his discomfort. However, I would hope that over [the] next 6-12 weeks this will gradually improve.

I think, therefore, it would be reasonable for him to return to work on a part-time basis, although acknowledgment has to be made that he does have some continuing disabilities. Furthermore, I would also recommend that he undergoes physiotherapy, which would include improving the core strength in his abdomen, and also increase the strength of his adductor and quadriceps group of muscles. He also needs continuing physiotherapy to improve the flexibility around his hip and groin region."

48. Dr Perkins, GP, 21 January 2013

"I am writing in support of the above-named patient and his application for medical discharge from Her Majesty's Armed Forces.

[Mr S] has become permanently unable to work full time in any capacity through ill health and his health conditions will continue until preserved pension age.

[Mr S] has continuing hip and groin problems, having fractured his acetabulum. He has had attempted restorative surgery ... under the care of Mr Richard Villar.

Even with the excellent surgery and care of Mr Villar and Mr David Lloyd in 2012, [Mr S'] health has not improved with regards his hip. He has continued pain and reduced mobility and function.

I support his application to be permanently discharged from the regular army on medical grounds, as well as being permanently discharged from his regular and long term reserve commitments."

49. Veterans UK's SMA, 14 March 2017

The SMA referred to their email of 26 September 2016 (paragraph 8), which they said remained pertinent. They said they had reviewed the recent evidence provided by Professor Lloyd and Dr Perkins. The SMA said:

"I note the contents of Prof Lloyd's email dated 31 January 2017.

Unfortunately I have difficulty in determining whether or not Prof Lloyd has recently seen [Mr S]. I note his conclusions "support application for part-time work". That appears to relate to date of the email ie 31 Jan 2017. However I note he also suggests possible reassessment of [Mr S]. Prof Lloyd provides no specific reasons for his opinion.

I also find it difficult to disentangle his use of present and past tenses. Prof Lloyd is not an occupational physician and seems to identify pain as the limiting factor. There is no reference to referral to a Pain Clinic or impact of any other intervention. At Pain clinics in addition to medication a major intervention is cognitive behaviour therapy so that patients take charge of their pain. Pain is not by itself and without assessment and treatment usually considered a reason for unemployability. Given the increasing evidence that work is good for health and well-being and the requirements of employers to meet the Equality Act in terms of job modification I also find it difficult to dismiss any full-time job as being suitable ie "prevent him working full-time".

The letter dated 19 April 2012 was written only days after bilateral groin surgery and at a time when [Mr S] would have been unlikely to have fully recovered from the acute effects of surgical intervention; never mind the ongoing effects of the underlying pathology. At that date Prof Lloyd recorded improvement in the post-operative period with some ongoing pain. While recording "some continuing disabilities" Prof Lloyd looked forward to further gradual improvement over the next few months. He supported the idea at that date ie 19th April 2012 of return to work on a part time basis. He was of the opinion that [Mr S] should undergo continuing physiotherapy.

I note ... the PO's interpretation of Prof Lloyd's reference to part-time employment. With respect I so not think that is the only possible interpretation. This is particularly because of the due date relative to surgery, the prognosis given and Prof Lloyd's expectation of further improvement over the next few months.

The GP report dated 10 Oct 2016 sets out a slightly different picture from his 2012 note and clarifies the intention of the 2012 letter which was limited to full-time military employment. Again it is not clear whether or not Dr Perkins has recently seen [Mr S]. It is reasonable however to assume that primary care would be the first port of call for someone with [Mr S'] disorder. It is also true that were he attending hospital, surgical or indeed any follow-up, update letters would be sent to his GP. The tone of Dr Perkins' letter does not suggest

this is the case. He however emphatically identified nil at this date which would preclude [Mr S] from full-time civilian employment, depending on the role.

Overall evidence supported by the GP report suggests strongly that [Mr S] is no longer being seen by Prof Lloyd and given the nature of general practice as the primary focus and co-ordinator of patient care in the UK the GP report supports that and that he is not receiving any medical help.

I would have to advise that following scrutiny of the new reports and reconsideration of the case facts, that at the due date, the previous advice to reject [Mr S'] claim to [early payment of his deferred benefits] and the subject of the PO's determination was appropriate."