

Ombudsman's Determination

Applicant	Mr I
Scheme	Armed Forces Pension Scheme 2005 (AFPS 05)
Respondent	Veterans UK

Outcome

1. I do not uphold Mr I's complaint and no further action is required by Veterans UK.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr I disagrees with the decision made by Veterans UK to award him Tier 1 ill health retirement benefits in the AFPS 05. He is of the opinion that he meets the eligibility criteria for a higher Tier 2 award.

Background information, including submissions from the parties

4. The AFPS 05 was established by statutory instrument issued under the Armed Forces (Pensions and Compensation) Act 2004. The rules are contained in the Armed Forces Pension Scheme Order 2005 (SI 2005/438) (as amended). Extracts from the relevant rules are contained in the Appendix.
5. Three tiers of benefit are available for individuals who leave the Armed Forces as a result of ill health. The level of benefit is based on the severity of the individual's condition and 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 D6). Tier 3 is awarded to those who are permanently incapable of any full time employment (rule D5). Tier 1 is awarded under article 16 of the Armed Forces Early Departure Payments Scheme Order (SI 2005/437) to those who are unable to do their service job, but their ability to undertake other gainful employment is not significantly impaired (see also Joint Services Publication (JSP) 764). Under rule D8, a member who has been awarded a Tier 1 or 2 benefit may request a review of his/her condition at any time before the fifth anniversary of the day on which he became entitled to the pension or lump sum.

6. Mr I has suffered from a Non Freezing Cold Injury (**NFCI**) to both his hands and feet since October 2012. He has also endured chronic pain in his hips and lower back since May 2013. Despite surgery and rehabilitation, he still finds it very painful walking and cannot stand for long. The pain sometimes keeps him awake at night and he has become depressed as a consequence of his ailments. In 2015, the Cold Injury Clinic advised him to only work in a properly heated building and not to deliberately rewarm his hands and feet as this would exacerbate the pain in them.
7. The Medical Board (**the Board**) Record (F Med 23) for Mr I dated April 2015 showed that:
 - the principal conditions which Mr I was suffering from were those described in paragraph 6;
 - he had been on long term sick leave since December 2014;
 - the Board recommended that he be discharged on the basis that he was permanently unfit for all military duties; and
 - their decision had been based on the medical evidence available at the time i.e. Mr I's DMICP medical record, F Med 4, Appendix 18, F Med 24 and Appendix 17A
8. The "Prognosis and ongoing treatment" section of the F Med 23 said that:

"Mr I is presently unable to engage with rehabilitation until the results of nerve root injections are clear and the option of orthopaedic surgery on his left hip explored further. Once these are completed however, his mood is likely to improve in the long term as he makes the transition to civilian life...His future employment is likely to be sedentary in nature within a heated office."
9. In October 2015 Veterans UK decided that Mr I qualified for Tier 1 ill health retirement benefits in the AFPS 05 with a discharge date of 1 January 2016 after considering the information shown on F Med 23 and the aforementioned medical evidence.
10. Mr I was unhappy with their decision and appealed it with the support of Lt Col Tredget, his GP and Dr Paul, a consultant in Rheumatology and Rehabilitation.
11. Veterans UK did not uphold Mr I's appeal at Stage One of the Internal Dispute Resolution Procedure (**IDRP**) in December 2016. The Deciding Officer (**DO**) said that:

"Your case was sent to the Senior Medical Advisor (**SMA**) who reviewed all the available evidence...

The SMA comments on your first referral to INM on 15 Jan 2015 when Dr Oakley assessed that your current symptoms would take 3-5 years to settle and recommended "no work outdoors but should remain working indoors in a properly heated building." The SMA notes that at the most recent INM review on 7 Dec 2016 there had been no cold exposure since Sept 2015 and you were reported as having nocturnal pain however no reference to pain during

the day....you were judged to be fit to work outdoors when warm and dry. The SMA comments that overall you showed improvement in your function.

The SMA also comments on your hip problems, she states that having had recent surgical intervention this is to be expected however assesses there should be improvement as the tissue heals post-surgery. The SMA therefore assesses that you are not deemed to be in an optimum state of health.

The SMA notes the letters from Lt Col Tredget...and Dr Paul...however the SMA does not believe that your records show that your employment prospects would be significantly impaired... Lt Col Tredget and Dr Paul have not stated the reason that they believe your significant impairment will continue and from the evidence in your records the SMA does not assess that you will continue to be unsuitable for full time paid employment. The SMA concludes that there may yet be further and sustained improvement in your symptoms and that you are not yet in a state of maximum medical improvement. .

The SMA has confirmed that the Tier award you received on discharge is appropriate but has suggested that you ask for review in two years if your condition had not improved..."

12. The DO also said that:

- she was satisfied that Mr I's early retirement application had been considered properly in line with the AFPS 05 rules;
- the test for a Tier 1 or 2 award is consideration of lifetime capacity to work and not a snapshot of the current situation;
- decisions on tier awards are based on what employment is reasonable and not on the difficulty of obtaining a job; and
- if Mr I's condition deteriorates unexpectedly, he has the right to have his case reviewed anytime between now and the fifth anniversary of his discharge

13. Mr I's appeal was also rejected at Stage Two IDRP in March 2017. The DO wrote that:

"The MA also notes that you have undergone operations to both hips for bilateral labral tears. You also have degenerative changes in the lower spine. Despite recent operations you are experiencing unremitting hip and back pain.

Our MA comments that best practice management of such chronic low back pain recommends a holistic approach...The aim is to improve function, achieve better quality of life, reduced use of medication, and prevention of relapse of chronic conditions. Physiotherapy, occupational therapy and vocational therapy are also desirable.

The MA notes the letter from Mr Langdown which states, "Mr I is actually making good progress. The pain is certainly much less than before, what is holding him back now is low back pain. He has been medically discharged

from the Military but has one last remaining residential course...which starts today. Hopefully this will give him significant improvement in his symptoms.”

Your Service Medical Records confirm your NFCl and you had borderline normal in your hands and abnormal in your feet. Whilst this may fall into a poor prognostic group, some improvement in this condition would be expected to occur in the medium to long term. The MA further notes that you previously worked as a teacher and civil servant and you should be capable of working in a sedentary role within a heated building.

Our MA further notes that your Mental Health issues seem to have developed in 2014...On review of your DMICP, your last recorded session for counselling was on 19/10/16. It was noted “that when Mr I worries about things his mood deteriorated and also that he notices pain more”. At that time Mr I had worries about his future housing needs and ability to cope with pain. As his physical conditions improves..., it would be expected that his worrying would lessen and his depression would improve.”

14. Mr I's service was extended and he was medically discharged on 4 March 2017.
15. In his letter dated 17 March 2017 to Veterans UK, Mr I's psychiatrist, Lt Col Howe said that:
 - Mr I has become fearful and mistrustful of others and cannot leave the house on his own;
 - Mr I might be capable of physically working in a sedentary role within a heated building but no allowance has been made for the fact that he will have to leave the house which would be impossible without an escort;
 - travelling to work would be very challenging for Mr I with his combined conditions of NFCl and restricted mobility; and
 - Mr I lacks the motivation and energy to complete a full days' work because he is chronically depressed and also tired after taking medication which made him drowsy
16. Mr I received details of the Tier 1 ill health early retirement benefits available to him from Veterans UK with their letter dated 28 March 2017.
17. In August 2017, Mr I asked Veterans UK to review the outcome of his last Full Medical Board (**FMB**) held in April 2016 because:
 - he subsequently underwent additional surgery whilst still serving in the Army and also required further treatment for his physical and mental ill health; and
 - there was a likelihood that some of his “physical and mental conditions were disregarded, not found, or were not available” at the FMB
18. Mr I also said that:

“My health conditions together undeniably would exclude me from any real time employment, or being in any work or social environments. Furthermore, my (NFCI) pain and lack of dexterity also restricts my physical ability, this along with my inability to concentrate and function, especially around people, especially with people I don’t know. In evidence, I have been awarded enhanced PIP (Personal Independence Payments) which is the highest disability rate, I hope supports that I have depressive issue and that my conditions limit my ability to function outside my home environment.”

Adjudicator’s Opinion

19. Mr N’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 briefly below:-

- It was clear from the available evidence that Veterans UK had taken some time to consider Mr I’s case and it had access to his medical records and its decision in October 2015 was based on a review of all the then available relevant evidence. It weighed the evidence before it and considered that Mr I’s incapacity would not continue until his normal retirement age, which is a factor required for Tier 2 ill health retirement.
- Other factors which might have been taken into account would have been his age, the likelihood of his health improving in the future (possibly from better-managed treatments) so that Mr I would be capable again of taking up employment.
- There was no evidence that Veterans UK took any irrelevant matters into account when making its decision in October 2015 or that anything of relevance was overlooked. Furthermore there was nothing to suggest that the AFPS05 rules have not been interpreted correctly or that Veterans UK failed to ask the right questions when assessing Mr I’s eligibility.
- Veterans UK did not doubt that Mr I’s conditions were causing him pain. The medical reports do not state, however that his prospects for gainful employment were significantly impaired. There was some conflicting medical opinion regarding his ability to function but no evidence that clearly indicates significant impairment.
- Veterans UK expressed the view that Mr I’s employment prospects would not be significantly impaired by his condition and there might yet be further improvement in his symptoms. It said that a Tier 1 award was appropriate and that Mr I should consider asking for a review in two years’ time if his conditions had not improved.
- When faced with a divergence of medical opinions amongst the experts consulted at the various stages of Mr I’s application on the prognosis of his illness, Veterans UK may reasonably prefer one medical view over the other. Moreover it is entitled to give more weight to its own medical adviser’s opinion.

- The fact that Mr I has subsequently provided further medical evidence showing that he is still suffering from the same conditions does not impact upon the validity of the original decision made in October 2015. Veterans UK was only expected to make their decision on the basis of information available to them at the time. But there is nothing improper in taking account of later medical evidence when reviewing a decision in so far as it bears on what Mr I's condition was at the time when the original decision was made. Caution needs to be taken however in revisiting earlier decisions made on the basis of contemporary material at the time of reconsideration but I consider that this is exactly what Veterans UK did.

20. Mr I did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr I provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr I for completeness.

Ombudsman's decision

21. When considering how a decision has been made by Veterans UK, I will generally look at whether:

- the correct questions have been asked;
- the applicable scheme rules or regulations have been correctly interpreted;
- all relevant but no irrelevant factors have been taken into account; and
- the decision arrived at must not be one that no reasonable body would make

22. Providing Veterans UK has acted in accordance with the above principles and within the powers given to it by the AFPS05 rules, I cannot overturn its decision merely because I might have acted differently. It is not my role to review the medical evidence and come to a decision of my own. I am primarily concerned with the decision making process.

23. The weight which is attached to any of the medical evidence is for Veterans UK to decide. It is also open to Veterans UK to prefer evidence from its own advisers unless there is a cogent reason why it should, or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser. If the decision making process is found to be flawed, the appropriate course of action is for the decision to be remitted for Veterans UK to reconsider.

24. The decision made by Veterans UK in October 2015 that Mr I should only qualify for Tier 1 ill health early retirement benefits was taken only after it had carefully considered all the available evidence at the time. Veterans UK had to weigh the evidence and make a decision based on the balance of probabilities.

25. I am satisfied that Veterans UK did give proper consideration to Mr N's application at the time by assessing all the medical evidence available and acted in accordance with the AFPS 05 rules and the above principles. In my view, its decision not to award

Mr I Tier 2 ill health benefits was not one that no reasonable body would make and it was within the bounds of reasonableness. The fact that Mr I is still suffering from the same medical condition does not impact upon the validity of the original decision. Veterans UK could only be expected to make their decision as at October 2015 on the basis of the condition as it was understood at the time and to review that decision in light of the medical prognosis available at each stage of the IDR process.

26. Mr I has provided evidence of his PIP payments. Receipt of this benefit does not, however, mean that Mr I would automatically qualify for a Tier 2 award from the AFPS 05 because the criteria used to determine whether or not he qualified for PIP are different to those used to ascertain the level of tier entitlement from the AFPS 05 he should be awarded.
27. The option of making a new application for a higher Tier 2 award in the AFPS 05 which takes into account that Mr I is still suffering from the same condition remains open to him. The new evidence which he has submitted to me for consideration may prove useful in such an application.
28. Therefore, I do not uphold Mr I's complaint.

Karen Johnston

Deputy Pensions Ombudsman
29 September 2017

Appendix

The Armed Forces Pension Scheme Order 2005 (as amended)

Rule D5 provides,

- “(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) ...
- (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, after consultation with the Scheme medical adviser, 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, after consultation with the Scheme medical adviser, as a result of the breakdown the member is incapable of any gainful full-time employment.
- ...”

Rule D6 provides:

“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) was formerly entitled to rights under a personal pension scheme or a retirement annuity contract in respect of which a transfer value payment has been accepted by the Scheme under Part F (transfers), and
- (c) the member is not entitled to a pension under rule D.5.(1) ...”

There is no definition of “gainful employment” or “significantly impaired” in the Rules.

Rule D8 provides:

- “(1) This rule applies if a member –
 - (a) ...
 - (b) has received a lump sum under article 16 of the Armed Forces Early Departure Payments Scheme Order 2005 ...
- (2) The member may request a review of his condition under the 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.
- ...
- (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 ...”

The Armed Forces Early Departure Payments Scheme Order 2005

Paragraph 16 provides,

- “(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, after consultation with the Scheme medical adviser, the person is unfit for service as such a member,
 - (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 ...
 - (ii) rule D.5 of that Scheme ...
 - (iii) rule D.6 of that Scheme ...
 - (iv) rule D.11 of that Scheme ...”

Joint Services Publication (JSP) 764

Under Part Two, Chapter Four “Lump Sum on Incapacity – Tier 1 Medical Discharge”, JSP 764 states,

“0401. A person who is discharged from the Regular Armed Forces on ill-health grounds is entitled to the immediate payment of a tax-free lump sum if:

- in the opinion of Vets UK (having received medical evidence from a registered medical practitioner) he is unfit for military service but deems his potential for gainful employment in civilian life is not affected (Tier 1),

- he is a member of AFPS 05 ...
- he has at least two years ***relevant service***,
- he is not entitled to a Tier 2 ... a Tier 3 ill-health award or a lump sum in lieu of five years' worth of pension having been given a life expectancy of less than 12 months ...

Tier 1 conditions are those which appear in Tariffs 12 – 15 in the table in Part 4 of this JSP. In categorising in terms of tiers and relative capacity for gainful employment, no account will be taken of the individual's motivation or skills, or the employment market ...”