

## Ombudsman's Determination

Applicant	Mr N
Scheme	Armed Forces Pension Scheme 2005 ( <b>AFPS 05</b> )
Respondent	Veterans UK

## Outcome

1. I do not uphold Mr N'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 N disagrees with the decision made by Veterans UK to award him Tier 1 ill health retirement benefits. He is of the opinion that he meets the eligibility criteria for a higher Tier 2 award in the AFPS 05.

## 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 N was medically discharged from the Army on 3 January 2015. The principal invalidating condition leading to discharge is recorded on Mr N's Medical Board Record (**F Med 23**) dated 4 September 2013 as "Anterior shin splints (bilateral)".
7. Mr N says that he developed this chronic condition six weeks after the start of basic training in 2011 and according to the F Med 23, his current symptoms were "pain in both anterior lower legs on walking more than 5 to 10 minutes and on any impact PT".
8. The F Med 23 also showed under the heading "Functional Capacity Evaluation" that Mr K's ability to work in his current military rank was very limited and that he could only do sedentary and office duties. In the "Recommendation" section it said that Mr N would exacerbate his condition on exercise or deployment unless it was in a purely sedentary role and he should be downgraded on a permanent basis for this condition.
9. In April 2014, Veterans UK decided that Mr N should qualify for Tier 1 ill health early retirement benefits once his date of discharge was confirmed after considering the information shown on the F Med 23 and F Med 24.
10. Mr N's original date of medical discharge was 2 July 2014. His service was subsequently extended until 3 January 2015 so that he could receive medical treatment available only from the Army and not the National Health Service. It was understood that this might not be enough time for Mr N to receive all the required treatment but if additional time beyond this six months was necessary, his unit could reapply for a further extension.
11. Mr N decided to appeal the decision made by Veterans UK in March 2015.
12. Veterans UK did not uphold Mr N's appeal at Stage One of the Internal Dispute Resolution Procedure (**IDRP**) in May 2015. The Deciding Officer (**DO**) said that:

"Your case was sent to the Medical Advisor (**MA**) who reviewed all the available evidence which included your letter of appeal and all medical evidence from your time in service.

Our MA also notes that in your appeal letter, you state you have compartment syndrome and underwent bilateral fasciotomies in October 2014 and you put excessive training down as the reason for your problems...

Our MA also notes that you underwent surgery and...after this...[were] working with a security firm, unfortunately after a flare up of symptoms you have been off work since February. You also state that most jobs involving long periods of standing or walking and this causes you great pain.

Our MA goes on to state that it is too early to say that you will not make a full recovery from your medical problem and surgery and even if you do not, it does not preclude employment in a less active or more sedentary role.

Our MA concludes that based on all information available to us at this time, the original Tier recommendation was appropriate and if your condition were

to deteriorate within the next 5 years, then you may ask for a review of your case.”

13. The DO also said that after reviewing Mr N's case thoroughly and taking into account all the available evidence including the MA's comments:

- he was satisfied that Mr N'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 feasible and not on the difficulty or ease of obtaining a job; and
- if Mr N's condition deteriorates in an unexpected way, he has the right to have his case reviewed anytime between now and the fifth anniversary of his discharge

14. Mr N's appeal was also rejected at Stage Two of the IDRP in February 2016. The DO wrote that:

“The SMA carefully reviewed your case and notes that you have not been seen at the hospital following your second operation in June 2015 although the op note suggested a 3 month review. The SMA states that on overall evidence including the nature of your disorder, she would have to conclude that unless there is evidence to the contrary that the operation must have been successful. The SMA concludes that a Tier 1 is appropriate in your case.”

15. Mr N contends that:

- there has been no appropriate treatment for his condition because of “the busy role he was placed in due to being injured in the army” and there was also no “continuous process in identifying his injury”;
- at his original discharge date, 2 July 2014, his injury had not been investigated or diagnosed properly;
- it was only after his service had been extended by a further six months that compartment syndrome was first diagnosed and the two operations performed on his legs;
- he is in a better position to judge whether or not he is going to make a full recovery after the operations and in his view, his condition has not improved;
- the surgeon who performed the operations, Lt Col Ward, told him after the second operation to seek further assistance from his GP who has supplied him with medication to ease the pain from which he suffers daily;
- Lt Col Ward has also suggested that he seeks assistance from a “vascular surgeon”;
- his GP has recommended that an “appropriate reassessment” of his injury is needed but this does not mean that he does not have a severe disability;

- his application “has not been taken seriously” by Veterans UK because he could not “make it to the battlefield” or his injury did not occur as a result of being deployed;
- he cannot undertake “full or part time employment” and his “working time has been cut short” due to his injury;
- after the second unsuccessful operation in June 2015, he experienced great difficulties in finding a new job;
- he therefore decided to attend a course at a college which provided him with a disabled parking space and also a lift pass only issued to disabled students;
- he also suffers from a serious back problem which Veterans UK are aware of;
- medical experts tend to be more interested in his low back problem because they are already aware of the two unsuccessful operations on his legs which “cannot be revisited or reversed”;
- there is evidence that people (such as him) who claim Personal Independence Payment (**PIP**) and Employment Support Allowance (**ESA**) do have (permanent) disabilities; and
- a person is said to be disabled if he or she has a physical or mental impairment that has a “substantial” and “long term” negative effect on his/her ability to do normal activities and this applies in his circumstances

## Adjudicator’s Opinion

16. 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:-

- Tier 2 benefits would be paid under rule D6 if Mr N had “suffered a breakdown in health as a result of which his capacity for gainful employment is significantly impaired”.
- There is no definition of “gainful employment” or “significantly impaired” in the AFPS 05 rules. The interpretation of these terms has been considered in a number of previous Ombudsman decisions. In summary, the Ombudsman has determined that:
  - a) Looking at rule D5 helps to interpret rule D6. This is because rule D5 is specific as to the level of impairment required to qualify for benefit and provides a higher level of benefit. Rule D6 provides a lower level of benefit than D5 and, therefore, a lower level of impairment is required to qualify for benefits.
  - b) Rule D5 applies if the member has suffered a permanent breakdown in health involving incapacity for any full-time employment. If the member were only capable of part-time employment, they could qualify for benefits under rule D5. Therefore, the gainful employment referred to in rule D6 must mean that the member is capable of some full-time employment (and not just part-time employment).

- c) The question presented by rule D6 cannot be answered by asking whether the applicant is capable of any paid employment in the civilian sector. That is the question to be answered under the stricter test in rule D5 and is the gateway criterion for the highest level of ill health retirement benefits (Tier 3).
  - d) The eligibility test in rule D6 is essentially a 'before and after' test; what was the member functionally capable of doing without the impairment and what are they functionally capable of doing with it?
  - e) The impairment to qualify for benefits under rule D6 must be significant. It would not be sufficient for the member simply to identify a small number of roles which they were unable to do.
- It was clear from the available evidence that Veterans UK had taken some time to consider Mr N's case and it had access to his medical records and its decision in April 2014 was based on a review of all the then available relevant evidence. It weighed the evidence before it and considered that Mr N'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 N 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 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 N's eligibility.
- Veterans UK did not doubt that Mr N's conditions were causing him pain. The medical reports did not state, however that his prospects for gainful employment were significantly impaired. There was some conflicting medical opinion from his GP regarding his ability to function but no evidence that clearly indicated significant impairment.
- Veterans UK expressed the view that Mr N'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 N should consider asking for a review if his condition deteriorated in an unexpected way between now and the fifth anniversary of his discharge.
- When faced with a divergence of medical opinions amongst the experts consulted at the various stages of Mr N'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.

- Mr N has provided evidence of his PIP and ESA payments. Receipt of these benefits does not, however, mean that Mr N 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 and ESA are different to those used to ascertain the level of tier entitlement from the AFPS 05 he should be awarded.
- The fact that Mr N has subsequently provided further medical evidence showing that he is still suffering from the same conditions did not impact upon the validity of the original decision made in April 2014. 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 N's condition was at the time when the original decision was made. Caution needed to be taken however in revisiting earlier decisions made on the basis of contemporary material at the time of reconsideration. This was exactly what Veterans UK did during both stages of the IDR.

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

### **Ombudsman's decision**

18. 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

19. 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.

20. 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.

21. The decision made by Veterans UK in April 2014 that Mr N 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.
22. 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 N 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 N is still suffering from the same medical condition and that compartment syndrome was only diagnosed after his discharge date had been postponed to 3 January 2015 from 2 July 2014 does not impact upon the validity of the original decision. Veterans UK could only be expected to make their decision as at April 2014 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 IDRP process
23. The option of making a new application for a higher Tier 2 award in the AFPS 05 which takes into account that Mr N is still suffering from compartment syndrome after surgery remains open to him. The new evidence which he has submitted to me for consideration may prove useful in such an application.
24. Therefore, I do not uphold Mr N's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
18 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),

**PO-17141**

- 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 ...”