

## Ombudsman's Determination

Applicant	Mrs K
Scheme	Naval and Marines Attributable Benefits Scheme ( <b>AFAB</b> )
Respondents	Veterans UK

## Outcome

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

## Complaint summary

2. Mrs K has complained that Veterans UK has declined to award her "attributable benefits" following the death of her husband.

## Background information, including submissions from the parties

### Background

3. Mrs K's husband died in August 2014. The cause of death recorded on his death certificate was metastatic rectal adenocarcinoma.
4. The relevant rules are contained within the Naval and Marine Pensions (Armed Forces Pension Scheme 1975 and Attributable Benefits Scheme) Order 2010 (as amended). Rule C.1 provides:
  - "(1) Subject to paragraphs (2) and (4) a surviving adult dependant is entitled to short term and long term compensation and a survivor's attributable lumps sum as compensation for a person's death ... where –
    - (a) it has been accepted for the purposes of articles 23 and 24 of the Service Pensions Order that the death was attributable to or hastened by –
      - (i) an injury which was attributable to the person's service in the Royal Marines or Royal Navy; or
      - (ii) the aggravation by such service of an injury which existed or arose during such service;

- (b) the service referred to in sub-paragraph (a) was service in the Royal Marines or Royal Navy in the period beginning with 31<sup>st</sup> March 1973 and ending with 5<sup>th</sup> April 2005;
- (c) the service referred to in sub-paragraph (a) was not excluded service; and
- (d) the Defence Council accepts on the balance of probabilities that the death was attributable to or hastened by the person's service ..."

5. Following the death of her husband, Mrs K was awarded a widow's pension under the War Pensions Scheme (**WPS**). The reason given was that the cause of Mr K's death could not be dissociated from his service prior to April 2005 and it was, therefore, considered due to his service. Mrs K applied for attributable benefits under the AFAB.

6. Veterans UK sought advice from the medical adviser (**MA**) who had been involved in the WPS decision. The MA responded by saying:

"Colorectal cancer is a common cancer, usually contracted at a greater age than that at which the deceased contracted it. It is a multi-factorial condition and he had none of the normally-associated risk factors, while there is no accepted occupational reason for developing the condition. Soon after initial presentation with symptoms he was referred as a priority patient to the local NHS hospital facilities for specialist diagnosis and management.

On the balance of probability the deceased's death was not attributable to his service, nor was it accelerated by it."

7. The MA said his comments had been made after consulting Mr K's Service Primary Health Care records, a synopsis of causation for colorectal cancer<sup>1</sup> and [www.patient.co.uk/doctor/colorectal-cancer](http://www.patient.co.uk/doctor/colorectal-cancer)

8. Mrs K's application was submitted to a Deciding Officer (**DO**) with the recommendation that her husband's death was not attributable to nor aggravated by his service. The DO accepted this recommendation. In its letter notifying Mrs K of its decision, Veterans UK referred to the advice it had received from the MA. It also said that the WPS had to make an award unless it could be proved that the death was not caused by or significantly hastened by service. Veterans UK said the AFAB rules required reasonable evidence that, on the balance of probabilities, the death was caused by or significantly hastened by service.

9. Mrs K appealed the decision not to award her attributable benefits.

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<sup>1</sup> Synopses of causation were commissioned by the MoD to assist in the decision making process. They were written by independent medical practitioners based on a literature search and validated by external consultants who were specialists in the relevant field. The synopsis of causation for colorectal cancer is dated September 2008.

10. Veterans UK sought advice from its senior medical adviser (**SMA**). In its referral, Veterans UK explained that Mrs K had said that her husband had initially been diagnosed with haemorrhoids and not referred to the district hospital until over four months later. Mr K had been informed by the hospital consultant that he had advanced colorectal cancer. Veterans UK said Mrs K had stated that the hospital consultant could not understand why Mr K's tumour had not been detected earlier. It also said that Mrs K had been advised that the doctor responsible for the misdiagnosis had been asked to leave the department. Veterans UK noted that the issues raised by Mrs K should be addressed by the Ministry of Defence's (**MoD's**) Clinical Negligence Team and asked the SMA to give an opinion on attributability.
11. In response, the SMA said: "In terms of attribution ... rectal carcinoma is not due to service on balance of probabilities". She asked to see the service medical records and hospital case notes in the light of the allegations made by Mrs K. Mrs K's case was subsequently referred to another DO. He rejected the appeal and said:

"I have taken all the available information into account, in particular the opinions given by [MA] and [SMA]. I am sufficiently satisfied that there is no evidence to suggest that the condition was attributable to service. In terms of aggravation, I empathise with [Mrs K] and can understand why she believes that the delayed diagnosis means that his condition was aggravated. However, I do not believe this is the case and agree with your recommendation that we provide her with details of the clinical negligence team."
12. Veterans UK wrote to Mrs K, on 29 September 2015, notifying her that her appeal had been unsuccessful. It said its SMA had confirmed that Mr K's cancer was not caused by or significantly hastened by his service. Veterans UK referred to Mrs K's allegations of clinical negligence on the part of the Navy doctor and said there was a separate procedure to deal with such claims. It also referred to the Limitations Act and provided an address for the relevant MoD department.

### **Mrs K's position**

13. Mrs K submits:-
  - The Navy medical service showed a lack of the duty of care and medical negligence.
  - Mr K had impaired renal function and regular bouts of serious ill health requiring hospital admission. Despite this, the Navy wanted to deploy him to areas which were unsuitable for someone in his position; such as the Gulf.
  - In late 2012, Mr K attended a Navy medical centre complaining of changes in his bowel habit, blood in his faeces and severe pain in his stomach and rectum. The doctor prescribed haemorrhoid cream. Mr K saw the doctor on six further occasions before he was given a non-urgent referral to the local hospital. The hospital progressed this to urgent on review of his symptoms.

- The hospital consultant has stated that he does not know how the Navy doctor did not know that Mr K had cancer. He informed them that, if another month had passed, the hospital would not have been able to offer any treatment at all.
- During Mr K's treatment for cancer, the Navy medical service suggested that he return to work. This was despite the high levels of pain medication he was taking and the consequent impairment to his ability to function. At the time, she was providing her husband with 24-hour care.
- Her son has lost his father and she has lost her husband. In addition, they have lost his income. This could have been avoided.
- It appears that not all the available medical evidence was considered by the DO in reaching a decision in her case. She has spoken to the various medical facilities involved in her husband's care and they have confirmed that they were not approached for information.
- It is factually incorrect to say that Mr K was referred as a priority patient to the local hospital soon after initial presentation.
- The misdiagnosis and negligence on the part of the Navy doctor caused a delay in Mr K's treatment. This impeded his chances of recovery and caused his death.

## **Adjudicator's Opinion**

14. Mrs K's complaint was considered by one of our Adjudicators who concluded that no further action was required by Veterans UK. The Adjudicator's findings are summarised below:-
- The Adjudicator began by explaining that the issues relating to Mr K's employment and, in particular, his deployment abroad were not matters which came within the Ombudsman's jurisdiction. The Adjudicator explained she had confined her investigation to the question of Mrs K's eligibility for benefits under the AFAB.
  - An individual's entitlement to benefits was determined by the relevant scheme rules or regulations. The scheme rules or regulations determined the circumstances in which individuals were eligible for benefits, the conditions which they must satisfy and the way in which decisions about benefits should be taken.
  - In order for Mrs K to qualify for benefits under Rule C.1 (see paragraph 4 above), her husband's death had to be accepted by Veterans UK as attributable to or hastened by his service. Veterans UK had to apply the civil

burden of proof in coming to a decision; that is, a decision based on the balance of probabilities.

- Mrs K argued that a misdiagnosis by a Navy doctor had led to a delay in her husband receiving the appropriate treatment for his cancer and that this had caused his death. The Adjudicator said she fully understand Mrs K's reasons for putting forward this argument.
- The question which Veterans UK (acting on behalf of the Defence Council) had been required to address was whether Mr K's cancer was attributable to or hastened by his service in the Royal Navy; that is, whether Mr K's cancer was caused by his service or aggravated by it.
- Given the nature of the question it had to address, it was entirely appropriate for Veterans UK to seek medical advice before coming to a decision. The advice it received was that Mr K's cancer was not attributable to nor hastened by his service.
- The role of the Ombudsman was not to review the medical advice and come to a decision of his own as to Mrs K's eligibility for benefits under Rule C.1. His concern was with the decision making process undertaken by Veterans UK. The Ombudsman would consider whether Veterans UK had correctly interpreted Rule C.1, whether it had based its decision on sufficient and appropriate evidence and whether the decision was supported by the available relevant evidence.
- With regard to the interpretation of Rule C.1, it was the Adjudicator's view that Veterans UK had applied the correct interpretation to the eligibility requirements for attributable benefits. Rule C.1 clearly provided that entitlement to benefits arose where the member's death was accepted as attributable to or hastened by his/her service. In the correspondence, Veterans UK had also used the terms "caused by" or "aggravated by". In the Adjudicator's view, this was acceptable paraphrasing of Rule C.1 and did not indicate any misinterpretation of the rule.
- At the heart of Mrs K's complaint was her allegation that the Navy doctor from whom her husband had sought help had failed to act appropriately. This was, however, a separate matter to the question of whether Mr K's cancer was attributable to or hastened by his service. Mrs K would have to establish that some aspect of Mr K's service in the Royal Navy was the cause of his cancer or had in some way hastened his death.
- The advice which Veterans UK received was that there was "no accepted occupational reason" for an individual to develop colorectal cancer. This position was confirmed by its SMA. It also appeared to be consistent with information as to causation provided by the NHS and cancer research organisations. The Adjudicator said she had not identified any reason why

Veterans UK should not have accepted the advice it received from its MA and SMA.

- The Adjudicator noted that Mrs K had said that the medical practitioners who were treating her husband were not contacted by Veterans UK and/or its medical advisers. She said she could understand why this had caused Mrs K some concern but it was not clear what further evidence as to causation could have been provided by Mr K's own doctors. The advice provided by Veterans UK's own medical advisers appeared to be consistent with the current general medical view as to causation. In the Adjudicator's view, the failure to contact Mr K's own doctors had not affected the outcome of Mrs K's application for attributable benefits under the AFAB.
- The Adjudicator explained that the Pensions Ombudsman was not able to consider Mrs K's complaint about medical negligence on the part of the Navy doctor. She noted that Veterans UK had provided Mrs K with the appropriate contact details for her to pursue this elsewhere.

15. Mrs K did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs K provided her further comments, which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the main points made by Mrs K for completeness.

#### **Mrs K's further comments**

16. Mrs K disagrees that the failure to contact her husband's treating physicians did not affect the outcome of her application for attributable benefits. She argues that the military medical advisers were not cancer or palliative care specialists and their opinions should not have been sought.

#### **Ombudsman's decision**

17. The matter before me is whether Veterans UK properly considered Mrs K's eligibility for a benefit under Rule C.1. My remit does not extend any further than this.
18. Briefly, in determining whether Veterans UK reached its decision in a proper manner, I consider:-
- whether it correctly interpreted Rule C.1;
  - whether it obtained sufficient and appropriate evidence; and
  - whether its decision is supported by the available relevant evidence.
19. I find that Veterans UK has correctly interpreted Rule C.1. In order for Mrs K to receive a benefit under Rule C.1, her husband's death has to be accepted by Veterans UK as attributable to or hastened by his service. In other words, there was some aspect of Mr K's service in the Royal Navy which caused him to develop

colorectal cancer or which hastened his death. This is the test which Veterans UK applied and the question which it asked of its medical advisers.

20. Veterans UK sought advice from its own medical advisers, as is its usual approach. Mrs K is firmly of the belief that it should have sought advice from the doctors who had treated her husband.
21. So far as their medical opinions are concerned, Veterans UK's medical advisers do not come within my jurisdiction. They are answerable to their own professional bodies. It would largely be a matter of their own professional judgment as to whether they felt able to provide the kind of advice Veterans UK was seeking. The question I need to consider is whether there was any reason why Veterans UK should not have relied on the advice its received from its medical advisers.
22. Veterans UK required advice as to the cause of Mr K's cancer. Had it been seeking advice as to diagnosis or treatment, I could perhaps see a stronger argument for seeking advice from the treating physicians. Arguably, a cancer specialist could give a more authoritative view on aetiology but s/he would also need to understand the nature of Mr K's service. There is no single definitive source of advice in the circumstances. I can understand why Mrs K does not have a good opinion of military doctors but I do not find that it was inappropriate for Veterans UK to seek advice from its own medical advisers.
23. The advice Veterans UK received was that there was no accepted occupational reason from Mr K to have developed colorectal cancer. That is, it was not accepted that Mr K's service in the Royal Navy had caused him to develop the cancer or had otherwise hastened his death. This is a separate issue to the allegations of negligence on the part of the Navy doctor from whom he had sought help. Even if these allegations had been upheld, and I make no finding on that, this would not mean that Mr K's service had caused his cancer or hastened his death. Mr K came into contact with the doctor in question because s/he was employed by the Navy, but this does not amount to his service having caused or hastened his death.
24. I do not find that it was maladministration for Veterans UK to accept its MA and SMA's advice and decline Mrs K's application for attributable benefits under the AFAB.
25. I do not uphold Mrs K's complaint.

**Anthony Arter**

Pensions Ombudsman  
19 February 2020