

Ombudsman's Determination

Applicant	Mr S
Scheme	Armed Forces Pension Scheme (the Scheme)
Respondent	Veterans UK

Outcome

1. I do not uphold Mr 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 S complains that Veterans UK has incorrectly reviewed his application for ill health retirement benefits; he considers that he at least meets the criteria for a tier 2 award. Further, Mr S believes Veterans UK has unfairly shifted the criteria for these benefits since his discharge.

Background information, including submissions from the parties

4. In 2006, Mr S sustained a traumatic brain injury.
5. On 12 October 2012, Mr S was medically discharged from the Army. The principal condition recorded was epilepsy.
6. Mr S subsequently applied for ill health retirement benefits and was granted tier 1. I understand that he appealed this decision through both stages of the Scheme's Internal Dispute Resolution Procedure (**IDRP**) and then, this Office. He was not successful.
7. Mr S later took up employment with British Telecoms (**BT**).
8. On 11 November 2016, Mr S attended a medical appointment at a Neurology Clinic. The key points were
 - Mr S suffered seizure attacks in 2009 and 2010 at which time a seizure diagnosis was made and he was started on anti-epileptic drugs.

- He was stable for 3-4 years and regained his driving licence but since early 2014 he has suffered further seizures, which may be associated with periods of stress.
 - These were unpredictable and the frequency may vary from a maximum of 2 per week to several months without.
 - Mr S did not wish to contemplate any changes to his anti-epileptic drug regime for fear of making things worse.
9. On 15 December 2016, Mr S submitted an appeal to Veterans UK regarding the tier of benefits he was awarded. He said “although somewhat controlled on discharge my seizures are still ongoing some 4 years later and I am very much suffering. I would like to start the process to open up the case in light of new medical evidence.”
10. On 27 January 2017, Mr S attended another appointment at the Neurology Clinic. The follow-up letter concerning his examination said:-
- Mr S was still experiencing seizures, one every two months, but these were better when he took his medication regularly.
 - He had tried multiple medication combinations and found his current one to be the most stable.
 - Post-traumatic epilepsy had a worse prognosis and some patients were considered for treatment with surgery. This would apply in Mr S’ case if the frequency of his seizures was higher.
 - To assess whether there was any focal injury, an MRI head scan would be arranged.
 - There was also some evidence to show that with a change in treatment, a quarter of patients could go into remission, although this was usually not sustained.
 - Mr S was not keen to change his treatment but could improve matters in the way he took his medication.
11. On 18 May 2017, Veterans UK responded to Mr S’ appeal under stage one of the IDRP. It said:-
- Medical records had been obtained from Mr S’ GP and Consultant Neurologist. It was noted that Mr S had suffered a traumatic brain injury in 2006 which resulted in problems with speech, concentration and memory.
 - Mr S developed epilepsy in 2009 but was retained in the Army until 2012.
 - Seizures returned in early 2014 after a period of being seizure free. At a Neurology review in January 2017, it was recorded that seizures were occurring every two months, but were better when medication was taken regularly.
 - With the information available, it was difficult to assess how much drug compliance was contributing to seizure frequency. Improved compliance plus an alteration to Mr S’ medication might reduce seizure frequency.

- If seizures persisted despite adequate interventions at a frequency which affected Mr S' employment status, it was advised that he re-apply in 9 months' time, with up to date supporting medical evidence.
- The Deciding Officer had reviewed Mr S' case thoroughly but was satisfied that it had been properly reviewed in accordance with the Scheme's rules. The test for tier 1 and 2 awards was consideration of lifetime capacity to work and not a snapshot of the current situation.

12. On 27 June 2017, Mr S sent a letter to Veterans UK to appeal its decision. He said:-

- His current employer, BT, had failed to make reasonable adjustments, and was offering him a small severance package, in which his disability of epilepsy was the root cause. He would therefore be leaving BT on 30 June 2017.
- He was unsure of what evidence Veterans UK still needed to see. He felt he had shown that he had a frequency in seizures over the years and was taking medication, as well as having taken others prior to this.
- The Deciding Officer was incorrect in saying that his condition was a snapshot of the current situation, he had been on other medication while serving in Germany and should be given some grace for the aggressive treatments he was yet to undertake.
- He had attended all appointments and adhered to recommendations by GP's and consultants.
- He was no longer able to undertake everything he had been trained to do by the army. The frequency of his seizures meant he could not carry out the sports he enjoyed, travel alone or even take a bath.

13. On 21 July 2017, the Scheme Medical Adviser wrote to Mr S asking a series of questions concerning the frequency and timing of his fits, the medication he was taking, his reasons for giving up his job and whether he had any plans to work in the future.

14. On 26 July 2017, Mr S provided his responses to these questions. In regard to the last question, Mr S said:

"I would love to have a job that accommodates my disability however, it is proving difficult. So for the foreseeable future, no."

15. On 19 September 2017, Veterans UK wrote to Mr S with its stage two IDRP decision. The following points were made:-

- Although Mr S had again not submitted any supporting evidence, it had been able to obtain more information from his Neurologist and GP.
- Mr S' case had been sent to the Scheme Medical Adviser. She had commented on the Neurology Review report dated January 2017, and that he was due to be seen in six months' time.

- From Mr S' letter, it was not clear how many fits he was having and when and whether he was taking regular medication etc. hence, she arranged to have these points clarified.
 - However, despite this extra information, there was no actual further evidence.
 - It was clear that Mr S suffered from frequent epileptic fits that affected his ability to undertake gainful employment until retirement age. Although there were restrictions on employment for those with epilepsy, there were many suitable jobs available.
 - The Equality Act and the employer had responsibilities regarding risks such as working alone, working at heights, driving etc. This related to the reason Mr S gave for leaving BT, where Mr S said that BT failed to make reasonable adjustments, which suggested that he would have continued to work had these been made.
 - The Deciding Officer noted that Mr S had not supplied any medical evidence to support his tier award. The AFPS was not a compensation scheme like AFCS and tier awards were based on lifetime capacity to work.
 - She agreed with the Scheme Medical Adviser that there were many suitable jobs available and the Equality Act set out appropriate guidelines.
 - While appreciating Mr S' present ill health, it was too early to conclude that the position would be maintained until retirement age. Mr S had a period of 4 years without an epileptic fit and with more treatment options becoming available, these may become better controlled. A tier 1 award was appropriate.
16. Mr S subsequently referred the matter to this Office for an independent review.
17. On 16 November 2017, Veterans UK provided its formal response reiterating the points it made previously. It commented on there being a lack of supporting evidence submitted by Mr S in his appeals.
18. On 4 December 2017, Mr S provided a follow-up letter following an epilepsy clinic appointment he attended on 29 September 2017. Amongst other things, it was commented that the risk of continued seizures was highly likely and long-term treatments carried side effects. It was also noted that Mr S had remained seizure free since 23 March 2017.
19. On 22 May 2018, Mr S provided a letter from Liverpool City Council, in which an Occupational Health Physician concluded that Mr S was not medically fit to undertake a School Crossing Patrol role.

Adjudicator's Opinion

20. Mr 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:-

- The Scheme offered three tiers of benefit for those who leave the Armed Forces as a result of ill health. 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 or she became entitled to the pension or lump sum. Mr S' requested a review of his award following his seizures becoming more frequent since 2014.
- The question for consideration was whether Veterans UK had followed the correct process in arriving at its decision. In recent months, Mr S had provided further information on his condition but only the information available to Veterans UK at the time of its final assessment in September 2017 could be considered.
- Veterans UK asked itself whether Mr S had suffered a breakdown in health as a result of which his capacity for gainful employment was significantly impaired. This was the correct question in respect of the Scheme's rules.
- Before Veterans UK made a decision at stage one of the IDRP, it requested further information from Mr S' GP and Neurologist, which was also considered at stage two. Further, it sought additional clarification on the frequency of Mr S' fits and other matters. This demonstrated that Veterans UK were proactive in gathering the information required for its review.
- Veterans UK acknowledged that Mr S was suffering regular fits which would have an effect on his ability to undertake gainful employment but decided there were a range of suitable jobs available which Mr S could undertake, despite his recent experience with BT.
- Veterans UK decided that it was too early to conclude that Mr S' current position would be maintained until retirement age and it was noted that he had a period of 4 years without an epileptic fit. These were all relevant considerations. There was no evidence that anything of relevance was overlooked or that anything irrelevant was taken into account.
- Veterans UK concluded that with more treatment options, Mr S' fits may become better controlled. Bearing in mind all of the above, Veterans UK's decision was one within the bounds of reasonableness.
- Although Mr S had doubts on his prospects for gainful employment, Veterans UK must reach a decision on the balance of probabilities having reviewed all of the available evidence. There did not appear to be any basis upon which one could say its decision was flawed.

21. Although Veterans UK accepted the Adjudicator's Opinion. Mr S did not and made the following comments:-

- If he had been in receipt of a Personal Independence Payment (**PIP**) during his employment at BT, he would have had further evidence in time. However, he never claimed for a PIP and thus never had the further medical evidence as he was honouring the system and did not wish to claim whilst earning.
- The noted 4 year period of being seizure free was only a recording in that he never made complaints to doctors regarding seizures during that time to protect

his employment. Further his seizures becoming somewhat controlled did not mean that he was seizure free.

- His epilepsy had been interfering with his ability to undertake the challenges associated with his appeal.
- Overall, his epilepsy continued to disrupt his employment, resulted in him leaving his last role and will hinder his ability to secure further gainful employment. It was very clear that he met the criteria for a tier 2 award.

22. As the Adjudicator remained of the same opinion, Mr S asked for his case to be reviewed by an Ombudsman. Mr S added that he had recently asked Veterans UK to consider further evidence. In response, Veterans UK acknowledged that in its stage one decision, it had said Mr S could re-apply in 9 months' time with new medical evidence. It said that although Mr S was slightly out of time, it would agree to exceptionally review his case and he must supply up to date medical information.
23. The complaint has been passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr S for completeness.

Ombudsman's decision

24. Firstly, I must point out that my consideration of this matter is limited to the decision which Veterans UK made in its IDRP and the evidence presented at that time. I understand that Veterans UK plans to conduct a further review in due course, which my decision here has no bearing on.
25. I have much sympathy for the injury Mr S sustained and the epilepsy which consequently developed, however, my role is not to review the medical evidence and make a decision on the conclusions reached, but to review the decision-making process.
26. In making its decision, Veterans UK considered medical reports from Mr S' Neurologist and GP. It was acknowledged that Mr S suffered from frequent epileptic fits and enquires were made into, among other things, whether Mr S was taking his medication regularly. Mr S' present ill health was taken into account but it was decided that from the overall evidence, it was too early to conclude whether Mr S' position would be maintained until retirement age. In my view, this conclusion is within the bounds of reasonableness.
27. Further, I understand that in stage one of the IDRP, Veterans UK said that if Mr S' seizures persisted despite adequate interventions, he was advised to re-apply in 9 months' time.
28. Veterans UK mentioned that Mr S had a period of 4 years without an epileptic fit and said "with further treatment options becoming available your fits may again be better controlled." For completeness, it would be prudent to add that the latter statement is

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unhelpfully broad and does not sufficiently address the question at hand, however, I do not consider that this invalidates the overall conclusions reached by Veterans UK. I also appreciate that this comment may have been made in view of the, relatively speaking, unusually long period Mr S has until retirement age.

29. Notwithstanding this, I am satisfied that Veterans UK has considered all of the available evidence and followed the correct process.
30. Therefore, I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman
29 June 2018