

## Ombudsman's Determination

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

## Outcome

1. I do not uphold Mr R'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 R's complaint against Veterans UK concerns its review of its original decision not to award him Tier 2 pension benefits.

## Background information, including submissions from the parties

4. The Adjudicator issued his Opinion on 15 August 2017 and directed Veterans UK to reconsider Mr R's application and then decide whether or not he satisfied the criteria for Tier 2 benefits when he was medically discharged from the Army. The Adjudicator also recommended that Mr R's treating specialists be furnished with Rule D.6 of the AFPS 05.
5. On 16 August 2017, Veterans UK sent a letter to Mr R acknowledging the Adjudicator's Opinion. It notified Mr R that it would refer his case to a new Medical Adviser (**MA**) for review and sent a copy of Rule D.6 to Mr R's treating specialists, Dr Chatakondur, Dr Paremain and Dr Scott-Perry. The specialists considered Rule D.6 and subsequently provided their opinions.
6. On 9 October 2017, a new MA, Dr Morris reviewed all Mr R's medical evidence and a copy of the Adjudicator's Opinion. The MA had a detailed review of Mr R's condition. He took account of Mr R's treating specialists' letters, Dr Scott-Perry's letter, dated 4 September, and Mr Paremain's letter, dated 24 August 2017 who confirmed that Mr R's back condition does satisfy the criteria set out in Rule D.6. The MA also had sight of the report of the Consultant Orthopaedic Surgeon, Mr Chatakondur, dated 6 September 2017, that said it was unlikely that Mr R would ever be able to resolve his back pain. The MA concluded that:

“The surgery was only completed June 2016...Regarding the final assessment by the CPD Medical Adviser on 25 Jan [sic] 2017 Mr R has included only one additional piece of medical evidence. This is a letter from his GP...dated 10 Jan [sic] 2017. The GP confirms that Mr R has undergone many years of physiotherapy and drug treatment. In respect of the latter there is no evidence that Mr R has been referred to a pain management clinic or that a number of alternative pain management procedures have recently been attempted. It is now only 15 months since surgery was completed. I would therefore disagree that all multi-disciplinary inputs and treatments have been attempted and that Mr R’s symptoms are likely to continue for the rest of his life. I refer once again to the Synopsis of Causation for Low Back Pain. While it is accepted that Mr R continues to have chronic pain despite recent surgery, this does not mean that he is permanently unfit for work as all treatment options have still not been considered. He should continue with rehabilitation and should discuss the possibility of requesting a pain management consultation...I remain of the opinion that the original Tier 1 recommendation was appropriate...In the long term Mr R’s ability to get gainful employment should not be significantly impaired on the balance of probabilities standard of proof, although he may need to avoid heavy manual work until he is better able to manage his symptoms”.

7. In October 2017, Veterans UK sent Mr R a decision letter that did not uphold his R’s case. The letter said that:

“...the DO [Deciding Officer] notes that it is only 15 months since surgery was completed and that there is no evidence of your referral to a pain management clinic and agrees that a Tier 1 award is appropriate. The test for Tier 1 or 2 is consideration of lifetime capacity to work and not a snapshot of the current situation. If your illness or injury deteriorates in an unexpected way you have the right to have your case reviewed anytime between now and the 5th anniversary of your discharge”.

8. Mr R appealed against Veterans UK’s decision by invoking the Scheme’s two-stage internal dispute resolution procedure (**IDRP**).
9. In October 2017, Veterans UK responded to Mr R under stage one of the IDRP and did not uphold his complaint. It confirmed that its DO reviewed all of Mr R’s available evidence and concluded that there are no grounds for overturning the previous decision not to award him Tier 2.
10. Mr R appealed against Veterans UK’s decision by invoking stage two of the IDRP. In his submission, Mr R provided two personal statements. On 12 October 2017, Veterans UK subsequently responded saying that:

“The PO requested that we seek the opinion of medical practitioners on whether Mr R meets the criteria for an increase in Tier awards. This has been provided, the latest from GP Scott-Perry which again references incorrectly

him having sustained a 'specific injury' whereas he has suffered a common degenerative disc condition'. As such the most recent medical opinion, evidences improvement. In addition it is clear that not all multi-discipline inputs have not yet been exhausted, as such he is not yet in steady state...I note that Mr R has held part time employment as a driver, attended college part time and has the potential to improve with further medical interventions. The medical opinion provided at times is conflicting incorrectly referring to a trauma that did not occur. Based on the medical evidence presented, including previous and most recent, I am in agreement with the MA and your recommendation ...that Tier 1 award remains appropriate at this time."

11. Mr R's position:-

- His medical experts said that his employment prospects are deemed to be significantly impaired and his back injury will affect his life.
- He has provided this Office with a copy of his Employment and Support Allowance (**ESA**) and Personal Independence Payment (**PIB**) to show that his poor health is affecting his ability to work.
- Veterans UK have not considered all medical reports from Mr R's specialists that recommend a Tier 2 award.
- Pain relief medication has not been effective.
- He has been unable work since September 2013 and feels there are few opportunities for employment as he still has severe mobility issues.

## **Adjudicator's Opinion**

12. Mr R'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 the Adjudicator's opinion that Veterans UK has assessed Mr R's eligibility for Tier 2 benefits in a proper manner because it relied on an opinion from its MA which addressed the relevant questions.
- The Adjudicator could see that on each occasion, Mr R's application was referred to a MA, who had access to all of the available evidence and he was invited to make additional submissions. The Adjudicator could not see that any medical evidence available at the time was overlooked by the MA. In the circumstances, the Adjudicator was satisfied that the MA reviewed the relevant evidence, and nothing irrelevant, when providing his opinion to Veterans UK.

- Additionally, as the Adjudicator has said, on each occasion the correct questions were asked. This required that Veterans UK was satisfied, having received evidence from the MA, that Mr R's lifetime capacity for full-time employment was not significantly impaired. It is clear from the evidence that this question was considered by Veterans UK.
  - On the basis that, having considered the other medical evidence, the MA's advice was that Mr R's capacity for full-time employment was not significantly impaired, the Adjudicator did not think Veterans UK's decision can be said to be irrational.
  - Mr R and his medical experts assert that due to his back injury he can never work full-time therefore he should qualify for a Tier 2 award. However, the weight which is attached to any of the evidence is for Veterans UK to decide, including giving some of it little or no weight. It is open to Veterans UK to prefer evidence from its own advisers; unless there is a cogent reason why it should not, 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.
  - The Adjudicator noted that Mr R has also provided this Office with evidence of receiving other benefits however these are awarded under different rules so the Adjudicator could not consider them in her Opinion.
13. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr R 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 R for completeness.
14. Mr R says that in the Adjudicator's Opinion, dated 15 August 2017, following Mr R's first complaint to this Office, he recommended that Mr R's specialists be furnished with Rule D.6 of the AFPS 05. Subsequently, all the medical experts wrote back confirming that he fits the criteria for Tier 2. However, Mr R believes that Veterans UK ignored this.

### **Ombudsman's decision**

15. 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 is not one that no reasonable body would make.
16. 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.
  17. 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.
  18. The decision made by Veterans UK that Mr R should only qualify for Tier 1 ill health early retirement benefits was taken after it had carefully considered all the available evidence at the time. I am satisfied that Mr R's specialists were furnished with Rule D.6, as recommended by the Adjudicator, but this does not mean that Mr R is automatically awarded Tier 2 benefits. Veterans UK had to weigh the evidence and make a decision based on the balance of probabilities.
  19. I am satisfied that Veterans UK did give proper consideration to Mr R's application.
  20. Mr R has provided evidence of his PIP and ESA payments. Receipt of these benefits does not, however, mean that Mr R would automatically qualify for a Tier 2 award under the AFPS 05 because the criteria used to determine whether or not he qualified for those benefits are different to those used to ascertain the level of tier entitlement from the AFPS 05.
  21. The option of making a new application for a higher Tier 2 award in the AFPS 05, which takes into account that Mr R is still suffering from the same condition, remains open to him. Mr R may wish to submit the new evidence which he has sent to me for consideration as part of this application.
  22. Therefore, I do not uphold Mr R's complaint.

**Anthony Arter**

Pensions Ombudsman  
25 May 2018