

Ombudsman's Determination

Applicant	Mr S
Scheme	Armed Forces Pension Scheme (AFPS)
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' complaint against Veterans UK concerns its decision not to give a discretionary award under the Attributable Benefit Scheme (**AFAB**).

Background information, including submissions from the parties

4. The relevant rules are contained in Schedule 2 of the Naval and Marine Pensions (AFPS 75 and AFAB) Order 2010 (as amended). Mr S was a member of AFPS 05 however as his principle condition (**PC**) originated in 1987, his case was reviewed by Veterans UK with regard to attributable benefits.
5. An award under AFAB is only made if the principle invaliding condition (**PIC**) is either attributable to or significantly aggravated by service. Part B, Rule B.1 (b) of Schedule 2 requires that "the injury was caused by service in the Royal Navy or Royal Marines in the period beginning with 31st March 1973 and ending with 5th April 2005.
6. Mr S was assessed by Surgeon Commander, Consultant in Orthopaedics, who concluded, in his report, dated 31 March 1987 that:

"This patient has very marked radiological Scheurmann's [sic] disease affecting two penultimate vertebral bodies...He requires no treatment as such and I am sure his symptoms at present almost completely resolved will be resolved completely in the near future... P2, no review. Permanently unfit Commando training".

7. Mr S remained in service until he was medically discharged on 22 December 2015 and awarded War Pensions Tier 1 benefits from AFPS 05. This was subsequently increased by Veterans UK to Tier 2. Mr S was awarded this benefit for his multilevel lumbar degenerative disc disease and erectile dysfunction.
8. Mr S' PC was recorded by Veterans UK as low back pain with multi-level disc degeneration, spondylolisthesis & spinal stenosis and multiple spinal surgery. Mr S' case was referred to a Veterans UK deciding officer (**DO**) under the Discretionary Award Review (**DAR**) in June 2016, to decide whether his PIC should be accepted as attributable to, or aggravated by military service.
9. On 22 July 2016, Veterans UK sent Mr S a decision letter rejecting his PC. On consulting with its medical adviser (**MA**), it said that:

“Dr... states that the appropriate Synopsis is Spondylosis dated 2015. It states there is strong evidence against an association between back pain and most of the normal activities military personnel, police and fire-fighters would undertake...A recent review found no strong evidence supporting a causal relationship between any occupational physical activity considered and low back pain...significantly lower rates of acute low back pain in active duty infantrymen compared to matched controls...there is no evidence that combat is a risk factor for spondylosis or back pain, and fitness appears to be protective...As a medical officer, whilst he would be expected to have a reasonable level of fitness, he would not be expected to undertake excessive weight bearing on a regular basis...Having considered all the evidence available, I would concur with the findings of our MA, on the balance of probabilities the PC low back pain with multi-level disc degeneration, spondylolisthesis and spinal stenosis. Multiple spinal surgery and adjustment disorder are neither attributable to nor aggravated by Service”.
10. In September 2016, Mr S appealed against Veterans UK's decision under Discretionary Award Appeals Review (**DAAR**). In his appeal, he said he hurt his back in 1987 during commando training. Despite being made unfit for commando training, he continued to serve with commando forces and the work he was doing required regular excessive loading. He said there was a clear narrative of initial spinal damage through overloading during intensive training throughout his army service, which resulted in four separate operations. Mr S also provided additional medical information in support of his appeal.
11. Mr S' case was referred to the Senior MA (**SMA**) for advice on 31 October 2016, who reviewed all of Mr S' medical evidence and concluded that:

“In service he first reported low back symptoms in the late 1980s but these settled with time and physio. He had a few recurrences in the 1990s eg [sic] he is said to have had an injury in 1993 and a further recurrence in 1995 but there is no clinical entry. 1995 radiological and MRI changes showed multilevel lumbar vertebral degeneration and facet joint OA and a small right

lateral disc protrusion at L3/4 was noted with narrowing of the right L3/4 neuroforamen but no spinal stenosis or cord compression...In 1999 service med records document recurrent low back pain and a past history of Scheurmann's [sic]. He had neck pain in Nov 2001 [sic] and was seen again with LBP [sic] in 2002...He is said to have been asymptomatic between 2005 and 2010 eg [sic] being fit at 45 year [sic]..."

12. In March 2017, Veterans UK sent a decision letter to Mr S rejecting his appeal. It noted that the case was considered by the SMA on 31 October 2016 but had been retyped in February 2017 due to typing errors and added the following comments:

"Mr S acknowledges the different standards of proof for AFAB and the War Pensions Scheme...During his early service he smoked cigarettes and at several points has been described as "overweight" with documented weight about 20kgs in excess of that described as ideal. These are factors increasingly associated with vertebral column degenerative change. I note also that Mr S says he was completely fit at service entry...There is no reference in service to a contemporary specific traumatic incident and no physical or radiological/ MRI sign of such. I note also the letter dated 3 May 2012 from Dr Holmes cons neurologist at Guy's and which records "significant low back pain which started following rugby playing in his teenage years" ...Based on the evidence provided I note and agree with the SMA's conclusion that reports marked radiological changes and that his lifestyle choices are factors associated with vertebral column degenerative change. I therefore agree with your conclusions that his PIC is not attributable to or aggravated by service..."

13. Mr S' position:-

- He refers to specific trauma during his training at Seaton Barracks in 1987. After performing multiple fireman's carries he developed severe back pain accompanied with right leg pain.
- He disagrees that he has Scheuermann's disease, which was wrongly diagnosed in the 1987 report.
- Notwithstanding the opinion given in the 1987 report, that he was permanently unfit for commando training, he was subsequently appointed to an operational commando unit.
- Veterans UK ignored the Synopsis of Causation which considers that bending and twisting while lifting weight is a recognised cause of lumbar spondylosis.
- He has no scans prior to 1995 because they were simply not available. However, he was seen by physiotherapists on numerous occasions.
- He accuses Veterans UK of having inaccurate records of his service and medical records.

14. In the formal response to this Office, dated 17 May 2018, Veterans UK explained that the AFPS 05 and AFAB are two different Schemes and benefits can be awarded from both. It added that:

“The AFPS 05 pension [War Pension] awarded to Mr S is in respect of occupational benefits and we do not need to consider attributability. Whereas, AFAB can only be awarded if the PIC was either attributable to or aggravated by service...The SMA stated that she does not doubt the disabling effects of Mr S’ back problems and agrees the Tier 2 award. However, she is unable to find, on available evidence, that the problems are attributable to or aggravated by service”.

Adjudicator’s Opinion

15. 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:-
- To be eligible for an award under AFAB a member must have a principle condition which is attributable to or significantly aggravated by service.
 - As explained by Veterans UK, an award under AFAB sets out stricter eligibility criteria than an award under AFPS 05.
 - It is clear from the available evidence that Veterans UK took time to consider Mr S’ case. It had access to his medical records and its decision was based on a review of all the then available relevant evidence. It weighed the evidence and agreed that Mr S had a back condition that caused him pain. But its MAs were unable to conclude, on the balance of probabilities, that the back condition was attributable to or aggravated by service. The MAs concluded that Mr S’ first back symptoms started in the late 1980s however, they settled with time and physiotherapy. The MAs said that Mr S’ back condition developed over time due to degenerative lumbar disc disease, degenerative spondylolisthesis and spinal stenosis rather than attributable to or aggravated by his service.
 - The Adjudicator noted that the MAs refer to ‘Synopsis of Causation’, saying “there is strong evidence against an association between back pain and most of the normal activities [sic] military personnel.” The MAs said that there was no reference to a contemporary specific traumatic incident and no physical, radiological or MRI sign of such. But, the Adjudicator was satisfied that the MAs considered all the relevant medical evidence including the 1987 report. The Adjudicator noted that although Veterans UK considered that the 1987 report says that Mr S should be considered “unfit for commando training”, it goes on to say that his “symptoms at present are almost completely resolved and will resolve completely in the near future”.

- 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 AFAB rules had not been interpreted correctly or that Veterans UK failed to ask the right questions when assessing Mr S' eligibility.
 - The Adjudicator noted that Mr S accuses Veterans UK of having inaccurate medical and service records for him. However, the Adjudicator has not seen any evidence to support this assertion
16. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S 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 S for completeness.

Ombudsman's decision

17. My role is to consider whether the decision was reached in a proper manner. There are some well-established principles which a decision-maker is expected to follow in exercising its discretion. Briefly, the decision-maker must consider and weigh all the relevant matters and no irrelevant ones. But the weight to attach to any piece of evidence is for the decision maker to decide. A decision maker could, if it wished, attach no weight at all to a piece of evidence. The only requirement is that the evidence is considered. Further, the decision maker must not reach a decision which no reasonable decision maker, properly directing itself, could arrive at in the circumstances.
18. If I am not satisfied that the decision has been taken properly he can ask the decision maker to look at the matter again. However, I will not usually replace the decision maker's decision with a decision of my own, nor can I tell them what their subsequent decision should be.
19. The MA said that Mr S' back condition developed over time due to degenerative lumbar disc disease, degenerative spondylolisthesis and spinal stenosis rather than attributable to or aggravated by his service.
20. Mr S has disputed that there was a Synopsis of Causation dated 2015. Veterans UK has confirmed that the 2015 date was an error and that the most recent one is dated 2008. It is not for me to comment on the medical aspects, but to decide whether Veterans UK has appropriately reviewed the medical evidence in accordance with the rules of the Scheme.
21. In Mr S' case, I am confident that the MAs had, when considering Mr S's application for discretionary award under AFAB, been presented with up to date medical information. The question the MAs and subsequently Veterans UK asked was, whether Mr S' health condition was attributable to or aggravated by his service. In

PO-19385

doing so, they satisfied the requirement to ask the right questions and to interpret the rules correctly.

22. I accept that Mr S disagrees with the MAs' opinions, but this is insufficient for me to find that the decision was perverse or that it was maladministration for Veterans UK to rely on those opinions in reaching its decision.
23. Therefore, I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman
21 June 2018