

Ombudsman's Determination

Applicant	Mr D
Scheme	Armed Forces Pension Scheme 2005 (AFPS 05)
Respondents	Veterans UK

Outcome

1. I do not uphold Mr D'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 D has complained that his eligibility for incapacity retirement benefits has not been considered in a proper manner.

Background information

4. Mr D is a member of the AFPS 05. He was involved in a very serious road traffic accident in June 2013. Mr D was medically discharged from the Army in April 2016. He was awarded Tier 1 benefits.
5. 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 (SI2005/438) (as amended).
6. 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 and consist of an immediate pension and lump sum. Tier 2 is awarded to those whose ability to undertake gainful employment is significantly impaired (rule D.6.). Tier 3 is awarded to those who are permanently incapable of any full-time employment (rule D.5.). At the time of Mr D's discharge, Tier 1 was awarded under article 16 of the Armed Forces Early Departure Payments Scheme Order 2005 (SI2005/437) (as amended) to those who were unable to do their service job, but their ability to undertake other gainful employment was not significantly impaired. Tier 1 consists of an immediate lump sum payment and deferred benefits payable at normal pension age. Extracts from the relevant rules are provided in the appendix.

7. Mr D appealed the decision to award Tier 1 benefits. He said that, since his accident, he had been admitted to a complex trauma department for ongoing rehabilitation on 16 occasions. He said he had significant impairment in three limbs; particularly in his left arm and left lower leg. Mr D explained that he would be required to wear a brace to help with mobility and gave details of the surgery he had undergone on his left hand. He provided details of grip strength and dexterity tests undertaken by an occupational therapist, which indicated he fell outside the norms for someone of his age. Mr D referred to literature relating to the AFPS 05 in which the Tier 2 eligibility test was compared to a tariff system used by the Armed Forces Compensation Scheme (**AFCS**). He said the diagnosis of foot drop and the permanent severely impaired grip in one hand were equivalent to a Tier 2 award.
8. Veterans UK referred Mr D's case to one of its medical advisers (**MA**). The MA noted that Mr D was due to undergo further surgery and rehabilitation and said he would wish to know the outcome of these before altering the tier award. He asked for further information. The MA then reviewed Mr D's case on 1 February 2016, having been provided with additional evidence. He referred to a report from a consultant hand surgeon and said the outcome of Mr D's surgery appeared to be favourable. He noted that Mr D was due to be admitted for rehabilitation and said it would be worth waiting for a report of the outcome.
9. Mr D's case was referred back to the MA on 31 March 2016. He responded on 8 April 2016. The MA concluded:

"While [Mr D] has sustained injuries to three limbs, he has made a very good recovery. He is independent for all ADLs and is learning to drive. He has identified forms of employment for which he would be suitable.

It would therefore appear that he does not have significant disablement which is likely to have an effect on his ability to work. Following from the Pensions Ombudsman Report, PO-6349 ... it is necessary to decide on whether the claimant's capacity for full-time paid employment has been impaired to the extent that very many of the roles he might otherwise have been able to consider are no longer viable. I do not believe that this situation has been met in this case.

I would therefore advise that the allocation of a Tier 1 award is appropriate."
10. Veterans UK informed Mr D that his appeal had been unsuccessful. It provided a summary of the advice it had received from its MA and of the eligibility tests for the various tiers of benefit.
11. Mr D's representative submitted a further appeal in April 2017. Veterans UK referred Mr D's case to its Senior Medical Adviser (**SMA**), together with additional medical evidence detailing further surgery undertaken since the previous decision. The SMA said she agreed with the previous MA's analysis of the case. She referred to a letter,

dated 27 February 2017, from the hospital which Mr D had attended and said this was very positive. The SMA said:

“I understand that [Mr D] may feel aggrieved that his very severe injuries and prolonged treatment and rehab seem only to merit a Tier 1 award and there is no question we recognise a degree of residual disability. However an even bigger issue is fitness and looking individually at his injuries he has had an excellent result. AFCS and AFPS awards in line with modern understanding of disability focus on function in a treated state.

On that basis the papers confirm that there are a range of suitable jobs which would be open to [Mr D] both in terms of skills and capacity in a civilian context where the Equality Act applies, e.g. smart meter reader, storeman, site manager, retail.

On overall evidence I confirm tier 1 benefits are appropriate.”

12. Veterans UK declined Mr D’s appeal. The Deciding Officer (**DO**) said the test for a Tier 2 award was “capacity to work, based on medical evidence indicating what is feasible in relation to employment, not the difficulty or ease of obtaining a job for any particular individual”. He noted that Mr D was learning to drive and that his medical records indicated he was making progress. Veterans UK wrote to Mr D, on 24 May 2017, notifying him that his appeal had been unsuccessful. It provided Mr D with a summary of the SMA’s advice and the DO’s decision.
13. In support of his claim, Mr D has provided a report from his consultant plastic surgeon. She explained that Mr D was unable to hold tools or objects with his left hand (he is right hand dominant). She explained that Mr D was unable to stand fully straight, that he was able to walk but not for long distances (500 metres) and he was unable to run. She noted that Mr D was able to drive but required extra leg room to accommodate his injuries. The surgeon noted that Mr D was working for British Gas repairing electricity and gas meters and drove a van. She said it took him longer to perform tasks and he struggled to get into small spaces. She said Mr D was able to do his job for British Gas but required modifications to achieve this. She concluded by saying Mr D was not in a position to take up many of the jobs he would have chosen to do.

Adjudicator’s Opinion

14. Mr D’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 not the role of the Ombudsman to review the medical evidence and come to a decision of his or her own as to Mr D’s eligibility for payment of benefits under the AFPS 05 rules. The Ombudsman was primarily concerned with the decision-making process. The issues considered included: whether

the relevant rules had been correctly applied; whether appropriate evidence had been obtained and considered; and whether the decision was supported by the available relevant evidence. Medical (and other) evidence was reviewed in order to determine whether it supported the decision made. However, the weight which was attached to any of the evidence was for Veterans UK to decide (including giving some of it little or no weight)¹. It was open to Veterans UK to prefer evidence from its own advisers; unless there was 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 was found to be flawed, the appropriate course of action was for the decision to be remitted for Veterans UK to reconsider.

- To receive either Tier 2 or Tier 3 benefits, Mr D had to meet the eligibility criteria set out in rules D.5 or D.6 as appropriate. Tier 3 benefits were payable, under D.5, if the member had suffered “a permanent breakdown in health involving incapacity for any full-time employment”. For Tier 3 benefits, Mr D would have to show that, on the balance of probabilities, he was not going to be capable of any type of full-time employment before he reached his normal retirement age. Rule D.6 applied to the lower level Tier 2 benefits. These benefits would be payable if Mr D’s “capacity for gainful employment [was] significantly impaired”. Neither “gainful employment” nor “significantly impaired” were specifically defined in the AFPS 05 rules.
- In previous determinations relating to rules D.5 and D.6, the Ombudsman had said that gainful employment must include some capacity for full-time employment. This was because, if the member was only capable of part-time employment, he or she would meet the rule D.5 eligibility test. Rule D.5 specified that the member should be incapable of any full-time employment. Rule D.6 paid a lower level of benefits and, therefore, it was reasonable to say that the eligibility test must relate to a lesser degree of incapacity. With regard to the term “significantly impaired”, the Ombudsman had said it was not sufficient for there to be a small number of roles which the member was no longer able to do.
- The Adjudicator noted that Mr D referred to the AFCS tariff system in his initial appeal against his Tier 1 award. It was the case that this was referred to in literature relating to the AFPS 05. However, the eligibility tests which Mr D had to meet for Tier 3 or Tier 2 benefits were those set out in rules D.5 and D.6.
- Veterans UK had declined Mr D’s appeal for a higher tier of benefits on the basis of the advice it received from its MA and SMA. It was entitled to do so unless there was a good reason why it should not. Having reviewed the advice

¹*Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

provided by the MA and SMA, the Adjudicator said she had not identified any reason why Veterans UK should not have come to its decision in reliance upon that advice. It was reasonably clear from the reports that the MA and SMA were applying the correct eligibility test. Whilst they did not use the exact wording of rules D.5 and D.6, the MA and SMA were concerned with Mr D's capacity for full-time employment.

- The MA who first considered Mr D's claim described the eligibility test as: "the claimant's capacity for full-time paid employment has been impaired to the extent that very many of the roles he might otherwise have been able to consider are no longer viable". The Adjudicator considered this to be a reasonable summary of the test set out in rule D.6. If the MA was of the opinion that Mr D did not meet the eligibility test for Tier 2 benefits, he did not need to consider if he would meet the higher test for Tier 3. The SMA was less clear in her report as to the eligibility test. However, she had said she agreed with the previous MA's analysis and, from this, the Adjudicator considered it reasonably safe to conclude that she had the correct test in mind.
- The Adjudicator acknowledged that Mr D did not agree with the MA and SMA's analysis of his employment capabilities. She said she had not, however, identified any factual errors in their reports and their opinions did not appear to be wholly inconsistent with the medical evidence from Mr D's own doctors. The Adjudicator noted that Mr D's surgeon had expressed the view that he was not in a position to take up many of the jobs he would have chosen to do. She accepted that this might well be the case. However, she did not consider that this was sufficient to find that Veterans UK should not have accepted the advice from its MA and SMA.

15. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. I agree with the Adjudicator's Opinion and my further comments follow.

Ombudsman's decision

16. Mr D's accident has clearly resulted in him being less able to pursue an alternative form of employment outside the Armed Forces than he would otherwise have been able to do. However, the question for Veterans UK was whether this amounted to a significant impairment in his capacity to undertake gainful employment. If Mr D did not pass this threshold for benefits under rule D.6, he was not going to pass the more stringent test for benefits under rule D.5. It was entirely appropriate, therefore, that Veterans UK first considered Mr D's capacity for gainful employment.
17. I am satisfied that both Veterans UK and its medical advisers applied the correct eligibility test when considering Mr D's case. I am also satisfied that all relevant evidence was considered and that there were no errors or omissions of fact on the part of Veterans UK or its medical advisers.

18. Mr D disagrees with the analysis of his capacity for future employment provided by Veterans UK's medical advisers. However, a difference of opinion, even if it is between doctors, is not usually sufficient for me to find that it was not appropriate for Veterans UK to rely on the advice from its own medical advisers. In Mr D's case, the advice from Veterans UK's medical advisers is consistent with the evidence from his own doctors. He has been left with a degree of incapacity which means he cannot now pursue all the possible employment options which might have otherwise been available to him. Veterans UK has determined that this does not, in Mr D's case, amount to a significant impairment. I find that this decision has been properly made on the basis of the available relevant evidence.
19. Therefore, I do not uphold Mr D's complaint.

Anthony Arter

Pensions Ombudsman
11 July 2018

Appendix

The Armed Forces Pension Scheme Order 2005 (SI2005/438) (as amended)

20. Rule D.5 provides:

“Early payment of benefits: active members with permanent serious ill-health

- (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, and
 - (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) is entitled to short service benefit by virtue of section 71 of the Pension Schemes Act 1993 (basic principles as to short service benefit) because of a transfer value payment having been accepted.
- (2) For the purpose 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 ...”

21. Rule D.6. 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) ...”

The Armed Forces Early Departure Payments Scheme Order 2005 (SI2005/437) (as amended)

22. Article 16 provides:

“Lump sum awards: incapacity for armed forces service

- (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 (retirement after reaching pension age),
 - (ii) rule D.5 of that Scheme (early payment of benefits: active members with permanent serious ill-health),

- (iii) rule D.6 of that Scheme (early payment of benefits: active members with significant impairment of capacity for gainful employment), or
 - (iv) rule D.11 of that Scheme (option for members in serious ill-health to exchange whole pension for lump sum).
- (2) The amount of the lump sum payable under this article is calculated by multiplying one eighth of the person's final relevant earnings by his calculation service (expressed in years and fractions of a year), except where paragraph (3) or (4) applies.
- ...
- (5) This article is subject to rule D.8 of the AFPS 2005 (under which a person may ask for a review of his entitlement under rule D.6 of that Scheme and in some circumstances some of the amount paid under this article must be repaid)."