

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 he has not been awarded the correct tier of ill health retirement benefits.

Background information, including submissions from the parties

Background

4. Mr D was discharged from the Armed Forces in October 2012. In May 2015, he was given a retrospective Medical Discharge. Mr D has been awarded Tier 1 benefits backdated to October 2012.
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) (the **AFPS 05 Order**).
6. Three tiers of benefit are available for members of the AFPS 05 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) (the **EDP Order**) to those who were unable to do their service job, but whose 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 Appendix 1 of this Opinion.

7. Mr D appealed his Tier 1 award. He said he had been told by a medical officer that he should be assessed as Tier 2 and referred to tables 6 and 7 in Joint Service Publications (**JSP**) 764 and 765. Mr D said his employability was significantly impaired due to his condition. He said he had wanted to do a riggers course to enable him to work on oil rigs, but had been told that he would fail the medical requirements because of his deafness and brain tumour. Mr D said his condition prevented him from undertaking a lot of other work opportunities.
8. Veterans UK referred Mr D's case to one of their medical advisors (**MA**). A summary of his response is provided in Appendix 2, together with summaries of other medical evidence relating to Mr D's case. The MA said the tables Mr D had referred to were not used primarily to assess the tier level for the AFPS 05. He said this was based on an assessment of whether or not there was significant disablement affecting employability. He said unilateral deafness and occasional dizziness would not prevent Mr D from undertaking most forms of employment. Veterans UK declined Mr D's appeal.
9. Mr D submitted a further appeal. He raised the following points:-
 - There was no mention in the decision of his brain tumour. This related directly to his condition and his medical discharge.
 - He had mentioned seeking work on an oil rig as an example. His employment prospects had been significantly affected by his brain tumour and deafness.
 - If the tier awards were made on the basis of the medical evidence, he fitted the criteria for Tier 2 as stated in JSP 764. He had been told this by a medical officer who had seen him in connection with his discharge.
 - He had not been assessed by occupational health, which he understood should have been the case. If he had been, the tier award would have been different.
 - He had been deemed fit for his Army role but had then been discharged.
 - His ability to earn a decent income beyond his service career had been detrimentally affected by his disability.
10. Veterans UK referred Mr D's case to another MA. The MA advised that Mr D's tumour was not a brain tumour in the usual sense and was unlikely to recur or cause further symptoms. She noted that Mr D had continued to serve for six years after his diagnosis. The MA said that, neither at discharge nor at the date of Mr D's claim, was

full-time employment in a suitable civilian job precluded. Veterans UK declined Mr D's appeal.

Mr D's position

11. Mr D submits:-

- He was discharged normally from the Army and, after three years, it was decided that he should have been medically discharged.
- It is a total contradiction for the Army to find him fit to do his role and then discharge him.
- He believes that Tier 1 award was wrong from the start. He had been informed by a Colonel, who saw him in connection with his medical discharge, that he should receive a Tier 2 award because his condition affected his brain and senses.
- He went from earning around £27,000 per year to a lower paid security job on around £21,000. He was unable to train for work on oil rigs.
- He would like Veterans UK to recognise his brain tumour and extreme tinnitus according to the rules.
- The medical evidence and the guidance provided in JSP 764 puts him in Tier 2.
- He questions where his condition is covered in JSP 764 if it is not under the brain and senses part. He was discharged because of his brain tumour.
- He should not have been dealt with under article 16 of the EDP Scheme unless there is a specific part dealing with the brain and senses.
- He does not believe that the relevant rules in JSP 764 have been applied fairly in his case.
- The Army must have thought that he had suffered a breakdown in health resulting in a significant impairment in his capacity for gainful employment for it to medically discharge him. It must have considered him incapable of carrying on his occupation and likely to continue to be so. The Secretary of State accepted that the Army was liable for his condition and that it is permanent.
- There were a number of errors in the documents provided by Veterans UK. This indicates a lack of attention to detail.

Adjudicator's Opinion

12. 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 below:-

- It was not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mr D's eligibility for payment of benefits under rule D.6. 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 weight¹). 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 usually for the decision to be remitted for Veterans UK to reconsider.
- In order to qualify for Tier 2 ill health retirement benefits, Mr D would have to meet the requirements of rule D.6 (see Appendix 1). Mr D would have to have suffered a breakdown in health resulting in a significant impairment to his capacity for gainful employment. He must also be deemed to be incapable of carrying on his occupation, because of physical or mental impairment, and likely to continue to be so.
- The terms "significant impairment" and "gainful employment" were not, themselves, defined in the AFPS 05 rules. In such circumstances, the accepted approach was to give the words their ordinary, everyday meanings. In addition, it had previously been determined that the interpretation of rule D.6 was to be guided by the provisions of rule D.5. It had been determined that, because rule D.5 applied when there was incapacity for any full-time employment, the eligibility test for rule D.6 must be lower. It must mean that the individual was capable of some full-time employment. This was because, if the individual was only capable of part-time employment, he or she would meet the rule D.5 eligibility test. Thus "gainful employment" must include some full-time employment. It did not, however, need to be the same as or similar to the role the individual undertook in the Armed Forces. Nor did it have to

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

provide the same level of earnings as that which Mr D received in his service role.

- With regard to what was meant by “significant impairment”, it had previously been determined that this should be taken to mean a notable impairment in the individual’s capacity for employment. It was not considered sufficient for an individual to have identified a small number of roles for which he or she was considered unsuitable. The Adjudicator acknowledged that Mr D’s reference to work on an oil rig was intended as an example only.
- Mr D had referred to the tables set out in JSP 764. This was a guidance document published by the Ministry of Defence. It was intended to provide individuals with an interpretation of the AFPS 05 rules “in plain language”. It also covered the Early Departure Payments Scheme, the Redundancy Scheme and the Redundancy, Resettlement and Gratuity Earnings Scheme; amongst others. JSP 764, itself, explained that the terms of the relevant order took precedence. When Veterans UK assessed Mr D’s eligibility for ill health retirement benefits, it had to apply the terms of the AFPS 05 Order or the EDP Order, as appropriate. The tables set out in JSP 764 did not form part of the AFPS 05 Order.
- In coming to its decision to award Tier 1 benefits to Mr D, Veterans UK had relied on the advice from its MAs. The first MA noted Mr D’s 2006 surgery for a left vestibular Schwannoma and his 2011 upper limb symptoms. He expressed the view that Mr D’s hearing loss might have meant he was unable to continue in his service role but advised that it did not significantly impair his “ability to get gainful employment on discharge”. The MA did not indicate what he understood by “gainful employment”. Whilst it might be argued that, as an MA acting for Veterans UK, he could be assumed to be applying the correct interpretation, it would have been helpful if he had made this clear. This was particularly so because the AFPS 05 rules, themselves, were not without ambiguity.
- The MA also referred to the tables in JSP 764 and said he had referenced Table 7, Item 36. It was not clear why he thought this should apply in Mr D’s case, since it referred to “Blast injury to ears or acute acoustic trauma due to impulse noise”. The Adjudicator noted that Veterans UK did not appear to have sought any clarification from the MA before awarding Tier 1 benefits to Mr D.
- The second MA, reviewing Mr D’s case on appeal, expressed the view that “unilateral deafness and occasional dizziness would not prevent Mr D from undertaking most forms of employment”. Again, the MA was not clear in what he meant by “most forms of employment”; that is, whether he included full-time employment in this. He did, however, clarify the role of the JSP 764 tables. The Adjudicator noted that, again, Veterans UK did not appear to have sought clarification before declining Mr D’s appeal.

- On his second appeal, Mr D's case was reviewed by a third MA. She addressed Mr D's particular concern that his brain tumour had not been considered. The MA explained that an acoustic neuroma was very unlikely to recur or cause further symptoms due to expansion. She concluded that Mr D's health did not preclude him from suitable full-time civilian employment. In the Adjudicator's view, this advice addressed the ambiguities in the earlier reports.
 - Having reviewed the evidence, the Adjudicator said she had not identified any grounds for remitting the decision to Veterans UK for review. Whilst there was some lack of clarity in the first and second MAs' reports relating to their interpretation of gainful employment, this was addressed at the second appeal. Mr D had identified errors within the evidence relied on by Veterans UK but these related largely to dates and his service role. In her view, these errors would not have impacted on the advice given by Veterans UK's MAs or the decision to award Tier 1 benefits.
13. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D 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 D for completeness.

Ombudsman's decision

14. Mr D has made several references to JSP 764. I can understand why he is concerned that the process set out in JSP 764 and, in particular, the tariff tables do not appear to have been applied in his case. However, the benefits to which Mr D is entitled must be determined in accordance with the relevant statutory instrument. These are the Armed Forces Pension Scheme Order 2005 (SI2005/438) and the Armed Forces Early Departure Payments Scheme Order 2005 (SI2005/437). JSP 764 cannot override these statutory orders
15. In order to qualify for Tier 2 benefits, Mr D has to meet the requirements of rule D.6. This means that he: (a) has suffered a breakdown in health as a result of which his capacity for gainful employment is significantly impaired; and (b) is (and will continue to be) incapable of carrying on his occupation because of physical or mental impairment. Rule D.6 does not refer to specific conditions which might constitute a breakdown in health; it does not need to. The question is whether Mr D's condition means he meets the above criteria.
16. Mr D has pointed out that the Army discharged him on medical grounds; albeit retrospectively. He is of the view that this means that the Army must have thought that he met the requirements of rule D.6. However, medical discharge from the Armed Forces does not mean that the individual's capacity for gainful employment is necessarily significantly impaired. The term "gainful employment" is much wider than the individual's service role. It is entirely possible that someone may no longer be fit

to undertake the duties of their service role but capable of many other forms of employment, including some full-time roles.

17. In order to make a decision as to Mr D's eligibility for benefits at any tier, Veterans UK sought advice from its medical advisers. The advice it received was that Mr D's condition should not preclude him from full-time civilian employment. Mr D has pointed out that he had previously been told that he would qualify for Tier 2 benefits. I understand Mr D was told this by a doctor he saw in connection with his retrospective discharge.
18. Veterans UK may rely on the advice it receives from its medical advisers unless there is a good reason for it not to do so. The kind of things which might mean it was not reasonable or appropriate for Veterans UK to rely on this advice include errors or omissions of fact, or a misunderstanding of the relevant rules. A difference of opinion, even between doctors, is not usually sufficient for me to find that Veterans UK should not rely on its own medical advisers' opinion. The opinions expressed by the MAs do not appear to be inconsistent with the rest of the available medical evidence; other than the comment referred to above. I do not find that it was maladministration for Veterans UK to rely on the opinions it received from its own medical advisers. I do not find that there are any grounds for me to require Veterans UK to review its decision to award Tier 1 benefits in Mr D's case.
19. Therefore, I do not uphold Mr D's complaint.

Anthony Arter

Pensions Ombudsman
18 December 2018

Appendix 1

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

1. 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 ...”

2. 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)

3. 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)."

JSP 764 Part 4 Supplementary Information

4. Chapter I "The Tariff" states:

"Introduction

0101. APPS 05 and RFPS 05 feature ill-health benefits based on tiers. These tiers relate to the severity of the individual's condition and capacity for suitable civilian employment, and are based on a Tariff of injuries and illnesses, within nine tables.

0102. The Tariff allocates conditions between 15 levels and these map across to the tiers in AFPS 05 and RFPS 05 as follows: ..."

5. The tiers and tariff levels are then set out in a table. AFPS 05 Tier 1 is equated to tariff levels 12 to 15. AFPS 05 Tier 2 is equated to levels 7 to 11. Medical conditions are then split into categories and provided with their own tables. Table 6 relates to neurological disorders and Table 7 relates to senses. These set out various conditions and assign a level to each. For example, total deafness in one ear is assigned level 8. The notes to Table 7 state that all awards for hearing loss include compensation for associated tinnitus; no separate award is paid for tinnitus alone.

Appendix 2

Medical evidence

Surgeon Commander Craner (consultant neurologist), 6 July 2011

6. Surg Cdr Craner saw Mr D in connection with a four-week history of acute neck pain. He said he suspected that Mr D had had a small prolapsed disc with some root irritation, which he hoped would settle with conservative treatment.

Mr Johnston (consultant neurosurgeon), 14 September 2011

7. Mr Johnston saw Mr D in connection with pain in his right arm, which had settled by the time of his consultation. Mr Johnston referred to an MRI scan which had shown an acute disc at C6/C7. He said this fitted nicely with Mr D's symptoms and that there was no need to consider surgery because the natural history was for spontaneous resolution.

Veterans UK's MA, 7 September 2015

8. The MA noted Mr D's upper limb symptoms and Mr Johnston's review in September 2011. He also noted references to Mr D's surgery for a left vestibular Schwannoma in 2006. The MA said an acoustic neuroma was the same condition as a Schwannoma and this should be considered Mr D's Primary Invaliding Condition (**PIC**).
9. The MA said Mr D could have been considered unable to continue with his Service job on account of his unilateral hearing loss. However, he assessed Mr D's ability to get gainful employment on discharge as not being significantly impaired. He said Mr D met the criteria for a Tier 1 award. The MA said he had referenced Table 7, Item 36, Level 13² in considering Mr D's case and had reviewed the Synopsis of Causation for primary Intracranial Tumours. He noted there was no evidence that the left acoustic neuroma was attributable to or aggravated by Mr D's Service.

Veterans UK's MA, 15 March 2016

10. The MA said it should be pointed out to Mr D that the tariff tables which he had referred to were used to decide on the level of Armed Forces Compensation Scheme (**AFCS**) awards. He said they were not primarily used to assess AFPS awards. The MA said the tier level was decided by whether there was evidence of a significant disablement which was likely to affect the employability of the person.
11. The MA noted that Mr D had wished to work as a rigger on oil rigs. He accepted that Mr D's condition would prevent such employment. The MA said unilateral deafness and occasional dizziness would not prevent Mr D from undertaking most forms of employment.

² Table 7 covers "Senses". Item 36 is "Blast injury to ears or acute acoustic trauma due to impulse noise". It has been assigned level 13.

Veterans UK's MA, 27 June 2016

12. The MA said she agreed with the previous MA's explanation of the tariff tables and the example occupation of oil rigger. She noted Mr D's appeal letter.

13. The MA went on to say:

"An acoustic neuroma is thankfully not a brain tumour in the usual sense. It is a tumour of the covering of a cranial nerve V11. Because of this and its location, when treated it is very unlikely to recur or cause symptoms because of expansion in the rigid skull cavity. This is the way in which most brain tumours lead to deterioration and death.

[Mr D's] neuroma is associated with unilateral deafness and some tinnitus but this is not inconsistent with a wide range of suitable civilian work. It should be noted that he left service in 2012 having had his diagnosis and treatment in service in 2006/7. He was not initially medically discharged. In 2012 he was working on guard duties and subject to yearly review. I note that in 2011 he was troubled with acute torticollis and although Xray was normal he was felt likely to have had a small prolapsed cervical disc. Neurosurgical opinion was that the neck problem was likely to resolve spontaneously and that no surgery was appropriate. I note he also had a history of high blood pressure haematuria and cholelithiasis. I note his age. Despite all these factors as he himself indicates in the letter ... he served for six years post diagnosis and his yearly med Board assessments found him fit for role."

14. The MA concluded that, neither at discharge nor at the date of Mr D's claim, was full-time employment in a suitable civilian job precluded.