

## Ombudsman's Determination

Applicant	Mr K
Scheme	Armed Forces Pension Scheme 1975 ( <b>AFPS 75</b> )
Respondent	Veterans UK

## Outcome

1. I do not uphold Mr K'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 K has complained that his application for the early payment of his preserved pension (**EPPP**) on grounds of ill health has not been considered in a proper manner.

## Background information, including submissions from the parties

4. A summary of the medical evidence pertaining to Mr K's case is provided in the Appendix.
5. Mr K left the Army in May 1992. Mr K applied for EPPP in June 2016 for osteochondral defects affecting both ankles. He was then age 48 and employed as a part-time School Porter. Prior to then he had been a full-time Prison Officer and was retired on ill health retired.
6. With his application Mr K submitted:-
  - Letters from Professor Tagoe (Consultant Podiatrist) to Mr K's GP Practice dated March 2007, December 2011 and November 2013.
  - A letter from Surrey Adult Linked Disability Registers to Mr K dated 15 April 2009, enclosing his registration card for SALDR.
  - A July 2009 MRI scan report.
  - An open letter from Dr Farmer (**GP**) dated 9 January 2014.

- A Classic medical retirement certificate dated 7 April 2014, pertaining to Mr K's ill health retirement from the Prison Service.
  - Occupational Health statement dated 19 October 2015, advising that Mr K was fit to undertake the part-time duties of School Porter.
7. The relevant rule is contained within Schedule 1 of the Army Pensions (Armed Forces Pension Scheme 1975 and Attributable Benefits Scheme) (Amendment) Warrant 2010 (as amended). Rule D.18 provides:
- “(1) A deferred member who has not reached the age of 60 may claim early payment of the pensions and lump sums payable under rule D.11 on grounds of ill health.
  - (2) A deferred member who has reached the age of 60, but has not reached the age of 65, may claim early payment of the further pension and lump sum payable under rule D.11(2)(b) and (5)(b) on grounds of ill health.
  - (3) A claim under paragraph (1) or (2) -
    - (a) must be made in writing to the Scheme administrator, in such form as the Scheme administrator may require; and
    - (b) must be supported by evidence from a registered medical practitioner that because of physical or mental impairment the member is, and at least until reaching -
      - (i) in the case of a claim under paragraph (1), the age of 60, or
      - (ii) in the case of a claim under paragraph (2), the age of 65,will continue to be, incapable of any full-time employment.
  - (4) If the Defence Council is satisfied of the matters mentioned in paragraph (3), and that the member has ceased to carry on the member's occupation -
    - (a) the pension or pensions are payable with effect from the date on which the claim was received by the Scheme administrator; and
    - (b) the lump sum or sums are payable immediately.
8. Veterans UK wrote to Dr Farmer advising the criterion for EPPP and asked that he complete the relevant sections of Annex D – AFPS 75, 'Early payment of preserved pension – age 60 certificate of assessment of permanent incapacity'.
9. Dr Farmer duly completed and returned the form. In section 2, 'Medical Information' Dr Farmer said Mr K had presented with ankle pain and had been referred to

Professor Tagoe's clinic in 2006. Mr K regularly attended the clinic to 2013. He had multiple steroid injections in both ankles, several arthroscopic examinations and micro fracturing of both ankles. He had been discharged from the clinic in 2013 as there was no prospect of further improvement. In Part B, Functional Capacity, Dr Farmer ticked that Mr K had restrictions with lifting and carrying and driving and had limitations with walking and sitting and standing. Commenting he said Mr K could only work for short periods with limited walking and standing. He said Mr K's condition would never improve and could be expected to deteriorate with time. In section 3, 'Declaration' he selected 'Permanently (i.e. until the age of 60) incapable of undertaking any form of suitable full-time employment (in line with skills and trade or for which they might reasonable retrain and, not taking account of local economic factors)'.

10. On 23 November 2016, Veterans UK notified Mr K that his application for EPPP had been unsuccessful. It said it did not consider Mr K permanently incapable of any type of regular full-time employment. Veterans UK referred to the advice it had received from its own medical adviser (**MA**). It said the MA did not consider Mr K to be unfit to undertake any form of suitable full-time employment before his 60<sup>th</sup> birthday.
11. Mr K appealed. He said he had been incapable of undertaking any suitable full-time employment for the past 16 months. He said he had been discharged from his specialist's (Professor Tagoe's) clinic having completed all available treatment. He said he had to focus on what he could do and had a responsibility to his employer to take reasonable care of his own safety and the safety of others, to attempt what he knew was beyond him physically would pose a risk to health and safety.
12. Mr K asked why the Classic retirement certificate and Dr Farmer's letter had not been considered. He said both documents should be regarded as new medical evidence for the purpose of his appeal. He further asked why reference had been made to DWP not having judged him as incapable of work, as he was not claiming that he was unemployable.
13. Mr K provided copies of medical reports from:-
  - Atos, Occupational Health, Drs: Wright (16 March 2009), Geoghegan (29 September 2009 and 16 October 2012), Khan (23 August 2010) and Milne (13 August 2013).
  - A letter from Dr Farmer dated 12 December 2016.
14. The DAR Deciding Officer turned down Mr K's appeal concluding that, on the balance of probabilities, Mr K was not permanently incapable of some form of full-time employment before reaching age 60. Veterans UK's letter of 10 January 2017 to Mr K said:

"The Medical Advisor has reviewed your additional medical evidence from the Consultants Occupation Physician reports from Mar 2009 to Aug 2013. The MA notes that they state that you are unfit to be employed on duties that require

prolonged standing or walking and that such working conditions may exacerbate your underlying medical condition. There is no suggestion in any of the reports that you are unfit to be employed in alternative duties with reasonable adaptations such as may be considered in sedentary duties or light manual work.

Our MA further notes that in your initial application you referred to pain as the main limiting factor in your ability to perform your usual activities and any employment. Your appeal gives no further details of the limitations that are resulting from your pain, and no record of the payment of any DWP benefits.

Our MA concludes that the additional medical evidence confirms that you are unfit for arduous duties. The correspondence does not confirm a permanent disability that would prevent any reasonable alternative employment with appropriate adaptations in respect of walking and standing. Further surgical treatment is not indicated but there are recognised referral pathways (which do not appear to have been considered) available for the management of chronic pain. The criteria for EPPP have therefore not been met as alternative full time employment is a reasonable option.”

15. Mr K appealed the review decision. He said it was clear that the medical evidence he and his GP had submitted had either not been analysed properly or ignored. His medical record showed the lengths he had gone to remain in regular full-time employment; repeated injections, the operations and the daily physiotherapy exercises that he still did. He said since his discharge from Professor Tagoe’s clinic he required a lot more rest and recuperation at home when not in the workplace. Working part-time in a role that suited his needs allowed him to manage his condition better and hopefully prolong his ability to remain in employment in some form.
16. With his appeal Mr K submitted medical evidence regarding the management of his chronic pain. Namely letters from: Mr McCallum (Podiatric Surgical Trainee) dated 27 July 2011; Professor Tagoe dated 23 December 2013; Ashford and St Peters Hospital dated 9 July 2013; and personal exercise programmes issued by the Hospital dated 10 September 2012 and 16 July 2013. Additionally, Mr K resubmitted Dr Farmer’s letter of 12 December 2016.
17. The DAAR Deciding Officer turned down Mr K’s appeal:

“The Senior Medical Advisor **[SMA]** carefully reviewed your case in its entirety, in light of the overall evidence including letters from your GP and the previous advice given by our Medical Advisors.

The SMA notes that you have a significant and painful chronic foot and ankle problem which made your previous job as a Prison Officer unsuitable and that you are presently employed on a part time basis.

The SMA confirms that the test against which EPPP is judged is capacity for any full time suitable job to retiral age. In your case that is age 60. The SMA could find no evidence of your function beyond mobility being compromised and as previously

commented no evidence is found of use of medications and/or possible side effects. The SMA judged you to be capable of many sedentary jobs for example clerical or administrative at this date until retiral.

The SMA...notes the letter from Dr Farmer dated 12 December 2016 and that unfortunately Dr Farmer provides only an opinion but no reasons for his view in relation to your employability in a suitable post.”

### **Mr K's position**

18. Mr K says:-

- His application for EPPP is fully supported by his GP.
- “I feel the Army are penalising me for working part-time in a sedentary role which suits my needs and not claiming DWP benefits, both of which should not warrant my pension being withheld from me.”

### **Veterans UK's position**

19. Veterans UK says:-

- The reasons for its decision to refuse Mr K an EPPP are explained in both the DAR and DAAR letters.
- The Minutes from the MA and SMA were considered by the Deciding Officer prior to reaching a decision on Mr K's application for EPPP.

### **Adjudicator's Opinion**

20. Mr K'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:-

- The role of the Ombudsman is not to review the medical evidence and come to a decision of his own as to Mr K's eligibility for payment of benefits under rule D.18. The Ombudsman is primarily concerned with the decision-making process. The issues considered include: whether the relevant rules have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the available relevant evidence. Medical (and other) evidence is reviewed in order to determine whether it supports the decision made. 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.

- For Mr K to receive his benefits under rule D.18, he has to be “incapable of any full-time employment” and likely to continue to be so at least until his 60<sup>th</sup> birthday. Veterans UK must decide whether Mr K meets this eligibility test.
- Veterans UK has declined Mr K’s application for EPPP. It has done so on the basis of the advice it received from its medical advisers.
- The first MA appears to have considered the relevant medical evidence. While Mr K queried on his first appeal why Dr Farmer’s letter of 9 January 2014 had not been considered, the MA’s report clearly referenced it. More importantly the MA noted Dr Farmer’s opinion in respect of Mr K’s application for ill health retirement from AFPS 75. The MA’s report does not mention the Classic Medical Retirement Certificate, but that was in respect of Mr K’s ability to carry out the duties of a Prison Officer. The MA noted that Mr K has major issues with his feet and was of the opinion that this would prevent him from undertaking work that involved significant walking, standing and lifting and related tasks. But the MA could see no reason why Mr K could not continue to work in a sedentary role,
- The second MA appears to have considered all of the relevant medical evidence. The MA agreed with the opinion of the first MA. The MA noted Mr K’s reference to pain as the main limiting factor in his ability to perform his usual daily activities and any employment. But there were no further details on the limitation that were resulting from this pain, no reference to consultation with a pain specialist, no record of any pain modifying medication and no record of the payment of any DWP benefits.
- The MA said the additional medical evidence confirmed that Mr K was unfit for the arduous duties of a prison officer but did not confirm that he was incapable of undertaking any reasonable alternative employment with appropriate adaptations in respect of walking and standing. The MA said there were recognised referral pathways available for the management of chronic pain that appeared not to have been tried. The MA did not specify what he/she had in mind.
- The SMA agreed with the opinions of the first MA and the second MA but went further and specified full-time roles (clerical or administrative) that he/she considered Mr K to be capable of.
- Veteran UK’s medical advisers are specialists in occupational health. Whilst the MAs’ and SMA’s opinion on Mr K’s capacity for full-time work differs with Dr Farmer’s opinion that is insufficient for the Ombudsman to find that Veterans UK’s decision has not been properly made.
- There are no grounds for remitting the decision to Veterans UK for review.
- Mr K is at liberty to submit a fresh application for EPPP to Veterans UK if he believes that his condition has since worsened.

21. Mr K did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr K 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 K for completeness.

### **Ombudsman's decision**

22. Mr K says Veterans UK's decision-making processes are flawed, resulting in unjust decisions being made. Mr K says Dr Farmer answered all the questions Veterans UK asked of him and he (Mr K) supplied additional medical evidence throughout the process. Mr K says this is a civil case and on the balance of probabilities he has provided cogent evidence that actually exceeds the level of proof needed to uphold his claim.
23. As the Adjudicator said, I am primarily concerned with Veterans UK's decision-making process. The issues considered include: whether the relevant rules have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the available relevant evidence.
24. In reaching its decision I am satisfied with the process that Veterans UK has followed.
25. While Mr K's GP disagrees with the opinions of Veterans UK's medical advisers that is not sufficient for me to find that the Veterans UK's decision is flawed. They are entitled to favour particular medical evidence given over other medical opinions received provided that those opinions have been given proper consideration.
26. I do not uphold Mr K's complaint.

**Anthony Arter**

Pensions Ombudsman  
14 December 2018