

## Ombudsman's Determination

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

### Complaint Summary

Mr N has complained that his application for the early payment of his benefits on the grounds of ill health has not been considered in a proper manner.

### Summary of the Ombudsman's Determination and reasons

The complaint is upheld against Veterans UK because it has failed to consider Mr N's application for the early payment of his benefits in a proper manner. It has failed to put forward appropriate evidence and reasoning to support its decision to decline Mr N's application.

## Detailed Determination

### Material facts

1. Mr N has preserved benefits in the AFPS 75. He applied for the early payment of his preserved pension (**EPPP**) in March 2017. Veterans UK declined Mr N's application and his subsequent appeals.
2. Mr N brought a complaint to the Pensions Ombudsman (**TPO**) in January 2018. Mr N's complaint was considered by one of our Adjudicators who concluded that further action was required by Veterans UK. She suggested that Veterans UK review its decision and pay Mr N £500 for the significant distress and inconvenience he had suffered. Both Mr N and Veterans UK accepted the Adjudicator's opinion. Veterans UK reviewed Mr N's case and again decided that he was not eligible for EPPP. This determination relates to that decision.
3. The relevant rules are contained in the Army Pensions (Armed Forces Pension Scheme 1975 and Attributable Benefits Scheme) (Amendment) Warrant 2010 and subsequent amending warrants. Rule D.18 provides for "Early payment of preserved pension in case of ill health" as follows:
  - "(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) ...
  - (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,  
...  
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 ..."

4. Mr N provided some additional medical evidence for Veterans UK to consider as part of its review. Summaries of the medical evidence relating to Mr N's case are provided in the appendix to this determination. Veterans UK obtained a report from Mr N's GP, together with copies of his GP and hospital records. It was also provided with a report from a speciality doctor at Mr N's local community mental health team, Dr Surapaneni.
5. Mr N's case was considered by a Deciding Officer (**DO**). Veterans UK wrote to Mr N, on 6 June 2018, declining his EPPP application. Veterans UK said:

"The Senior Medical Advisor (SMA) looked at all available medical evidence:

Our SMA notes that your Consultant Shoulder & Elbow Surgeon advised that your shoulder should take a year to get back to normal. The SMA also notes that in Nov 2017 you were referred to the MSK Clinic with neck pain. Your notes indicate that you were on a 12 month physiotherapy program and your GP notes from Jan 2018 indicate you have made a good response to physiotherapy.

Our SMA comments that you have bilateral sensorineural hearing loss and comments that your audiogram from Nov 2017 displays the features of non-organic hearing loss however notes that your hospital reports do not note any difficulty in hearing or communicating by speech and you are not wearing hearing aids. The SMA comments that disabling effects of hearing loss would be expected to be reduced by the use of appropriate hearing aids.

Your Dyslexia is life long and has not previously prevented you from full-time employment.

The SMA notes that you first presented with bilateral knee pain in 2011/12 and had arthroscopy bilateral and partial medial meniscectomy in April 2012 however you were discharged from the orthopaedic clinic and are no longer under specialist orthopaedic care.

A diagnosis of Atypical presentation of Post Traumatic Stress Disorder F43.1 with depression and severe anxiety has been made. The SMA reviewed the reports from Bedford Mental Health Services and notes that you reported symptoms since Feb 2017 when you lost your job, the SMA also notes that you reported similar symptoms when you discharged from the Army however you advised that it only lasted a week and did not require medical input. It is noted that while you are currently being treated with medication, you have yet to undertake the planned psychological treatment. The SMA advises that the NICE recommended best practice treatment is psychological therapy.

The Deciding Officer has reviewed all the evidence available, including the reports that have been provided since your last appeal and, after taking account of the medical advice, is of the opinion that once you undertake

psychological treatment you may make sufficient progress to allow you to resume some kind of suitable full-time employment before age 60. The Deciding Officer is also of the opinion that your other conditions should not prevent you from undertaking any full-time employment before age 60. The DAAR Deciding Officer therefore concluded that you do not qualify for EPPP. These opinions are based on the balance of probabilities.”

### **Summary of Veterans UK's position**

6. Veterans UK's submission is summarised below: -

- Mr N's GP did not complete a declaration on the application form as to his opinion of Mr N's capacity for employment. He stated he did not know how much Mr N's inability to do heavy lifting or manual work would prevent him from undertaking his usual occupation.
- Mr N's consultant shoulder and elbow surgeon said he was making good progress but would need at least six months of physiotherapy. He said it would take up to a year for Mr N's shoulder to get back to normal and he may have long-term symptoms which would rule out manual work.
- It was decided that, on the balance of probabilities, it was not possible to state that Mr N was incapable of doing any suitable full-time employment until the age of 60.
- In connection with Mr N's appeal, the GP expressed the view that there was no prospect of Mr N's shoulder improving sufficiently for him to return to any type of physical work. He also said Mr N was not then fit for work because of low mood and anxiety with elements of Post-Traumatic Stress Disorder (**PTSD**).
- The DO was of the view that the outcome of Mr N's shoulder surgery was still to be determined and he was still to undertake treatment for his PTSD, which had only recently been diagnosed. He was of the view that improvement could be expected and the evidence did not suggest that Mr N was permanently incapable of undertaking any form of full-time employment.
- Further evidence was obtained following Mr N's application to TPO. The DO accepted that Mr N may never have a full range of movement in his shoulder. However, he was of the opinion that, on the balance of probabilities, Mr N would improve sufficiently to undertake some form of full-time employment.
- The DO noted that Dr Surapaneni supported Mr N's application for EPPP. However, he noted that Dr Surapaneni had said that Mr N's disorders are of a relapsing and remitting nature and it was difficult to predict his recovery. The DO concluded he could not state, on the balance of probabilities, that Mr N would be incapable of undertaking full-time employment before normal retirement age.

- The DO was of the opinion that Mr N's knee pain, hearing loss and dyslexia would not result in permanent incapacity for full-time employment.

7. Having been provided with a preliminary decision, Veterans UK said it was willing to review Mr N's case. It wrote to Mr N confirming that it would do so and explaining that such a review might take up to 40 days to complete. Veterans UK has explained that the 40 days it referred to is its normal timeframe and it would be prioritising Mr N's case.

## Conclusions

8. In order to be eligible to receive his benefits under the EPPP provisions, Mr N has to be incapable of any full-time employment and likely to continue to be so incapable. Rule D.18 does not specify the length of time for which the incapacity for full-time employment should be expected to continue. In such circumstances, the courts<sup>1</sup> have said it may be implied that the incapacity should be expected to last until normal retirement age. In Mr N's case, this is age 60.
9. It may help if I explain at this point that I do not, as a rule, review the medical evidence and come to a decision of my own as to eligibility for payment of benefits. My concern is with the decision-making process. The issues I will consider include: whether the relevant rule has been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the available relevant evidence. I will look at the medical (and other) evidence 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)<sup>2</sup>. 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.
10. Veterans UK has accepted that Mr N may never regain the full range of movement in his shoulder. It referred to Mr Ferran's comment, that it would take a year for his shoulder to get back to normal and to his GP record from January 2018, which indicated he had responded well to physiotherapy. Veterans UK concluded that Mr N would improve sufficiently to undertake some form of full-time employment. It is unclear, from the documents provided, how Veterans UK came to that conclusion. Mr Ferran's comment had been made in March 2017. More than a year had elapsed since. It is, therefore, unclear why Veterans UK was still relying on this comment. Mr N's GP record did, indeed, note that he had responded well to physiotherapy and he had subsequently been discharged by the physiotherapist. However, the notes also

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<sup>1</sup> *Harris v Shuttleworth* [1994] PLR 47 - [1994] ICR 991 - [1994] IRLR 547

<sup>2</sup> *Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

recorded that he had been re-referred to his local musculoskeletal clinic. There is no obvious reason to conclude that Mr N's musculoskeletal condition was likely to improve and Veterans UK did not explain why it had reached this view.

11. Veterans UK had been provided with a report by Dr Surapaneni relating to Mr N's mental health issues. In its decision letter to Mr N, Veterans UK said its SMA had reviewed the reports from Bedford Mental Health Services and noted that Mr N had reported symptoms since February 2017, when he lost his job. Veterans UK said the SMA also noted that Mr N had reported similar symptoms when he was discharged from the Army. It said Mr N had reported that the earlier symptoms had only lasted a week and had not required medical input at that time. It noted that Mr N was being treated with medication and had yet to undertake planned psychological treatment. Veterans UK said its SMA had advised that the NICE recommended best practice treatment is psychological therapy.
12. Veterans UK concluded that once Mr N had undertaken psychological treatment he might make sufficient progress to allow him to resume some kind of suitable full-time employment before age 60. It has subsequently explained that, whilst it noted that Dr Surapaneni supported Mr N's application, he had said that Mr N's disorders were of a relapsing and remitting nature and it was difficult to predict his recovery.
13. Dr Surapaneni had said Mr N suffered with PTSD of such severity that it was likely to impair his ability to gain or keep full time employment until he was aged 60. He explained that Mr N had been experiencing depressive symptoms and symptoms of PTSD for the last 25 years and these had worsened since his employment had been terminated. He said Mr N had experienced a change of personality and had poor coping strategies for stress. Dr Surapaneni did, indeed, state that Mr N's PTSD and depressive disorder were of a relapsing and remitting nature and it was difficult to predict his recovery. He also confirmed that Mr N was receiving medication and would be receiving psychological input.
14. It is unclear, from Veterans UK's decision letter and subsequent correspondence, how it came to the conclusion that Mr N might make sufficient progress to allow him to resume some kind of suitable full-time employment before age 60. It is clear that the magnitude of Mr N's current mental health issues is of a different scale to those which he experienced on leaving the Army. As a comparison, it is of little value in assessing his current capacity for full-time employment. Psychological therapy may well be the NICE recommended best practice treatment but, in and of itself, this is not evidence that Mr N is, more likely than not, going to recover sufficiently to undertake full-time employment before he reaches age 60. The fact that Mr N's PTSD and depression are relapsing and remitting in nature does not mean that he is likely to recover sufficiently before age 60 to undertake full-time employment.
15. Veterans UK noted Mr N's hearing loss but said his hospital reports did not note any difficulty in hearing or communicating by speech and he was not wearing hearing aids. In fact, Mr N's GP record stated he was to be provided with a hearing aid.

Veteran's UK said its SMA had commented that the disabling effects of hearing loss would be expected to be reduced by the use of appropriate hearing aids. It also stated that Mr N's Dyslexia was life long and had not previously prevented him from undertaking full-time employment.

16. It may well be the case that neither Mr N's hearing loss nor his Dyslexia, in and of themselves, would prevent him from undertaking full-time employment. However, they are likely to limit the types of employment he is able to undertake. I do not consider it appropriate for Veterans UK to consider each of Mr N's conditions in isolation. For example, Mr N might find office work difficult because of his Dyslexia and manual work impossible because of his musculoskeletal problems. Veterans UK must consider Mr N's capacity for full-time employment in the round.
17. I find that Veterans UK has not put forward appropriate evidence and reasoning to support its decision to decline Mr N's EPPP application. In particular, it has failed to explain why it chose not to accept Dr Surapaneni's opinion. Whilst it was not obliged to do so, it should have been able to explain why it gave greater weight to alternative evidence. After all, Dr Surapaneni is Mr N's treating physician. He has seen Mr N in person and could be expected to have a good idea as to the likelihood of him making sufficient recovery, in the next four years, to be able to undertake full-time employment. Veterans UK, on the other hand, has referred to out-of-date evidence or evidence of a general nature to support its decision. That is unsatisfactory and gives the impression of looking for reasons to decline the application rather than considering it with an open mind.
18. I do not find that Veterans UK has considered Mr N's application for EPPP in a proper manner. This amounts to maladministration on its part. Mr N has suffered injustice in that it has yet to be established whether or not he should be receiving his benefits. I uphold his complaint against Veterans UK.
19. I realise that Mr N is looking to me to make a decision as to his eligibility for the payment of his benefits under rule D.18. I note that he has provided details of his current medication and explained that his condition has deteriorated. At this stage, I consider it is still appropriate for the decision to be reviewed by Veterans UK. I acknowledge that Veterans UK has indicated its willingness to review Mr N's case, which is helpful. Nevertheless, I consider it appropriate to make directions to this effect. Not least because I do not find that a 40-day timeframe is appropriate in Mr N's case. Veterans UK has indicated that it intends to prioritise Mr N's case but I am of the view that a clear timeframe is more appropriate in the circumstances.

## Directions

20. Within **28** days of the date of this determination, Veterans UK shall reconsider Mr N's application for EPPP. It shall provide him with a written decision clearly stating its reasons for reaching its decision and the evidence it has relied upon.

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21. Within the same 28 days, Veterans UK shall also pay Mr N £1,000 for the additional substantial anxiety and inconvenience he has experienced because of its continued failure to consider his EPPP application properly.

**Anthony Arter**

Pensions Ombudsman  
25 July 2018



## **Appendix**

### **Medical evidence**

#### **Mr Ferran (consultant shoulder and elbow surgeon), 14 March 2017**

22. In a letter to Dr Limond, Mr Ferran said he had reviewed Mr N six weeks after his operation. He said Mr N was stiff and feeling some discomfort in his shoulder, which was to be expected. He said Mr N would be having physiotherapy. Mr Ferran said he had warned Mr N that he would be unable to do any heavy lifting or manual work for at least six months after his operation. He also said it would take a year for Mr N's shoulder to get back to normal.
23. In a letter to Mr N, Mr Ferron reiterated the above view and also said Mr N may always have long-term symptoms in his shoulder which might rule him out of future manual jobs.

#### **Veterans UK's MA, 18 May 2017**

24. The MA said Mr N had applied for EPPP on the grounds of injury to his right shoulder, wear and tear in his knees, dyslexia, hearing loss and stress/anxiety. He said Mr N felt that his age was a factor preventing him undertaking employment. He said Mr N had given up work in February 2017. The MA said Mr N's GP had confirmed his right shoulder problem but nothing else. He said the GP was not sure how much Mr N's ability to do heavy lifting or manual work would affect his usual occupation. The MA referred to correspondence from Mr N's orthopaedic surgeon. He said this confirmed the surgery and that the surgeon had said it would be up to a year before Mr N's shoulder returned to normal. He also referred to a consultation with the GP, in April 2016, for dermatitis caused by work stress.
25. The MA said:

"His condition has not yet reached a steady state. Under the balance of probabilities standard he does not reach the criteria for award of EPPP. He should reapply once a year has elapsed after his surgery. He should also provide the outcome from any DWP benefit applications. He might also be expected to have had an occupational health assessment when his job was terminated (he has ticked the 'no' box for health termination but says he left due to injuries caused through military service.) Please ask him about this so that we can get copies of any OH assessments for his last or previous employment."

#### **Dr Limond (GP), 12 June 2017**

26. Dr Limond said, in addition to his shoulder condition and reduced hearing, Mr N had been suffering from anxiety and depression for the last nine months. He expressed the view that there was no prospect of Mr N's shoulder improving sufficiently for him to return to any type of physical employment. Dr Limond also said that Mr N was not

fit for work at present because of low mood and anxiety, with elements of PTSD, including flashbacks and sleep disturbance. He said he felt Mr N was going to be permanently incapable of undertaking “any regular employment suitable to his skills and experience”. He concluded by saying he thought it unlikely that Mr N would be “capable of considering any form of employment given his overall physical and mental health”.

**Veterans UK’s MA, 10 July 2017**

27. The MA referred to Dr Limond’s letter. He said Dr Limond’s opinion appeared to differ from that of Mr Ferran. He agreed with the previous MA that Mr N’s orthopaedic problem was not yet in a steady state and the outcome of the surgery would not be known until January 2018. He went on to say:

“With regard to the symptoms of anxiety and stress, there is a lack of information. Has a diagnosis of PTSD been made and if so has any treatment been offered? Has [Mr N] been referred to the local Mental Health Team? I would require further information from the GP and from any mental health team that [Mr N] has attended.

The hearing loss and knee problems appears to be long-standing and have not previously prevented employment.”

**Dr Limond, 4 August 2017**

28. Dr Limond said he had referred Mr N to the local mental health team. He said Mr N’s stress had worsened and he had been prescribed a short-term antidepressant.

**Dr Gurang (GP trainee to consultant psychiatrist), 8 September 2017**

29. In an email to Veterans UK, Dr Gurang said Mr N had been seen by a consultant psychiatrist, Dr Rajamani. He said Mr N had been diagnosed with an atypical presentation of Post-Traumatic Stress Disorder (**PTSD**), with depression and severe anxiety. He said Mr N had been prescribed a low dose of an antidepressant and would be referred for talking therapy. Dr Gurang said, if a detailed letter was needed, Veterans UK could request one.

**Veteran’s UK’s MA, 11 September 2017**

30. The MA referred to Dr Gurang’s email. He noted Mr N had been dismissed from his previous employment. The MA said this seemed to have precipitated anxiety and depression. He noted Mr N was pursuing a claim for unfair dismissal and went on to say:

“It is therefore difficult for [Mr N] to argue that he was unfairly dismissed and at the same time claim to be physically unable to continue employment.”

31. The MA concluded:

"[Mr N] has developed symptoms of PTSD in association with anxiety and depression. He has only just started treatment for his mental health problems which were precipitated by his dismissal from his job. He would therefore be expected to show improvement following the introduction of suitable treatment.

He clearly feels that he was unfairly dismissed and therefore is not physically incapable of that employment.

I would therefore advise that he does not currently meet the criteria for EPPP."

**Dr Gurang, 25/27 September 2017**

32. In a letter to Mr N's GP, Dr Gurang set out a history of Mr N's health and a risk assessment. He confirmed the diagnosis of atypical presentation of PTSD with depression and severe anxiety.

**Veterans UK's SMA, 1 November 2017**

33. The SMA noted that Mr N had claimed a war pension but his case had not been decided. She commented that the criteria for EPPP were very strict and noted that Mr N's removal from his previous job did not relate to his health. The SMA concluded:

"Any psychological symptoms he has are only beginning to be addressed, see cons report dated 27 Sept 2017 and his shoulder surgery was only a few months ago. I note he makes reference to being 70% deaf. There is no evidence about this – although some may become available in relation to his war pension assessment. This means that the disorders are not yet in a steady state. The test for EPPP is **any** suitable full-time work until normal retirement age. It is not about previous jobs/role."

**Dr Limond, 22 November 2017**

34. Dr Limond referred Mr N to Walking Wounded. He said Mr N had been referred to the local NHS psychiatry team but he understood Walking Wounded could offer additional help and support.

35. Dr Limond said Mr N had been experiencing increasing low mood, anxiety and night time disturbance with flashbacks and nightmares. He said Mr N's mental wellbeing had deteriorated since he had injured his shoulder in the previous summer and had surgery. He referred to the prospect that Mr N might never regain full strength and use of his right side. Dr Limond said Mr N had been abruptly dismissed from his role at a school. He described this as a role Mr N had valued greatly but was unlikely to be able to perform at any time in the future. Dr Limond said Mr N was not feeling actively suicidal but had expressed a strong wish to wander off and was very angry about his dismissal.

36. Dr Limond also referred Mr N to the local audiology department in relation to hearing damage dating from his army service. Mr N underwent tests on 25 November 2017.

**Ms Freeland (physiotherapist), 27 November 2017**

37. In an open letter, Ms Freeland confirmed that Mr N had attended for physiotherapy from February to October 2017. She said his shoulder movements had improved but were still limited and unlikely to improve further. She said Mr N still experienced significant pain when using his shoulder for day to day functional activities and had reduced strength. Ms Freeland said Mr N's rehabilitation was complete. She said, given the degree of arthritis in his joint and the large tear, Mr N would never be able to use his shoulder for heavy lifting. She said his functional use of his arm was limited to light activities for short periods.

**GP notes, 30 January 2018**

38. Mr N's GP record contains the following entry:

"Chronic cervical spine mechanical pain, likely severe OA.

Responding well to treatment but has taken 4 sessions to start to get any benefit from treatment consisting of cervical and thoracic mobilisations, soft tissue massage and home exercises and advice. Improved ROMs and decreased pain but not at a stage yet where the patient can self manage and Julie feels with an extension she will be able to discharge without the need for further intervention. Has had 6 sessions to date."

**Dr Limond, 13 April 2018**

39. Dr Limond provided Veterans UK with copies of Mr N's medical records from January 2016 on request. He also provided details of Mr N's medication. He went on to say:

"Since [Mr N] has become physically less able he has presented with a strong knowledge that he will never be able to work again, and as his pension application has become more complicated he has become increasingly anxious and agitated with the hardships that his current path presents.

There will need to be a substantial improvement in his psychological well being before he will have the capacity to engage with training or employment."

**Dr Surapaneni, 26 April 2018**

40. In an email to Veterans UK, Dr Surapaneni said Mr N was suffering from PTSD of such severity that it was likely to impair his ability to gain or keep full-time employment until he was 60. He gave details of the medication Mr N was receiving. Dr Surapaneni promised to provide a detailed report.

### **Dr Surapaneni's report**

41. Dr Surapaneni's report is undated but he said he had interviewed Mr N on 28 November 2017 and 10 May 2018.
42. Dr Surapaneni said Mr N's mental health problems had escalated following his dismissal from employment in the Spring/Summer of 2017. He then outlined the symptoms Mr N was experiencing and his personal/medical history. Dr Surapaneni concluded:

"[Mr N] is a 57 year old gentleman who has been suffering with depressive symptoms and symptoms of post traumatic stress disorder for the last 25 years, and these have worsened since he suffered a termination of employment one year ago. [Mr N] has change of personality and has poor coping strategies to stress. He currently feels hopeless, especially about his future employment prospects and believes the only way for him is to get the Army pension from his work in the Army of 15 years from the age of 17.

[Mr N] does not want to apply for the Employment and Support Allowance as he believes he is entitled to the pension\*.

[Mr N] is facing imminent homelessness and financial problems.

#### Diagnosis

1. Post traumatic stress disorder, Atypical
2. Major depressive disorder without psychotic features.

#### Plan

...

#### My recommendation to the Army pensions

1. To provide possible PTSD support available to this ex-serviceman.
2. To provide [Mr N] with guidance towards recovery and rehabilitation in terms of the significant physical and mental disorders he has.
3. To consider [Mr N's] request for early release of pension on health grounds; as I think, realistically there is a limited chance he will be doing a fulltime paid employment due to the nature of his psychological disorder, as above. The severity and nature of the PTSD and Depressive disorder are of relapsing and remitting nature and it is difficult to predict his recovery although he is getting treatment in the form of medication and will have Psychological input in the near future.

4. The physical disorders of [Mr N] are of long standing nature which got severe recently. These have caused significant limitation in terms of finding gainful employment. His GP is looking after his Physical Health.”

\*Mr N has explained that he had previously applied for ESA and his application had been declined because his then partner owned her own home.