PO-25046

Ombudsman's Determination

Applicant	Mr N
Scheme	Armed Forces Pension Scheme 1975 (**AFPS 75**)
Respondent	Veterans UK

Complaint Summary

Mr N has complained that Veterans UK has failed to consider his application for the early payment of his preserved pension in a proper manner.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against Veterans UK because it failed to explain its decision to Mr N.

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.

3. Mr N brought a further complaint to TPO in June 2018. The Ombudsman upheld Mr N's complaint and issued a determination (PO-23253) on 25 July 2018. He directed Veterans UK to reconsider Mr N's application for EPPP and provide him with a written decision setting out its reasons and the evidence it had relied on. Veterans UK issued its further decision on 20 August 2018. It declined Mr N's application for EPPP. Mr N brought a further complaint to TPO on 21 August 2018. This determination relates to the August 2018 decision.

4. 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 …"

5. In her letter to Mr N, Veterans UK's decision maker began by explaining her approach. She said:

> "Firstly, I can advise that every case for early release of benefits on ill health grounds is assessed against the criteria of the medical evidence presented, on balance of probabilities standard of proof, is more likely than not, of preventing the member from engaging in full time gainful employment continuously up until the normal scheme retirement age. In your circumstances this is age 60 years. I will consider whether the range of functional limitations caused by ill health prevents you from continuing in your usual occupation and whether those limitations affect your ability for paid employment in a capacity out with your normal occupation.
>
> I will also consider whether those functional limitations are beyond the scope of improvements, through treatment or re-habilitation [*sic*] and whether on balance, treatment interventions could improve your current functional capacity to re-engage in the work place."

6. The decision maker noted that Mr N had applied for EPPP on the grounds that the following conditions prevented him from undertaking full-time employment: injury to right shoulder, wear and tear in both knees, dyslexia, hearing loss, stress and anxiety. She noted that Mr N's last employment had ceased on 22 February 2017 and that it did not end due to ill health. She said Mr N claimed that his age was an additional factor which prevented him from undertaking employment. The decision maker noted that Mr N's GP had not said whether Mr N's condition was temporary or permanent.

7. The decision maker referred to advice provided by Veterans UK's own medical adviser (**MA**) in May 2017. Summaries of this and other medical evidence relating to Mr N's case are provided in an appendix. She noted that the MA had said that Mr N's condition was not in a steady state and he should reapply after a year if he remained unfit for work. The decision maker said she fully supported the decision taken at that time to reject Mr N's application because the medical evidence did not suggest that Mr N's shoulder injury was beyond improvement. She accepted that, until Mr N's shoulder made sufficient recovery, it impacted on his usual occupation.

8. The decision maker then referred to a letter, dated 12 June 2017, from Mr N's GP (see appendix). She said, following this, Veterans UK had requested more detailed evidence relating to Mr N's mental health. The decision maker then sub-divided her remaining decision into Mr N's various conditions. With regard to the evidence relating to Mr N's mental health, the decision maker said:

> "Email dated 8/9/17 from Bedford West Community Mental Health Team, confirming you were seen on 6/9/17 and a diagnosis of Atypical presentation of Post Traumatic Stress Disorder F43.1 with depression and severe anxiety was made. Prescribed a low dose of an anti-depressant and a referral to Psychology (primary talking therapy) will be made."

9. The decision maker then moved on to consider Mr N's injury to his right shoulder. She referred to a letter from a consultant shoulder and elbow surgeon, Mr Ferran, dated 15 December 2016 and a diagnostic report dated 29 December 2016. She noted that the diagnostic report had shown moderately severe degenerative change in the AV [*sic*] joint, severe sub-acromial supraspinatus tendon impingement with a partial thickness rupture and marked tendinopathy. She noted that Mr N had been admitted for right shoulder arthroscopic rotator cuff repair, sub-acromial decompression and ACJ excision. The decision maker said the published guidelines on this procedure stated that full recovery was likely between three to six months after surgery.

10. The decision maker referred to a letter from Mr Ferran dated 14 March 2017. She noted that Mr Ferran had said that Mr N's sling had been removed and it was unsurprising that his shoulder was stiff. She noted Mr N had been advised not to do any heavy lifting or manual work for six months and that it was expected to take a year for his shoulder to return to normal. She also noted that Mr Ferran had written to Mr N saying he might have long-term symptoms in his shoulder which might rule him out of future manual work.

11. The decision maker referred to a letter, dated 27 November 2017, provided by the physiotherapist who had seen Mr N between February and October 2017. She noted that Mr N's movements had slowly improved but were limited to 120^{o} flexion and abduction of his shoulder. She noted that Mr N was reported to experience significant pain if he used his shoulder for day to day functional activities. She noted that the physiotherapist had reported that Mr N's rehabilitation was completed and that, given the degree of arthritis in the joint and the large tear, it was unlikely he would recover fully. She noted the physiotherapist's view that Mr N would not be able to use his shoulder for heavy lifting and was limited to light activities for short periods. The decision maker concluded:

> "It is also noted that you reported to your GP in March 2018 with further problems and were referred for further physiotherapy. However, based on this latest report I accept that you are no longer able to continue with the physical aspects of your usual occupation and a return to the role of PE Instructor

> would be limited to a more administrative role over a physical role. However, this restriction to your non-dominant right shoulder should not limit full-time employment in some suitable role where physical exertion is not a requirement."

12. With regard to the wear and tear in Mr N's knees, the decision maker referred to advice from Veterans UK's senior medical adviser (**SMA**). She said the SMA had noted that Mr N had first presented with bilateral knee pain in 2011/12 but no gross pathology had been demonstrated. She noted that Mr N had undergone investigation and a partial meniscectomy in 2012 and was no longer under specialist care. She concluded there was no evidence of functional limitation preventing Mr N from engaging in full-time employment from the wear and tear in his knees.

13. With regard to Mr N's hearing loss, the decision maker referred to a health assessment by his GP and noted the GP had not discussed hearing issues with Mr N. She noted Mr N had been referred to audiology in November 2017 and an audiogram had shown features of non-organic hearing loss. She noted hearing aids had been recommended. The decision maker referred to advice from the SMA that objective testing was required to assess Mr N's actual hearing disablement. She noted that the SMA was of the view that any disabling effects of hearing loss would be expected to be reduced by the use of hearing aids. The decision maker noted that a report from a psychologist, in May 2018, had referred to Mr N wearing hearing aids. She said she therefore did not accept that hearing loss prevented Mr N from engaging in full-time employment.

14. The decision maker then considered Mr N's dyslexia. She said this was a lifelong condition. She went on to say that, in his job as a PE Instructor of children, Mr N would have to have read and written reports on training, and health and safety. She said his dyslexia had not prevented him from doing so. She noted he had had a long career as a PE Instructor and that his dyslexia had not affected his performance so far. The decision maker said she did not accept that Mr N's dyslexia significantly impacted on his ability to work.

15. The decision maker concluded:

> "I do accept that you are permanently unable to return to the physical demands of your previous occupation as a PE Instructor, the functional limitations associated with heavy lifting and movement and the stress this would place on your shoulder injury impacts on this, however, you could still perform in this role in an administrative capacity where the physical demands are not necessary.
>
> Acceptance of early release of deferred pension benefits within the Armed Forces Pension Scheme are [*sic*] measured against any form of employment and are [*sic*] not restricted to usual occupation. I do accept that you are currently experiencing significant mental health symptoms associated with

> anxiety and stress as well as elements of PTSD. However, much of the anxiety and stress is related to the loss of your job, the circumstances surrounding the loss of your job and the fact that your claim for EPPP has previously been rejected.
>
> The nature of your mental health problems are [*sic*] in the main treatable and the issues with PTSD can be improved with the appropriate therapy. It appears that you are of the opinion that you will never be able to return to work and the only option available to you is to have access to your deferred pension before the age of 60 years to support this decision. I am not able to concur with this assertion because the decision to accept early release of benefits on ill health grounds is made using the available evidence of illness/condition and the likely prognosis of that condition with medication and support.
>
> I do not accept that at this stage you have exhausted all treatment options to improve your mental health, the medical opinion is that once you undertake psychological treatment it is possible that you may make sufficient progress to allow you to resume some kind of suitable full-time employment before the age of 60 years. I am also of the opinion that the combination of all your conditions should not prevent you from undertaking any form of full-time employment before the age of 60 years. I therefore conclude that at this stage you do not qualify for EPPP. These opinions are based on the balance of probabilities."

16. The decision maker said that, in addition to considering the available medical evidence, she had referred to "Synopsis of Causation" documents produced by the Ministry of Defence (MoD). These are guidance documents written by medical practitioners and based on a literature search at the standard of a medical textbook and generalist review articles. The decision maker enclosed the synopses for "Acute and Chronic Soft Tissue Injuries: The Shoulder and Elbow" and "Depressive Disorder" with her letter to Mr N.

17. In response to Mr N's further complaint to TPO, Veterans UK said it had nothing to add to the above decision. It stated:

> "The medical evidence does not demonstrate that [Mr N's] ill health conditions are beyond improvement, the condition PTSD is a treatable condition and a diagnosis does not mean that the person is incapable of any form of paid full time employment."

Veterans UK's position

18. Veterans UK submits:-

- Its decision, issued on 20 August 2018, detailed the reasons for rejecting Mr N's claim for EPPP. It referred to the multiple conditions which Mr N claims are

contributing to his inability to work full time at any time before he reaches age 60 in 2021.

- Its decision maker had not felt it necessary to specifically refute Dr Surapaneni's report. He had stated in his report that he had considered Mr N's past psychiatric history from electronic records and from interviews and discussions with other team members. Dr Surapaneni interviewed Mr N on two separate occasions and would have had access to the same medical evidence which was submitted in support of Mr N's claim.

- The MAs it employs to give opinions based on the medical facts of a case come from a range of medical backgrounds. They are generally retired consultants, with experience in the rehabilitation of chronic medical conditions; GPs; occupational health specialists; or ex-military accredited practitioners, who regularly assess cases of post-traumatic stress disorder (**PTSD**) of differing severity in serving and retired cohorts of the Armed Forces. Its SMA, who provides an opinion at stage two of the appeal process, is the SMA for the Deputy Chief of Defence Staff (Personnel). Its advisers are extensively qualified and are validated by the General Medical Council.

- All available medical evidence in Mr N's case was reviewed by two separate MAs; one of whom reviewed his case twice. Its SMA reviewed all the medical evidence on 1 and 24 November 2017. The medical opinion was consistent; in that it was considered that the evidence did not support the test for permanent incapacity from gainful full-time employment.

- Mr N completed a questionnaire, in January 2017, prior to surgery on his shoulder. He was asked if he had any history of mental health problems, such as depression or memory problems. He answered 'no' to these questions.

- Although stress and anxiety were mentioned in Mr N's application, his GP did not make any reference to or provide any evidence to support these conditions. Following Mr N's appeal, further evidence was obtained from Dr Limond. He stated that Mr N had been suffering anxiety and depression for the previous nine months and was unable to work due to low mood and anxiety, with elements of PTSD. As his treating clinician, Dr Limond advocated for Mr N. He gave an opinion that Mr N was going to be permanently incapable of undertaking any regular employment.

- In August 2017, a report from a social worker in the community mental health team stated that Mr N felt his mood had been affected by dismissal from his job and delay in receiving his pension. The report also stated that Mr N had the capacity to make decisions and judgments. It stated Mr N reported having flashbacks in 1994 which he attributed to bullying whilst in the Army. It stated he had worked for 20 years teaching life skills, including two years with his last

employer. It stated Mr N felt he had been unfairly dismissed and that his career and reputation had been ruined.

- In September 2017, a report was obtained from Dr Gurung, a GP trainee completing psychiatric training. He advised that Mr N had been having flashbacks of his Army life since losing his job. He referred to Mr N having reported a similar episode after leaving the Army 23 years ago, which had lasted a week and required no medical input. Dr Gurung had referred to atypical presentation of PTSD, with depression and severe anxiety. He had prescribed a low dose of antidepressant and talking therapy.

- In November 2017, Dr Surapaneni had stated that Mr N was very unhappy with the rejection of his EPPP claim. He had reported that Mr N's symptoms were not improving and also said that Mr N had not been taking his medication regularly because he did not like taking tablets.

- In a subsequent report, Dr Surapaneni said Mr N had suffered from PTSD for 25 years and the termination of his employment had made it worse. No evidence was provided to indicate that Mr N's PTSD symptoms had interrupted his past employment or that he had been seen, treated or diagnosed with this condition previously.

- It does not dispute Mr N's symptoms, but it is likely that the symptoms of PTSD he had in the past were mild and controllable. Mr N's pre-morbid personality was of a "bubbly, outgoing nature, he used to be the soul of the party". Dr Surapaneni rightly stated that PTSD and depressive disorder are of a relapsing and remitting nature and it is difficult to predict Mr N's recovery. Dr Surapaneni increased Mr N's medication and recommended psychological input. It considers that it is implicit, therefore, that treatment had only commenced and the outcome is still unknown.

- Giving weight to opinion requires evidence. There is no evidence to show that Mr N's symptoms were anything more than mild. He held down a responsible job for a considerable time. His symptoms only got worse after the significant life-event of losing his job. There is no evidence of a traumatic event causing worsening of PTSD symptoms.

- Dr Surapaneni increased the dose of Mr N's antidepressant medication and recommended that he engage with psychological treatment. This is in accordance with NICE guidelines. No evidence was submitted showing the outcome of this treatment. It is, therefore, fair to say that Mr N has not exhausted all treatment options.

- It is accepted that Mr N is currently experiencing significant mental health symptoms associated with anxiety and stress, as well as elements of PTSD. However, much of the stress and anxiety relate to the loss of his job, the

circumstances surrounding this and the fact that his EPPP claim has been rejected. This has been referenced in the medical reports.

- A diagnosis of PTSD does not automatically mean that a person's ability to work and function normally is permanently affected to the degree that employment in any capacity is unlikely in the long term. Mr N's mental health problems are, in the main, treatable.
- All the available medical evidence, its MAs' and SMA's opinions and the synopses of causation were taken into account.
- It is not accepted that, at this stage, Mr N has exhausted all treatment options to improve his mental health. The medical opinion is that, once he undertakes psychological treatment, it is possible that he may make sufficient progress to allow him to resume suitable full-time employment before the age of 60 years. Mr N's treatment is ongoing. Unless there is evidence that his mental health is beyond any improvement and that all treatment options have been exhausted, he cannot be considered permanently incapacitated.
- It is not considered appropriate to pay Mr N any further compensation for non-financial injustice (distress and inconvenience). He has already been paid £1,500. Its August 2018 decision did not fail to provide Mr N with sufficient explanation.

Mr N's comments

19. Mr N has submitted the following comments:-
    - He has recently been admitted to hospital and is now on a higher dose of medication.
    - His mental health team disagrees with the views expressed by Veterans UK and consider it is time for the Ombudsman to direct payment of his pension.
    - It is inappropriate for Veterans UK to still be referring to evidence from 2017.
20. Mr N has provided copies of up to date medical reports from a clinical liaison nurse, his GP and a consultant psychiatrist. Mr N saw the psychiatrist following his referral to the Veterans Complex Treatment Service.

Conclusions

21. I am aware 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. He has made it clear that he expects me to direct Veterans UK to pay his deferred benefits early on the grounds of his ill health.
22. I have previously explained that my concern is primarily with the decision-making process. The issues I 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 medical (and other) evidence in order to determine whether it supports the decision made. If I find the decision-making process is flawed, I will ask the relevant decision maker to revisit the decision. I do not make a new decision myself.

23. In taking the above approach, I am adopting the line taken by the Courts. There is now a substantial body of caselaw relating to the circumstances in which the Courts may interfere in the actions of decision makers. The established principles which decision makers are expected to follow are:-

    - The decision maker must ask itself the correct questions.
    - It must direct itself correctly in law; in particular it must adopt a correct construction of the pension fund rules.
    - It must not arrive at a perverse decision, i.e. a decision to which no reasonable decision maker could arrive, and
    - It must take into account all relevant but no irrelevant factors.

    The Courts[1] have held that, if the decision maker arrives at its decision within these limits, its decision cannot be overturned by the Courts or the Ombudsman.

24. I am conscious that the above principles had their origins in caselaw relating to the exercise of discretionary powers. The decision to be made by Veterans UK, under rule D.18, is not strictly the exercise of a discretionary power. It must satisfy itself that, because of physical or mental impairment, Mr N is and, at least until reaching the age of 60, will continue to be incapable of any full-time employment. Veterans UK's decision is more akin to the finding of a fact. If the evidence were to show that Mr N is indeed incapable of any full-time employment, it would not be open to Veterans UK to decide otherwise.

25. I must, therefore, consider whether the above principles should apply to the circumstances of Mr N's case and the terms of rule D.18. In this, I will again be guided by the Courts.

26. In *Saffil Pension Scheme v Curzon* [2005] EWHC 293 (Ch), Mr Justice Park said:

> "… in general, a court (and thus the Pensions Ombudsman) should not interfere with decisions which trustees take in relation to claims for benefits under the rules of their particular schemes. If the trustees have to form a judgment on some question of fact which is relevant to whether a member of the scheme is or is not entitled to a benefit under the rules, the court will in general not substitute its own judgment for that of the trustees. However, there are limits to that general proposition. One of them is that if the trustees decide

[1] *Harris v Shuttleworth* [1994] PLR 47 - [1994] ICR 991 - [1994] IRLR 547, *Edge v Pensions Ombudsman* [2000] Ch 602

> a question in a way which the court considers perverse … the court will intervene. Further, it is not precluded from doing that by provisions in the rules which state that it is the trustees who need to be satisfied whether a particular condition is fulfilled or not, or by rules which say that the trustees' decision is to be final."

27. Mr Justice Park went on to say:

> "I do not agree … that a decision by trustees on whether a person has satisfied the factual requirements for the grant of a pension is in the nature of a "trustee discretion". Nor do I agree that anything in Edge v Pensions Ombudsman … decides that it is. It is true that such a decision by trustees does involve an exercise of judgment, and that there is a broad area (in the nature of the "no man's land of fact and degree") where the particular judgment to which the trustees come is conclusive. The point is not dissimilar from the familiar proposition that an appellate court is reluctant to interfere with the findings of fact made by the court of first instance. Nevertheless, an appellate court does interfere with such findings if it considers that they were plainly wrong. In a similar way, the decision whether the conditions for a mandatory benefit under a trust instrument or pension scheme are present or not is in the nature of a secondary finding of fact based on the primary facts, and the decision can only stand if it is one which is capable of being reached on the basis of the primary facts. In this case the primary facts were the medical reports. The secondary finding was that Mr Curzon did not qualify under rule 18(A) for the incapacity benefit. In my judgment that finding was not one which could be reached on the basis of the primary facts. That being so, the proper course for the Ombudsman was to say so and to give directions accordingly, not just to send the matter back to the Trustees for them to think about it again.
>
> What the Ombudsman did was … within his powers. Contrary to the way in which it is expressed in ground of appeal 4, he did not grant the pension, which he did not have power to do. Rather he directed the Trustees to pay to Mr Curzon an incapacity pension, which was something which the Trustees had power, or rather an obligation, to do. Under s151(2) of the 1993 Act the Ombudsman had a statutory power to direct any person responsible for the management of the scheme (in this case the Trustees) to take such steps as he might specify in the written statement of his determination. The direction which he gave was wholly appropriate given his decision upon the substantive matters which were before him, a decision with which I respectfully agree."

28. In *Sampson v Hodgson* [2008] All ER (D) 395 (Apr), the judge concluded that attaching little or no weight to some of the medical evidence was not a valid ground on which to interfere with the trustees' decision. He found that the weight which is attached to any of the evidence was entirely for the trustees to decide and this

included giving it little or no weight. This, he decided, was not the same as disregarding the evidence in question.

29. I conclude, therefore, that although rule D.18 does not give Veterans UK the discretion to pay Mr N's deferred benefits early, it should follow broadly the same principles in coming to a decision as it would for a discretion. I conclude also that I may interfere with the decision only if those principles have not been followed. I may, however, direct Veterans UK to pay Mr N his pension if its decision not to can be considered perverse.

30. I move now to consider the circumstances of Mr N's case in light of the above.

31. I believe it is worth reiterating the basis upon which Mr N may receive his benefits under rule D.18. In order to be eligible to receive his benefits, 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[2] 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. He will reach this age in 2021; four years after his initial application for EPPP.

32. Veterans UK's decision maker described the eligibility test as ill health "preventing the member from engaging in full time gainful employment continuously up until the normal scheme retirement age". I consider this to be an accurate description of the test set out in rule D.18. Veterans UK can, therefore, be said to have adopted a correct construction of rule D.18. Having read the decision maker's letter, I am satisfied that she asked the correct questions; namely, did Mr N's ill health render him incapable of any full-time employment and was this likely to be the case up until his 60th birthday?

33. The decision maker helpfully referred to the medical reports she had relied on in her letter. There is one notable exception: Dr Surapaneni's report. Given that this report was provided by the specialist doctor who was treating Mr N, I am surprised that there is no mention of his report in the decision maker's letter. Whilst it is for Veterans UK to decide how much weight it attaches to Dr Surapaneni's report (including giving it little or no weight), I would have expected it to be referred to; if only to explain to Mr N why little or no weight was being given to his consultant's view. In the absence of any reference, it is difficult to determine whether the decision maker failed to take this report into account or did take into account but gave it little or no weight. The lack of any reference to Dr Surapaneni's report is very unsatisfactory.

34. Veterans UK has explained that it was not felt necessary to refute Dr Surapaneni's report. However, the decision maker must have been aware that Mr N was relying on the evidence provided by his own doctors to support his claim. It would be natural for him to want to understand why Veterans UK did not agree with the view expressed by

[2] *Harris v Shuttleworth*

Dr Surapaneni. Failing to make reference to Dr Surapaneni's reports or to explain why his opinion had not been accepted was a glaring omission and one which added considerably to Mr N's distress and confusion.

35. The explanation now offered by Veterans UK refers to the background of its own MAs; though it has not explained the specific background of those MAs who actually reviewed Mr N's case. Nor do I see any relevance in the fact that its SMA is the SMA for the Deputy Chief of Defence Staff (Personnel). I would agree that one of the relevant factors in determining what weight should attach to any medical opinion is the physician's experience in the condition in question. Surely, another might be that the physician has actually seen the applicant and is responsible for his care. On that basis, it might be expected that Dr Surapaneni would at least have been afforded a mention.

36. I note also Veterans UK's reference to Mr N's GP acting as his advocate. It appears to be suggesting that Dr Limond's opinion was coloured by the fact that he was one of Mr N's treating physicians. This is an inappropriate approach to take to the evidence provided. No doubt Veterans UK would not accept that its MAs were advocating for it. Whilst neither Dr Limond nor Veterans UK's MAs were acting as expert witnesses, they should nevertheless be treated equally as having provided an opinion in good faith and subject to their own code of ethics.

37. With the exception of Dr Surapaneni's report, I am nevertheless satisfied that Veterans UK took all other relevant matters into account and no irrelevant ones.

38. I have deliberately left the question of whether Veterans UK's decision can be considered perverse to last. It is only if Veterans UK's decision can be considered perverse that I am able to intervene in the way in which Mr N would like me to; that is, to direct Veterans UK to pay his pension. However, this benchmark is set quite high. It is not sufficient for me to reach the view that I would have come to a different decision. In order to set aside Veterans UK's decision, I must be satisfied that its decision is not one it could reach on the primary facts. As in *Saffil*, the primary facts are the medical reports. I must, of course, also balance this against Veterans UK's right to determine the weight which is attached to any of the evidence.

39. At this point, I should explain that the decision I am reviewing is that which Veterans UK made in August 2018. This relates to Mr N's application for EPPP in 2017. It is clear, from the additional medical evidence which he has submitted, that Mr N's circumstances have changed since then. However, I can only judge Veterans UK's decision on the basis of the evidence which was available at the time it was taken. I cannot take into account medical evidence which has been provided since that decision and which relates to Mr N's condition as it is now; even if that evidence is strongly indicative of Mr N now satisfying the requirements of rule D.18. The more appropriate course of action is for that evidence to be submitted to Veterans UK for them to assess.

40. In August 2018, Veterans UK decided that, as a result of his shoulder injury, Mr N was no longer capable of continuing with the physical aspects of his former occupation. That decision is supported by the medical evidence. In fact, the medical evidence indicates that Mr N would be permanently incapable of any work involving heavy lifting. Veterans UK decided that Mr N's shoulder did not prelude him from undertaking a role where physical exertion was not a requirement. An administrative role was suggested. That decision is supported by the medical evidence relating to Mr N's shoulder.

41. I have previously expressed concern that Mr N's capacity for full-time employment should be considered in the round; rather than against each of his conditions in isolation. Mr N's capacity for non-physical work cannot be solely assessed in terms of his shoulder. For example, he has dyslexia and hearing loss which will both impact upon his ability to undertake administrative work.

42. Veterans UK came to the conclusion that Mr N's dyslexia was not such that it would impact on his ability to work. The decision maker pointed to the fact that Mr N had been working in a school and said he must, therefore, have been able to read and write reports. She noted that Mr N now wore hearing aids and said she did not accept that his hearing loss would prevent him from engaging in full-time employment. It is clear that Mr N's dyslexia and hearing loss are likely to make undertaking administrative work in an office environment difficult for him. However, the evidence does not suggest that he would be prevented from undertaking such work.

43. In reality, the main issue for Mr N in August 2018, as it is now, was his mental health. He has been diagnosed with an atypical presentation of PTSD, with depression and severe anxiety. The evidence relating to Mr N's mental health consisted of Dr Gurang's email of 8 September 2017 and Dr Surapaneni's email and report in 2018, together with the opinions expressed by Veterans UK's medical advisers.

44. In his email of 26 April 2018, 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. In his subsequent report, Dr Surapaneni said Mr N had been experiencing the symptoms of PTSD for 25 years and these had worsened since his employment had been terminated. He said the severity and nature of Mr N's PTSD and depressive disorder were of relapsing and remitting nature and he acknowledged that it was difficult to predict his recovery. Dr Surapaneni expressed the view that there was a limited chance that Mr N would be able to undertake full-time paid employment.

45. Veterans UK's own medical advisers noted that Mr N had only just started treatment for his PTSD, that his ill health was not in a steady state and that he could be expected to show improvement following the introduction of suitable treatment. The SMA advised that the NICE recommended best practice treatment is psychological therapy.

46. Veterans UK's decision maker said the nature of Mr N's mental health problems were treatable and his PTSD could be improved with appropriate treatment. She did not accept that Mr N had exhausted all treatment options. She said:

> "… the medical opinion is that once you undertake psychological treatment it is possible that you may make sufficient progress to allow you to resume some kind of suitable full-time employment before the age of 60 years."

47. Strictly speaking, that was not the case. The opinions provided by Veterans UK's own medical advisers do not add up to a statement to the effect that Mr N could be expected to make sufficient progress over the coming four years to enable him to undertake full-time employment. At most, the medical advisers said Mr N could be expected to show some improvement with suitable treatment. Dr Surapaneni, on the other hand, had stated that 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.

48. It would be more accurate to say that medical opinion differed. The decision maker should then have gone on to explain why she preferred the opinions from Veterans UK's own medical advisers. She did not. This, coupled with the lack of any reference to Dr Surapaneni's report, means I cannot find that Veterans UK reviewed Mr N's case in a proper manner; even with the extended explanation provided in response to Mr N's application to me.

49. The recent explanation submitted by Veterans UK for its decision not to grant EPPP relies heavily upon Mr N's medical history. Veterans UK points out that Mr N's PTSD symptoms have not previously affected his ability to hold down a responsible job. It also points out that he had not previously been seen, treated or diagnosed for PTSD. It suggests that this indicates that Mr N's PTSD symptoms have previously been mild and controllable. This may well have been the case. However, Mr N's eligibility for EPPP rests on the future development of his mental health, rather than its past. The fact that Mr N was able to recover from an episode of flashbacks in 1994, and subsequently cope with full-time employment, is no guarantee that he will be able to do so in the future.

50. It is clear that Mr N has suffered a serious relapse in his condition. It appears to have been triggered, at least in part, by the loss of his job and the circumstances of that loss. Veterans UK accepts that Mr N is currently experiencing significant mental health symptoms. It says it has declined his application on the basis that the evidence does not show that his mental health is beyond any improvement and that all treatment options have been exhausted. This is, in fact, setting the bar too high.

51. Mr N does not have to exhaust all treatment before he qualifies for EPPP. An assessment has to be made, on the balance of probabilities, as to the likely outcome of his treatment. This is in order that Veterans UK can determine whether or not Mr N is, more likely than not, going to recover in the four years following his application such that he will be capable of full-time employment. This is the question which

Veterans UK's decision maker said she was addressing. The further explanation provided by Veterans UK has simply served to muddy the waters and reinforces my view that his case has not been reviewed in a proper manner.

52. The question remains, however, as to whether Veterans UK's decision can be said to be perverse. As I have mentioned, it is not a question of whether I would have reached a different decision myself. It is a question of whether Veterans UK's decision is one which they can reach on the basis of the primary facts. I do not find that the evidence is sufficient for me to say that the decision was perverse and that I should make a direction for Veterans UK to grant EPPP.

53. I am, however, upholding Mr N's complaint on the grounds that Veterans UK did not provide sufficient clear reasoning for its decision.

54. I note Mr N's concern that Veterans UK has referred to evidence from 2017. It is clear that Mr N's circumstances have changed since he first submitted his application for EPPP. However, it is his 2017 application and the August 2018 decision which are the subjects of his complaint. It is his eligibility under rule D.18 in 2017 which is under consideration and, therefore, it is evidence which relates to his condition then which is relevant.

Directions

55. Within 10 days of the date of this determination, Veterans UK will review Mr N's case and provide him with a properly reasoned decision. At the same time, Veterans UK will consider the additional medical evidence provided by Mr N and consider whether he now fulfils the requirements of rule D.18.

56. Within the same 10 days, Veterans UK will pay Mr N £1,000 for the serious additional distress and inconvenience resulting from the continuing failure to consider his application for EPPP in an appropriate manner.

Anthony Arter
Pensions Ombudsman

20 November 2018

Appendix

Medical evidence

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

57. 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.

58. 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

59. 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.

60. 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

61. 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

62. 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

63. 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

64. 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, 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

65. 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."

66. 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

67. 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

68. 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

69. 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.

70. 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.

71. 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

72. 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

73. 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

74. 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

75. 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

76. Dr Surapaneni's report is undated but he said he had interviewed Mr N on 28 November 2017 and 10 May 2018. He said he had considered Mr N's past psychiatric history from electronic records, his interviews and discussions with other members of the community mental health team (**CMHT**). He also said he had discussed Mr N's case with the consultant psychiatrist who had been treating Mr N before his care had been transferred to his current CMHT. He explained he had also had information from Mr N's ex-partner.

77. 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.
>
> <u>Diagnosis</u>
>
> 1. Post traumatic stress disorder, Atypical
>
> 2. Major depressive disorder without psychotic features.
>
> <u>Plan</u>
>
> …
>
> <u>My recommendation to the Army pensions</u>
>
> 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.