

Ombudsman's Determination

Applicant	Mr S
Scheme	Armed Forces Pension Scheme 2005 (AFPS 05)
Respondent	Veterans UK

Outcome

1. I do not uphold Mr S' complaint and no further action is required by Veterans UK.

Complaint summary

2. Mr S has complained that his eligibility for ill health retirement benefits has not been assessed properly. He is of the view that he meets the eligibility criteria for Tier 2 benefits.

Background information, including submissions from the parties

3. Mr S sustained a back injury in 2011. He has also been diagnosed with non-freezing cold injury (**NFCI**). Mr S was discharged from the Royal Navy on medical grounds in May 2014. He was awarded Tier 1 benefits. He was then aged 34.
4. The AFPS 05 was established by statutory instrument issued under the Armed Forces (Pensions and Compensation) Act 2004. The Rules are contained in the Armed Forces Pension Scheme Order 2005 (SI2005/438) (as amended).
5. Three tiers of benefit are available for individuals who leave the Armed Forces as a result of ill health. The level of benefit is based on the severity of the individual's condition and their capacity for civilian employment. Tiers 2 and 3 are awarded under the AFPS 05. Tier 2 is awarded to those whose ability to undertake gainful employment is significantly impaired (Rule D.6.). Tier 3 is awarded to those who are permanently incapable of any full-time employment (Rule D.5.). At the time of Mr S' discharge, Tier 1 was awarded under article 16 of the Armed Forces Early Departure Payments Scheme Order 2005 (SI2005/437) (as amended), to those who were unable to do their service job, but their ability to undertake other gainful employment was not significantly impaired.

6. Mr S' claim for Tier 2 benefits has been the subject of two previous applications (PO-9373 and PO-15739) to the Pensions Ombudsman. In respect of the last, the Senior Adjudicator was of the view that it was not possible to say with confidence that the right interpretation of Rule D.6. had been applied by Veterans UK, specifically the likely result of treatments on Mr S' conditions and whether Mr S was then, or could be before normal pension age (**NPA**), capable of some form of full-time employment. Veterans UK agreed to review Mr S' case, having sought further advice from a medical adviser (**MA**), who had not previously been involved.
7. Veterans UK referred Mr S' case to another MA. In addition to a copy of the Senior Adjudicator's latest opinion, Veterans UK provided the MA with copies of previous medical reports and other submissions. In a note to the MA, Veterans UK said:

"I have highlighted the paragraphs that the Ombudsman requires clarification on and would ask that you review this case with a view to answering the Ombudsman's questions."

8. In his/her subsequent report the MA referred to the Senior Adjudicator's latest Opinion and reviewed and commented on the medical evidence pre and post Mr S' discharge, including the opinions expressed by Dr Braidwood (Senior MA), dated 4 August 2014, and Dr Gordon (MA), dated 6 September 2016. The MA said there was very little specialist documentation available since Mr S' discharge to indicate that his clinical condition had deteriorated significantly, or that all treatment options had been concluded. It simply confirmed that Mr S' treatment was ongoing and that his symptoms were persisting. The MA said he/she agreed with Dr Braidwood's and Dr Gordon's advice reference to the Tier 1 assessment.
9. The MA went on to say:

"I have reviewed the Synopsis of Causation for Low Back Pain. While it is accepted that [Mr S] did suffer from chronic pain prior to discharge and that this was still present in Jun[e] 2015, this does not mean that he will be permanently unfit or restricted for work. [Mr S'] treatment had focussed on conservative management. There is no indication for immediate surgery although a continuation of symptoms suggestive of a nerve root irritation might eventually result in consideration for surgery and it is probable that this would relieve his most severe symptoms. He continued to attend a pain management clinic and had attended a neurologist. It is reasonable to expect that further improvement will result following radio frequency ablation in view of Mr Way's [Consultant Orthopaedic Spinal Surgeon] optimism for this treatment in [Mr S'] case. It is the eventual outcome that will determine what job opportunities [Mr S] can consider in the future. Successful surgery, for example should not normally limit his employment choice significantly or hamper his career prospects. Pain can usually be effectively managed when the appropriate therapy (medical, psychological or surgical) is identified. I therefore consider that, on discharge and at each of the subsequent MA reviews it was too early to conclude

that [Mr S] had a permanent and limiting decrease in his mobility as a result of low back pain and that further improvement would not occur.

I have also reviewed the Synopsis of Causation for Cold Injury and the first and third IMEG reports. I note that [Mr S] has been given appropriate advice for the management of this condition and that it is probable that his symptoms will be manageable over the next few years with avoidance of cold. It should not prevent him from considering a wide range of employment opportunities.

I have finally reviewed the Synopsis of Causation for Depressive Disorders and note that depression is not a single, static disorder, but a dynamic condition. Depression may occur as a single lifetime event, but more often the illness pursues a recurrent course. The severity and duration of depressive episodes tends to increase with each new recurrence. In this case the symptoms have been precipitated by chronic pain and uncertainty over the future. [Mr S] continued to receive appropriate mental health support up to his day of discharge and it is probable that this continued under the NHS or a Veterans agency. Improvement in pain should result in an improvement in his mental health.

[Mr S] was unsuccessful in claiming PIP [Personal Independence Payment] in 2015. There is no update on his appeal. In addition there is no new medical evidence for me to consider that has not already been considered by the MAs who have already reviewed this case. I remain of the opinion that the original Tier 1 recommendation was appropriate and there has been no medical evidence for an increase in the award. In the long term [Mr S'] ability to get gainful employment should not be significantly impaired on the balance of probabilities standard of proof, although he may need to avoid heavy manual work until he is better able to manage his symptoms.

Should this case require further consideration then up to date medical evidence will need to be provided in respect of both GP notes and all on-going NHS specialist treatment."

10. The Internal Dispute Resolution (**IDR**) Procedure stage two Deciding Officer (the Assistant Head Veterans UK) agreed with the MA's recommendation that the Tier 1 award was correct. Mr S was duly informed that his complaint had been rejected.

Mr S' position

11. Mr S says after several procedures in the NHS and in India he is still in pain. He says flair-ups keep him in bed and sometimes awake at night and during the winter he cannot go out for long periods because of his NFCI. He says he suffers from depression and medication affects his mental state and sex life. He says he has lost jobs because he cannot work every time and he can no longer run or play basketball.

Veterans UK's position

12. Veterans UK's position is as set out in the Deciding Officer's IDR stage two decision.
13. I have not provided summaries for the medical evidence considered. Summaries were provided in the previous Opinions (the references are in paragraph 6 above).

Adjudicator's Opinion

14. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Veterans UK. The Adjudicator's findings are summarised below:-
 - It is not disputed that Mr S is permanently unfit for his role in the Navy. What is disputed is whether Mr S' capacity for gainful employment is significantly impaired to his NPA.
 - Tier 2 benefits would be paid under Rule D.6. if Mr S has "suffered a breakdown in health as a result of which his capacity for gainful employment is significantly impaired".
 - There is no definition of "gainful employment" or "significantly impaired" in the AFPS 05 Rules.
 - Rule D.5. assists in the interpretation of Rule D.6. This is because Rule D.5. is specific as to the level of impairment required to qualify for benefit and provides a higher level of benefit. Rule D.6. provides a lower level of benefit than D.5. and, by implication, a lower level of impairment is required to qualify for benefits. Rule D.5. applies if the member has suffered a permanent breakdown in health involving incapacity for any full-time employment. It follows, therefore, that, if the member was only capable of part-time employment, he/she would qualify for benefits under Rule D.5. Therefore, the gainful employment referred to in Rule D.6. must mean that the member is capable of some full-time employment (and not just part-time employment). The question presented by Rule D.6. cannot be answered simply by asking whether the applicant is capable of any paid employment in the civilian sector. That is the question to be answered under the stricter test in Rule D.5. and is the gateway criterion for the highest level of ill health retirement benefits (Tier 3). The impairment to qualify for benefits under Rule D.6. must be significant. It would not be sufficient for the member simply to identify a small number of roles which they were unable to do. If the individual is not considered to meet Rule D.6., it must be because Veterans UK take the view that he/she is, or will be before normal retirement age, capable of undertaking some form of full-time employment. That employment does not have to be the same or similar to the role the member undertook for the Armed Forces, but it must be full-time. If the individual is not likely to be capable of any full-time employment, he/she would qualify for benefits under Rule D.5.

- The MA appears to have considered the available medical evidence both to the date of Mr S' discharge and following his appeals and the contents of the Senior Adjudicator's last Opinion. With respect to the Opinion, Veterans UK asked the MA to consider the implications of 'gainful employment' or 'significantly impaired' within Rules D.5. and D.6.
 - Referring to Mr S' low back pain the MA said, while it was accepted that Mr S suffered chronic pain prior to discharge and this was still present in 2015, it did not mean he would be permanently unfit or restricted for work. The MA noted that Mr S continued to attend pain management and had attended a neurologist. The MA said it was reasonable to expect that further improvement would result from radio frequency ablation, but if his symptoms continued surgery would most likely relieve the most severe symptoms with the result not normally limiting his employment choice significantly or hampering his career prospects.
 - In respect of Mr S' NCFI, the MA noted that Mr S had been given appropriate advice for its management and that it was probable that his symptoms would become manageable over the next few years with avoidance of cold. The MA concluded that the condition should not prevent Mr S from considering a wide range of employment opportunities.
 - On Mr S' depression, the MA noted the symptoms had been precipitated by chronic pain and uncertainty over the future and that up to his date of discharge Mr S had continued to receive appropriate mental health support which was likely to have continued. The MA said improvement in pain should result in an improvement in Mr S' mental health.
 - The MA noted that Mr S had been unsuccessful in claiming a PIP from the State in 2015 and that no new medical evidence had been submitted. The MA concluded that Mr S' ability to obtain gainful employment should not, on balance, be significantly impaired.
 - The Deciding Officer for Veterans UK then considered the MA's recommendation 'in light of' the other medical evidence before accepting it.
 - There does not appear to be a difference of medical opinion between the MA and Mr S' treating doctors. But even if there was that is not enough to say that Veterans UK's acceptance of the MA's recommendation means its decision was not properly made.
15. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S 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 main points made by Mr S.

Ombudsman's decision

16. Mr S says he has not seen the MAs inputs or reports. But collectively Veterans UK's original, IDR stage 1 and 2 decisions detailed the MAs respective opinions.
17. Mr S says:-
 - Since his discharge he has had numerous treatments both here and in India; and is scheduled to return to India to try a treatment recommended by his consultant.
 - He does not receive any State benefits.
 - He is a blue badge holder.
 - He continues to suffer with back and leg pain, constant pain in his foot and no sensation in his right toe.
 - He has changed his lifestyle to accommodate his condition, but still struggles. He has taken up meditation, yoga and regularly has acupuncture and visits a hydro pool to manage and adapt to the pain.
 - His NFCI and depression have been understated by Veterans UK.
 - He was told by the Institute of Naval Medicine that his NFCI would get better in 3 to 4 years, but he is still suffering with the same symptoms. This has and continues to significantly affect him in the job market. He worked in logistics whilst serving. It was difficult for him to go back to that as most jobs involve either working in cold areas or outside. Sitting for long hours affects his back and legs. He had to leave a job due to his struggle with pain and mental health.
18. What I have to consider is whether Veterans UK's decision was properly made. That is whether Veterans UK has: (i) gone about making the decision in the right way; and (ii) made a decision that makes sense based on the evidence. It is not relevant whether I agree or disagree with the actual decision.
19. I am satisfied that the relevant Scheme Rules have been correctly applied and appropriate medical evidence was considered. I find no grounds for saying that Veterans UK erred in accepting the recommendation of its MA.
20. I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman
09 March 2020