

**PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN**

Applicant	Mr L
Scheme	Armed Forces Pension Scheme (AFPS 75)
Respondent	Veterans UK

Subject

Mr L has complained that Veterans UK have refused to increase his Service Attributable Pension from 60% to 70% to match his War Disablement Pension.

The Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against Veterans UK because the decision was properly reached.

DETAILED DETERMINATION

Rules

I. **Queen's Regulations for the Royal Air Force 1977 (the "Regulations") as amended**

Sub-paragraphs 3021(5) and (6) of the Regulations state:

- “(5) Unless the Defence Council decide otherwise, where an airman is invalided from the Service as the result of disabilities which are accepted by the DSS as attributable to or aggravated by his service, (including one who has opted out of the Armed Force Pension Scheme) and the degree of disability is assessed at 20 per cent or more, he may be awarded a service attributable pension. This will be either the award for which he is eligible under clause (2) of this para, or the minimum rate of service attributable pension appropriate to his rank and percentage of disability as set out in AP 3392, Vol 2, Leaflet 1813 Annex B, whichever is the greater. Where an airman is ineligible for an award under clause (2) he may be awarded service attributable pension at the appropriate rate. Service attributable pension may be awarded irrespective of length of service, but is subject to adjustment or cessation as provided for in clause (6). In cases where the Defence Council so decide, the award and the amount of service attributable pension will be at their discretion.
- (6) Where an airman is granted service attributable pension, the award will be adjusted upwards or downwards (but not below the rate of service invaliding pension to which he may otherwise be eligible) during the first 12 months following discharge, according to the degree of disability. Thereafter the award will be adjusted only if the degree of disability rises or when it falls below 20 per cent. The revised rate of service attributable pension will be the rate appropriate to the new degree of disability, payable under the pension code in force when the airman was discharged, increased as appropriate by pensions increase measures. Payment of service attributable pension will cease where the degree of disability falls below 20 per cent. However, in such a case payment of service invaliding pension may continue where the airman has sufficient service to qualify for it under the terms of clause (2).”

Material Facts

2. Mr L served with the Royal Air Force from May 1990 until he was medically invalided from service on 2 January 1998. The Primary Invaliding Condition (**PIC**) was back and neck pain with the date of origin recorded as May 1992 and the cause a road traffic accident whilst on duty.

3. As Mr L was invalided out from the Armed Forces, his case was first considered by the War Pensions Agency under the War Pensions Scheme (**WPS**) for a War Disablement Pension (**WDP**) or Gratuity. Under the WPS, the assumption is that an invaliding condition is attributable unless it is shown beyond reasonable doubt that it is not. Where the Principal Invaliding Condition (**PIC**) is accepted as attributable to or aggravated by service, the case is then considered for a Service Attributable Pension (**SAP**).
4. As Mr L was a member of AFPS 75 and the cause of his discharge was accepted as attributable to his service by the War Pensions Agency (now Veterans UK) he was awarded a SAP. Initially the level of Mr L's WDP and SAP were set at the same level of 20%. Mr L subsequently had a number of assessments for his injuries which resulted in his WDP and SAP being increased to 60%.
5. Mr L's WDP was reassessed in July 2004 and a number of new conditions including "Bruxism" (or teeth grinding), "Microfractures Anterior Teeth" and "Bilateral Pes Planus" (or flat feet) were accepted as being consequential to the PIC. Mr L's WDP was increased to 70%.
6. Veterans UK also reassessed Mr L's position for SAP and on 26 November 2004 issued a letter to say that they had been advised of an additional seven conditions that had been accepted for his WDP. All of the conditions [including the bruxism, tooth microfractures and bilateral pes planus] had been reviewed but they could not be considered as PICs or be deemed to have resulted as a result of the PIC. The Medical Advisers considered that the conditions were either present before the road traffic accident in May 1992 or not related.
7. Mr L appealed the decision through the Internal Disputes Resolution Procedure (IDRP) Stages 1 and 2 before bringing the complaint to this office. As a consequence of Mr L raising the issue through the IDRP the case was referred by Veterans UK to their Senior Medical Adviser, Dr Braidwood.
8. Veterans UK wrote to Mr L on 30 October 2009 to confirm the outcome of his appeal under the second stage of IDRP and said:

"Dr Braidwood agrees with the previous medical opinion provided in your case. She has stated that your service medical records show that Bruxism (teeth grinding) caused the Microfractures. Your records show, however, that this entry on your records is recorded as 19 March 1992. This entry pre-dates your Road Traffic Accident in

May 1992 and therefore cannot be considered as consequential to your PIC. It has been accepted under the War Pensions scheme standard of proof as aggravated by Service but as you are aware the AFPS can only make an award for a condition if it can be proved beyond reasonable doubt that it occurred as a consequence of your PIC.

It may help if I explain that the criteria used by SPVA (Norcross) in the administration of the War Pension Scheme and the AFPS 75, concerning the rules on attributability, are different. The criteria used by SPVA (Norcross) to determine attributability is that a War Disablement Pension or Gratuity will be paid unless it can be proven **beyond reasonable doubt that the condition was not** attributable to, or aggravated by service. However, when considering making an attributable award under AFPS 75 we are required to make an entirely new and independent decision on attributability, based on the evidence and using different criteria, which are stricter than those used by SPVA (Norcross). Under AFPS 75, the criteria used requires evidence to prove that on the balance of probabilities (i.e. more likely than not), the condition was attributable to, or aggravated by service. This means that a condition is often found attributable or aggravated by SPVA (Norcross) but rejected under AFPS 75.

Dr Braidwood also states that with regard to your Bilateral Pes Planus that congenital defects do not necessarily manifest at birth and that they may need an environmental trigger- here standing, loading, walking - before clinical onset. There is also evidence that you presented to the Medical Authorities both in January 1992 and April 1992 with Flat Feet, right ankle injury and Metatarsalgia. Again these injuries pre-date your Road Traffic Accident and cannot therefore be considered as consequential to your PIC.

9. Mr L's complaint has been accepted for investigation outside the normal time limits on the grounds that Mr L's conditions made it reasonable for him not to have complained to the Pensions Ombudsman earlier.
10. Mr L has also provided to this office a number of documents obtained both from the internet and other sources to support his arguments about the possibility of pes planus being acquired and it not being solely a congenital condition.

Summary of Mr L's position

11. Mr L says that upon joining the Royal Air Force in February 1990, he was subject to a very thorough medical and there was no record of any medical findings, including flat feet, or any other injury. Thus he must have sustained his injuries whilst in active armed forces service.
12. Mr L says that the road accident he was involved in was a head-on crash. He was the middle passenger in a military four ton lorry. The weight of the lorry that day

was much greater as onboard were two generators weighing two tons each. At the time of the crash the lorry was travelling at approximately 45 to 50 miles per hour. The other vehicle, a Vauxhall Astra GTI weighing approximately one ton, was travelling at in excess of 80 miles per hour. The kinetic energy released in this high-speed impact would have been akin to being in a bomb blast. The impact of the road crash caused the micro fractures of his anterior teeth.

13. The medical advisers have talked about the balance of probability but have not looked at the balance of probability as to where the microfractures of his teeth came from. There was a combined speed of over 125 miles per hour plus the weight of the two vehicles resulting in an incredible amount of energy release.
14. The medical advisers say the microfractures are caused by bruxism or teeth grinding and point to the medical notes where Mr L was given a mouth shield following the removal of a wisdom tooth. But there was no other evidence of bruxism other than the evidence referred to on a "form M28" dated 1 September 2009 where there is a handwritten note that says:

"...the service records show that Bruxism (teeth grinding) caused the teeth micro fractures. It however predated the accepted accident and is accepted under the war pensions scheme standard of proof as "agg'd" by service. The bruxism was March 92. The rta in May 92.

Entry of 15/3/92 records grinding teeth - pain L side of face, has plastic shield to wear".

15. Mr L says that he went to the Medical Officer as he had wisdom teeth removed on 10 March 1992 just three days prior to the entry on 13 March (and not 15 March as stated in the handwritten note) where grinding teeth is recorded. Mr L says he was never treated for teeth grinding and all he was treated for was pain following the removal of a wisdom tooth in a dentist surgery. The medical officer told him that the removal of his wisdom tooth should never have been attempted in a dental practice and should only be attempted in a dental hospital. This tooth removal twisted his jaw and he was told to wear a mouth guard for a time.
16. Mr L says it has been confirmed, with x-rays by Glasgow Dental hospital that he has microfractures to his anterior teeth caused by the impact. It has also been accepted by Service Personnel and Veterans Agency.

17. Mr L says that there are two possible explanations for the microfractures of his anterior teeth either a dentist removing a wisdom tooth or a head on smash. Mr L says that “the doctors at the WPS, the consultant dental surgeons at Glasgow Dental Hospital, the orthopaedic surgeon and his dentist all say the accident was the cause.”
18. Mr L says he has constantly maintained that there are two completely different types of pes planus - congenital and acquired. He says the correspondence he has had from AFPS 75 has never once mentioned the existence of two types of pes planus. He adds that he sent them a document “synopsis of causation” published by the Ministry of Defence Medical Section they just dismissed or ignored it. Pes planus was first recorded in 1992 after two years of active service. The medical officer changed his footwear from general issue rubber soled shoes to leather soled shoes. This resolved any pain issues he had with his feet. The general issue rubber soled shoes offered no support for any part of the foot. When he first joined the Royal Air Force there was no recorded mention of flat feet, so that rules out congenital flat feet, and the probability of acquired flat feet.
19. Mr L says the aggravation of his acquired flat feet is best illustrated by the duties he was asked to perform. In 1993 he was ordered to take part in the ceremonial guard for the AOC Air Officer Commanding inspection. This resulted in many hours of marching practice, which aggravated his known medical condition. Again, in 1994 he was ordered to attend ceremonial marching duties in Newcastle for the 50th anniversary of the D-Day landings.
20. Mr L says that although the road traffic accident happened in 1992 it was not until 1994 that his condition was properly diagnosed. He had suffered serious damage to his back and on his discharge the Wing Commander had written that he had “a genuine, discernible and lasting disability significantly affecting his quality of life and civilian employment prospects”.
21. After the accident the pain in his feet was completely different, being extremely severe and completely debilitating. Since the accident he has continually felt shooting pains from his lower back down both hips, legs, ankles and feet to his toes.

Summary of Veterans UK's position

22. The attributability criteria used in the administration of the WPS and those used in the AFPS 75 rules are different. The WPS will pay a War Pension unless it can be proven beyond reasonable doubt that the conditions are not attributable to service. However, when considering making an attributable award under AFPS 75, the Discretionary Awards Appeal Review (**DAAR**) is required to make an entirely new and independent decision on attributability, based on the evidence and using different and stricter criteria. Under AFPS 75, the criteria are that that, on the balance of probabilities (i.e. more likely than not), the cause of discharge (including any consequential conditions) was attributable to, or hastened by service. This means that conditions that found attributable to service under WPS rules is often rejected under AFPS 75. This is what has happened in this case.
23. Mr L was discharged from the RAF on 2 Jan 1998 with "back and neck pain" recorded as his PIC associated with a Road Traffic Accident (RTA) he had in May 1992. His conditions have been accepted by the War Pensions Scheme but the AFPS 75 does not consider on the balance of probabilities that the bruxism, microfractures to his teeth and the problems with his feet are either secondary conditions, consequential or part and parcel of the PIC.
24. The Senior Medical Advisor has said that none of Mr L's discharge medical report or the many detailed entries from the date of the accident in May 1992 either in military, primary, secondary, rehab or NHS clinics make any reference to symptom or sign related to teeth, mouth or feet symptoms.
25. There is only one reference to bruxism on 13 March 1992 after the tooth extraction on 10 March 1992. However, the nature of the accident reported symptoms which were restricted to the body areas of the neck and much later low back pain with no mention of any symptom related to mouth teeth or feet so the Senior Medical Adviser finds it implausible that there could be any link to the accident. The Senior Medical Advisor has noted the recent dental report suggesting a possible causal link, however, that opinion was informed only by Mr L's history and not by scrutiny of the extensive case papers.
26. In numerous medical boards in and post service, while Mr L is described as using a walking stick for support there is also reference to "no limp". A synopsis of causation is attached. As Mr L says, pes planus can be an acquired condition secondary to trauma, Paragraph 3.2.6 of the "synopsis of causation" says:

“Post-traumatic. This can be the result of fractures of the ankle, midfoot or hindfoot that heal with malunion or fail to unite and collapse into a valgus position. Soft tissue injury including laceration of the posterior tibial tendon can also cause a flatfoot deformity.”

27. That indicates that the necessary trauma is significant and had it occurred in relation to the RTA it would have produced symptoms and signs around that time. The service medical records include references to pain in feet, right and left and especially in the great toe area. These entries are dated 10 January 1992, 15 October 1993, 5 April 1994 and 17 November 1994. The entries make reference to the flatness of Mr L's longitudinal arches and on each occasion remedy is by orthotic supports. There is no reference to possible causal or time link to the RTA.

Conclusions

28. Mr L has had an increase in his WDP to 70% but that does not confer a right to an automatic increase in his SAP. Veterans UK have to refer the decision to the DAAR and obtain appropriate medical advice. Veterans UK did refer the decision to DAAR and the medical advice received was that on the balance of probabilities Mr L's bruxism, microfractures and pes planus conditions should not be treated as attributable to his service with the RAF.
29. Mr L has however questioned the decision of the medical advisers and provided a number of documents obtained to support his arguments.
30. So far as their medical opinions are concerned, the medical advisers are not within my jurisdiction. It is not my role to review the medical evidence and/or come to my own decision as to whether Mr L's conditions are attributable to or aggravated by his service. Rather, my role is to review the decision making process undertaken by the DAAR. There are certain well-established principles which they are expected to adhere to in deciding Mr L's eligibility for an increase in his SAP. Briefly, they must only take relevant matters into account and not irrelevant ones; they must ask the right questions, they must interpret the rules correctly; and they should not come to a perverse decision. In this context, a perverse decision is one which no other decision maker, properly directing itself, would come to in the circumstances. The weight they attach to any evidence is for the DAAR to decide. Provided that they consider all the available evidence, they can decide to give little or no weight to some evidence. In particular, there

is nothing intrinsically wrong with giving more weight to the advice they receive from one or more of their medical advisers than they do to, say, the evidence supplied by Mr L.

31. The evidence does not suggest that DAAR overlooked any relevant matters or took any irrelevant ones into account.
32. The question the DAAR asked was whether Mr L's conditions were attributable to or significantly aggravated by his service. In doing so, they satisfied the requirement to ask the right question and to interpret the rules correctly. It remains to consider whether the decision, that Mr L's conditions were not attributable to or significantly aggravated by his service, could be described as perverse. A perverse decision will usually be one which is unsupported by evidence. In this case, the DAAR decision was based on the advice they received from their medical advisers.
33. For these reasons I do not uphold Mr L's complaint.

Tony King
Pensions Ombudsman

9 December 2014