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

Applicant	Mr J Schorah
Scheme	Armed Forces Pension Scheme 1975 (**AFPS 75**)
Respondent(s)	Veterans UK

Subject

Mr Schorah has complained that his application for the early payment of his preserved benefits on the grounds of permanent incapacity has not been properly considered.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against Veterans UK because they failed to consider Mr Schorah's application for the early payment of his preserved benefits in a proper manner, including failing to address errors and ambiguities in the medical evidence.

DETAILED DETERMINATION

Material Facts

1. Mr Schorah served in the RAF until 14 March 2007. He applied for the early payment of his deferred benefits on the grounds of ill health in 2008 and was declined. Mr Schorah reapplied in July 2013. At the time of Mr Schorah's application, Veterans UK were known as the Service Personnel & Veterans Agency. To avoid confusion, they will be referred to as Veterans UK throughout this document.

2. Rule D.18 of the Air Force (Armed Forces Pension Scheme 75 and Attributable Benefits Scheme) (Amendment) Order 2010 states,

> "D.18 Early payment of preserved pension in case of ill health
>
> (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) …
>
> (a) must be made in writing to the Scheme administrator … 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 … 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 …"

3. On his application form, Mr Schorah said that he was suffering from narcolepsy and denervation of his left infra-spinatus muscle. Mr Schorah was diagnosed with narcolepsy in 2003. On 10 July 2013, his GP wrote to the AFPS,

> "Mr. Schorah has asked me to prepare a letter for you regarding his narcolepsy condition. This is an incurable illness which results in frequent episodes of daytime drowsiness. This requires him to take several naps per day in order that he can function in his self-employed job. I can certify that he is permanently (ie until the age

> of 60) incapable, by virtue of ill health, of undertaking any regular full-time employment in any reasonable capacity and likely to be so disabled until his normal retirement age."

4. Mr Schorah's GP was asked to complete a "Certificate of Assessment of Permanent Incapacity". He listed narcolepsy, denervation of left infra-spinatus muscle group and lumbar spine osteoarthritis as Mr Schorah's conditions. He said that Mr Schorah had been diagnosed with narcolepsy in 2002, causing him daytime drowsiness and requiring him to sleep for 20-30 minutes to recover. The GP explained that Mr Schorah became confused if he tried to stay awake. He also explained that the denervation of Mr Schorah's left infra spinatus muscle group had been diagnosed in 2007 and caused weakness in his left shoulder muscles. The GP said that lumbar spine osteoarthritis had been diagnosed in 2013. He went on to say that Mr Schorah took medication for his narcolepsy which had been confirmed by sleep studies and blood tests and required him to sleep two to four times during the day.

5. The form gave the GP four boxes to choose from and asked that he tick one. The options were:

   - Temporarily incapable of undertaking their usual occupation.
   - Temporarily incapable of undertaking any form of employment.
   - Permanently (i.e. until the age of 60) incapable of undertaking their <u>usual</u> full-time occupation (not taking account of local economic factors) but able to undertake some other form of suitable full-time employment.
   - Permanently (i.e. until the age of 60) incapable of undertaking <u>any</u> form of suitable full-time employment (in line with skills and trade or for which they might reasonable (*sic*) retrain and, not taking account of local economic factors).

   Mr Schorah's GP ticked the last option.

6. Veteran's UK referred Mr Schorah's case to one of their medical advisers (**MA**). He reported,

> "… Mr Schorah reports that he has narcolepsy causing frequent episodes of day-time drowsiness requiring several day-time naps; and denervation of the left infraspinatus causing weakness for the left shoulder. I note the attached GP letter of support. Mr

> Schorah confirms that he works part-time in a self employed role but does not state what type of work (although I see that blacksmith work has been noted in the past as well as painting). He confirms that he receives a War Pension but there is no evidence of benefits such as DLA. He further confirms that his conditions "have remained unchanged since diagnosis".
>
> … the GP confirms narcolepsy causing regular day-time drowsiness requiring sleep for 20 to 30 minutes and requiring treatment with … which is at the same dose as previously; there is no record of recent specialist input. Also confirms denervation of the left infraspinatus muscle; no recorded recent specialist input. Also lumbar osteoarthritis causing recurrent low back pain – Mr Schorah himself has made no reference to his back … there is no recorded specialist input.
>
> The GP further confirms that Mr Schorah has impairment for upper-limb function and bending but not for the other functional areas. It is noted that at the 2007 and 2008 Annex Ds, the GP confirms at those times impairment for all areas of mobility in relation to the upper- and lower-limbs as well as impairment for the senses and, in 2008, additionally for mental functioning.
>
> The GP opines that Mr Schorah is permanently incapable of undertaking any form of work, whereas previously he opined that a lesser degree of incapacity existed. However, this change of opinion is difficult to reconcile with Mr Schorah's own personal statement … where he says … that his conditions "have remained unchanged since diagnosis".
>
> Mr Schorah at age 37 has twenty-three years to go until age 60. It is reasonable to expect opportunities for different and new treatments for narcolepsy in that time. The evidence does not indicate that the upper-limb or low back pain conditions in themselves would preclude all forms of suitable work.
>
> On the balance of probabilities, the evidence in its entirety does not allow us to conclude that Mr Schorah is permanently incapable of undertaking any form of suitable full-time employment."

7. Veterans UK wrote to Mr Schorah, on 10 September 2013, declining his application on the grounds that he was not permanently incapable of engaging in regular full-time employment. They said they had taken into consideration the views of their MA and made the following points:

- Mr Schorah's GP had stated that he had narcolepsy causing day time drowsiness, requiring sleep for 20 to 30 minutes and medication at the same dose as previously.

- The GP had confirmed denervation of the infra-spinatus muscle and lumbar osteoarthritis and impairment of upper limb function and bending, but not of other functional areas.
- The GP had opined that Mr Schorah was permanently incapable of undertaking any form of work, whereas he had previously stated a lesser degree of incapacity existed. This change of opinion was difficult to reconcile with Mr Schorah's own statement that his conditions remained unchanged since diagnosis.
- He had said that he worked part-time in a self employed role.
- He had twenty-three years to go until he reached age 60. It was reasonable to expect opportunities for different and new treatments for narcolepsy in that time.
- The evidence did not suggest that his upper-limb or low back pain conditions would preclude all forms of suitable work.

8. Mr Schorah appealed. Amongst other things, he said that his GP's answer had changed because the options provided for him had changed. Mr Schorah said that his GP had explained that previously he had simply been asked if Mr Schorah could work and he had answered yes because he could work part-time. The GP had explained that he had not previously been given the option to distinguish between full and part time work. Mr Schorah went on the say that the reference to new treatments for narcolepsy was speculation. He said that narcolepsy was a seldom researched condition because of the small demand for any drugs given its rare occurrence. Mr Schorah went on to explain that they drug he was taking had not originally been developed for narcolepsy. He also said that, should a new treatment or cure enabling him to work full-time become available, it would be classed as a change of circumstances. He would be required to inform Veterans UK and his pension could cease.

9. Veterans UK referred Mr Schorah's case to another MA for review. He reported,

> "I have carefully reviewed the medical evidence provided as well as Mr Schorah's appeal letter and the recent certificate from the GP.

> My opinion is that there has, as Mr Schorah states been no material change in his condition since his last application.
>
> His GP's certificate notwithstanding my opinion remains unchanged from that … of previous MAs, including myself, that he is capable of some form of full time employment."

10. Veterans UK wrote to Mr Schorah declining his appeal. They said that his case had been reviewed by another MA who was of the opinion that there had been no material change in Mr Schorah's condition since his last application. Veterans UK said that their MA was of the opinion that, on the balance of probabilities, Mr Schorah was not permanently incapable of undertaking any form of suitable full time employment.

11. Mr Schorah appealed further. He said that his condition had prevented him from working full time for the previous six years. Mr Schorah said that his last tour of service in the RAF had been on a part-time basis and, on being diagnosed with narcolepsy, he had been offered the choice of medical discharge, leave free as an indulgence or serve his remaining time on a part-time basis. He said he had chosen the latter because he had a new baby and a mortgage to consider with no prospects of future employment. Mr Schorah said that, had he chosen medical discharge, he would have qualified for a pension, but that this had not been explained to him at the time. He said the RAF's action at the time was evidence that he could not work full-time and mentioned that his reserve service had been waived because of his condition. Mr Schorah said that narcolepsy was not a condition with any likelihood of improvement; it was either stable or degenerative. He said there was no cure and no alternative treatment.

12. Veterans UK referred Mr Schorah's case to their Senior Medical Adviser (**SMA**). The SMA said that she agreed with the previous decision and reasons. However, she went on to say,

> "I accept that narcolepsy is a difficult disorder but in most cases the aim which is achievable, is treatment to control the disorder so that it is compatible with work/school etc. I would expect in a young man like this that if that optimum has not been reached, and probably in any case, he should have contact with an appropriate specialist and hospital clinic. Narcolepsy with respect is uncommon and it is unlikely that many GPs would have expertise without specialist back-up.
>
> I suggest before giving the final word we check up on hospital follow-up and obtain any HCNs. Where was he diagnosed?

> When? And by whom? Did he have specialist follow-up? Does he still attend?"

13. Veterans UK wrote to Mr Schorah asking the above questions. He responded explaining that he had been diagnosed at RAF Leeming medical centre by way of a blood test. Mr Schorah said that he had been found to be positive for both DRB1*15 and DQB1*0602 (DQ6(1)) on 26 September 2003. He said that this had been followed up by sleep studies at York Hospital and he had been under the care of a neurologist, whom he had seen regularly until his discharge in 2007. Mr Schorah said that he was currently under the care of his GP. He provided copies of an electro-encephalography report and tissue typing report.

14. Mr Schorah's case was referred back to the SMA. She responded,

> "I have reviewed the new material. I note the date of diagnosis of this condition and the follow-up Mr Schorah is aged 37 years If Mr Schorah's position is deteriorating then I would expect him to be re-referred to specialist hospital clinic This does not seem to be happening
>
> If that is the case ie looked after solely by … his GP but no specialist management I think we should reject
>
> We need to make a decision when he is in the optimum state of medical management and in any case at his young age there is still plenty of opportunity for improved medical management to become available before he is at retirement age."

15. Mr Schorah's case was reviewed by a Deciding Officer (DO). He concluded,

> "This is a fairly straightforward case. It is evident that Mr Schorah is not receiving any specialist care and therefore his condition must be deemed to be in 'steady state'. At 37 I concur that it is too early to say that this condition will preclude him from work until the age of 60 when other treatments may become available. The changing opinion of the GP, who is his sole medical carer, also makes me consider the true clinical picture. Current specialist care may have been more persuasive …"

16. Veterans UK wrote to Mr Schorah, on 9 January 2014, declining his appeal. Amongst other things, they said that the SMA was of the opinion that, if Mr Schorah's condition was in a state of decline, there should have been a referral to a specialist hospital clinic which had not occurred.

Summary of Mr Schorah's Position

17. Mr Schorah submits:

- He is unable to work full-time and is likely to be unable to do so until retirement age.
- His application for the early payment of his deferred benefits was supported by a medical report to this effect.
- His application has been rejected on the basis that medication may be developed in the future which would better control his condition.
- His GP did not change his opinion; he was given different options to select from.

18. Mr Schorah would like his pension put into payment and backdated to the date of his first application.

Summary of Veterans UK's Response

19. Veterans UK maintain that their original decision was correct. They say the Mr Schorah's GP was given the same options in 2007, 2008 and 2010. Veterans UK say that the GP was of the opinion that Mr Schorah was incapable of undertaking his usual full-time occupation but able to undertake some other form of suitable full-time employment in 2008 and again in 2010. They say that he did not annotate the form to say that he thought Mr Schorah was only capable of part-time employment. Veterans UK say that it was only in his letter of 10 July 2013 that the GP said that he thought that Mr Schorah was permanently incapable of undertaking any regular full-time employment. They believe that the GP changed his mind between 2007 and 2013.

Conclusions

20. If Veterans UK are to pay Mr Schorah's deferred benefits early under Rule D.18, he must be incapable of any full-time employment at least until he reaches age 60. A claim under Rule D.18 must be supported by evidence from a registered medical practitioner. If Veterans UK (acting for the Defence Council) are satisfied that Mr Schorah is incapable of full-time employment, his pension is payable from the date they received his claim. The decision as to whether or not

Mr Schorah is permanently incapable of any full-time employment is a finding of fact.

21. Mr Schorah's application is based on three conditions: narcolepsy, denervation of his left infraspinatus muscle and lumbar osteoarthritis. The evidence indicates that all three conditions have been taken into account by Veterans UK and their MA/SMA. The MA and SMA have advised that they do not consider Mr Schorah to be permanently incapable of any full-time employment. In support of his application, Mr Schorah has submitted letters from his GP, who currently supervises his treatment. He is not currently under the care of a specialist.

22. The decision as to whether Mr Schorah's benefits can be paid early is for Veterans UK to make and they are entitled to give greater weight to the advice from their own medical advisers than, say, Mr Schorah's GP. However, they should not do so blindly and certainly not if there are errors of fact or reason within that advice.

23. The first MA noted that the opinion expressed by Mr Schorah's GP appeared to have changed since the 2008 application. He said that that the GP was now of the opinion that Mr Schorah was "permanently incapable of undertaking any form of work" when he had previously thought that a lesser degree of incapacity existed. I note that he refers to the GP having said that Mr Schorah was incapable of "any work" when he had very specifically said "any regular **full-time** work" (my emphasis). The MA went on to say that this change of opinion was difficult to reconcile with Mr Schorah's own statement that his conditions "have remained unchanged since diagnosis". Mr Schorah has explained that his GP has not changed his opinion, rather it was the options he had been given to choose from which had changed. This point does not appear to have been taken up with the MA and, despite Mr Schorah's further explanation, was still being put forward at the final appeal stage. Veterans UK consider that the GP has changed his mind and they point to the options he chose on their forms in 2008 and 2010. The safest way to determine such a query would, of course, be to ask the GP.

24. However, I am far more concerned by the MA's subsequent comment, where he said,

> "Mr Schorah at age 37 has twenty-three years to go until age 60. It is reasonable to expect opportunities for different and new treatments for narcolepsy in that time."

25. This is not the correct test for determining whether or not Mr Schorah is permanently incapable of any regular full-time employment. The assessment must be made by reference to existing treatment options and not to possible future medical discoveries which may or may not materialise. This was not picked up by Veterans UK at the time and, in fact, the same reasoning was put forward by the SMA when she said that there was "still plenty of opportunity for improved medical management to become available before he is at retirement age".

26. The SMA also said that she would expect Mr Schorah to be referred back to a specialist hospital clinic if his condition was deteriorating. It is unclear why she thought this was the case when Mr Schorah had said that there had been no change in his condition. Again, this was not queried before a decision to decline Mr Schorah's appeal was made.

27. The SMA was concerned that Mr Schorah was not currently under the care of a specialist. She went on to say that they should make the decision when he was "in the optimum state of medical management". Mr Schorah is currently receiving the recognised treatment for his narcolepsy. This is enabling him to work part-time but not full-time. The SMA did not identify any existing treatment which she thought might still be tried and which might improve Mr Schorah's condition to the extent that he could undertake regular full-time employment. In fact, her comment was tied to her reference to possible future improvements in medical management for this condition. It is not clear what the SMA had in mind or why she thought there should be continuing specialist input. It is not unusual, when there is no further treatment to be offered by a specialist, for an individual to be discharged into the care of their GP on a maintenance basis.

28. Given the errors and ambiguities within the medical advice relied on by Veterans UK, I cannot find that they gave due consideration to Mr Schorah's application for the early payment of his deferred benefits. I uphold his complaint on this basis.

29. It is not my role to review the medical evidence and determine whether Mr Schorah's benefits should be paid; this remains the responsibility of Veterans UK. This is all the more so when the medical evidence, itself, requires supplementing before a decision can be properly taken. The correct course of action is for me to remit the matter for Veterans UK to review the decision and I have made

directions accordingly. I note that Mr Schorah would like his benefits backdated to the date of his first application in 2008. Mr Schorah did not apply to me when this application was declined and my investigation has been confined to a consideration of his most recent application. Therefore, I make no direction as to whether the 2008 application should be reconsidered. It may, nevertheless, be something which Veterans UK would wish to consider since there appears to have been no change in Mr Schorah's situation since he left the RAF.

30. I find that it would be appropriate for there also to be some recognition that the failure to properly consider Mr Schorah's application will have caused him some distress and inconvenience. I consider it appropriate that he receive some modest compensation for this.

31. I note that there is an apparent contradiction within Rule D.18. The eligibility test for the early payment of deferred benefits refers to the member being "incapable of any full-time employment". It follows that someone could be capable of part-time employment and still meet that test. However, Rule D.18 also requires that the member has "has ceased to carry on [his] occupation" before benefits are paid. There is no definition of "occupation" in the AFPS 75 Rules. In such circumstances, the accepted approach is to give the word its natural and ordinary meaning. The Oxford University Press on-line dictionary defines "occupation" as job or profession. The question is whether Rule D.18 requires Mr Schorah to have given up all employment in order to receive his benefits despite qualifying for those benefits if capable of part-time employment.

32. The same general principles apply to the construction, that is, interpretation, of pension scheme documents as to any other legal documents. The principal aim being to determine the meaning which the document would convey to a reasonable person in possession of all the background knowledge which would reasonably have been available to the authors.

33. Rule D.18 provides for a deferred member to access his benefits early if he is incapable of "any full-time employment" at least until age 60 (in Mr Schorah's case). The Rule specifically refers to full-time employment. It is not straining the language to conclude that a deferred member who is capable of part-time employment would still qualify for early payment of his benefits. If that is the case, it would be odd if Rule D.18 then required the member to give up all

employment, including any part-time employment of which he was capable, in order to receive the benefits. A more natural and reasonable interpretation would be to find that Rule D.18 applies where the member is permanently incapable of full-time employment and has ceased to carry on that full-time employment. Otherwise, the situation could arise where a deferred member is undertaking part-time employment at the time of application and is declined on that basis; whereas a deferred member who takes up part-time employment shortly after his benefits are put into payment may continue to receive them. I find that the reference to "occupation" in Rule D.18 should be interpreted to mean full-time employment.

Directions

34. I direct that, within 21 days, Veterans UK shall seek clarification from Mr Schorah's GP as to whether his assessment of Mr Schorah's capability has changed since 2008. They will then review their decision to decline Mr Schorah's application for the early payment of his deferred benefits under Rule D.18.

35. Within the same 21 days, Veterans UK will also pay Mr Schorah £250 in recognition of the fact that he will have suffered some distress and inconvenience as a result of the failure to consider his application for the early payment of his deferred benefits.

Jane Irvine

Deputy Pensions Ombudsman

13 October 2014