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

Applicant	Mr L K
Scheme	The Armed Forces Pension Scheme 2005 (**AFPS 05**)
Respondent(s)	Veterans UK

Subject

Mr K has complained that his eligibility for ill health retirement benefits has not been properly considered. He disagrees with the decision to pay him Tier 1 benefits.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld against Veterans UK because they failed to give proper consideration to Mr K's eligibility for Tier 2 benefits.

DETAILED DETERMINATION

Material Facts

1. Veterans UK, the respondents to the complaint, were known for some of the relevant time as the Service Personnel and Veterans Agency. For ease I refer to them as Veterans UK throughout this document.

2. Mr K was awarded a retrospective medical discharge from the Army with effect from March 2009. He has two periods of Army service: June 2001 to February 2005 and March 2006 to March 2009. Mr K was a member of the Armed Forces Pension Scheme 1975 in respect of his first period of service.

3. 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). Extracts from the relevant Rules are contained in an appendix to this document.

4. 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 other gainful employment is significantly impaired (see Rule D.6.). Tier 3 is awarded to those who are permanently incapable of any full time employment (see Rule D.5.). Tier 1 is awarded under paragraph 16 of the Armed Forces Early Departure Payments Scheme Order (SI2005/437) to those who are unable to do their service job, but their ability to undertake other gainful employment is not significantly impaired (see also Joint Services Publication 764). Under Rule D.8., a member who has been awarded a Tier 1 or 2 benefit may request a review of his/her condition. Under Rule D.9., the Secretary of State may review Tier 2 or 3 awards.

5. Following the revision of Mr K's discharge, Veterans UK referred his case to one of their medical advisers (**MA**). They asked which Table, Item and Level would be most suitable for the condition Post Traumatic Stress Disorder (**PTSD**). This is a reference to a series of tables used by the Armed Forces to determine the level of incapacity suffered by an individual. The booklet "AFPS 05: ill health benefits" states,

> "The tiers are linked to the tariff that is used for the AFCS. The tariff allocates conditions between 15 levels and these map across the tiers as follows:
>
> | Tier | Tariff level |
> |---|---|
> | 1 | 12-15 |
> | 2 | 7-11 |
> | 3 | 1-6" |

6. Veterans UK also provided copies of:

   - the consultant psychiatrist's report which had led to Mr K's discharge
   - a report from Combat Stress[1]
   - evidence from Combat Stress and the Royal British Legion (the IMEG report)[2]
   - personal statements from Mr K.

7. Veterans UK also submitted a folder of medical evidence, but noted that there was no FMed23 (medical form).

8. In his report, the consultant psychiatrist, Col McAllister, outlined Mr K's military history and said that his symptoms appeared to have been triggered in 2007. He gave a brief history of the treatment Mr K had received and noted that he was then a full time student living in Spain. Col McAllister concluded,

> "It would appear from the history that in September 2007 … he developed a full blown PTSD symptomology. He may have presented at the time as being aggressive and volatile but he has had and continues to have hypervigilance, avoidance, re-experiencing phenomena …
>
> He has received a PTSD diagnosis with a specialist from Combat Stress but was also independently for the SPVA. There is little doubt in my mind that he fulfils the diagnostic criteria and probably did at the time."

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[1] Combat Stress is a mental health charity which offers help and support to ex-Servicemen and women.
[2] A report of evidence presented by Combat Stress and the Royal British Legion to a review of the AFCS.

9. The MA advised (9 April 2013),

> "Reference:
>
> A. Synopsis: Post-Traumatic Stress Disorder, Sep 2008
>
> 1. The diagnosis is post-traumatic stress disorder (PTSD) and this has been confirmed by a consultant psychiatrist. The evidence indicates a delayed diagnosis.
>
> 2. Symptoms were triggered due to a service-related incident in 2007.
>
> 3. Mr [K] continues with hypervigilance, avoidance and re-experiencing symptoms.
>
> 4. He has been under Combat Stress care. There is no mention of recent treatment input. He is on no medication.
>
> 5. His mental state examination at recent psychiatric review (11.02.13) shows some anxiety but no current suicidal thoughts, is cognitively intact with no psychotic phenomena, and is described as having a smart and clean appearance.
>
> 6. Mr [K] is currently in year 3 of a 4-year university degree course in Spanish and Business. He is coping well with his studies. He is currently undertaking a planned year's study in Spain.
>
> 7. It is appreciated that the PTSD diagnosis was delayed and it is now over 5 years since the onset of symptoms. However, the question to be addressed is to what degree is Mr [K's] capability for civilian employment impaired. The overall evidence indicates that a Tier 1 assessment is appropriate. A possible descriptor is Table 3, Item 4, Level 12* although it does not fully reflect the overall evidence due to the "within 5 years" stipulation contained in that descriptor. But it is emphasised that the overall evidence indicates a Tier 1 assessment."

*"Mental disorder, which has caused or is expected to cause functional limitation and restriction at 2 years, from which the claimant has made, or is expected to make, a substantial recovery within 5 years."

10. Mr K was notified that he had been awarded a Tier 1 benefit and he appealed. He attended an assessment with a psychiatrist on 5 June 2013. The psychiatrist declined to provide a report for Mr K without legal instruction. He also said that, without "clearly defined criteria for gainful employment", it would be difficult to provide an opinion on Mr K's capacity.

11. When referring his case to another MA, Veterans UK noted that Mr K had questioned the award for Tier 1 and Tariff 12 and a Tier 2 award. They provided a copy of the Tariff table for the MA. Veterans UK also noted that Tariff 12

referred to a condition "from which the claimant has made, or is expected to make, a substantial recovery within 5 years". They asked the MA to advise if level 12 was appropriate because of the word "expected". Veterans UK advised that Mr K was currently studying in Spain and was due to return to the UK in June 2013 to resume his studies.

12. The MA advised,

> "The case seems to revolve around whether his life since leaving the army has been significantly impaired by the symptoms of PTSD which he professes and which have been accepted as PTSD causing a retrospective medical discharge.
>
> While he may date his symptoms to his experiences in Iraq in 2003 he was able to rejoin the army in 2006 with a normal medical grading and his symptoms only occurred in 2007 when he says his memories were triggered by having to serve again as a Warrior gunner.
>
> I note that his consultation with the Army psychiatrist seems to concentrate on whether he should have been medically discharged although there is some assessment of his mental state at the time.
>
> It would appear that on discharge from the army in 2009 he was able to enrol in a degree course at University which suggests that his symptoms were not prominent at the time.
>
> He himself states at para 19 in attachment 8 "<u>It was in 2008 when my symptoms were at their worst</u>" (my underlining) suggesting they are now better.
>
> Putting this all together with the fact that he is in Spain on year 3 of a University degree which he expects to lead to a 2.1 degree and the remarks made by [the previous MA] at M4 it appears that he has little in the way of mental symptoms at present and I would therefore support the Tier 1 award which he has.
>
> As far as his capability for civilian employment after his degree ends are concerned I can find no evidence that these will be impaired and would assess them as being no different for any other graduate with a similar degree."

13. Mr K's case was referred to a Deciding Officer (**DO**) with the recommendation that the Tier 1 award be upheld. In addition to the advice from the MA, the DO was provided with information relating to Mr K's claim for a War Pension. The War Pensions Tribunal had accepted Mr K's PTSD as attributable to service in respect of his first period of service. Mr K had been assessed as 15-19% impairment but was not awarded a benefit because he had not been medically

discharged at the end of this first period of service. His assessment has since been increased to 20% and he is due to receive a weekly pension.

14. The DO upheld the Tier 1 award (10 June 2013). The DO noted that Mr K's PTSD had been confirmed by a consultant psychiatrist and that there had been a delayed diagnosis. He noted that Mr K continued to sufferer hyper-vigilance, avoidance and re-experiencing. The DO also noted that there was no mention of recent treatment and no evidence of medication. He referred to the recent psychiatric review and to the fact that Mr K was studying in Spain. The DO concluded,

> "The key to this decision is with Mr [K's] employability. I am in agreement with the MA's in that there is no evidence to suggest that Mr [K's] employability will be impaired."

15. On 3 December 2013, Combat Stress wrote to Mr K's GP. They said that Mr K had been assessed by a consultant psychiatrist on 26 November 2013 and they enclosed a medical assessment summary and care plan. Combat Stress said that Mr K was on the waiting list for a six week PTSD intensive treatment programme.

16. Mr K submitted a further appeal, together with copies of Dr McAllister's report form, a letter from his GP, a report from Combat Stress, an occupational therapy report dated 13 January 2014 and information about PTSD. On 20 February 2012, Dr Fletcher, a consultant psychiatrist for Combat Stress, had written,

> "The issue, as I understand it, is to determine the appropriate diagnosis when Mr [K] sought help from Army Medical Services in 2007, rather than his current diagnosis. The key document is in the Army Medical Records, dated 18th September 2007 …
>
> The symptoms as described fulfil the ICD-10 diagnostic criteria for F43.1, Post Traumatic Stress Disorder.
>
> What appears to have complicated matters at the time was that, whilst Mr [K] was serving in Iraq, his Mother was seriously ill … and he was thus repatriated home early. The assessing Community Psychiatric Nurse was also aware of Mr [K's] disenchantment with the way he was treated by his superiors.
>
> It is not the role of a Community Psychiatric Nurse to make a diagnosis, but the CPN was of the view that the situation which required immediate management was best conceived as an Adjustment Reaction to a number of negative life events. In my view Mr [K] had a diagnosis of PTSD and was finding it difficult to adjust to a number of negative life events.

> I see that, in the Medical Records Summary dated 2nd November 2007, the diagnosis of PTSD is given as it is on 2nd September 2007. There is no doubt in my mind that the Medical Records make it clear … that Mr [K] did suffer from PTSD following his service in Iraq."

17. On 23 November 2013, Mr K's GP had written,

> "Mr [K] is currently receiving treatment for PTSD. He tells me this condition has been diagnosed by two separate psychiatrists following his leaving the army in 2007. This seems to manifest mainly as recurrent nightmares, which he finds very troubling.
>
> He also describes symptoms of anxiety particularly when in social situations. This would be consistent with a social phobia. He tells me this prevents him from socialising with his peers but also from fulfilling his potential academically. Certainly this avoidance of social situations would make job interviews and employment in any job with regular face to face contact very difficult for him. This may restrict him in terms of the type of work he can currently carry out."

18. On 8 January 2014, Mr K's GP wrote,

> I have read and agree with all three psychiatrist reports that diagnosed PTSD as of September 2009 and this was caused by his active military service in Iraq.
>
> I confirm that in 2009 Mr [K] was medically discharged from the army as QR's paragraph 9.387 as permanently medically unfit for any form of army service (now or in the future).
>
> I confirm that Mr [K] has contacted Combat Stress and has been diagnosed by a Consultant Psychiatrist with moderate PTSD with depression. He is currently taking … and is awaiting a 6 week intensive treatment program upon completion of University in the summer.
>
> I can confirm his symptoms have continued for more than 6 years since the onset in September 2007.
>
> I agree with Mr [K] that whilst his PTSD and depressive symptoms should not leave him permanently incapable of employment within the civilian sector, his condition has significantly impaired his employment prospects."

19. On 13 January 2014, Mr K's occupational therapist wrote,

> "… due to PTSD, significant sleep disturbances have resulted in [Mr K] being unable to reliably maintain a productive routine; this has affected his attendance at university and would be expected to continue to present difficulties with maintaining gainful employment. Tiredness has had the further effect of reducing [Mr K's] ability to concentrate properly.
>
> Social difficulties have resulted in reduced opportunities for [Mr K] to participate in meaningful activities. [Mr K's] ability to manage social situations is significantly impaired … Needing to work in isolation would significantly reduce [Mr K's] opportunities to achieve satisfaction in his career …
>
> As a result of his PTSD, [Mr K] has a loss of ability with regard to maintaining a productive routine, as well as significant difficulties with social interaction. [Mr K] also has reduced concentration ability and reduced emotional control. [Mr K] is less able to adapt to change and he experiences heightened levels of anxiety. These impairments have resulted in both reduced self-esteem and reduced life opportunities and have clearly impacted on his university studies.
>
> Whilst [Mr K] intends to work on regaining his social skills, routine and emotional resilience, PTSD has been strongly linked to poor employment outcomes for veterans … Although [Mr K's] PTSD is classed as 'moderate', I feel that it is realistic to expect his difficulties to continue to significantly limit his opportunity to establish himself in a rewarding career and personal life for several years to come."

20. Veterans UK referred his case to their Senior Medical Adviser (**SMA**). She responded,

> "Thank you for letting me see this file. I note M10. [the paper prepared for the DO] and the full background I note Mr [K's] university attendance and progress and agree with the points re function and employability documented as made by [the previous MA].
>
> I note the additional evidence … In particular I note that Mr [K] is being considered for the CS six week PTSD programme As discussed in the IMEG report common mental health problems are treatable to improved function if not to cure.
>
> For Tier allocation we should look at the client in his treated state of optimum medical function"

21. Mr K's case was referred to a different DO with the recommendation that the Tier 1 award be upheld and that they revisit Mr K's case once he had undergone the planned treatment and his progress had been reviewed. The SMA was also asked to clarify whether she was supporting the Tier 1 award. She responded that she was recommending Tier 1 "at this point on available evidence".

22. The DO said (12 February 2014) that, having reviewed the SMA's comments, he could not see that they were in a position to make a Tier 2 award on the basis that Mr K was still the subject of on-going treatment and had not reached maximal improvement. He said that giving Mr K the option to re-apply after his treatment seemed a sensible approach, but that, given the IMEG report on the success of the treatment, it was inappropriate to make a Tier 2 award at that point. The DO went on to say that the fact that Mr K was studying at university suggested that office work of some sort was a possibility.

23. Veterans UK wrote to Mr K notifying him of the DO's decision. Amongst other things, Veterans UK explained that they assessed the appropriate tier by reviewing the Medical Board Report and any new evidence documented since. They also explained that they referred to a Synopsis of Causation[3] and provided Mr K with a link to an online version. Veterans UK explained that the "test for Tier 1 or 2 is a consideration of lifetime capacity to work and not a snapshot of the current situation".

24. Mr K asked for his case to be reconsidered. He submitted a further letter from his GP, dated 29 April 2014, in which the GP said,

> "I write to advise that whilst Mr [K] did present with symptoms of anxiety and PTSD, treatment given at the time (…) proved to be ineffective.
>
> Therefore, it was decided to stop the medication even though there has been no improvement and symptoms remain unchanged."

[3] The synopses of causation were commissioned by the MoD and cover a range of injuries and disorders likely to be seen in service personnel and veterans. They were written by independent medical practitioners and based on a literature search.

25. Veterans UK referred his case back to the SMA. They said that Mr K had informed them that medication had been ineffective and made him drowsy. They said that he had explained that he had informed his GP that he no longer wished to take it. Veterans UK said that Mr K had informed them that he would not be attending the Combat Stress course because he planned to emigrate to Mexico when he finished university. They said that Mr K had been asked for up to date reports from his GP and his psychiatrist, but had not provided any new medical evidence. They attached a report from the GP dated 29 April 2014. Veterans UK said that Mr K based his case on the fact that his condition had been ongoing for more than five years and he felt that this qualified him for a Tier 2 award.

26. The SMA responded,

> "I note your understanding of Mr [K's] view as to his appropriate Tier and hope that I have adequately addressed the legislative provisions in my note dated 5 March 2014 … award level of AFCS is not the definitive test for AFPS 05 benefits
>
> I note the GP comment dated 29 April 2014 Unfortunately medication alone is not regarded as recommended best practice treatment for PTSD Further while the GP states that Mr [K's] symptoms remain unchanged the interest for pension Tier is his functional capability I note the previous GP report dated 8 January 2014 which records that Mr [K] has been offered a place on the NHS six week treatment course delivered at Combat Stress and that he will undertake this after his university course this summer
>
> By contrast Mr [K's] e-mail of 31 March 2014 states that four months of medication has not improved his position and he has discontinued treatment He goes on to say that he will not now be attending the six week course at Combat Stress He describes this as OT arts and crafts (this is not in fact the nature of the course) Rather Mr [K] intends to start a new life emigrating to Mexico immediately after he has completed his degree He will also undertake a master's degree to enhance his employment prospects He believes that a new life abroad will be the best form of treatment to help overcome his mental illness
>
> It is my medical opinion that even to contemplate such actions indicates a high level of mental health functioning."

27. The SMA advised that she still considered the Tier 1 award to be appropriate. Mr K's case was referred back to the previous DO. He agreed that the Tier 1 award was appropriate and said (28 May 2014),

> "Mr [K] appealed … on the basis that he believes we have not properly considered that his condition precludes him from further employment. He has submitted further additional medical notes. Having reviewed the comments of the SMA I cannot see that we are in a position to make a Tier 2 award on the basis that he is clearly able to function on a number of levels, not least in effective oral and written communication, analysis of legal precedents and the ability to complete cogent and logical argument. The test I have to apply is whether this individual is going to be able to have any chance of employment in the civilian sector before 55. His acceptance on to a Masters degree course and a move to Mexico to further aid his rehabilitation only strengthens the case for maintaining Tier 1 benefits."

28. Mr K was notified of the DO's decision and advised that he could apply to the Ombudsman if he wished to appeal further. Veterans UK explained that his case had been reviewed by the SMA and outlined her comments. In addition, they explained that the SMA had commented on the approach taken by the AFPS 05 and the Armed Forces Compensation Scheme (**AFCS**) as follows:

- For both Schemes the focus in judging severity and hence level of award/benefit is the impact of the disorder leading to medical discharge on the person's functional capacity for civilian employment over a life-time. Under the AFPS 05, Tier 2 benefits are appropriate if on immediately ceasing work medical evidence shows that an individual is incapable (and will continue to be until age 55) of carrying on a suitable occupation because of physical or mental impairment.
- It is a given that the standard of fitness for military employability both physically and mentally is higher than in civilian employment. The civilian work should also be suitable for the person's skill and training. Civilian employment also places certain duties on employers in relation to the Equality Act 2010.

- The AFPS legislation describes the tiers only in terms of employability. There is no reference to the AFCS nor any equivalence between the awards/descriptors and legislation says the decision is for the Secretary of State and scheme medical adviser.
- The advice regarding equivalence of Tiers and AFCS levels is not binding but merely aims to assist lay colleagues get orientated and focus on the pertinent issues.
- Decisions are informed by the case specific evidence.
- Table 3 of the AFCS 2011 Order relates to mental health disorders. These are described generically and not in terms of specific diagnoses so that for example anxiety state is innately paid more than depression or PTSD.
- The severity and hence award paid for any discrete diagnosable disorder appropriately diagnosed as set out in the AFCS Order is judged, not on the presence of symptoms but on the consequent functional restrictions i.e. things a person cannot do or limitation i.e. things a person should not do.
- In both Schemes the aim is to provide financial certainty and to make full and final awards applicable over a lifetime as early as possible but also when the person in in an optimum medical state i.e. has had adequate course of appropriate medical treatment.
- There are many challenges associated with mental health problems. In contrast to injuries and physical disorders there are no objectively verifiable diagnostic criteria. Rather diagnosis is heavily reliant on the client's reported symptoms.
- It is also true that mental health symptoms such as anxiety / low mood / anger / assertiveness are normal. They are symptoms present at different times and to different degrees in all of us. The presence of symptoms does not mean people cannot function well. People can have symptoms and indeed meet the diagnosis of disorders, but retain good functional capability i.e. symptoms do not equate to function.

29. The SMA had also commented,

> "Although it is not entirely clear what contemporary documentary evidence was used by Dr McAllister and Dr Harding we accept their diagnosis of PTSD in Mr [K]
>
> As discussed in the [IMEG] report, PTSD is a treatable disorder and the subject of evidence based best practice treatment
>
> Mr [K] is still to have the Combat Stress six week treatment programme so may not be yet in a steady state of maximum medical function even although the evidence is that present function is good
>
> In terms of Mr [K's] function, in his report dated 23 March 2012 Dr Harding records
>
> "So far he has had little in the way of treatment and yet made progress" "… did not appear objectively depressed. "His sleep is better … still gets some Iraq related nightmares" "Concentration has improved" "Good appetite "hope and good plans for the future" "He has not lost his temper recently, this seemed only to be a problem when he was drinking alcohol" "No psychotic symptoms" "He is functioning at an acceptable level and this should continue to improve "He does not at this time require any particular treatment …"
>
> Dr McAllister … saw Mr [K] on 31 January 2013 His report records that Mr [K] is a full time student living in Spain "He tells me … he is coping well with his degree … and is expecting a 2:1" The mental state examination is recorded as normal especially in relation to mood; thoughts; perceptions and cognition.
>
> Applying this to Mr [K] His accepted disablement PTSD is causally related to SPO service and accepted and assessed under the War Pensions Scheme He also claimed under the AFCS when PTSD was rejected His initial AFCS appeal was withdrawn but then reinstated and at FTT dated 22 August 2012 the FTT upheld Agency rejection He is not yet in a treated state but is very successfully undertaking an Honours degree He is articulate and as shown by his interaction with the Agency, well able to communicate effectively orally and in writing
>
> In conclusion AFCS tariffs are not pertinent to Mr [K] He has had significant specialist input notably from Drs Harding and McAllister Their reports provide no compelling evidence of significant functional limitation or restriction over the period since Iraq 2003 where he served only two months as a Warrior driver before being given compassionate leave because of his mother's sad illness, and I note his SPO assessment"

30. Dr Harding had assessed Mr K in March 2012 in connection with the retrospective amendment of his discharge. He reported that Mr K had a mild degree of PTSD which was related to his service in 2003. Dr Harding said that the delay in onset of symptoms (until 2007) was unusual but not unknown. He described Mr K's symptoms and noted that they were improving but that nightmares and a lack of confidence were still a problem. Dr Harding concluded that Mr K was functioning at an acceptable level and should continue to improve. He said Mr K did not require any particular treatment but suggested that some counselling might be necessary at a late date if his symptoms remained after a year.

31. Veterans UK said that they had applied the above guidance to Mr K's case. They went on to note that he "was not yet in a treated state but [was] very successfully undertaking an Honours degree". Veterans UK said he was "articulate as shown by [his] interaction with the Department and [was] well able to communicate effectively orally and in writing. They concluded that the AFCS tariffs were not pertinent to Mr K's case. Veterans UK referred to reports provided by Drs Harding and McAllister and said that there was "no compelling evidence of significant functional limitation or restriction over the period since 2003".

32. In subsequent correspondence with the Pensions Advisory Service (**TPAS**), Veterans UK said that "gainful employment" was not defined in the AFPS 05 Rules. They went on to explain that they interpreted it as,

> "consistent and regular work that provides an individual with an income and a sense of purpose through the achievement of a variety of tasks and goals. It does not have to be similar to the duties or tasks that the individual undertook whilst a member of the Armed Forces."

Summary of Mr K's Position

33. Mr K has submitted a considerable amount of material in support of his application. It would not be practical to refer to it all in this determination. In particular, Mr K has submitted a considerable amount of medical evidence in the form of references to (amongst other things) research into and reviews of PTSD. Since it is not my role to review medical evidence and come to a decision as to Mr K's eligibility for a benefit, I have not reviewed this evidence in any detail.

34. A brief summary of the key points in Mr K's argument is provided below:

- Veterans UK failed to apply Rule D.6 correctly. They did not ask the right questions and came to a perverse decision.
- Veterans UK and their medical advisers were biased in their approach to his case.
- There is nothing in Rule D.6. to say that the test is a consideration of lifetime capacity to work and not a snapshot of the current situation.
- There is nothing in the Rule which states that the test to be applied is how a person may or may not respond to treatment; the appropriate tier is determined at the date of discharge.
- Paragraph 0318 of Chapter 3 of Part 1 of JSP 764 states,

  "If an active member with at least two years' ***qualifying service*** suffers ill-health leading to medical discharge, he will be entitled to an ill-health award. The type and size of the award will depend upon the Tier, which is allocated by reference to the Tariff (see Part 4, Chapter 1 for Tariff), and the length of the individual's service."

- The booklet "AFPS 05: ill health benefits" links the Tiers of benefit to the tariffs used for the AFCS. Tier 2 benefits are mapped to tariff levels 7-11. Item 3 of Table 3 of the AFCS tariffs "Mental disorders" refers to a disorder "causing functional limitation and restriction, which has continued, or is expected to continue for 5 years". This is given a level 10 which would map to Tier 2 benefits. He has been diagnosed with and suffering from PTSD for longer than five years, as evidenced by Col McAllister's report.
- Veterans UK should adhere to the tariffs. They were introduced to prevent inconsistency. The statement "significantly impair capacity for gainful employment" is ambiguous. Each medical adviser could have a different opinion and this could lead to inconsistency.
- PTSD is a permanent condition for which there is no cure. One of the criteria for a diagnosis of PTSD is that the symptoms lead to "clinically significant distress or impairment" in areas such as social relations and occupational activities.

- A War Pension Tribunal has previously recognised that PTSD is a permanent condition and that it meets the criteria for the AFCS Tariff level 8 and 9 which means a Tier 2 pension.
- He provided specific medical evidence to show that his capacity for gainful employment is significantly impaired, which Veterans UK failed to accept. As a consequence, they came to a perverse decision.
- Rule D.6.(1)(aa) states "the Secretary of State has received evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on his occupation because of physical or mental impairment". Col McAllister is a registered medical practitioner and his report stated that he was incapable of carrying on his occupation and would continue to be.
- He accepts that, should he gain employment in the future, a Tier 2 pension would be reduced to a Tier 1 pension. However, Veterans UK should accept that, from his discharge to the present day, he meets the criteria for Tier 2.
- Veterans UK have said that they will reconsider his appeal after he has received treatment. There is nothing in the Scheme Rules which states that appeals will only be considered following treatment.
- He believes that the MAs and SMA are generalists rather than mental health specialists and, as a result, do not fully understand the symptoms of PTSD and the significant functional limitation and restrictions they cause.
- He was never assessed in person by Veterans UK's medical advisers. He provided them with the same evidence, information and documents that he provided for his GP and Occupational Therapist, who both assessed him in person. They concluded that his capacity for gainful employment was significantly impaired, but Veterans UK's medical advisers ignored this.
- The SMA failed to refer to the reports from his GP and/or his Occupational Therapist. It cannot be assumed that this evidence has been considered and, therefore, it cannot be said to have been given little weight rather than ignored.

- The report by Combat Stress states that their case histories have shown that a claimant suffering from a mental disorder which is yet to be treated will experience difficulty in finding and holding down a job. In addition, a past history of PTSD is a predisposing factor making it more likely for PTSD to redevelop if exposed to further trauma. There is, therefore, functional limitation even if treatment is successful.
- The fact that he was attending university should have been irrelevant when Veterans UK determined which tier of benefits to award. It is very different to work and he was only required to attend for 12 hours per week. It is also the case that his attendance began to suffer and he failed four exams in his third year. He was entitled to a disabled student allowance because of his symptoms.
- He received Employment Support Allowance (**ESA**) on the basis of the evidence from his GP. This was paid from the date he left university until four weeks after he left the UK to live in Mexico.
- He has not been accepted onto a masters course; he expressed an interest in doing a masters, but cannot afford it. He had in mind to do an online masters degree in football administration.
- He has never suggested or stated that his symptoms have improved. There is a big difference between the meaning of "at their worst" and "better". PTSD is a permanent condition and a medical professional should know this.
- His only skills and experience are those of an infantry soldier. The equivalent civilian employment would be a security guard. He would gain no "sense of purpose through the achievement of a variety of tasks and goals" by working in a mundane job as a security guard, which involves long hours and minimum wage. He will never have the sense of purpose he had as a soldier.
- Veterans UK did not make any enquiries into what type of gainful employment he could undertake. His Occupational Therapist is better qualified to make this judgement than Veterans UK's medical advisers.

- Under a Freedom of Information request, he discovered that individuals suffering from PTSD have been paid both Tier 1 and Tier 2 benefits. Since it is the same condition, they should be receiving the same benefits.
- The failure to properly consider his case, including at appeal stage, has unnecessarily lengthened the process and caused him distress and inconvenience.
- Veterans UK are in breach of the European Convention on Human Rights and the Equality Act 2010.
- The Equality Act 2010 defines a disabled person as someone who has a physical or mental impairment, which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Mental health illness, such as PTSD, is a protected characteristic under the Equality Act and Veterans UK have to adhere to the Act.
- If his case is to be reconsidered by Veterans UK, he would prefer a medical adviser and a deciding officer who has not previously been involved in his case to undertake the review. He would also like the medical adviser to be provided with a copy of this determination.

Summary of Veterans UK's Position

35. A summary of Veterans UK's response is provided below:

- The Medical Advisers and Deciding Officers assessing Mr K's case have consistently found that Tier 1 benefits are appropriate. They have found that Mr K's employment prospects are not significantly impaired. They note that he is still undergoing treatment and that he has been able to undertake a degree course.
- Mr K has submitted large amounts of evidence; all of which has been taken into consideration and his correspondence has been acknowledged at all stages.

Conclusions

36. Mr K has been awarded a Tier 1 benefit. It is, therefore, accepted that he is unfit for service as a member of the Armed Forces. Mr K argues that he should receive Tier 2 benefits.

37. There are two levels of benefits payable on ill health retirement under the AFPS 05; under Rules D.5 and D.6. Rule D.5 pays the higher level of benefit – Tier 3. Benefits are payable under Rule D.5 if the member is permanently (that is to say, at least until he reaches pension age) incapable of any gainful full-time employment. While Mr K is not arguing for Tier 3 benefits, Rule D.5 is relevant to understanding the Rule D.6 criteria. Rule D.5 refers specifically to 'full-time' employment and, therefore, someone who was able to undertake some part-time employment (but not full-time) would be eligible for a Tier 3 award. Rule D.6 pays a lower level of benefit – Tier 2. Benefits are payable under Rule D.6 if the member's capacity for gainful employment is significantly impaired. Rule D.6 refers to "gainful employment", rather than "full-time employment", but the term is not defined in the Rules. However, the lower level of benefit paid under Rule D.6 suggests that a lower level of incapacity is required to meet the eligibility test. If the member was only capable of undertaking part-time employment, he would be eligible for benefits under Rule D.5. This suggests that "gainful employment" equates with full-time employment. The key, however, to determining whether a member is eligible for benefits under Rule D.6 is in deciding whether his capacity for employment is "significantly impaired". There is no definition of "significantly impaired" in the Rules.

38. If a member was only going to be capable of part-time employment until pension age, he would be eligible for Tier 3 benefits. Tier 2 benefits must be payable if the member is (or will be) capable of some full-time employment, but his capacity for that employment is impaired and that impairment is significant. Since there is no specific definition of "significantly impaired", the words must be given their ordinary, everyday meanings. So, for example, the Concise Oxford English Dictionary would point to something being impaired if it is damaged or weakened and the impairment being significant if it is sufficiently great or important as to be worthy of attention.

39. In effect therefore, the Tier 2 criteria are not about how much work a person can do, they are about what he or she is capable of doing: whether the full range of work previously open to them remains open to them at the time the decision falls to be made.

40. It would be appropriate at this point to address the question of the AFCS tariffs and their role in determining which tier of AFPS benefit would be appropriate for Mr K. AFPS literature states that the tiers of ill health benefits payable under the AFPS 05 are linked to the AFCS tariffs and that they "map across" to certain tariff levels. Understandably, Mr K has pointed out that he had been diagnosed with PTSD over five years before the decision as to which tier of benefit to award him was made. He points out that this would align with a level 10 on the appropriate tariff table and he expects, therefore, that he should be paid Tier 2 benefits. The booklet maps Tier 2 benefits to tariff levels 7-11. However, as the SMA later explained, the AFPS 05 Rules themselves do not link the benefits payable to the AFCS tariffs. The fact that Mr K's condition might map to tariff level 10 does not automatically mean that he meets the criteria for Tier 2 benefits; a separate decision as to his eligibility must be made.

41. To that end, the questions for Veterans UK (and their medical advisers) were whether Mr K was going to be capable of any gainful employment before he reached pension age and, if he was, whether his capacity for that employment was weakened to an extent that was worthy of attention.

42. Veterans UK referred Mr K's case to an MA. The MA noted that Mr K had been diagnosed with PTSD and was experiencing hyper-vigilance, avoidance and re-experiencing. He noted that Mr K had been under Combat Stress but that he was not currently receiving any treatment or medication. The MA also noted that Mr K was attending university and was coping well with this. He said that the question was to what degree was Mr K's capability for civilian employment impaired. Although phrased slightly differently to the AFPS 05 Rules, I find this to be the correct question for the MA to ask. My concern lies with the answer the MA gave.

43. The MA recommended a Tier 1 benefit and then tried to tie his recommendation into the AFCS tariffs. There was no discussion as to what he thought Mr K's capacity for civilian employment was or whether and why he thought this was

not significantly impaired. It may be tempting for Veterans UK to assume that their MAs are familiar with the AFPS 05 Rules. As a result, they may feel that they can read between the lines and assume that, by recommending Tier 1, the MA is saying that Mr K's capacity for gainful employment is not significantly impaired. However, this is neither safe nor fair to Mr K. Both he and Veterans UK need to know what the MA is thinking and why he is making his recommendation. If the MA thought that Mr K's capacity for gainful employment was not significantly impaired, he should have been able to say why.

44. Following Mr K's appeal, Veterans UK referred his case to another MA. The MA noted that Mr K had been able to enroll on a degree course in 2009, which he felt showed that his symptoms had not been prominent at that time. He also noted that Mr K referred to his symptoms as being at their worst in 2008, which he felt indicated there had been an improvement since. The MA noted that Mr K was now on year 3 of his degree course and living in Spain. He noted that Mr K expected to get a 2:1 in his degree and had little in the way of symptoms at that time. The MA said that he considered Mr K's capability for civilian employment was no different to any other graduate with a similar degree. Mr K, on the other hand, has said that he was in receipt of a disabled student's allowance and only had to attend for 12 hours per week. He makes the point that this is very different to working. This is a pertinent comment.

45. The question is not whether Mr K is capable of undertaking a degree course (and I note there was no discussion as what this entailed) nor whether his capability is the same as other graduates with his degree. The question is whether his capacity for gainful employment is significantly impaired. There is no indication of whether this is what the MA had in mind nor what he understood by significant impairment.

46. Following a further appeal, Mr K's case was referred to the SMA. Her report was brief to the point of being cursory. The SMA noted that Mr K was being considered for a six week treatment programme by Combat Stress and that the IMEG report had said that "common mental health problems are treatable to improved function if not to cure". She went on to say that they should look at Mr K "in his treated state of optimum medical function". The fact that Mr K was being considered for treatment is only relevant in the context of what effect that treatment might have on his capacity for gainful employment. The SMA did not

say what she thought this might be. The IMEG report was not relevant since it was not specific to Mr K's case and, at most, simply indicated that mental health problems in general were treatable to some extent.

47. The second report from the SMA was much longer. It is still the case, however, that for a large part of the report the SMA was discussing generalities. For example, that PTSD "is a treatable disorder and is the subject of evidence based best practice treatment". When the SMA turned to discussing Mr K's case specifically, she said:

- He was still to undergo the Combat Stress programme and so may not be "in a steady state of maximum medical function".
- The evidence was that his present function was good (she referred to the reports from Drs Harding and McAllister).
- He was not yet in a treated state.
- He was successfully undertaking a degree.
- He was articulate, as shown by his interaction with Veterans UK, and well able to communicate orally and in writing.

48. Of the above, only the fact that the evidence from Drs Harding and McAllister indicated that Mr K's function was good was relevant to the question of whether his capacity for gainful employment was significantly impaired. That there was outstanding treatment and Mr K was not yet in "a treated state", is insufficient in itself to reach a decision as to his eligibility under Rule D.6. There has to be some consideration of whether Mr K's capacity for gainful employment is significantly impaired or not and whether the treatment is likely to change this. As discussed, the fact that he was undertaking a degree was insufficient to conclude that his capacity for gainful employment was not significantly impaired because the requirements are not the same as for full-time employment. The same can be said for Mr K's capacity (or otherwise) to communicate with Veterans UK.

49. Veterans UK accepted the recommendations from their medical advisers without seeking further clarification. I do not find that the reports (even taken as a whole) answered the questions I have outlined above in a clear and unambiguous way. As I have mentioned, this was not a safe or fair way to proceed. Both Veterans UK and Mr K needed to be clear as to why he was not being awarded Tier 2 benefits. Veterans UK needed to be sure that they had made a decision in line with Rule D.6. Mr K needed to understand how they had reached that decision so that he could either accept it or prepare an appropriate appeal.

50. The evidence is insufficient for me to find that Veterans UK have given proper consideration to Mr K's eligibility for Tier 2 benefits and I uphold his complaint on this basis.

51. It is not my role to come to a decision of my own as to Mr K's eligibility. The proper course of action is for me to remit the decision for Veterans UK to reconsider it and I have made directions accordingly. I note Mr K's request that his case be considered by another medical adviser, who has not previously been involved. I do not find that the circumstances indicate that such a direction from me would be necessary or appropriate.

52. It may well be that, with further due consideration, Veterans UK will find that Mr K does not in fact qualify for Tier 2 benefits. This is still one of the possible outcomes of their reconsideration and, provided that it is supported by sufficient, appropriate evidence, would not be incorrect. It would, no doubt, be disappointing for Mr K, but he might find it easier to accept if he were able to understand the reasoning behind it. If it is the case that Veterans UK decide that Tier 2 benefits are appropriate, Mr K will be due to receive arrears from March 2009, with appropriate interest.

53. This has been a stressful time for Mr K and the failure to consider his case in a proper manner will have unduly caused distress and inconvenience. In saying this, I do not find that the evidence indicates that either Veterans UK or their medical advisers were biased when considering Mr K's eligibility for benefit. The fact that I have identified issues with the way in which the decision was reached and the evidence upon which it was based does not mean that I consider that they approached the task in anything less than good faith. Nevertheless, I find that a modest compensation payment for the distress would be appropriate.

54. Mr K has made reference to the Equality Act 2010. I do not find that this assists his case. For example, he has not identified an appropriate comparator against whom he feels he has been treated less favourably. In view of the fact that I am upholding his complaint for other reasons, I do not consider that I need discuss the application of the Equality Act in detail.

Directions

55. I direct that, within 21 days of the date of my determination, Veterans UK are to reconsider Mr K's eligibility for Tier 2 benefits, having first sought further medical advice. Within the same time period, they will pay Mr K £250 as compensation for the distress and inconvenience he has suffered.

Tony King
Pensions Ombudsman

28 November 2014

Appendix

The Armed Forces Pension Scheme Order 2005 (as amended)

Rule D.5. provides,

"Early payment of benefits: active members with permanent serious ill-health

(1) An active member who ceases to be in service by virtue of which he is eligible to be

an active member of the Scheme is entitled to immediate payment of a pension and a lump sum before reaching pension age if –

(a) in the opinion of the Secretary of State the member has suffered a permanent breakdown in health involving incapacity for any full-time employment,

(aa) the Secretary of State has received evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on his occupation because of physical or mental impairment, and

(b) the member either -

(i) has at least two years' qualifying service, or

(ii) was formerly entitled to rights under a personal pension scheme or a retirement annuity contract in respect of which a transfer value payment has been accepted by the Scheme under Part F (transfers).

(2) For the purpose of this rule and rule D.8 a member's breakdown in health is "permanent" if, in the opinion of the Secretary of State, after consultation with the Scheme medical adviser, it will continue at least until the member reaches pension age.

(3) For the purpose of this rule and rule D.8 a member's breakdown in health involves incapacity for any full-time employment if, in the opinion of the Secretary of State, after consultation with the Scheme medical adviser, as a result of the breakdown the member is incapable of any gainful full-time employment.

(4) The amount of the annual pension payable under this rule is calculated by multiplying one seventieth of the member's final pensionable earnings by N.

(5) For the purposes of paragraph (4), N is equal to the greater of –

(a) the sum of the member's reckonable service and half of the further reckonable service which he would have been able to count under the Scheme if he had remained an active member from the date he ceased to be such a member until pension age (both expressed as a number of years), and

(b) 20.

(6) The amount of the lump sum payable under this rule is calculated by multiplying the amount of the annual pension so payable by 3."

Rule D.6. provides,

"Early payment of benefits: active members with significant impairment of capacity for gainful employment

(1) An active member who ceases to be in service by virtue of which he is eligible to be an active member of the Scheme is entitled to immediate payment of a pension and a lump sum before reaching pension age if –
  (a) in the opinion of the Secretary of State the member has suffered a breakdown in health as a result of which his capacity for gainful employment is significantly impaired,
  (aa) the Secretary of State has received evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on his occupation because of physical or mental impairment, and
  (b) the member either -
    (i) has at least two years' qualifying service, or
    (ii) was formerly entitled to rights under a personal pension scheme or a retirement annuity contract in respect of which a transfer value payment has been accepted by the Scheme under Part F (transfers), and
  (c) the member is not entitled to a pension under rule D.5.(1).

(2) The amount of the annual pension payable under this rule is calculated by multiplying one seventieth of the member's final pensionable earnings by N.

(3) For the purposes of paragraph (2), N is equal to the sum of the member's reckonable service and one-third of the further reckonable service which he would have been able to count under the Scheme if he had remained an active member from the date he ceased to be such a member until pension age (both expressed as a number of years).

(4) The amount of the lump sum payable under this rule is calculated by multiplying the amount of the annual pension so payable by 3."

There is no definition of "gainful employment" or "significantly impaired" in the Rules.

The Armed Forces Early Departure Payments Scheme Order 2005

Paragraph 16 provides,

"(1) A person who ceases to be in service as a member of the armed forces is entitled to immediate payment of a lump sum if -
  (a) in the opinion of the Secretary of State, after consultation with the Scheme medical adviser, the person is unfit for service as such a member,
  (b) the person has at least two years' relevant service,
  (c) immediately before the service ceases the person is an active member of the AFPS 2005, and
  (d) the person is not entitled to payments under article 9 of the Scheme or the immediate payment of a pension or lump sum under -
    (i) rule D.1 of the AFPS 2005 …
    (ii) rule D.5 of that Scheme …
    (iii) rule D.6 of that Scheme …
    (iv) rule D.11 of that Scheme …"

Joint Services Publication (JSP) 764

Under Part Two, Chapter Four "Lump Sum on Incapacity – Tier 1 Medical Discharge", JSP 764 states,

"0401. A person who is discharged from the Regular Armed Forces on ill-health grounds is entitled to the immediate payment of a tax-free lump sum if:

- in the opinion of Vets UK (having received medical evidence from a registered medical practitioner) he is unfit for military service but deems his potential for gainful employment in civilian life is not affected (Tier 1),
- he is a member of AFPS 05 ...
- he has at least two years ***relevant service***,
- he is not entitled to a Tier 2 ... a Tier 3 ill-health award or a lump sum in lieu of five years' worth of pension having been given a life expectancy of less than 12 months ...

Tier 1 conditions are those which appear in Tariffs 12 – 15 in the table in Part 4 of this JSP. In categorising in terms of tiers and relative capacity for gainful employment, no account will be taken of the individual's motivation or skills, or the employment market …"