

PO-7169

Ombudsman's Determination

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

Complaint summary

Mr K has complained that his eligibility for Tier 2 benefits under Rule D.6 of the AFPS 05 Rules has not been considered properly.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against Veterans UK because they relied on a report from their medical adviser when it was not clear that he had correctly interpreted Rule D.6.

Detailed Determination

Material facts

1. There are three tiers of benefits payable on leaving the Armed Services because of ill health. Mr K has been awarded Tier 1 benefits. These consist of a lump sum payable immediately and deferred benefits payable at normal retirement age. Tier 1 benefits are awarded under paragraph 16 of the Armed Forces Early Departure Payments Scheme Order (SI2005/437). Further information is contained in Joint Services Publication 764 (**JSP764**).
2. Tiers 2 and 3 are awarded under Rules D.6 and D.5 (respectively) of the Armed Forces Pension Scheme Order 2005 (SI2005/438) (as amended). Extracts from the relevant rules are provided in an appendix to this document.
3. Mr K's eligibility for Tier 2 benefits was the subject of a previous investigation (PO-4301). The Ombudsman issued a final determination on 28 November 2014. Veterans UK were directed to reconsider Mr K's case, having first sought further medical advice.
4. Veterans UK referred the case to a medical adviser who had not previously been involved, Dr Morris. He was asked for an opinion on whether Mr K's medical condition had a significant impact on his ability for civilian employment. Dr Morris was provided with a copy of the Ombudsman's determination and the synopsis of causation document for PTSD. The synopses of causation are a series of documents 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.
5. Dr Morris reported on 26 November 2014. He said he would refer to Rule D.6. Dr Morris said that the Ombudsman had found that "gainful employment" equated with full-time employment; although this was not stated in the AFPS Rules. He noted that the Ombudsman had found that a member would be eligible for Tier 3 benefits if they were only capable of part-time employment. Dr Morris said that this was not his understanding of the current interpretation of the AFPS Rules. He did not explain what his understanding was.
6. Dr Morris referred to the 2013 report by Consultant Psychiatrist, Col McAllister. He said that Mr K had been described as experiencing the full diagnostic criteria for PTSD. Dr Morris noted that Col McAllister had carried out a mental state examination and had reported that Mr K was subjectively and objectively a little anxious, with no record of any significant mood disturbance, thought disorder or cognitive deficit. He said that Mr K had reported stress and anxiety and a loss of confidence, together with nightmares and a tendency towards becoming reclusive. Dr Morris also noted that Mr K had reported to his garrison medical centre with sleep disturbance, nightmares, low mood and aggression and had admitted to thinking about the trigger incident. Dr Morris noted that Col McAllister had concluded that Mr K was experiencing PTSD at

the time of the consultation and that this had probably been the case at the time of discharge (2009).

7. Dr Morris said,

“There is therefore evidence that [Mr K] was suffering from an underlying medical condition at the time of his discharge. He was seen by members of the mental health team prior to discharge but there is no evidence that he was referred to a consultant psychiatrist for advice on his symptoms or to formulate a specific diagnosis – DMICP refers only to an ‘adjustment reaction’ which would have been expected to resolve on [Mr K’s] discharge from the services.

Had [Mr K] been diagnosed as suffering from PTSD during his service it is likely that he would have been able to access the specialist treatment available for this condition and this may have resulted in either a resolution of his symptoms or a significant improvement. I note that since discharge [Mr K] has been assessed by Combat Stress and before his move to Mexico was on a waiting list for an NHS commissioned 6 week PTSD Intensive Treatment programme. Although he has not managed to attend this course, it is possible that a course similar to this will benefit [Mr K] in his management of his PTSD symptoms.”

8. Dr Morris noted that Mr K had been employed as an infantry soldier and had said that his only skills, qualification and experience was as an infantry soldier. He quoted Mr K as having said that he thought the equivalent civilian job would be a security guard and that this would not give him a sense of purpose or achievement. Dr Morris said that this indicated that Mr K had given some thought to his future employment. He noted that Mr K had said that his mental health issues were an issue for him and had described marked physical and psychological symptoms of anxiety in social situations. Dr Morris noted that Mr K had found exercise beneficial and that he had expressed a desire to work for a football club as a marketing executive on completion of his degree.

9. Dr Morris said that there was no evidence of any physical limitation which would affect Mr K’s capacity for employment. He went on to say,

“Although [Mr K] does have a number of unpleasant/uncomfortable psychological symptoms – some of which are accompanied by physical symptoms but which can often be controlled – such as the anxiety symptoms he is experiencing, I would not regard these symptoms as being significant with regard to future employment. While it is accepted that study at University does not equate to employment it does illustrate a degree of learning skills and cognitive function that would be compatible with many types of employment available to [Mr K].”

10. Dr Morris then quoted the AFPS 05 Rules as saying “The test for AFPS 05 benefit Tier aims to reflect any functional restriction or limitation caused by the conditions

which led to invaliding and, which would adversely affect your civilian employability in jobs suitable for your skills and training". He referred to Mr K's view that he would not find the position of security guard appropriate even though this was consistent with his experience and training. Dr Morris suggested that this was what prompted Mr K to undertake a university course.

11. Dr Morris said that the diagnosis of "the relatively uncommon condition Delayed Onset PTSD" had been established. He said that Mr K had contacted mental health teams and Combat Stress but had been unable to attend the type of intensive treatment which may be beneficial in his case. Dr Morris said that the prognosis was therefore uncertain. He suggested that Mr K should continue to explore treatment options in Mexico. Dr Morris referred to Mr K's use of exercise to manage his symptoms and said that this was likely to continue to be of benefit. He concluded,

"Although [Mr K] experiences typical symptoms of PTSD there is no indication that they are of sufficient severity to affect either his physical or mental capacity. It is recognised that anxiety and social interactions can be difficult for [Mr K] to manage. Taking all the evidence into consideration I would not consider that PTSD is causing [Mr K] any significant limitation and that the award of a Tier 1 benefit is appropriate."
12. Mr K's case was referred to a Deciding Officer (**DO**). The DO agreed with Dr Morris. She said that it was accepted that Mr K had been diagnosed with delayed onset PTSD but that this, in itself, did not trigger a Tier 2 award. The DO said that the test was to consider whether Mr K's capacity for gainful employment was significantly impaired. She said that the evidence indicated that Mr K was managing his symptoms and should continue to explore the treatment options available to him. The DO said that the evidence did not indicate that Mr K's symptoms were of sufficient severity to affect his mental or physical capacity and, therefore, his capacity for gainful employment.
13. Veterans UK wrote to Mr K, on 9 December 2014, notifying him that it had been decided that his award should remain at Tier 1. They referred to Dr Morris' report and set it out in some detail for Mr K. Veterans UK said that the DO agreed with Dr Morris. They said that the DO accepted that Mr K had been diagnosed with delayed PTSD but that this did not, in itself, trigger a Tier 2 award. Veterans UK then set out the DO's comments as above.
14. In subsequent correspondence with Mr K, Veterans UK said that, in addition to Col McAllister's report, the following medical evidence had also been reviewed:
 - A letter from Dr Fletcher dated 20 February 2012;
 - A letter from Mr K's GP dated 8 January 2014;
 - An occupational therapy assessment dated 22 March 2012;
 - A letter from Combat Stress dated 3 December 2012;

- A DWP Work Capability assessment.

Extracts from the first three medical reports were included in the previous determination and are not repeated here. The letter from Combat Stress enclosed an assessment and care plan by one of their consultant psychiatrists, Dr Ewusi-Mensah, and confirmed that Mr K was on the waiting list for an NHS six-week intensive treatment programme. Dr Ewusi-Mensah had said,

“Patient is articulate and insightful about his symptoms. He has had PTSD diagnosed by Consultant Psychiatrists, which I concur having interviewed. He seems quite motivated to be involved in his care plan because ‘I want to be the person I was’.”

“Describes nightmares of incidents in battle front in Iraq. Avoids TV or situations that are likely to provoke reliving military incidents ...

Hyperaroused: loses temper, poor sleep, always on edge, especially when he meets or walks past persons in Muslim clothing. Hypervigilant and ‘suspicious’ of situations that remind him of Iraq.”

Summary of Mr K’s position

15. Mr K has submitted a considerable volume of evidence in support of his case. It is not practical or necessary to refer to it all in this document. What follows is a summary of the key points.
16. The issue is whether or not his capacity for gainful employment is significantly impaired. Both his GP and his occupational therapist have provided evidence in support of his case and have stated that his capacity for gainful employment is significantly impaired. An occupational therapist is the most suitably qualified medical professional to comment on occupational functioning. Veterans UK have stated that this evidence was amongst that considered by them in reaching a decision. They have, therefore, come to a perverse decision. Mr K cites *Yeboah v Crofton* [2002] EWCA Civ 794.
17. The Pensions Ombudsman’s role is to determine the facts. He previously determined that the Tier 2 criteria are not about how much work a person can do, rather they are about what he or she is capable of and whether the full range of work previously open to them remained open to them. The full range of work previously open to him is no longer open to him due to his PTSD. Therefore, he meets the criteria for Tier 2 benefits.
18. The Ombudsman set out his interpretation of the AFPS 05 Rules in the previous determination. Dr Morris said that this was not his understanding of the current interpretation of the Scheme Rules. He said that the test for AFPS 05 benefit Tier aimed to reflect any functional restriction or limitation caused by the invaliding conditions which would adversely affect civilian employability in jobs suitable for the

individual's skills and training The medical advisers and deciding officers have failed to apply the correct interpretation.

19. Mr K argues that the interpretation of Rule D.6. set out in PO-4301 should apply.
20. He has also suggested that Dr Morris cannot be considered independent. He argues that it is Dr Morris' interests to help Veterans UK to save money by not paying benefits. He also argues that Dr Morris is a generalist and not a mental health specialist.
21. He has provided details of employment options which would not be open to him as a result of his PTSD. These include joining the police force, prison service or fire service. He also points out that the prescription of antidepressants would preclude an individual from driving with an HGV1 licence or holding a pilot's licence. He makes the point that, even if the individual's depression responded to antidepressants, the functional limitations on their ability to work would remain whilst they were taking the antidepressants. He has been on antidepressants and will go back on them when he is able to register with a GP.
22. In reconsidering the decision, Veterans UK incorrectly placed emphasis on the severity of his symptoms. There are no provisions in the AFPS 05 Rules relating to the degree of disablement or severity. It is a medical fact that PTSD is a permanent disorder which fluctuates in severity. If the severity of his symptoms was a relevant factor, the pension Tier would change every few weeks or months.
23. PTSD is classed as a disability because it has a substantial and long term effect on day to day activities. It is accepted that substantial means more than minor or trivial (*Goodwin v Patent Office* [1999] ICR 302 (EAT)). He has been assessed as "unfit for gainful employment" by a consultant psychiatrist in connection with his claim for compensation. Mr K has provided a copy of the psychiatrist's report. He suggests that this opinion should count for more than that offered by Dr Morris because he is a generalist rather than a mental health specialist.
24. He also wishes to claim for financial loss suffered as a result of maladministration on the part of Veterans UK. Following receipt of the reports from his GP and occupational therapist, he assumed that it was a certainty that he would receive Tier 2 benefits. He made plans to emigrate to Mexico on completion of his university course in May 2014. He heard from Veterans UK shortly after moving to Mexico that they were maintaining the Tier 1 assessment. He decided to remain in Mexico but has been unable to meet the financial requirements to obtain a residence permit. He has been living there on a tourist visa which prevents him from opening a bank account, working or registering with a GP. He is also required to leave every six months and this incurs costs (in excess of £1,600). He also incurs costs as a result of having to use his UK bank account (around £300).
25. Veterans UK have failed to act in good faith. They have tried to manipulate the evidence to fit the Tier 1 award. They informed the DO that the Ombudsman had not

disputed the award of Tier 1 benefits and by so doing encouraged her not to consider the possibility of a Tier 2 award.

26. Under the European Convention on Human Rights, a pension is classed as property and he has been wrongly denied the correct type of pension. He has a right to Tier 2 benefits in accordance with the AFPS 05 Rules. This is a protected right and he has been denied this right through maladministration on the part of Veterans UK. Veterans UK are in breach of Article 14 of the European Convention on Human Rights, together with Article 1 of Protocol 1.
27. He would like the Ombudsman to take into account the fact that he was in receipt of Employment Support Allowance (**ESA**). The basic condition for entitlement to ESA, under section 1(3)(a) of the Welfare Reform Act 2007 is that “the claimant has limited capability for work”. The approach to be taken in determining whether a person meets the basic condition is set out in the Act and subsequent regulations.
28. Combat Stress case histories demonstrate that claimants will have experienced considerable difficulty in holding down a job, if they have found employment at all, and will have by definition suffered a significantly reduced earnings capacity.
29. Combat Stress also found that the predictive timescales in the Armed Forces Compensation Scheme (**AFCS**) tariff levels 12 – 14 did not match with any psychiatric classification system they were aware of. In addition, no consideration appeared to have been given to prognostic indicators such as likelihood of relapse if exposed to further trauma.
30. Mr K has questioned how “significantly impaired” is to be fairly and accurately determined and quantified. He suggests that the link to the AFCS tariffs should be maintained. It will be difficult for him to gain employment and also to maintain employment. This is because of his sickness record. He was on sick leave for 12 months prior to his discharge from the Army and also received warning letters about his attendance from the university. He also has a history of workplace violence and has assaulted colleagues. He suffers from insomnia and the harmful use of alcohol which impairs his functioning. Employers would not hire someone with PTSD.
31. Veterans UK have defined “gainful employment” 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”. His occupation was as an infantry soldier and no other job/career would give him a sense of purpose such as he had in the Army. He left the Army and re-joined because he did not have a sense of purpose as a civilian. Since his discharge from the Army, he has suffered a loss of amenity and a loss of congenial employment. Mr K has identified 11 occupations which he says are the only ones likely to give him a sense of purpose. He says he will be unable to undertake any of these because of his PTSD. Mr K argues that the full range of jobs previously open to him should still be open to him if he is not eligible for Tier 2 benefits.

32. His employment opportunities are further limited by the fact that he now lives in Mexico, where he feels safer, because of his basic level of Spanish and inability to obtain a work permit.
33. Veterans UK have consistently failed to interpret the AFPS 05 Rules correctly and ignored the Ombudsman's previous directions. Further reconsideration by Veterans UK would be unnecessary and the Ombudsman should instruct them to award him Tier 2 benefits. He cites previous Ombudsman decisions where this has been the outcome. He also cites *Futter v HMRC* [2013] UKSC 26 in which the judge said that the courts would be more ready to intervene where trustees were exercising judgement on an issue of fact, rather than exercising discretion. He cites *Sinclair Roche & Temperley v Heard* [2004], an Employment Tribunal case on the relevant factors to consider when deciding whether to remit a case.
34. Veterans UK have stated that the AFCS tariff level awarded to veterans diagnosed with PTSD is dependent upon the severity of their symptoms. They have confirmed that, between April 2012 and March 2014, 151 Tier 1, 23 Tier 2 and 8 Tier 3 awards were made where PTSD was a principal or contributory condition leading to discharge. This shows that there is no consistency or fairness in the decision making process. Anyone with the same injury or illness should receive the same pension tier. This is why Veterans UK use the AFCS tariffs because it has clear criteria to identify the correct pension tier. It was only when he was able to show that his tariff level should mean a Tier 2 award that Veterans UK said that the tariff was not pertinent.
35. The approach taken by Veterans UK has caused him inconvenience, severe distress and financial hardship over the last 21 months. He would like to be compensated for this to the maximum amount referred to in Veterans UK's policy on financial redress for maladministration.
36. Mr K cites a number of legal cases relating to awards for being disadvantaged in the labour market which he would like the Ombudsman to consider. In particular, *Smith v Manchester Corporation* [1974] EWCA Civ 6. He considers that being disadvantaged in the labour market is the same thing as having a significantly impaired capacity for gainful employment. Mr K also cites *West v MoD*; a recent case concerning the failure to identify PTSD at an early stage.
37. Mr K has also listed a number of previous Ombudsman decisions which he considers to be pertinent to his case.

Conclusions

38. Mr K is firmly of the view that he is entitled to Tier 2 benefits. Tier 2 benefits are paid under Rule D.6. Under this rule, Mr K would be entitled to immediate payment of benefits if, in the opinion of Veterans UK (acting for the Secretary of State), he has "suffered a breakdown in health as a result of which his capacity for gainful employment is significantly impaired". Unlike in some public sector pension schemes, there is no specific definition of "gainful employment" or "significantly impaired".

39. Rule D.6 provides for the payment of a lower level of benefits (Tier 2) than Rule D.5 (Tier 3). It follows that Rule D.6 is intended to cater for a lower level of impairment than Rule D.5. For this reason, it is helpful to look at the provisions of Rule D.5 in interpreting Rule D.6. Rule D.5 provides for the payment of benefits where the member has suffered “a permanent breakdown in health involving incapacity for **any full-time** employment” (my emphasis). Therefore, if the member was *only* capable of part-time employment, he would meet the eligibility test in Rule D.5 – he would be incapable of any full-time employment. This interpretation was covered in the previous determination.
40. Since Mr K would qualify for Tier 3 benefits if he was incapable of any full-time employment, the “gainful employment” referred to in Rule D.6 must mean full-time employment. If Mr K was capable of some full-time employment, he would not qualify for Tier 3 benefits, but he might still qualify for Tier 2 benefits if his capacity for such employment was significantly impaired. I note that Veterans UK have previously referred to “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”. The OED (concise edition) defines gainful (of employment) as “paid”. I am aware that, in psychology, it has a wider definition which encompasses concepts such as happiness and a sense of achievement. The pension scheme, however, is essentially intended to provide a source of income in specific circumstances. In the case of Tier 2 benefits, it is to provide an income where the individual is unable to undertake employment (and thereby obtain an income) to the same extent as before. In view of this, I find that the OED definition is appropriate and that “gainful” in Rule D.6. means “paid”.
41. In the absence of a specific definition for “significantly impaired”, the words must be given their ordinary everyday meanings. The previous determination referred to the dictionary definitions of the words “significantly” and “impaired”. Something might be considered impaired if it is damaged or weakened and the impairment might be considered significant if it is sufficiently great or important as to be worthy of attention. Therefore, the question for Veterans UK and Dr Morris might be framed thus - is Mr K capable of the same range of work that was previously open to him?
42. Rule D.6 refers to the capacity for employment being *significantly* impaired. It must, therefore, envisage something more than simply being unable to do the full range of jobs previously open to him. I note that Mr K has identified a number of employment options, such as joining the police and driving a HGV, which he says would not be open to him. The fact that some employment options may no longer be open to him would not be sufficient, in my view, to meet the Rule D.6 eligibility test. Nor is it the case that the remaining options should be those which he finds most congenial. There must be a significant reduction in Mr K’s employment options such that very many of those roles he would otherwise have been able to consider are no longer viable for him as a result of his health. For this reason, I find that it is appropriate for Veterans UK (and their medical advisers) to consider the severity of Mr K’s symptoms. It is not the case that everyone suffering from the same condition should

receive the same benefits. The qualifying criteria for benefits under both Rules relate to capacity for employment; not the condition suffered from.

43. I have said that the limitations to be considered are those resulting from his health because Mr K has made reference to the fact that his move to Mexico has further limited his employment options. He says this is because of his poor level of Spanish and inability to obtain a work permit. I do not find that this is something that Veterans UK are required to take into account when making a decision under Rule D.6. They are required to consider the impact of Mr K's health on his capacity for employment. Mr K's decision to move to Mexico is a lifestyle choice and not a consequence of his health problems. I imagine that he may well argue that he chose to move to Mexico because of his health. However, the move was not an inevitable consequence of Mr K's PTSD nor is there any evidence that the move was recommended by a doctor. It can more properly be considered a lifestyle choice.
44. It is for this reason that I do not find that an employer's attitude to PTSD is something that Veterans UK are required to take into account. They are required to consider what employment Mr K would be capable of; not whether an employer would employ him.
45. Mr K appears to consider that I have moved away from the interpretation of Rule D.6. set out in PO-4301. This is not the case. However, it is clear that both parties would benefit from the interpretation being clarified and this is what I have done here. I acknowledge that there are difficulties with determining what might be considered a significant impairment, but this is the wording of the Rule and the parties must work with it. There is no requirement to link the tier of benefit payable under the AFPS 05 with the tariff system under the AFCS.
46. Dr Morris noted that Mr K had been diagnosed with delayed onset PTSD. He also noted that Mr K had been due to attend a six-week intensive treatment course but had been unable to do so because of his move to Mexico. Dr Morris expressed the view that such a course would help Mr K manage his symptoms. He acknowledged that Mr K experienced "unpleasant/uncomfortable psychological symptoms" but he did not consider these "as being significant with regard to future employment". Dr Morris concluded by saying that he "would not consider that PTSD is causing Mr K any significant limitation and that the award of a Tier 1 benefit is appropriate".
47. Veterans UK's DO accepted that Mr K had been diagnosed with delayed onset PTSD but said that this, in itself, did not trigger a Tier 2 award. The DO said that the test was to consider whether Mr K's capacity for gainful employment was significantly impaired. She said that the evidence indicated that Mr K was managing his symptoms and should continue to explore the treatment options available to him. The DO said that the evidence did not indicate that Mr K's symptoms were of sufficient severity to affect his mental or physical capacity and, therefore, his capacity for gainful employment.

48. It is clear that, in coming to her decision, the DO was placing a great deal of weight on Dr Morris' advice. The weight that is to be attached to any of the evidence is for the DO to decide and it was open to her to place greater weight on the advice from Dr Morris than, say, Mr K's GP or the occupational therapist. I note that Mr K has also referred to a more recent report by a consultant psychiatrist in connection with another claim he has made. This report was provided after Veterans UK had made their decision and could not, therefore, be taken into account by them.
49. Having said that it is for the DO to determine how much weight to place on any of the evidence, Dr Morris' advice should not be accepted blindly. I fully accept that the DO is a layperson and will therefore not be in a position to review Dr Morris' medical opinion. However, the DO can still be expected to actively review Dr Morris' advice to ensure that he has, for example, not made any factual errors and has correctly interpreted the relevant rule; that is, he has applied the correct eligibility test.
50. At the beginning of his report, Dr Morris stated that the interpretation of gainful employment set out in the previous determination was not his understanding of the current interpretation of the AFPS Rules. However, Dr Morris did not explain what interpretation he was applying to the Rules. So, when he said that he did not consider Mr K's symptoms to be significant with regard to future employment, it is not clear that he meant full-time employment. The test quoted by Dr Morris (functional restriction or limitation caused by the condition which led to invaliding and which would adversely affect civilian employability in jobs suitable for skills and training) is not found in Rule D.6. Nor do I find it to be a particularly accurate summary of the test set out in Rule D.6.
51. In view of this, it was not safe for the DO to rely on the advice from Dr Morris without seeking clarification. It may be tempting for Veterans UK to assume that their own medical advisers are fully cognisant of the AFPS 05 Rules. However, where the medical adviser has specifically noted that his understanding of the Rules differs to that which has been investigated and determined, it is as well to be completely clear. I find that the failure to seek clarification before relying on Dr Morris' report amounts to maladministration. Mr K suffered injustice as a consequence because it is not clear that his eligibility for benefit has been properly assessed. I uphold his complaint on that basis.
52. Mr K has made the point that Dr Morris is not a mental health specialist and he argues that, for this reason, the view of his psychiatrist should be given greater weight. I have said that the report from Mr K's psychiatrist was not made available to Veterans UK when they were reviewing the decision to pay Mr K Tier 1 benefits and, thus, it could not have been considered by either them or Dr Morris. In any event, it is not quite as straightforward as saying a specialist's view should always carry greater weight than the opinion of a generalist. On matters of diagnosis, it may be the case that a specialist would have the better knowledge. However, the question of diagnosis is not at issue here. On the question of eligibility for benefits, a generalist with an understanding of the scheme rules may have some advantages over a specialist

without such understanding. There is nothing intrinsically wrong with Veterans UK seeking an opinion from Dr Morris despite his lack of specialism in mental health.

53. I note that Mr K has questioned Dr Morris' independence. There is no specific requirement under the AFPS 05 Rules for Veterans UK to seek the opinion of an independent medical practitioner. However the practitioner is using his expert skills and would be expected to act independently. So far as his medical opinion is concerned, Dr Morris is accountable to his own professional body and does not come within my jurisdiction. However, I would say that the evidence does not support Mr K's assertion that Dr Morris took financial considerations into account when giving his opinion. I have seen nothing which suggests that Dr Morris acted in anything but good faith.
54. Mr K has made the point that, where a decision involves a finding of fact, there is more scope for me to make a decision myself rather than remit it for reconsideration. However, having found that clarification is required before a decision can be made, it would still be appropriate for me to remit the decision for Veterans UK to reconsider. I do not find that the evidence indicates any lack of good faith on the part of Veterans UK which might support a different course of action. The cases Mr K has referred to rested very much on their own facts and do not assist in determining his case; other than to confirm that there is scope, in the right circumstances, for me to make a finding of fact.
55. Mr K wishes to claim compensation for financial loss on the basis that his move to Mexico was based on an assumption that he would receive Tier 2 benefits. I do not find that this is an appropriate basis for determining whether Mr K has suffered financial loss. There is no evidence that Veterans UK had informed Mr K that he would be receiving Tier 2 benefits. He made assumptions based on his own assessment of his eligibility and, on that basis, went ahead with his move. I do not find that this decision or its financial consequences were a direct result of any maladministration on the part of Veterans UK.
56. Mr K also wishes to claim compensation on the basis that the approach taken by Veterans UK over the past 21 months or so has caused him inconvenience, financial hardship and severe distress. The greater part of that period was covered by the previous determination and cannot be revisited here. This investigation and determination concerns only the most recent decision by Veterans UK. That decision was made within a couple of weeks of the previous determination. On that basis, I do not find that there has been any unnecessary delay on the part of Veterans UK. However, it is the case that the decision was not properly made and Mr K is faced with a further period of uncertainty while it is revisited. I find that it would be appropriate for him to receive some modest compensation for this.
57. Mr K has made reference to the European Convention on Human Rights. He seeks to argue that Veterans UK are in breach of the Convention because he is being denied a benefit to which he has a right. Mr K only has a right to receive benefits under Rule

D.6 if he meets the eligibility criteria. Since that has yet to be determined, it is not possible to find that he has been denied a benefit to which he has a right.

58. Mr K is in the habit of submitting a great deal of evidence (often on multiple occasions). Whilst I can understand his eagerness to see the matter fully considered, much of the evidence he has provided in the past has been of a general nature; it relates to PTSD in general rather than to Mr K's case in particular. I do not find that this assists Mr K's case and in fact can work against it inasmuch as the relevant information becomes lost in a storm of less relevant data. It is necessary for Mr K to be given the opportunity to submit evidence in support of his case. However, on this occasion I find that it would be appropriate to confine that option to the submission of new medical evidence specifically related to Mr K only.

Directions

59. Within 21 days of the date of my final determination, Veterans UK are to reconsider Mr K's case. Before doing so, they are to seek clarification from Dr Morris as to his interpretation of Rule D.6. Mr K is to be allowed one further opportunity to submit any medical evidence relating specifically to his case which he has not already supplied.
60. Within the same 21 days, Veterans UK are to pay the sum of £50 to Mr K for additional distress and inconvenience resulting from this further consideration of his case.

Jane Irvine

Deputy Pensions Ombudsman
20 May 2015

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 ...”

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) ...”

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 ...”