# Ombudsman's Determination

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| Applicant | Mrs R |
| Scheme | Armed Forces Attributable Benefits Scheme (**AFAB**) |
| Respondent | Veterans UK |

## Outcome

1. I do not uphold Mrs R's complaint and no further action is required by Veterans UK.

## Complaint summary

2. Mrs R has complained that Veterans UK has declined to award her "attributable benefits" following the death of her husband.

## Background information, including submissions from the parties

3. On 9 September 1957, Mr R joined the Royal Navy.

4. On 26 October 1983, Mr R joined the Royal New Zealand Navy as a public servant on transfer.

5. On 5 November 1983, Mr R officially left service with the Royal Navy while continuing his service with the Royal New Zealand Navy.

6. On 19 June 1999, Mr R left the Royal New Zealand Navy.

7. On 29 July 2013, Mr R made a claim for a war disablement pension based on a diagnosis of Asbestos related Pleural Disease. This was supported by his respiratory consultant in Australia.

8. On 14 April 2014, Mr R notified Veterans UK that he was returning to the UK for health reasons.

9. On 28 December 2018, Mr R died. The cause of death recorded on his death certificate was:

"I (a) Congestive Cardiac Failure

(b) Biventricular Cardiac Hypertrophy, Ischaemic Heart Disease

(c) Mitral and Aortic Stenosis

II Chronic Obtrusive Pulmonary Disease"

10. The relevant rules are contained in the Naval and Marine (Armed Forces Pension Scheme 1975 and Attributable Benefits Scheme) Order 2010 (as amended). Rule C.1 provides:

> "(1) Subject to paragraphs (2) and (4) a surviving adult dependant is entitled to short term and long term compensation and a survivor's attributable lumps sum as compensation for a person's death … where –
>
> (a) it has been accepted for the purposes of articles 23 and 24 of the Service Pensions Order that the death was attributable to or hastened by –
>
> (i) an injury which was attributable to the person's service in the Royal Marines or Royal Navy; or
> (ii) the aggravation of such service of an injury which existed or arose during such service;
>
> (b) the service referred to in sub-paragraph (a) was service in the Royal Marines or Royal Navy in the period beginning with 31st March 1973 and ending with 5th April 2005;
>
> (c) the service referred to in sub-paragraph (a) was not excluded service; and
>
> (d) the Defence Council accepts on the balance of probabilities that the death was attributable to or hastened by the person's service …"

11. Following the death of Mr R, his wife, Mrs R was awarded a widow's pension under the War Pensions Scheme (**WPS**). This was an automatic award as Mr R was eligible for an 80% disablement award at the time of his death. A medical decision was not made. The award from the WPS was on the basis that Mr R's death could not be dissociated from his service prior to April 2005 and so it was considered due to his service. Mrs R was then considered for attributable benefits under the AFAB.

12. On 9 June 2019, Veterans UK sought the advice of the medical adviser (**MA**) to be able to consider Mrs R's claim for attributable benefits. It said:

- Mr R had died after leaving service.
- Mrs R had been awarded a War Widows Pension and so Veterans UK must consider whether there was a further entitlement under the AFAB scheme for dependants.

- Using the balance of probabilities standard of proof and the relevant synopsis of causation could the MA provide a medical opinion whether the cause of death could have been attributable to, or hastened by, military service.

13. On 7 August 2019, the MA provided their opinion which was:-

- The underlying cause of death was Ischaemic Heart Disease. This was normally caused by Atherosclerosis. Atherosclerosis was the most frequent cause of Coronary Heath Disease (**CHD**). The process of Atherosclerosis began in childhood and progressed throughout adult life. The modifiable risk factors were inactive lifestyle, cigarette smoking, a diet rich in calories and saturated fats, High Blood Pressure, Diabetes Mellitus, and Hyperlipidaemia. CHD included Ischaemic Heart Disease. There was no evidence that there was an increased risk associated with Mr R's service.

- The MA also reviewed the Synopsis of Causation[1] for Chronic Obstructive Pulmonary Disease (**COPD**) and noted that cigarette smoking was recognised as a significant factor in the cause of lung disease. There were no medical notes with this case to confirm or deny a history of heavy smoking. There was no proven evidence that exposure to any environmental or Service factors, including Service in the Royal Navy that needed to be considered in this case and the postmortem did not confirm Asbestos Related Lung Disease

- The MA assessed, on the balance of probabilities standard of proof, that the cause of death could not have been attributable to or hastened by Mr R's employment in the Royal Navy.

14. On 23 August 2019, the Deciding Officer (**DO**) reviewed the evidence of the MA and the Synopsis of Causation document to decide if there was any causal link between Mr R's military occupation and death. The DO confirmed:-

- Mr R died at age 77 which was 35 years after leaving the Royal Navy. His cause of death was recorded on his death certificate as Congestive Heart Failure due to the underlying condition of Ischaemic Heart Disease. A secondary condition was listed as COPD.

- The DO considered whether Mr R's cause of death had any association with his military service since under the WPS an award of a War Widows Pension had been made. His cause of death was ultimately due to Heart Disease. The MA had noted that Heart Disease was a very common cause of death, Atherosclerosis referred to the build-up of fats, cholesterol, and other substances in and on the artery walls (plaque) which could restrict blood flow and was the most common cause of heart disease. It began in childhood and progressed through adult life. The modifiable risk factors were lifestyle related.

[1] Synopses of Causation were commissioned by the Ministry of Defence to assist in the decision making process. They were written by independent medical practitioners based on a literature search and validated by external consultants who were specialists in the relevant field. The synopsis of causation for Chronic Obstructive Pulmonary Disease is dated September 2008.

There was no greater risk of developing this disease in Service life than in a civilian occupation.

- The secondary cause of death had a recognised association with exposure to cigarette smoke and no accepted link to employment in the Armed Forces.

- Taking account of the opinion of the MA and the Synopsis for the Causation for the condition, the DO was of the opinion that Mr R's death was not in any way linked to his career in the Royal Navy. The DO rejected the case for attributable benefits.

15. On 27 August 2019, Veterans UK sent a letter to Mrs R which said:-

    - A Discretionary Award Review (**DAR**) had been conducted to decide whether Mrs R had an entitlement to an AFAB award.

    - The DAR DO had decided that no AFAB benefits were due as there was no grounds for accepting the WPS attributability. If Mrs R disagreed with this decision, she could appeal to the Discretionary Award Appeals Review (**DAAR**).

    - The reason why attributability was sometimes not accepted was because the rules used by the two pension arrangements to decide if a condition was attributable to or aggravated by service were different.

    - The WPS must make an award unless it could be shown that the death was not caused by or significantly hastened by Service.

    - Under the rules of the AFAB Scheme reasonable evidence was required, using the balance of probabilities, which showed that the death was caused by or significantly hastened by service.

16. On 31 August 2019**,** Mrs R appealed the decision and said she strongly objected to the decision and the findings that Mr R died of smoking and lifestyle.

17. On 24 September 2019, Veterans UK asked the Senior Medical Adviser (**SMA**) to review Mrs R's appeal and the additional medical evidence she had provided going back to 1994. In addition, the MA's opinion was provided and the SMA was requested to consider the Synopsis of Causation for Atherosclerosis and the Synopsis of Causation for CHD and for COPD.

18. On 7 October 2019, the SMA provided their opinion which said:-

    - They had carefully reviewed the file and noted Mr R's long service in the Royal Navy as a marine engineer, his smoking history, history of asbestos exposure, the certified cause of death and, finally, the postmortem dated 7 January 2019. Mr R's death had been reported to HM Coroner on 30 April 2019 because of the possibility of an asbestos related death. The SMA also noted the reference to the diagnosis of Asbestos Related Lung Disease in Australia.

- The standard proof for AFAB benefits was the balance of probabilities. The autopsy confirmed severe stenosing Atherosclerosis and the heart muscle was damaged by what was most likely to be post infarction that is heart attack thinning and fibrosis. Mr R had COPD which was most associated with cigarette smoking. The SMA noted Mr R was a former smoker. There was evidence of asbestos exposure and detection of amphibole asbestos. This was confirmed by the mineral fibre analysis following the postmortem as causing Pleural Plaques and thickening, Asbestosis was not confirmed.

- So, the SMA advised that Mr R's death at age 77 was not, on the balance of probabilities, caused or hastened by Service.

19. On 8 October 2019, the DO reviewed the case and said:-

    - Mrs R submitted a letter of appeal. In her appeal letter she strongly disagreed with the decision not to award AFAB benefits, and she did not agree with the MA's comments.

    - Mrs R enclosed documentation from 1994 for consideration in her appeal. She stated that part of Mr R's pay was in cigarettes, and she further stated that he rarely smoked at home.

    - It had considered the SMA's comments in full.

    - Following the SMA's comments a letter was received from Mrs R. However, as she did not attach any further medical evidence, the SMA was not asked to revisit the case.

    - Taking into account the available medical evidence together with both the MA's and the SMA's comments, the DO was in agreement that there were no known Service causes in relation to Mr R's cause of death. Nor was there any evidence of aggravation by Service. So, on the balance of probabilities, Mr R's death was not caused by nor aggravated by Military Service and no attributable benefits were due.

20. On 7 November 2019**,** Veterans UK sent a letter to Mrs R stating that the DAAR had considered her appeal and it had been rejected.

21. Following the complaint being referred to The Pensions Ombudsman, Mrs R made further submissions that have been summarised below.

**Mrs R's position**

22. Mr R's heart problem, which was Hypertension, was diagnosed at age 50 and was successfully managed with medication.

23. His heart was also strong enough to endure:-

    - Successful treatment of Pericarditis in 2008.

- Two Pleurodesis operations in 2011, of which the first was unsuccessful, resulting in approximately two weeks in an Intensive Care Unit.
- Countless chest infections.
- Several Hypoxic episodes. In July 2017 his oxygen levels read 74.

24. Hospital doctors had told her and Mr R that the Pleural Plaques had now calcified and that there was no more elasticity in his lungs, and this was impacting on his heart.

25. The response from Veterans UK focused on Mr R's "bad heart". Asbestosis was not mentioned but COPD, smoking and lifestyle had now become the cause of death.

26. Mr R had four brothers, three of whom have had serious heart problems, all are still alive and well, the eldest now aged 85. Mr R was the only one in the Royal Navy, the only one who had asbestos exposure. He was the only one who died aged 77.

27. The first line of the coroner's report stated that Mr R had diabetes, and this was incorrect. She did not give permission to divulge the postmortem report to a third party but the DO seemed to have been able to quote it verbatim.

28. The Royal Navy, as an employer, had a duty of care to its personnel, families, and veterans.

29. She did believe that her husband's death was aggravated by service. Aggravated means "made more serious or severe" and there was a great deal of emerging evidence and research pointing to a link between Heart Disease/COPD and asbestos exposure.

30. COPD could be caused by the inhalation of foreign fumes or substances. Various statistically significant incidences of COPD had been found among those exposed to toxic materials such as asbestos. A Swedish study of 316,729 construction workers found the mortality rate from COPD was more than two and a half times higher in participants who had been exposed to airborne toxins, including asbestos, than in patients who had not been exposed to toxic dust in their jobs.

31. The same was true of Heart Disease. A study published in Britain's journal of Occupational and Environmental medicine had indicated asbestos exposure was linked to an increased risk of Heart disease because of its inflammatory properties. There were 15,557 deaths from all causes analysed during the study period. Compared with the general population, men exposed to asbestos were 39% more likely to die from Heart Disease.

32. Moreover, her husband's medical records were also relevant. On 14 August 2018, a respiratory consultant directly linked Mr R's Heart failure, Pulmonary Hypertension, and Lung Disease to asbestos exposure.

33. She believed there was evidence that in all probability the causes of her husband's death were aggravated by Service and in that event the threshold was clearly met. To

suggest that her husband's heart issues, and COPD were the sole causes of his death, which was entirely natural and not aggravated by his service was either naive in the extreme or disingenuous.

## Adjudicator's Opinion

34. Mrs R's complaint was considered by one of our Adjudicators who concluded that no further action was required by Veterans UK. The Adjudicator's findings are summarised below in paragraphs 35 to 41.

35. The Adjudicator explained that it was not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mrs R's eligibility for payment of attributable benefits. The Ombudsman was primarily concerned with the decision-making process. The issues considered included whether the relevant rules have been correctly applied; whether appropriate evidence had been obtained and considered; and whether the decision was supported by the available relevant evidence.

36. Medical, and other, evidence was reviewed in order to determine whether it supported the decision made. However, the weight which is attached to any of the evidence was for Veterans UK to decide, including giving some of it little or no weight. It was open to Veterans UK to prefer evidence from its own advisers; unless there was a cogent reason why it should not. If the decision-making process was found to be flawed, the appropriate course of action was for the decision to be remitted for Veterans UK to reconsider. It was on this basis that the Adjudicator reviewed Mrs R's complaint.

37. In order for Mrs R to qualify for benefits under Rule C.1 (see paragraph 10 above), her husband's death had to be accepted by Veterans UK as attributable to, or hastened by, his service. Veterans UK must have applied the civil burden of proof in coming to a decision; that is, a decision based on the balance of probabilities.

38. In the Adjudicator's view, given the nature of the question it has to address, it was entirely appropriate for Veterans UK to seek medical advice before coming to a decision. The advice it received was that Mr R's death was not attributable to, nor hastened by, his service.

39. Mrs R challenged the medical evidence and provided: evidence of the health of Mr R's brothers, Mr R's experience in hospital and additional studies that discussed the link between asbestos exposure and Heart Disease. The role of the Ombudsman was not to review the medical evidence and decide if it was correct but rather to decide whether Veterans UK had correctly interpreted Rule C.1 and whether it had based its decision on sufficient and appropriate evidence.

40. The Adjudicator's view was that Veterans UK applied the correct interpretation of the eligibility requirements for attributable benefits. Rule C.1 provided that entitlement to benefits arose where the member's death was accepted as attributable to or

hastened by his/her service. The advice that Veterans UK received was that there was no accepted occupational reason for an individual to develop COPD or CHD. This position was confirmed by the SMA. It was also consistent with the information detailed in the Synopsis of Causation. The Adjudicator did not identify any reason why Veterans UK should not have accepted the advice it received from the MA and SMA.

41. Mrs R also said that she did not agree for the postmortem report to be released to Veterans UK and that the coroner's report contained incorrect information. The postmortem report formed part of Mr R's medical records and as such was released to Veterans UK. It was unfortunate that the coroner's report contained an error with regard to Mr R having diabetes. However, in the Adjudicator's opinion this did not negate the whole report. Veterans UK had not relied on the report alone and had considered the information provided as part of a full review of the relevant information available. In the Adjudicator's opinion, there was no reason for Veterans UK to not consider the coroner's report and there was no maladministration in the decision making process.

42. Mrs R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs R provided her further comments which are, in summary:

- How could Veterans UK, an organisation set up to support service personnel and their families, have maligned Mr R's exemplary forty-two years of Naval service, twenty of which as a Warrant Officer Marine Engineer Artificer.

- She was told that she had exhausted the internal appeals process, but she has now reviewed paperwork she has received from the MOD regarding her complaint, and, on 20 March 2020, an internal note said:

  "I have spoken to appeals and Mrs R will have a right to appeal."

  This is contrary to what she was told, and she is now unsure if the correct process had been followed.

- The autopsy report should be voided. It contained incorrect information and neither she nor the coroner gave permission for it to be released. The coroner's letter she received, dated 12 May 2019, said:

  "The Pathologist will never send a report to a third party without the permission of the coroner and from reviewing the file, no such permission was given in this case."

- She did not understand how Asbestosis with Pleural Plaques, an accepted condition for Mr R's war pension, was now disregarded as a contributory cause of death.

- She believed that there was sufficient evidence to support Rule C.1. The synopsis of causation for Atherosclerosis said that the modifiable risk factors were inactive lifestyle, cigarette smoking, high blood pressure and diabetes. Mr R was still in

active duty at age 55. He smoked from age 18 to 30 but no evidence was reviewed to verify he was a heavy smoker. He was successfully treated for high blood pressure from age 50 and he was never diagnosed with diabetes. The decision was made on the balance of probabilities that Mr R died of smoking and lifestyle. This was not a scientific process.

43. I note Mrs R's further comments, but they do not change the outcome. I agree with the Adjudicator's Opinion.

## Ombudsman's decision

44. Mrs R has complained that she should have been eligible for benefits under the AFAB Scheme. That is, she has submitted that there was a causal link between Mr R's service and his death. I have every sympathy for Mrs R as the subject of Mr R's death is deeply emotive for her.

45. For Mrs R to qualify for benefits under Rule C.1, Mr R's death has to be accepted by Veterans UK as attributable to or hastened by his service. Veterans UK must apply the civil burden of proof in coming to a decision; that is, a decision based on the balance of probabilities. I consider that Veterans UK has understood and acted in accordance with the criteria laid out by Rule C.1 when considering Mrs R's case. That is, it understood that it needed to determine whether Mr R's death was attributable to or hastened by his service in the Royal Navy. To do this, Veterans UK sought medical advice from the MA. On appeal, advice was sought from the SMA.

46. I have considered the opinions expressed by the medical advisers, in connection with the available evidence/submissions from Mrs R. Overall, I am satisfied that Veterans UK was in receipt of sufficient information to allow it to proceed with making a decision regarding Mrs R's eligibility for AFAB benefits in accordance with Rule C.1. There is no identifiable reason as to why Veterans UK should not have accepted the advice it received from the MA or the SMA.

47. Mrs R has said that the autopsy report should not have been used as part of the evidence. I agree with the Adjudicator, it was unfortunate that the coroner's report contained an error with regard to Mr R having diabetes, but this did not make the whole report invalid. I note that Mrs R was told that permission had not been given by the coroner to release the autopsy report, but the fact remains that the report was released and provided to Veterans UK. This can only have happened if the coroner's office agreed to provide it and is, perhaps something that she should take up with the coroner's office

48. Mrs R has said she believed that there was insufficient evidence to support Rule C.1 due to Mr R's active duty, his smoking stopped at age 30 and his high blood pressure was controlled. It is not for me to say whether or not I agree with the view taken by Veterans UK. In situations such as this a contrary view may be taken on the same evidence by a different decision maker. But I am satisfied that there is sufficient

evidence to support the decision maker's view to mean it cannot be considered perverse and I see no reason to interfere.

49. Mrs R has said she did not understand how Asbestosis with Pleural Plaques, which was an accepted condition for Mr R's war pension disablement award was now disregarded as a contributory cause of death. I can understand why the refusal of an attributable pension under the AFAB is difficult to accept, given that a widow's pension is payable under the WPS. Although the test is the same under both schemes, a different standard of proof applies. Under WPS there is, in effect, a presumption that the death was attributable to service. But, under the AFAB, the decision maker has to be satisfied, that, on the balance of probabilities, the death was attributable to or significantly hastened by service.

50. Mrs R was unsure if she could have made a further appeal regarding this matter. The correct process is set out in the current guidance Armed Forces Pension Scheme Appeals and Disputes Scheme 2022- 2023. Available on the Gov.uk website. A DAR is followed by a DAAR for a discretionary award and the Internal Disputes Procedure is available for complaints about maladministration. Following the appeal outcome the complaint can be referred to The Pensions Ombudsman. I agree that the comments regarding Mrs R's right to appeal lacked clarity, but she has been able to complete the appeal process regarding the DAR decision.

51. I recognise that my decision will be disappointing for Mrs R, but I do not uphold her complaint.

**Anthony Arter CBE**

Deputy Pensions Ombudsman
14 May 2024