CAS-30163-T9G3

Ombudsman's Determination

Applicant	Mrs I
Scheme	Local Government Pension Scheme (**LGPS**)
Respondents	Dorset Council (**Dorset**)

Outcome

1. Mrs I's complaint against Dorset is not upheld.

Complaint summary

2. Mrs I has complained that:-

- her ill health retirement award was not reviewed after 18 months, as provided for in the LGPS regulations;
- the doctor from whom an opinion was sought for the purposes of re-assessing her original award was not provided with all the relevant evidence; and
- the length of time taken to review her case by Dorset was unreasonable.

Background information, including submissions from the parties

Background

3. Mrs I was employed by Dorset until June 2016, when her employment was terminated on the grounds of medical capability. Initially, Mrs I was not awarded ill health retirement benefits. She appealed and, in October 2016, Dorset wrote to her informing her that she had been awarded Tier 3 benefits with effect from June 2016.

4. Mrs I's ill health retirement award was the subject of a previous complaint to The Pensions Ombudsman (**TPO**). Mrs I's complaint was considered by an Adjudicator, who issued an opinion in May 2018 (PO-19693). The Adjudicator expressed the view that Mrs I's complaint could be upheld and suggested that, in order to put matters right, Dorset should review her case. He also suggested Mrs I receive £500 for distress and inconvenience. Both Mrs I and Dorset accepted the Adjudicator's opinion and her complaint was treated as withdrawn. This investigation relates to subsequent events; it cannot reopen the previous investigation.

5. The relevant regulations are contained in the Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended) (the **2013 Regulations**). Regulation 35 provides for three tiers of benefits for ill health retirement depending upon the member's level of incapacity for future employment. Briefly:-

   Tier 1 The member is unlikely to be capable of undertaking gainful employment before normal pension age.

   Tier 2 The member is unlikely to be capable of undertaking any gainful employment within three years of leaving employment but is likely to be capable of such employment before normal pension age.

   Tier 3 The member is likely to be capable of undertaking gainful employment within three years of leaving employment (or before normal pension age if earlier).

   Extracts from the relevant regulations are provided in Appendix 1.

6. A member may receive Tier 3 benefits for as long as s/he is not in gainful employment up to a maximum period of three years. Regulation 37(5) requires Dorset to review payment of Tier 3 benefits after they have been in payment for 18 months (**the 18-month review**). It is then required to decide between: (a) continuing payment for a period up to the maximum three years; (b) awarding Tier 2 benefits from the date of the review decision; or (c) ceasing payment of benefits.

7. Before making a decision under either Regulation 35 or Regulation 37, Dorset is required to obtain a certificate from an independent registered medical practitioner (**IRMP**). The IRMP is to be asked whether, and if so when, the member is likely to be capable of undertaking gainful employment. "Gainful employment" is defined as: "paid employment for not less than 30 hours in each week for a period of not less than 12 months".

8. On 7 December 2017, Dorset wrote to Mrs I asking her to complete a form as part of the 18-month review process. The form asked Mrs I to state whether she had obtained paid employment of 30 hours or more. She circled the option "No" and signed the form. Mrs I dated the form 10 December 2017. She added a note saying that her Tier 3 award had not taken into account the fact that osteoarthritis is a degenerative disease. Mrs I said she had been diagnosed with osteoarthritis in her wrists (2011) and in her neck and lower back (2013). Mrs I said she had had injections in her wrists in the last few months. She said she had been told by her consultant that NICE[1] guidelines stated that injections in her neck were no longer a viable option and that future treatment would be pain management. Mrs I said she could not sit in one position for any length of time. Dorset acknowledged receipt of the form on 13 December 2017.

9. Dorset's occupational health (**OH**) team wrote to Mrs I, on 15 December 2017, requesting her consent to undertake the 18-month review.

[1] National Institute for Health and Care Excellence

10. On 29 December 2017, Mrs I emailed the OH team to ask if a 2013 MRI scan would be included in the evidence to be reviewed. The OH team responded the same day and said all the evidence it held relating to Mrs I's neck condition would be submitted and this would include the MRI scan. It also said the MRI results had been referred to in 2016 reports from Mrs I's GP and a consultant rheumatologist, Professor Thompson[2]. The OH team said the 18-month review would only commence when Mrs I had provided her written consent and it would await her further instruction. On 2 January 2018, Mrs I emailed the OH team again. Among other things, she mentioned that the 18-month review would be put on hold until TPO had made a decision.

11. In an internal email, dated 19 February 2018, the OH team said it had spoken to Mrs I on 20 December 2017 and 2 January 2018. It said it had explained that the 18-month review was separate to Mrs I's appeal to TPO but that Mrs I had not given it consent to proceed.

12. The TPO Adjudicator issued his opinion in May 2018, and it was accepted by both parties in the same month. Having agreed to reconsider Mrs I's case, Dorset arranged for it to be referred to a doctor working for the local NHS trust and an appointment was arranged for 21 June 2018.

13. The NHS Trust doctor subsequently declined to undertake the review; as did two other doctors working for the NHS trust. Dorset was advised that the doctors felt the case should be reviewed by a Member of the Faculty of Occupational Medicine who had LGPS experience. The NHS trust recommended another doctor but Mrs I did not agree to her case being referred to this doctor. Dorset and Mrs I subsequently reached agreement that her case would be referred to an IRMP, Dr Shaw.

14. Dorset wrote to Dr Shaw on 19 September 2018. It said it had been directed by TPO to commission an IRMP's review of Mrs I's February 2016 application for the early payment of her pension on the grounds of ill health. Dorset said TPO had listed the documents which it was to provide as follows:-

    - An MRI scan dated 16 November 2013.
    - Reports from Mrs I's GP dated 26 April and 11 August 2016; from Professor Thompson dated 25 November 2013 and from Dr Milne dated 23 March 2016.
    - Mrs I's sickness record from May 2006 to June 2016.
    - Mrs I's 2016 application form, appeal letter and internal dispute resolution (**IDR**) application.
    - A job description.
    - Workstation assessments carried out in 2011 and 2013, and information about equipment recommended by an Access to Work assessment in 2013.

[2] Professor Thompson's report is actually dated 25 November 2013

15. Dorset said TPO had requested a further IRMP's report because the MRI scan and workstation assessments had not been made available to the previous IRMP and the sickness record had been of poor quality. It said Mrs I had asked that the Access to Work assessment be provided and explained it did not have a copy of the full assessment because this would have been sent to her employer. Dorset asked Dr Shaw to confirm that he had seen these documents in his report.

16. Dorset wrote to Mrs I, on 31 October 2018, setting out the approach it proposed to take. In particular, it confirmed that it had not instructed Dr Shaw to undertake a face-to-face assessment because this was not standard procedure. It said the review of Mrs I's case should be based on her medical condition in 2016 and, therefore, the inclusion of medical records relating to assessments or reviews after this date was irrelevant.

17. Dr Shaw issued a report on 14 November 2018. He said he supported the decision of an earlier IRMP, Dr Blatchford, to refuse Mrs I's application for ill health retirement because all reasonable treatment options at the time had not been explored. Summaries of and extracts from the medical evidence relating to Mrs I's case are provided in Appendix 2.

18. Mrs I contacted Dr Shaw about his report. In response, Dr Shaw said he was not prepared to enter into a prolonged debate because his report had been based on the paperwork he believed had been available at the time. He went on to say there was a debate around the use of neck injections and suggested that the NICE guidelines might be used to ration services. Dr Shaw said there were many people who had benefitted from such injections, but he agreed that they were of most use for people who had referred pain in the arm. He suggested that such injections were still available in the private sector.

19. Mrs I submitted a detailed response, dated 17 November 2018, and emailed Dorset on 18 November 2018. In summary, Mrs I said:-

    - Dr Shaw's finding that she had refused to have injections in her neck was incorrect. She had not refused any treatment; she had taken the advice of the doctors who were treating her.
    - Professor Thompson's and Dr Milne's comments concerning injections in her neck had been taken out of context.
    - She had been assured by her GP and consultant that injections in the neck had been stopped due to lack of efficacy.
    - This treatment was not offered on the NHS and she was not in a position to access private healthcare.
    - Dorset had not provided Dr Blatchford with all the relevant evidence and, consequently, her report should not be relied upon.

- She could not find any requirement in the LGPS regulations for all reasonable treatment options to have been explored.

20. In her email to Dorset, Mrs I reiterated her view that Dr Shaw had based his assessment on the opinion that she had refused injections in her neck and this was not the case. Mrs I also disagreed with Dr Shaw's comments concerning the decision not to offer this treatment on the NHS. She said she had been told the treatment was not available because it was deemed ineffective and referred to a letter from a consultant rheumatologist, Dr Marks, which she had attached.

21. Dr Shaw emailed Mrs I again on 19 November 2018. He said he was genuinely sorry to have reached the conclusion he had and it was a pity they had not met a few years ago. Dr Shaw said, whilst doing his research, he had come across patient information leaflets from two hospitals on the subject of neck injections and suggested that this indicated some leeway on the NICE guidelines depending upon the person's symptoms.

22. On 4 March 2019, Dorset notified Mrs I of the outcome of its reconsideration of its original decision on her ill health retirement. It said Dr Shaw had concluded that he supported the decision by Dr Blatchford to refuse Mrs I's application for ill health retirement. Dorset referred to the 2013 Regulations and guidance issued by the Department for Communities and Local Government (**DCLG**) in 2014. It noted that the guidance stated that an IRMP should consider whether: (i) the member would be capable of following further treatment; (ii) whether the treatment was readily available and appropriate; and (iii) whether, with treatment, the member was likely to become capable of gainful employment before normal pension age. Dorset said the fact that the member might choose not to have such treatment was not a relevant factor.

23. Dorset responded to points raised by Mrs I as follows:-

    - It did not agree that Dr Shaw's statement to the effect that Mrs I had refused injections was incorrect. Dr Shaw had simply referred to a statement in Professor Thompson's report of 23 March 2016 (*sic*).

    - It had not considered a face-to-face consultation with Dr Shaw to be appropriate because the review was to be based upon the information available in 2016. Nevertheless, it had given Dr Shaw the option to arrange a face-to-face consultation if he felt it would be beneficial. He did not consider this necessary.

    - Dr Shaw had addressed the availability and appropriateness of treatment in his report.

    - Mrs I had agreed the evidence which was to be sent to Dr Shaw.

    - Mrs I had commented that she could find no reference to having to explore all reasonable treatment options in the LGPS Regulations. It had referred to the

relevant Regulations and guidance which existed at the time of her original application and the decision in 2016.

- It had not sent any separate or additional instructions to Dr Shaw without Mrs I's knowledge.

24. Dorset wrote to Mrs I, on 27 March 2019, stating that its review had been based on Dr Shaw's opinion; that no tier of ill health retirement benefit should be granted. It confirmed that Mrs I would continue to receive her Tier 3 pension and apologised for any confusion.

25. Mrs I emailed Dorset, on 28 March 2019, setting out three complaints: (i) her Tier 3 award had not been reviewed in December 2017; (ii) it had based its latest decision on Dr Shaw's opinion when he had not been made aware of all the facts; and (iii) the length of time taken by Dorset to make a decision had added to her distress and inconvenience.

26. Dorset responded on 8 April 2019. It said:-

- It had been unable to progress with the 18-month review because Mrs I had denied it permission to progress until her appeal relating to the level of award had been concluded.

- Its decision had taken Dr Shaw's opinion into account as it had been instructed to by the TPO Adjudicator. All the information provided to Dr Shaw had been agreed with Mrs I before being sent to him.

- The matter of increased distress and inconvenience would be a judgment for TPO.

27. Mrs I completed an application to TPO on 11 April 2019

28. Dorset wrote to Mrs I, on 12 April 2019, expressing the view that the 18-month review should now proceed. It set out the approach it proposed to take. Dorset said the review would be paper-based and that the NHS trust had confirmed that it could take Mrs I's case. Dorset said the review would include a consideration of up-to-date medical reports and that it would also provide the doctor with the agreed list of documents sent to Dr Shaw. Dorset said, in the event that the recommendation was to uplift Mrs I's pension to Tier 2, it would backdate the uplift to December 2017. It said, if the recommendation was to suspend Mrs I's Tier 3 pension, this would not be backdated and payment would continue to the end of the original three-year period. Dorset said it required Mrs I's consent to obtain medical information and provided her with consent forms.

29. On 16 April 2019, Mrs I emailed Dorset saying she had raised new complaints with TPO. She said she had no objections in principle to the 18-month review but thought it prudent to wait for TPO's decision. In response, Dorset said it was happy to delay the 18-month review but thought it should be completed by the end of May. It said it

would be possible to progress with the review in parallel with Mrs I's complaints to TPO.

30. Dorset wrote to Mrs I again, on 24 May 2019, asking her to complete the consent forms to allow the 18-month review to proceed. Mrs I responded by email the same day. She said Dorset was asking for documentation which she had already supplied on more than one occasion and she assumed it had, therefore, been mislaid. Mrs I said she had been pushing for a review for three years. She asked for clarification that Dorset did not wish to await the outcome of her complaint to TPO before undertaking a review.

31. Dorset responded on 5 June 2019. It said Mrs I's Tier 3 pension was due to cease on 12 June 2019 and this was why it was attempting to progress with the 18-month review. Dorset said that, in order to progress with the review, it needed Mrs I's consent to access medical information, which required her to complete the forms previously sent to her. It clarified that this was a different form to that which she had signed in December 2017. Dorset also said that it had enquired as to whether there was any discretion to extend the payment of Mrs I's Tier 3 pension and had been told there was none. It said, if it proceeded with the review, it might be the case that a higher level of award was granted and this would mean continuous access to a pension for Mrs I.

32. Dorset met with Mrs I and a companion on 14 June 2019. Mrs I has submitted a statement by her companion giving her recollection of what was said at the meeting.

33. On 22 July 2019, Dorset wrote to Mrs I saying it had received information from her GP which would allow it to commence the 18-month review procedure and commission the IRMP to consider her current health. It said it had asked its OH team to check a 2016 report from Mrs I's GP. Dorset said the GP had stated that Mrs I had experienced neck pain, with associated migraine, for some time. It said the GP had mentioned a referral to a consultant rheumatologist and the results of an MRI. Dorset said this information was the basis for the original decision to award Mrs I a pension. It said it was unable to refer to Mrs I's wrist pain as part of the review and it was unable to agree to her additional wording for the letter to the IRMP. Dorset said it proposed to send the original commissioning memo to the IRMP, together with a pack of information as provided by Mrs I in the June meeting and the additional information provided by her GP. It said, as Mrs I had already provided written consent to the review by the IRMP, it would now make the necessary arrangements. It said it had contacted the NHS Trust to ensure the review was progressed as a matter of urgency and hoped that the IRMP would be able to look at Mrs I's case within the next fortnight.

34. Mrs I emailed Dorset on 22 July 2019. She set out a number of concerns with its proposed approach to the 18-month review. Dorset responded, on 30 July 2019, reiterating its view that it could only consider a change to the medical condition which had led to the decision to pay Mrs I's pension. It said it had reviewed the medical evidence and there had been no reference to Mrs I's wrists. Dorset said the 2013

Regulations did not, therefore, allow it to include this condition as part of the 18-month review. It confirmed that an appointment had been booked with the chosen doctor for 7 August 2019. Dorset listed the information it proposed to send to the doctor and confirmed that nothing had yet been sent to him.

35. On 31 July 2019, Mrs I emailed Dorset raising further queries relating to the inclusion of the arthritis in her wrists and the 18-month review procedure. Dorset responded on 2 August 2019. It referred to the Adjudicator's opinion of May 2018 and said it had undertaken to comply with the instruction to obtain a further medical opinion. It said Dr Shaw had provided an opinion following a review of the relevant medical information, which had been agreed with Mrs I and included information about her wrists. Dorset said it had read Dr Shaw's report and there was no specific reference made to Mrs I's wrists. It said there had been no reference to any particular medical condition in its instruction to Dr Shaw. Dorset reiterated its view that, for the 18-month review, it was restricted to reviewing the condition which had been the reason for the Tier 3 award. It confirmed that the appointment with the IRMP, on 7 August 2019, was on hold and said it needed Mrs I's consent to send any paperwork to the IRMP.

Mrs I's position

36. Mrs I submits:-

- It is factually incorrect to say that she refused to proceed with an 18-month review in December 2017. She returned the review form on 10 December 2017. This was acknowledged on 13 December 2017. She has asked Dorset for a copy of the form and has been told that it cannot be located. She would like Dorset to apologise for stating that she had refused the 18-month review.

- She was informed by Dorset, on 2 January 2018, that the 18-month review could not be completed while there was a current case with TPO.

- Dr Shaw was made aware of Dr Blatchford's report but not a report from another IRMP, Dr Chapman[3]. It is correct that she agreed to the information being sent to Dr Shaw. She did not see the point of Dr Blatchford's report because it had been superseded by Dr Chapman's report. She assumed Dorset would tell Dr Shaw that Dr Chapman had awarded her Tier 3 benefits in September 2016.

- A ruling by the Information Commissioner's Office (**ICO**) concluded Dorset could use Dr Chapman's report until a new assessment was carried out.

- She questions why Dr Shaw said he supported Dr Blatchford's decision. This was not what TPO had directed and she, therefore, questions what instructions Dorset gave Dr Shaw.

[3] This was the report which led to Mrs I being awarded Tier 3 benefits.

- She was always against there being a review because it should have been a fresh opinion, as required by TPO. Dorset never agreed to this.
- Dr Shaw's reason for refusing her appeal was based on treatment which is no longer available on the NHS. NICE has decided that the treatment is ineffective.
- At no time, other than in occupational health reports in 2013, has Dorset acknowledged the arthritis in her wrists. The reason why her wrists were not mentioned in the original assessments is because Dorset withheld information from the original assessments.
- In the meeting in June 2019, Dorset agreed to include all her medical evidence up to June 2019. This was to include all the medical evidence held by Dorset but withheld from the IRMPs, including information about her wrists. Dorset later withdrew this agreement.
- She would like to be awarded the correct tier of pension backdated to 13 June 2016; that is, the day her retirement commenced.
- The £500 she was awarded under her previous complaint to TPO was for distress and inconvenience; not financial loss.
- It is her opinion that the appeal procedure adopted by Dorset is detrimental to any appeal. The appeal procedure is undertaken by two people; one of whom also deals with complaints against Dorset. The appeal procedure, in her case, took too long and requests for meetings were refused.

Dorset's position

37. Dorset submits:-

- Mrs I called, on 2 January 2018, to inform it that there should be no 18-month review until TPO had made a decision. It cites an email, dated 2 January 2018, confirming the discussion. Mrs I called, on 23 January 2018, and was informed that the review should have been done.
- It can confirm that Mrs I's form has not been mislaid and is held by its OH team.
- Its OH team wrote to Mrs I on 15 and 29 December 2017, and 2 January 2018, requesting consent to a medical review. It understands that Mrs I declined to consent to a review at this time whilst awaiting the outcome of her complaint to TPO.
- The 18-month review of Mrs I's Tier 3 pension was put on hold pending the review of the original award following the TPO Adjudicator's opinion. It has provided a timeline of the process.

- The statement, dated 8 April 2019, to the effect that Mrs I had declined to consent to the 18-month review until after her appeal was thought to be true at the time. This was based on the email exchanges in December 2017, and January 2018 (see paragraphs 10 and 11 above). There was no wish to cause Mrs I any distress.

- Since April 2019, it has been in ongoing correspondence with Mrs I and has met with her to discuss the instruction to the IRMP. In the course of the correspondence, it uncovered a misunderstanding of the review process. It has explained to Mrs I that the form was the first step in the review process and the second step was to seek her consent to a medical review. It has informed Mrs I that it cannot proceed with the 18-month review without her consent.

- Its referral to Dr Shaw included information relating to Mrs I's wrists. Dr Shaw did not refer to this in his decision.

- It is restricted in the information it can consider within the review to the conditions which were referred to in the decision to release Mrs I's pension. This decision did not refer to Mrs I's wrists. The LGPS Regulations do not permit it to include a condition not taken into account in the original decision when undertaking an 18-month review.

- A memo of instruction for an IRMP has been drafted and shared with Mrs I. It has not been able to instruct an IRMP because Mrs I has not provided her agreement.

- Mrs I has not provided consent to proceed with the 18-month review because of her ongoing insistence that her wrist condition is explicitly covered in the commissioning letter to the IRMP.

- It treated the TPO Adjudicator's opinion as a direction to obtain a fresh opinion on Mrs I's original application. It, therefore, limited the medical evidence to that which was available at the time, including Dr Blatchford's report. Any subsequent change in Mrs I's condition would be for the 18-month review to consider.

- It remains of the view that the arrangements for the reconsideration and the instructions to and evidence provided for Dr Shaw were consistent with the TPO Adjudicator's opinion and were agreed with Mrs I.

- It refers to its letter of 4 March 2019 (see paragraphs 22 and 23 above).

- It did not provide a copy of Dr Chapman's report for Dr Shaw because it had previously been the subject of a data protection challenge by Mrs I. The evidence to be provided for Dr Shaw was agreed with Mrs I and this suggests she agreed with the decision not to include Dr Chapman's report.

- Because Dr Shaw agreed with the original decision not to award ill health retirement and it was already paying a Tier 3 pension, it does not agree that any revised or additional award should be backdated to June 2016. It has agreed that any uplift arising out of the 18-month review of Mrs I's Tier 3 award would be backdated to December 2017. However, the longer any such review is delayed, the more difficult it will be to honour this commitment.

- It believes its appeal procedure is correct, but it will consider and comply with any opinion from TPO.

Adjudicator's Opinion

38. Mrs I's complaint was considered by one of our Adjudicators who concluded that further action was required by Dorset. The Adjudicator's findings are summarised below:-

- Members' entitlements to benefits when taking early retirement due to ill health were determined by the scheme rules or regulations. The scheme rules or regulations determined the circumstances in which members were eligible for ill health benefits, the conditions which they must satisfy, and the way in which decisions about ill health benefits must be taken.

- In this case, the relevant regulations were Regulations 35 to 37 of the 2013 Regulations (see Appendix 1).

- There were two strands to Mrs I's case: (i) the reconsideration of the original decision to award her Tier 3 benefits; and (ii) the 18-month review of her Tier 3 award.

Reconsideration of the original award

- Dorset had agreed to reconsider its decision to award Mrs I Tier 3 benefits and to obtain a further opinion from an IRMP. The Adjudicator noted Mrs I's comments as to whether this should have been a fresh opinion or a review. She said she understood Mrs I's concern arose out of Dr Shaw's comment that he supported Dr Blatchford's "decision". In the Adjudicator's view, this did not indicate that Dr Shaw had not come to an independent opinion. He had simply commented that he had arrived at the same conclusion as Dr Blatchford had done previously.

- Mrs I had raised a number of concerns about the evidence which had been provided for Dr Shaw. However, the Adjudicator noted that Dorset had agreed with Mrs I what documents would be sent to Dr Shaw. She said she had seen no evidence that it withheld any evidence or that it in any way tried to interfere in Dr Shaw's assessment. It was the case that Dr Shaw had not been provided with a copy of Dr Chapman's report but this report had been the subject of a complaint by Mrs I to the ICO. Dorset had previously been criticised for

continuing to use Dr Chapman's report. The Adjudicator considered it reasonable for it not to have been included in the evidence provided for Dr Shaw. In any event, Mrs I had been, or should have been, aware that it had not been included. The Adjudicator noted also that Dr Shaw had obtained additional information himself; namely, copies of Mrs I's GP notes from August 2013 to September 2016 and her OH notes since April 2003. The evidence indicated that Dr Shaw had been provided with or obtained sufficient appropriate evidence on which to base his opinion.

- Mrs I had raised the question of a face-to-face consultation with Dr Shaw. Dorset did not consider this necessary but it had left it to Dr Shaw to decide. In the Adjudicator's view, this was a reasonable approach to take. It was not unusual for the IRMP to base her/his opinion on the paper evidence and there was no requirement in the 2013 Regulations for there to be a face-to-face consultation. It was largely a matter for the IRMP's professional judgment as to whether s/he had sufficient information upon which to base an opinion.

- The decision to award ill health retirement benefits and at which tier under Regulation 35 was for Dorset to make. It was required to obtain a certificate from an IRMP before making such a decision in the first instance and had agreed to do so for its reconsideration of Mrs I's case. Dorset was not, however, bound by the opinion expressed by the IRMP and should come to a properly considered decision of its own. That being said, the weight which was attached to any of the evidence was for Dorset to decide, including giving some of it little or no weight[4]. It was open to Dorset to accept the advice it received from an IRMP unless there was a good reason why it should not do so or should not do so without seeking clarification. The Adjudicator said the kind of things she had in mind were errors or omissions of fact or a misunderstanding of the relevant regulations. The reason would have to be obvious to a lay person. Dorset would not be expected to challenge a medical opinion.

- The Adjudicator clarified that, so far as their medical opinions were concerned, the IRMPs did not come within the Ombudsman's jurisdiction. They were answerable to their own professional bodies and the General Medical Council.

- Dorset had accepted the opinion expressed by Dr Shaw and had declined to change the tier of benefit awarded to Mrs I as of June 2016. For the avoidance of doubt, this was an entirely separate decision to that which Dorset was required to make under Regulation 37 as part of the 18-month review of Mrs I's Tier 3 award.

- In fact, Dr Shaw had advised that he was of the opinion that Mrs I did not satisfy the conditions for payment of any tier of award under Regulation 35. The reason given by Dr Shaw for reaching this conclusion was that Mrs I had

[4] Sampson v Hodgson [2008] All ER (D) 395 (Apr)

not exhausted all reasonable and available treatments. In particular, Dr Shaw referred to the fact that Mrs I had not had an injection in her neck. He commented that it was a common procedure at the time and it was not unreasonable to have expected Mrs I to have agreed to this treatment. Dr Shaw said he had seen this treatment enable several patients return to work. He went on to say that, had he been Mrs I's occupational physician at the time, he would have advised her to see a pain consultant to discuss this treatment.

- Mrs I had queried the reference to having exhausted all reasonable treatment and had pointed out that there was nothing to this effect in the 2013 Regulations. The Adjudicator agreed. A member need not have tried and/or exhausted all reasonable treatment in order to qualify for benefits under Regulation 35. What was required from an IRMP was a view on the likely efficacy of any treatment. Although the Adjudicator disagreed with Dr Shaw's reference to having exhausted all reasonable and available treatment, she noted that he did then go on to discuss the likely efficacy of the treatment he had in mind.

- Mrs I did not agree with Dr Shaw's comment to the effect that she had refused to have an injection in her neck. She said she had not refused this treatment and had always followed the advice of her doctors. Mrs I also pointed out that her local NHS trust did not offer this treatment anymore and she could not afford private treatment. She had provided a letter from her consultant rheumatologist confirming that this treatment was no longer offered under her local NHS trust.

- It was not clear why Dr Shaw gained the impression that Mrs I had refused neck injections. Professor Thompson, in 2013, had said Mrs I's symptoms were improving and she was going to give it more time. He had said, if things got stuck, Mrs I would come back and they could talk about some local injections but he hoped this would not be necessary. This suggested that neck injections might well have been discussed with Mrs I, in 2013, and considered as a possible future treatment if her neck symptoms did not improve. There was no evidence that Mrs I had refused this treatment at this time. Later on, in his 2016 report, Dr Milne had said Professor Thompson had indicated that neck injections could be considered if required, but Mrs I was "not keen on this". Again, this did not amount to Mrs I having refused this treatment.

- The letter from Dr Marks, which Mrs I had provided to substantiate her point that this treatment was not available to her, was dated 12 September 2017. This was some 15 months after Mrs I's employment with Dorset had ceased. There was no indication in the letter as to when the NHS trust had stopped offering this treatment. But, the fact was, at some point between Professor Thompson's letter in 2013 and Dr Marks' letter in 2017, Mrs I's local NHS trust had ceased to offer neck injections for her condition.

- Dr Shaw's response to Mrs I pointing this out to him was to indicate that some hospitals still offered this treatment. He had also expressed a view as to why the treatment was no longer being offered locally. Neither point was relevant to Mrs I's case. The relevant matter in Mrs I's case was whether, at the time her employment ceased, this treatment was considered appropriate and was available to her through her local NHS trust. If so, it would then have been appropriate to consider the likelihood of it improving Mrs I's condition such that she might be capable of discharging the duties of her employment with Dorset before her normal pension age.

- One of the specific obligations on decision-makers was to consider all relevant information which was available to them and ignore all irrelevant information. It was the Adjudicator's view that Dorset should have taken steps to clarify the availability of this treatment to Mrs I. It should have obtained the date at which this treatment ceased to be available to Mrs I; that is, the date on which her local NHS trust had ceased to offer it to persons with her condition. As Dorset itself had noted, the statutory guidance issued by the DCLG in September 2014 referred to treatment which was "**readily available** and appropriate to the member" (emphasis added). In the Adjudicator's view, this did not include treatment which was not available to the member via her/his local NHS trust.

- However, it was important not to apply hindsight in such circumstances. If the neck injections had been readily available and appropriate to Mrs I at the time her employment ceased, Dr Shaw's view would be valid. It would not be relevant to Mrs I's eligibility for an award under Regulation 35 if the treatment had become unavailable to her subsequently. The key was to establish what the availability of and expectations for the neck injections were in June 2016. As it stood, Dorset had not taken steps to obtain the necessary information to determine this question.

- This did amount to maladministration on its part. Mrs I had sustained injustice inasmuch as her eligibility for an award under Regulation 35 had not been properly established; that is, it had not been properly determined whether she should have received a Tier 1 or Tier 2 award, rather than the Tier 3 award she had been granted.

- The Adjudicator noted that Mrs I had said that Dorset had offered to supply Dr Shaw with all her medical evidence up to June 2019. She said this offer was later withdrawn. In fact, information about the progress of Mrs I's condition after June 2016 was not relevant to Dorset's reconsideration of its Regulation 35 decision and did not need to be provided for Dr Shaw.

The 18-month review

- Dorset's reconsideration of its original decision under Regulation 35 had become entangled in its statutory responsibility to review Mrs I's Tier 3 award under Regulation 37(5).

- Regulation 37(5) provided that a Scheme employer must review payment of Tier 3 benefits after they have been in payment for 18 months. The employer was required to obtain a further certificate from an IRMP before making a decision as to which of the options available under sub-paragraph (7) was appropriate.

- Dorset had sent Mrs I a form to complete in December 2017. Its OH team had then requested her consent to undertake the 18-month review. Mrs I had completed and returned the form which Dorset sent to her but she did not provide the required consent for its OH team to obtain an IRMP's certificate.

- Mrs I said she was informed by Dorset, in January 2018, that the 18-month review could not proceed whilst she had a complaint with TPO. The Adjudicator said she had no reason to doubt Mrs I's recollection of events, but there was no evidence to substantiate her view that she had been told that the 18-month review could not proceed. In fact, the evidence indicated that, on more than one occasion, Dorset had informed Mrs I that the 18-month review was a separate process to its reconsideration of the original award decision. It had also explained to her that the form she had completed and returned was only part of the process and it required her consent to share medical information with an IRMP. In any event, Mrs I's previous complaint had been concluded in May 2018 and could no longer be a reason for her to withhold her consent. She did not submit her further complaints to TPO until April 2019.

- Dorset had a statutory responsibility to review Mrs I's Tier 3 award after it had been in payment for 18 months. It was a matter of fact that it failed to carry out the 18-month review. However, it had to be acknowledged that it was significantly hampered in doing so by Mrs I's failure to provide the required consent for it to obtain an IRMP's certificate.

- The alternative approach would have been for Dorset to proceed with the 18-month review regardless. It would have meant obtaining a certificate from an IRMP of its choice on the basis that Mrs I had not consented for it to provide medical information for her/him. This would have made it extremely difficult for the IRMP to provide advice for Dorset. It would then have had to have made a decision as to which option was appropriate under Regulation 37(7) on the basis of such limited information and advice as was available to it. Given the history of Mrs I's case, the Adjudicator did not consider it appropriate for Dorset to be criticised for not taking this approach.

- Dorset had offered to undertake the 18-month review and backdate any uplift, which might arise out of the review, to December 2017; that is, the date at which the review should have taken place. In the Adjudicator's view, this offer was appropriate redress for the delay in undertaking the 18-month review.

- In the interests of clarity, the Adjudicator explained that the IRMP should be asked to give an opinion as to whether Mrs I was capable of undertaking any

gainful employment as of December 2017. If appropriate, s/he should also be asked if Mrs I satisfied the Tier 2 conditions as of December 2017. In a similar way to the reconsideration of Dorset's original Regulation 35 decision, the progress of Mrs I's condition since December 2017 was not relevant to the decision Dorset was required to make under Regulation 37. It was Mrs I's capacity for employment as of December 2017, including the availability of and expectations for any treatment at that time, which was relevant.

- It was the Adjudicator's opinion that Mrs I's complaint about the failure to undertake the 18-month review could not be upheld. This was on the basis that any injustice she had sustained as a result of Dorset's failure to proceed with the 18-month review was adequately redressed by its offer of a backdated review.

- The Adjudicator noted that, latterly, the discussion between Mrs I and Dorset had included her wish that the IRMP consider the symptoms she experienced in her wrists. She had said that she was diagnosed with osteoarthritis in her wrists in 2011. In support of this, Mrs I had provided copies of a 2013 report from Dorset's OH team (see Appendix 2). Dorset took the view that the 18-month review should only consider the condition which gave rise to the Tier 3 award; that is, Mrs I's neck condition.

- Under Regulation 37(6), Dorset must ask an IRMP "whether, and if so when, the member will be likely to be capable of undertaking gainful employment". This was in keeping with the preceding sub-paragraphs which referred to the member's Tier 3 award ceasing if s/he started gainful employment. Sub-paragraph 7(b) gave Dorset the option to award Tier 2 benefits from the date of the review decision if the member satisfied the same conditions as set out in Regulation 35(6). There was no reference to the member having to satisfy the Tier 2 conditions by reference to a particular condition. Equally, there was no reference to the purpose of the review being to consider whether there had been a deterioration in the condition for which the member had been awarded the Tier 3 benefits. The matter under consideration was the member's capacity for gainful employment.

- In the Adjudicator's view, the wording of Regulation 37 indicated that the decision which Dorset was required to make at the 18-month review was entirely separate to that which it made under Regulation 35. It could decide that Mrs I satisfied the Tier 2 conditions at that point when she may not have done so at the time her employment ceased. The fact that any Tier 2 award made under Regulation 37 was "from the date of the review decision" indicated that this was a separate award and a separate decision.

- Dorset was quite right to say that Mrs I's Tier 3 award had been based on her neck condition. Apart from the brief reference to a diagnosis of arthritis in Mrs I's left wrist in the 2013 OH report, the medical evidence had focussed on her neck condition. However, Dorset was not precluded from considering Mrs I's

wrists at the 18-month review point. If it became necessary to refer her case to an IRMP for the 18-month review, Dorset should allow Mrs I to submit evidence relating to the arthritis in her wrists provided that the evidence related to the position in December 2017.

- The Adjudicator explained that she had said "if it is necessary" because Dorset needed first to obtain some clarification from Dr Shaw in connection with its reconsideration of its Regulation 35 decision. The necessity of undertaking an 18-month review of Mrs I's Tier 3 award depended upon the outcome of this.

Putting matters right

- The Adjudicator suggested that Dorset should obtain information as to when the local NHS trust ceased to offer neck injections for individuals in Mrs I's position. If this decision pre-dated the cessation of Mrs I's employment, it should ask Dr Shaw to clarify if his opinion would have been the same if he had been required to discount this treatment. If Dr Shaw's opinion changed as a result of the additional information about treatment options, Dorset should ask him to provide an opinion as to whether Mrs I satisfied the Tier 1 or 2 conditions as at June 2016. On receipt of this additional advice, Dorset should reconsider its Regulation 35 decision and notify Mrs I accordingly.

- The Adjudicator suggested that Dorset should take steps to obtain the additional information about neck injections from the NHS trust within 28 days of being notified if and when her Opinion had been accepted by both parties. It should refer the matter to Dr Shaw within a further 28 days of receipt of the additional information from the NHS trust. It should then reconsider Mrs I's case within a further 28 days of receipt of the additional advice from Dr Shaw. The Adjudicator said, in the current circumstances, it would be necessary for the parties to be flexible on timescales; particularly when seeking information from the NHS.

- The Adjudicator said she had also considered whether it would be appropriate for Mrs I to receive a payment for non-financial injustice in line with the Ombudsman's current guidelines[5]. Dorset could not be held solely responsible for the length of time taken to reconsider Mrs I's Regulation 35 award or the delay to the 18-month review of her Tier 3 award. Mrs I's own actions had contributed significantly to this. Nevertheless, she faced a further period of uncertainty whilst Dorset addressed the matter of treatment availability. This was something it could have been expected to pick up and query when Mrs I contacted it on 18 November 2018. Its response, that Dr Shaw had addressed the availability and appropriateness of treatment in his report, was insufficient and missed the point that the treatment should have been available locally.

[5] https://www.pensions-ombudsman.org.uk/wp-content/uploads/Updated-Non-financial-injustice-September-2018-2.pdf

- The Adjudicator suggested that Dorset pay Mrs I £500 for non-financial injustice.

39. Dorset did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.

Dorset's further comments

40. Dorset submits:-

- It instructed Dr Shaw as an IRMP and, as such, it was entitled to rely on his expertise. Dr Shaw gave his opinion and addressed further questions from Mrs I. It appears that it is being required to go behind a report from a medical expert and question his finding. This contradicts the statement that it would not be expected to challenge a medical opinion.

- It is concerned that the suggested timescales for a review of its decision are inappropriate in the current circumstances. It is concerned that Mrs I's expectations are being raised and it is being set up to fail.

- Since receiving the Adjudicator's Opinion, it has attempted to contact Dr Marks but has not been able to reach him.

- As an alternative to contacting the NHS during the current crisis, it proposes to conduct an online investigation into the availability of neck injections and provide any additional information it finds to Dr Shaw. It has already conducted a search for information about treatments being offered by local NHS trusts for pain management in 2016. It has not been able to establish when the treatment approach changed at Mrs I's local NHS hospital. It has found information about four studies relating to treatment for back and radicular pain[6]. It has not been able to find any NICE guidelines which specifically relate to cervical injections in around 2016.

- It proposes to provide this information for Dr Shaw and seek his view on the likely treatments being offered locally in early 2016. He would have been working as a local GP at the time and would have a good knowledge of what treatment options would have been available to patients at that time.

- In February 2016, when ill health retirement was first considered, Mrs I had had minimal absence due to neck/back pain. Her extended absence commenced after the ill health retirement referral had been received. Initial acute episodes of back/neck pain are generally managed conservatively within the primary care setting unless there is a 'red flag' which would indicate acute cord compression. In the event the pain does not settle after 6 to 8 weeks, a GP may then consider onward referral to either a particular clinical specialist team or pain management clinic. In other similar cases, the IRMP has looked

[6] Dorset has provided links to the relevant websites where the reports can be accessed.

for evidence that an individual has already exhausted all possible treatment pathways available at the time. From the information it holds on file, the approach suggested by Dr Marks did take place in 2018 and the Mrs I undertook a pain management programme between September and October 2018. This would seem to suggest that not all treatment options had been exhausted in 2016.

- It refers to guidance issued by the DCLG dated April 2015. In particular to a Frequently Asked Questions (**FAQ**) document. It refers to Question 43: "Can a Tier Three member be uplifted to the enhanced Tier Two with a condition other than that which resulted in the ill health retirement?". The FAQ document states:

  "No. The regulations are quite clear that it is the initial condition resulting in an ill health Tier Three payment that should be considered when assessing a possible uplift to a Tier Two pension."

- It refers to statutory guidance issued by the DCLG which states:

  "46. … There is no provision to make a determination for a Tier One payment at the review or a subsequent occasion. If at the Tier Three review or subsequently, the independent registered medical practitioner judges that the member is, because of the condition resulting in Tier Three benefits, now permanently incapable of their local authority employment and is unlikely to be capable of undertaking gainful employment before normal pension age or is unlikely to be capable of undertaking any gainful employment within 3 years of leaving employment but is likely to be able to undertake gainful employment before normal pension age, the employer only has powers to award a Tier Two pension."[7]

- At the time of the initial ill health pension determination, the main presenting problem set out by Mrs I and her GP was one of neck pain. Although there is reference made by Mrs I to adjustments made previously due to arthritis in her wrists, this condition did not appear to be clinically acute at the time. The Tier 3 release would appear to be linked with the degenerative neck condition and associated arm pain and migraine type headaches. The LGPS guidance references above appear to conflict with the Opinion and suggest that it would not be possible for Dorset Council to take account of Mrs I's wrist condition in its 18-month review.

- There has been no maladministration in its approach to reconsidering the original award, no error in its approach to the 18-month review and, therefore,

[7] This paragraph has been taken from the statutory guidance issued, in 2014, in respect of the Local Government Pension Scheme 2008. The relevant extract from the statutory guidance for the 2013 Scheme is provided in Appendix 1.

no basis on which to make an award for non-financial injustice; no injustice has been suffered.

Mrs I's further comments

41. Mrs I was content to accept the Adjudicator's Opinion, but submitted some further comments. For completeness, these are summarised below:-

- Dorset referred to one regulation instead of two. It was aware of both regulations.
- The 18-month review was handled by Dorset's occupational health and human resources departments. It should have included the pensions department.
- The reason she would not agree to the 18-month review was because Dorset would only use information from 2016 and would not include her wrist condition or her condition at the time of the review.
- Dorset has referred to the wrong area of her spine. Her problem is in the C5-7 facet joints in her neck. Dorset has referred to studies into the effectiveness of injections for thoracic facet joint pain.
- At no time has she suggested which tier of award she should have received. She just felt that Tier 3 was inappropriate.

42. In response to an enquiry from the Adjudicator, Mrs I has explained that Dr Marks was on holiday when Dorset tried to contact him. She has since obtained a letter from Dr Marks, dated 7 May 2020, in which he says her local NHS trust decommissioned the facet joint injections in June 2017. Dr Marks said this was on the basis of a NICE document dated November 2016 relating to lower back pain and sciatica which the trust felt had wider application.

Ombudsman's decision

43. The purpose of conducting a review of the original decision to award Mrs I Tier 3 benefits was to ensure that this decision was appropriate in the particular circumstances of her case. The decision which Dorset is required to make, under Regulation 35, is very much based upon the facts of the case. It must, therefore, ensure that it is, as far as is reasonably possible, in possession of all the relevant facts.

44. I note Dorset's comment as to an apparent contradiction in saying it is not expected to challenge a medical opinion and yet asking it to obtain information about the availability of treatment. Whilst it is the case that Dorset is only expected to review the IRMP's opinion from a lay perspective, it should do so actively. That is to say, it should not blindly accept the IRMP's opinion. As a bare minimum. Dorset should ensure that there have been no factual errors by the IRMP. Where something has been drawn to its attention by the member, such as the availability of treatment, it can

be expected to ensure that it has sufficient information in order to answer the query. This is not challenging a medical opinion; it is a straightforward fact-check.

45. In response to Mrs I's concern, Dorset said Dr Shaw had addressed the availability and appropriateness of treatment in his report. I do not find this to be the case. In response to Mrs I telling him that the treatment was not available to her because her local NHS trust did not offer it, Dr Shaw simply said he had found evidence that the injections were still being offered elsewhere. This missed the point.

46. The statutory guidance issued by the DCLG in September 2014 refers to treatment which is "readily available and appropriate to the member". The conditions which the member must satisfy in order to be eligible for a pension under Regulation 35 relate to her/his capacity for employment. Therefore, any consideration of the likelihood that treatment may improve the member's capacity for employment must, logically, relate to that member's particular circumstances. This is what Regulation 35 provides for.

47. In Mrs I's case, the information about the availability of neck injections was one of the main factors taken into account in determining whether she satisfied the eligibility conditions set out in Regulation 35. Dorset failed to obtain the necessary information in order to make a properly informed decision about Mrs I's eligibility under Regulation 35.

48. I note Dorset's suggestion that, instead of obtaining information about the availability of neck injections from Mrs I's local NHS trust, it could provide Dr Shaw with information it has collected from elsewhere. This, however, would simply be taking the same approach as before; that is, relying on information which is not specific to Mrs I's particular circumstances. In any event, Mrs I has been able to obtain the required information from Dr Marks herself.

49. Dr Marks has said that the facet joint injections, which Dr Shaw thought likely to help Mrs I such that she would be able to return to her former role, were decommissioned by the NHS trust in June 2017. This post-dates the cessation of Mrs I's employment with Dorset. Dr Shaw was required to provide an opinion relating to the situation as it stood in June 2016. At that time, the neck injections were still available as a potential future treatment option for Mrs I at some time prior to her normal pension age. Dr Shaw's comments as to their likely efficacy, therefore, remain valid so far as Mrs I's eligibility for benefits under Regulation 35 is concerned.

50. Nevertheless, I find that Dorset's failure to clarify the situation when Mrs I raised the matter does amount to maladministration on its part. Mrs I had raised a perfectly valid query which Dorset failed to engage with. This quite unnecessarily added to the stress and inconvenience of what was already a stressful situation for Mrs I; particularly, when it appears that all Dorset needed to do was contact Dr Marks or ask Mrs I to do this herself. However, I do not consider that the maladministration was significant, especially when account is taken of the date when neck injections ceased to be available locally.

51. The other aspect to Mrs I's case is the 18-month review of her Tier 3 award. Under Regulation 37, Dorset is required to review payment of a Tier 3 award once it has been in payment for 18 months. This is a statutory obligation. It is a matter of fact that Dorset failed to carry out the 18-month review at the appropriate time. However, I agree with my Adjudicator that Dorset was significantly hampered in its attempts to carry out the 18-month review by Mrs I's unwillingness to co-operate in the process. Whilst I acknowledge that Mrs I has reservations about the review, she needs to understand that this is a statutory obligation which Dorset is required to undertake and she cannot expect to control the process.

52. Arguably, Dorset tried a little too hard to accommodate Mrs I when it should simply have proceeded with the 18-month review on the basis that this was a statutory requirement. However, I agree that, without Mrs I's consent to provide the IRMP with the necessary medical information, the review would have been very difficult to undertake in any meaningful way. I do not find that it is appropriate to criticise Dorset for not proceeding on this basis. I note that Dorset has offered to undertake the 18-month review and backdate any uplift which may be recommended. This is ample redress for Dorset's contribution to the delay in undertaking the 18-month review. I do not uphold Mrs I's complaint about the delay to the 18-month review.

53. Mrs I has complained that Dorset has declined to consider her wrists under the 18-month review. Dorset takes the view that it is not able to do so under Regulation 37. It has referred me to guidance issued by the DCLG.

54. My starting point here is to consider exactly what Regulation 37 says. As the DCLG FAQ document itself states, it does not replace the Regulations. Equally, whilst Dorset and its IRMP must have regard to the DCLG guidance[8], it is guidance and not part of the 2013 Regulations themselves.

55. Regulation 37 provides that an employer must make a decision about the member's entitlement after obtaining a further certificate from an IRMP as to "whether, and if so when, the member will be likely to be capable of undertaking gainful employment". Despite the references in the DCLG guidance to the IRMP's opinion relating to "the condition resulting in Tier Three benefits", there is no reference to this requirement in the 2013 Regulations themselves.

56. I would be more inclined to agree with Dorset if Mrs I was seeking to introduce a condition which she had only begun to experience after the cessation of her employment. Regulation 37 is clearly intended to provide for the possibility that a member's incapacity for employment has deteriorated since the initial Tier 3 decision or has not improved in the way it was expected to. It is intended to allow for those cases where there might be a measure of uncertainty as to the appropriateness of a Tier 3 award at the time the award is made. Logically, the review of the Tier 3 decision should, therefore, consider those medical conditions which were present at the time of the initial decision.

[8] Regulation 36(4)

57. Mrs I would like information about the arthritis in her wrists to be included in the 18-month review. Dorset has declined to agree to this on the basis that there was no reference to Mrs I's wrist pain in the IRMP's report upon which its Tier 3 decision was based. It is clear from the medical evidence that the primary cause of Mrs I's incapacity for employment at the time her employment ceased was considered to be her neck pain. However, she had already been diagnosed with arthritis in her left wrist by then. This information would have been available to the IRMPs because it was mentioned in Mrs I's OH notes. The fact that the IRMPs did not specifically refer to Mrs I's wrist pain suggests that they did not consider it to be contributing to any notable degree in her incapacity for employment at that time. That position is supported by the evidence from Professor Thompson and Mrs I's GP.

58. On balance, I do not find that Regulation 37 prevents Dorset from including information about Mrs I's left wrist arthritis in its review of her Tier 3 award. This is on the basis that the condition was present at the time of the initial Tier 3 decision and, as such, was a factor in that decision; albeit one which the IRMPs did not consider notable at that time.

59. I do not uphold the complaint.

Anthony Arter

Pensions Ombudsman
19 May 2020

Appendix 1

The Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended)

60. Regulation 35 provides:

> "(1) An active member who has qualifying service for a period of two years and whose employment is terminated by a Scheme employer on the grounds of ill-health or infirmity of mind or body before that member reaches normal pension age, is entitled to, and must take, early payment of a retirement pension if that member satisfies the conditions in paragraphs (3) and (4) of this regulation.
>
> (2) The amount of the retirement pension that a member who satisfies the conditions mentioned in paragraph (1) receives, is determined by which of the benefit tiers specified in paragraphs (5) to (7) that member qualifies for, calculated in accordance with regulation 39 (calculation of ill-health pension amounts).
>
> (3) The first condition is that the member is, as a result of ill-health or infirmity of mind or body, permanently incapable of discharging efficiently the duties of the employment the member was engaged in.
>
> (4) The second condition is that the member, as a result of ill-health or infirmity of mind or body, is not immediately capable of undertaking any gainful employment.
>
> (5) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking gainful employment before normal pension age.
>
> (6) A member is entitled to Tier 2 benefits if that member -
>
> (a) is not entitled to Tier 1 benefits; and
>
> (b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment; but
>
> (c) is likely to be able to undertake gainful employment before reaching normal pension age.
>
> (7) Subject to regulation 37 (special provision in respect of members receiving Tier 3 benefits), if the member is likely to be capable of undertaking gainful employment within three years of leaving the employment, or before normal pension age if earlier, that member is entitled to Tier 3 benefits for so long as the member is not in gainful employment, up to a maximum of three years from the date the member left the employment."

61. Regulation 36 provides:

> (1) A decision as to whether a member is entitled under regulation 35 (early payment of retirement pension on ill-health grounds: active members) to early payment of retirement pension on grounds of ill-health or infirmity of mind or body, and if so which tier of benefits the member qualifies for, shall be made by the member's Scheme employer after that authority has obtained a certificate from an IRMP as to -
>
> (a) whether the member satisfies the conditions in regulation 35(3) and (4); and if so,
>
> (b) how long the member is unlikely to be capable of undertaking gainful employment; and
>
> (c) where a member has been working reduced contractual hours and had reduced pay as a consequence of the reduction in contractual hours, whether that member was in part time service wholly or partly as a result of the condition that caused or contributed to the member's ill-health retirement.
>
> (2) An IRMP from whom a certificate is obtained under paragraph (1) must not have previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested.
>
> (2A) For the purposes of paragraph (2) an IRMP is not to be treated as having advised, given an opinion on or otherwise been involved in a particular case merely because another practitioner from the same occupational health provider has advised, given an opinion on or otherwise been involved in that case.
>
> (3) If the Scheme employer is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of IRMP.
>
> (4) The Scheme employer and IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation and regulations 37 (special provision in respect of members receiving Tier 3 benefits) and 38 (early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members)."

62. Regulation 37 provides:

> "(1) A member in receipt of Tier 3 benefits who attains normal pension age continues to be entitled to receive retirement pension and ceases to be regarded as being in receipt of Tier 3 benefits from that date, and nothing in the remainder of this regulation applies to such a person.

(2) A member who receives Tier 3 benefits shall inform the former Scheme employer upon starting any employment while those benefits are in payment and shall answer any reasonable inquiries made by the authority about employment status including as to pay and hours worked.

(3) Payment of Tier 3 benefits shall cease if a member starts an employment which the Scheme employer determines to be gainful employment, or fails to answer inquiries made by the employer under paragraph (2), and the employer may recover any payment made in respect of any period before discontinuance during which the member was in an employment it has determined to be gainful employment.

(4) A Scheme employer may determine that an employee has started gainful employment for the purposes of paragraph (3) if it forms the reasonable view that the employment is likely to endure for at least 12 months and it is immaterial whether the employment does in fact endure for 12 months.

(5) A Scheme employer must review payment of Tier 3 benefits after they have been in payment for 18 months.

(6) A Scheme employer carrying out a review under paragraph (5) must make a decision under paragraph (7) about the member's entitlement after obtaining a further certificate from an IRMP as to whether, and if so when, the member will be likely to be capable of undertaking gainful employment.

(7) The decisions available to a Scheme employer reviewing payment of Tier 3 benefits to a member under paragraph (5) are as follows -

(a) to continue payment of Tier 3 benefits for any period up to the maximum permitted by regulation 35(7) (early payment of retirement pension on ill-health grounds: active members);

(b) to award Tier 2 benefits to the member from the date of the review decision if the authority is satisfied that the member -

(i) is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either

(ii) is unlikely to be capable of undertaking gainful employment before normal pension age, or

(iii) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age; or

(c) to cease payment of benefits to the member.

(8) A member whose Tier 3 benefits are discontinued under paragraph (3) or (7)(c) is a deferred pensioner member from the date benefits are discontinued and shall not be entitled to any Tier 3 benefits in the future.

(9) A Scheme employer which determines that it is appropriate to discontinue payment of Tier 3 benefits for any reason shall notify the appropriate administering authority of the determination.

(10) A Scheme employer may, following a request for a review from a member in receipt of Tier 3 benefits or within 3 years after payment of Tier 3 benefits to a member are discontinued, make a determination to award Tier 2 benefits to that member from the date of the determination, if the employer is satisfied after obtaining a further certificate from an IRMP, that the member is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either -

(a) is unlikely to be capable of undertaking gainful employment before normal pension age; or

(b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age.

(11) The IRMP who provides a further certificate under paragraphs (6) or (10) may be the same IRMP who provided the first certificate under regulation 36(1) (role of the IRMP).

(12) Where the member's former employer has ceased to be a Scheme employer, the references in paragraphs (5) to (7), (9) and (10) are to be read as references to the member's appropriate administering authority."

Statutory Ill Health Retirement Guidance relating to the 2013 Regulations

63. The statutory guidance issued in September 2014 by the DCLG states:

"51. There is no provision to make a determination for a Tier One payment at the review or a subsequent occasion. If at the Tier Three review or subsequently, the independent registered medical practitioner judges that the member is, because of the condition resulting in Tier Three benefits, now permanently incapable of their local authority employment and is unlikely to be capable of undertaking gainful employment before normal pension age or is unlikely to be capable of undertaking any gainful employment within 3 years of leaving employment but is likely to be able to undertake gainful employment

before normal pension age, the employer only has powers to award a Tier Two pension."

Appendix 2

Medical evidence

64. Mrs I has provided a copy of a referral to Dorset's OH team in November 2013. This stated that she was due to return to work on 6 November 2013 and had experienced a "flare up of arthritis – neck pain". The referral stated that Mrs I had a history of arthritis in her hands, neck and shoulders. It stated that she had been provided with a specialised chair, keyboard, software and headset. The report from the OH nurse said:

> "… you have said [Mrs I] has a history of arthritis in her hands, neck and shoulders. I understand from [Mrs I] that the diagnosis of arthritis has only been for her left wrist. [Mrs I] reports that she saw a rheumatology consultant yesterday who informed her that the MRI scan had shown a small bone protrusion in her neck which was likely to be causing her neck pain and headaches."

65. The OH nurse recommended a two-week phased return to work.

Professor Thompson, consultant rheumatologist

66. On 25 November 2013, Professor Thompson wrote to Mrs I's GP:

> "… the MRI scan shows some age related disc wear mainly at C5/6 and C6/7 causing some foraminal narrowing which may well have caught a nerve root causing her symptoms. Fortunately her symptoms are improving as they usually do in this situation and she simply going to give it some more time. If things get stuck however she will come back and we can talk about some local injections but hopefully this won't be necessary."

Dr Milne, consultant occupational physician

67. On 23 March 2016, Dr Milne provided a report for Dorset. He said Mrs I had given a two and a half year history of neck pain, which had been worse over the previous six months. He said Mrs I had said the pain got worse over the working week and after sitting at her workstation but eased when away from work and with activity/exercise. Dr Milne referred to the 2013 MRI scan and Mrs I's consultation with Professor Thompson. He said Professor Thompson had indicated that neck injections could be considered if required, but Mrs I was "not keen on this".

68. Dr Milne noted that Mrs I had been absent from work since early March 2016 and felt unable to return to work in the future. He said, therefore, she was unfit. Dr Milne said fixed neck positions for prolonged periods, such as sitting at a computer, would make Mrs I's neck discomfort worse. He suggested gentle neck movements and a workstation risk assessment. He said fully adjustable seating might help but would not cure Mrs I's neck problem. Dr Milne said spinal neck degeneration was permanent and could deteriorate with age, but pain could fluctuate.

Mrs I's GP

69. On 20 April 2016, Mrs I's GP wrote to OH Assist in response to a request for medical information. He said Mrs I had had problems with neck pain for some considerable time and this caused disability and triggered migraines. The GP said Mrs I had first raised the issue in October 2012, when she had complained of regular upper back and neck pain. He said she had been referred for physiotherapy but continued to have problems. The GP said Mrs I had been referred to a consultant rheumatologist. He referred to an MRI scan, which had shown disc wear at C5/6 and C6/7. The GP explained that Mrs I's neck pain had continued and caused problems with neck and upper limb use. He mentioned that Mrs I had been absent from work due to neck pain in January and March. The GP concluded:

> "Therefore in summary [Mrs I] has long standing persistent and deteriorating neck pain probably due to wear and tear noted on the MRI scan which is unlikely to improve with time and if anything deteriorate. It is affecting her from a pain point of view causing restriction to her activities, and many activities she does in her job and can actually aggravate her neck pain. Unfortunately as a result of the neck pain she also has more regular migraines than she might do otherwise, which are adding to the intermittent disablement.
>
> I cannot foresee any great improvement over the next few years in [Mrs I's] symptoms with the possibility of deterioration. Therefore a strong consideration for ill health retirement at this stage seems the sensible way ahead. She has been battling with various painkillers and medications together with physiotherapy but this simply helps her to cope with it but has not in fact resolved the problem."

70. On 11 August 2016, Mrs I's GP wrote to OH Assist saying that he did not have anything to add to his previous report. He expressed surprise at being asked for information and questioned why his previous letter and a report from Dr Milne had been ignored. The GP reiterated his view that Mrs I would struggle to be gainfully employed at any point in the future.

Dr Chapman, IRMP

71. Dr Chapman provided a report on 6 September 2016. She said the medical evidence comprised a letter from Mrs I dated 16 May 2016 and a letter from Mrs I's GP dated 11 August 2016.

72. In response to the question as to whether Mrs I was suffering from a condition which, more likely than not, rendered her permanently incapable of discharging efficiently the duties of her employment, Dr Chapman said: "Yes". In response to the question as to whether Mrs I was immediately capable of undertaking any gainful employment, Dr Chapman said: "No". In her explanation, Dr Chapman said the GP had indicated that Mrs I had had symptoms of neck and upper back pain for the last four years and physiotherapy had been only partially successful. She referred to OH records and adjustments which had been made, such as a special chair. Dr Chapman

acknowledged that Mrs I had had few absences due to her symptoms, but said it was clear that she had been struggling at work. She noted that Mrs I had symptoms of continuous neck pain, intermittent symptoms of arm pain and migraine type headaches. Dr Chapman said these symptoms were made worse by prolonged sitting, using a PC, reviewing clients in their homes and making notes. She expressed the view that Mrs I was permanently unfit for these duties.

73. Dr Chapman indicated that Mrs I satisfied the Tier 3 condition; that is, she was likely to be capable of undertaking gainful employment within the next three years. She said Mrs I had a degenerative condition, which was manageable by medication and avoiding activities which exacerbated her symptoms. She suggested referral to a pain management service for consideration of facet joint injections. Dr Chapman expressed the view that this treatment was likely to reduce Mrs I's symptoms of pain. She said, if Mrs I's pain could be better controlled, she would be medically fit for gainful employment avoiding prolonged sitting or using a computer.

Dr Marks, consultant rheumatologist

74. In a letter to Mrs I's GP, dated 12 September 2017, Dr Marks said there were no effective targeted interventions they could offer in rheumatology to assist with Mrs I's ongoing symptoms. He said they did not undertake cervical epidurals in the absence of intractable upper limb symptoms and they no longer offered cervical facet joint injections in line with recent NICE guidelines. Dr Marks said the mainstay of treatment remained physiotherapy and stretching. He suggested a referral to a community pain service.

Dr Shaw, IRMP

75. Dr Shaw provided a report for Dorset on 14 November 2018. He began by listing the documents he had received. In addition to the documents provided by Dorset, Dr Shaw listed copies of Mrs I's GP notes from August 2013 to September 2016 and her OH notes since April 2003.

76. Dr Shaw noted that Mrs I had first consulted her GP for pain in her neck and upper back in October 2012 and had been referred for physiotherapy. He noted that she had been referred to Professor Thompson in November 2013. Dr Shaw summarised the contents of Professor Thompson's report and noted his comment that Mrs I's symptoms were improving but, if things got stuck, they could talk about some local injections. He then summarised the contents of Dr Milne's report.

77. Dr Shaw concluded:

> The role of an occupational physician is quite different from the role of a general practitioner as the latter's role is to act as the patent's advocate whereas the role of the occupational physician is to provide an independent report to management on an employee's fitness for work. Dr Milne almost certainly considered [Mrs I's] age, medical condition, her preference to avoid injections and the nature of her role in making his assessment of her fitness

for work. Taking these factors into account plus the fact he stated she could not see herself returning to work in the future even if she were not granted medical retirement it is likely he felt it preferable to recommend ill health retirement rather than for management action to dismiss her on the grounds of medical incapability for work. He would however have been aware that the independent OH Assist doctor might not be supportive of this request.

It is accepted by occupational physicians that in order to qualify for a pension under the Local Government Pension Scheme the applicant must have exhausted all reasonable and available treatments and from my own experience as both a general practitioner and an occupational physician it is not unreasonable to have expected [Mrs I] to have agreed to undergo neck injections; this was a common procedure at the time and indeed I have seen it benefit several patients such that they have been able to make not only a successful return to work but also to return to sporting activities such as tennis and golf. The injections are normally carried out under x-ray control by an anaesthetic consultant who specialises in pain management. If injections are however unsuccessful then consideration could be given to surgery and indeed although obviously a more invasive procedure, I have witnessed this give very beneficial results in providing excellent relief of symptoms.

At the time of her application, [Mrs I] was almost 61 years of age; had I been her occupational physician at the time I would have advised her to see a Pain Consultant who specialised in neck injections in order that she could make a fully informed decision as to whether or not to proceed with the proposed treatment. I would also have informed her that to refuse the injections might mean her application for an ill health retirement pension would be refused by the independent OH Assist doctor acting as Medical Adviser to the LGPS scheme as the treatment first suggested by Professor Thompson was both available and reasonable. The role of this independent adviser is to review the medical evidence and to safeguard the pension scheme by ensuring that all ill health retirements are medically appropriate i.e. that all reasonable treatments have been exhausted.

If however surgery rather than injections had been recommended to [Mrs I] at that time, then in view of her age and the more invasive nature of surgery and risk of serious potential side-effects, I would have supported ill health retirement in the knowledge that the LGPS Medical Adviser would probably have granted it.

In conclusion therefore, I support the decision of Dr Mary Blatchford to refuse [Mrs I's] application for ill health retirement under the terms of the LGPS as all reasonable treatment options at the time were not explored. I have not considered it necessary to undertake a face to face appointment as in reaching my opinion I have carefully considered all the relevant information at the time of her application in 2016.

I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct.”