

Ombudsman's Determination

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| Applicant | Mr H |
| Scheme | Local Government Pension Scheme (Scotland) (the Scheme) |
| Respondents | Scottish Public Pensions Agency (SPPA) Glasgow City Council (the Council) |

Outcome

1. I do not uphold Mr H's complaint and no further action is required by SPPA and the Council.

Complaint summary

2. Mr H's complaint is that he has only been awarded Tier 2 ill health early retirement (**IHER**) benefits under the Scheme. He considers that he satisfies the conditions to receive Tier 1 IHER benefits.

Background information, including submissions from the parties

3. Mr H was employed by the Council as a Land and Environment driver. He stopped working due to ill health on 29 January 2015 and his employment was terminated due to ill health on 31 August 2016.
4. The relevant Regulations in this case are the Local Government Pension (Scotland) Regulations 2014 (**the 2014 Regulations**) which state:

"Early payment of retirement pension on ill health grounds: active members

34(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 or 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 condition in paragraph (3) of this regulation.

(2) The amount of the retirement pension that a member who satisfies the conditions mentioned in (1) receives is determined by which of the benefit tiers

specified in paragraphs (4) and (5) that member qualifies for, calculated in accordance with regulation 37 (calculation of ill-health pension amounts).

(3) The 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) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking gainful employment before normal pension age.

(5) A member is entitled to Tier 2 benefits if that member –

(a) is not entitled to Tier 1 benefits but,

(b) is likely to be able to undertake gainful employment before reaching normal pension age.

35. Role of IRMP

Regulation 35(1) A decision as to whether a member is entitled under regulation 34 (early payment of retirement pension on ill health grounds: active members) to early payment or retirement on grounds of ill-health or infirmity of mind or body and if so which tier the member qualifies, 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 condition in regulation 34(3); and if so

(b) Whether the member is unlikely to be capable of undertaking gainful employment.”

5. The Council did not refer Mr H's application for ill health early retirement (**IHER**) to an Independent Registered Medical Practitioner (**IRMP**). The Council accepted, based on the Occupational Health (**OH**) assessments, that Mr H was incapable of discharging efficiently the duties of his former employment. He was awarded IHER under Tier 2.
6. Mr H appealed the Council's decision and said that he was undergoing a number of medical investigations for a number of underlying health conditions. He also said that he had been prescribed medication while the investigations were ongoing.
7. On 12 September 2017, the Council dismissed Mr H's appeal under Stage One of the Internal Dispute Resolution Procedure (**IDRP**). It said that Dr Stewart Russell, (the **OH practitioner**), who had previously reviewed the case, had confirmed his decision remained the same. The Council said all the relevant facts had been taken into account and the case had been processed correctly by the Council.
8. Mr H appealed against the Council's decision and invoked Stage Two of the IDRP. This meant that his appeal would be considered by SPPA, acting on behalf of the

Scottish Ministers. Mr H said that he met all the Tier 1 criteria; there were letters from his GP and Consultant Psychiatrist that confirmed he would not be able to work again. He provided further medical evidence to support his case.

9. On 9 July 2018, as part of the appeals process, the SPPA referred Mr H's case to an IRMP, Dr Sheard. It provided copies of Mr H's job description, sickness records and both the previous and new medical reports for review.
10. On 12 July 2018, the IRMP issued his report. He acknowledged that SPPA were seeking to understand whether, on the balance of probabilities, Mr H was:-
 - Incapable of discharging the duties of his former employment by reason of permanent (i.e. until normal pension age) ill-health or infirmity of mind and body.
 - Unlikely to be capable of obtaining employment before his normal pension age.
 - Likely to be capable of obtaining gainful employment before his normal pension age.
11. SPPA requested that the IRMP also consider whether it is more probable than not that any health conditions existed on 31 August 2016.
12. In his response, the IRMP noted that Mr H had appealed against the original decision to award Tier 2 IHER benefits. However, there were no reports from an IRMP which formally addressed the IHER criteria and there was no copy of any ill health retirement certification. The IRMP considered that at Stage One of the IDRP the Council had only referred to Dr Russell, who appeared to be a OH doctor rather than an IRMP.
13. The IRMP confirmed the additional evidence provided by Mr H was not medical "evidence" and most of the evidence post-dated 31 August 2016. He advised that he had considered:-
 - Job specific competencies.
 - Mr H's "Sickness Absence Record".
 - A written statement Mr H made as part of his appeal, dated 9 October 2017, and his emails to SPPA.
 - The OH reports to the Council dated 26 March 2015, 31 July 2015, 17 December 2015, 17 February 2016, and 20 June 2016.
 - Reports from Mr H's GP dated 5 March 2017, 24 May 2017, 20 June 2018.
 - Various specialist reports and Consultant Psychiatrist's reports dated 1 February 2018 and 1 May 2018.

14. The GP's report of 15 May 2018 said that Mr H "suffered from a number of serious long term health conditions, the combined effects of which I feel render him unfit for gainful employment for the rest of his life".
15. The GP summarised Mr H's health conditions. He indicated that these included chronic lower back pain, fibromyalgia diagnosed in 2017, and "stroke disease" following a mini stroke in 2016. He advised that Mr H had Hemochromatosis, a genetic condition, which was diagnosed in 2017 and caused by too much iron in the bones. He also advised that this was a debilitating condition; fatigue was one of the prominent symptoms of the condition. Mr H also had Diabetes Mellitus, as a consequence of the Hemochromatosis. He confirmed that Mr H had suffered from anxiety and depression for approximately three to four years.
16. The Consultant Psychiatrist's report of 1 May 2018 said that she had been involved in Mr H's care for a year. She said that Mr H had a significant number of health conditions, which required a number of medical specialists. She stated that:

"In my opinion given all his physical health complaints alone, he would not be able to work again. He continues to remain under psychiatric care."

17. In his report the IRMP concluded:

"It is clear to me that as of 31/08/2016 Mr [H] was unfit to work due to his reduced mental well-being and investigations into his TIA [Stroke] and other symptoms. The occupational health service report by Dr Russell predates the TIA but notes that given the length of his absence and his predictable future absence he is aware that his contract could be terminated on grounds of capability. It is noted he requires further psychological support and Dr Russell anticipates he will benefit from the same. It is noted that his emotional state may take some months to resolve fully even with psychological support.

It appears unlikely that there is new medical evidence to consider at this stage although a better understanding of the evidence available at 31/8/16 would be useful.

In the absence of any new medical treatments likely to substantially improve his physical and mental well-being and given the chronic nature of his symptoms I cannot anticipate an improvement in his health sufficient to allow him to return to driving/safety critical work on the highway/roadways. I think it is unlikely that he would develop sufficient confidence/concentration to allow him to drive on a Group 2 in a safe manner some years after he has last done this sort of work even if/when DVLA were to return his licence.

In the circumstances and on the balance of probabilities I suggest that as a result of ill-health of infirmity of mind or body Mr [H] is permanently (i.e. to normal pension age) incapable of discharging efficiently the duties of his former employment.

In my opinion it is more probable than not that the condition existed on 31 August 2016 and that at that time Mr [H] was permanently incapable of carrying out efficiently the duties in question and would not improve sufficiently before reaching normal pension age (67) for his to be considered capable of carrying out those duties efficiently.

However as of 31 August 2016 I believe it would have been too early to suggest that Mr [H] unlikely to be capable of undertaking gainful employment before his normal pension age. This is because at that time he was awaiting treatment and other conditions had not been diagnosed/become apparent....I would support Tier 2 on this evidence.”

18. On 9 October 2018, SPPA wrote to Mr H under Stage Two of the IDRP and said that it had reviewed all the evidence previously submitted, including the report from the IRMP. It said that Mr H was permanently incapable of discharging efficiently the duties of his former employment. However, he was likely to be capable of undertaking gainful employment before his normal pension age. Consequently, he was not entitled to Tier 1 IHER benefits.
19. Not satisfied with this outcome Mr H then submitted his complaint to The Pensions Ombudsman (**TPO**). He said that he considered that he should be awarded Tier 1 IHER benefits, as both his GP and physiatrist had said he could not work again.
20. During TPO’s investigation of the complaint, the Council confirmed it had not initially referred Mr H’s case to an IRMP. It advised that the referral was made during Stage Two of the IDRP. The Council’s representative said:

“On reviewing the case I would concur, that whilst Mr [H]’s fitness was assessed by three different Physicians at Occupational Health, the last being Dr Russell and his subsequent review of the case, this would not constitute Dr Russell as being an IRMP. I offer my apologies for this oversight. The Stage 2 Determination to award Tier 2 IHER Benefits was actioned and payment backdated to 31 August 2016 by Glasgow City Council.”

Adjudicator’s Opinion

21. Mr H’s complaint was considered by one of our Adjudicators who concluded that no further action was required by SPPA and the Council. The Adjudicator’s findings are summarised below:-
 - The 2014 Regulations required the Council to determine if Mr H met the criteria for IHER benefits. And, if so, what Tier of benefits he was entitled to after it had obtained a certificate from the IRMP.
 - The 2014 Regulations also stated that, in order to be eligible for Tier 1 IHER benefits, a member must be permanently incapable of gainful employment before their normal pension age.

- There were procedural errors made by the Council during its handling of Mr H's case. The Council should have obtained a report and a certificate from an IRMP to allow it to consider Mr H's IHER application, however, the case was only referred to an OH practitioner. Also, the IRMP did not refer to the test for gainful employment throughout his report, but rather the test for regular employment of like duration.
- While the IRMP applied the test of regular employment, he would likely have come to the same conclusion in the circumstances. This is because Mr H worked full time; if he considered that Mr H was likely to be capable of full-time employment, it follows that he could be capable of working 30 hours per week.
- The procedural failings amounted to maladministration but even if the correct procedure had been followed, the Adjudicator considered that the same decision would more than likely have been reached given the available medical evidence at the time.
- Mr H has argued that the separate reports provided by his GP and the Consultant Psychiatrist in 2018 confirmed he could not work again due to his health conditions. However, the IRMP considered the position when Mr H left employment in August 2016, whereas the GP and Consultant Psychiatrist were assessing Mr H sometime after he had left employment; by which point further additional information had become available.
- It did not automatically follow that evidence produced after the relevant date may not be considered. However, any new evidence must relate to the situation as it stood at the relevant date, which was August 2016. It should also reflect the reasonable expectations held by the medical advisers at that time. In his report, Mr H's psychiatrist said that he had been looking after Mr H for a year, so this post-dates when Mr H left employment in August 2016. The GP set out a number of health issues. However, many of these were diagnosed after August 2016.
- Unless there was a logical reason why it should not have done so without seeking clarification, it was open to the decision-maker to prefer the advice it received from the IRMP. In this case, the IRMP clearly set out his opinion which was that in 2016 it would have been too early to say Mr H was permanently incapable of gainful employment.
- The Adjudicator considered the decision was properly made following Stage Two of the IDRP and there are no valid grounds to remit the decision back to the Council.

22. Mr H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr H's representative provided the following comments:-

- The Council acted with "haste" in August 2016 when they "paid him off" on the grounds of capability, rather than on the grounds of ill health, which would have resulted in him receiving a full pension.

- There was important medical evidence which came to light just weeks after his employment ceased which would have supported the position that Mr H was in ill health. This has had “major consequences” ever since.
- SPPA refused Mr H the full ill health pension as it believed he could still gain employment before retirement age, but all the medical evidence suggests otherwise.
- Mr H is not ever likely to be either physically or mentally able to hold down any sort of paid employment again.
- Mr H considers the medical evidence supports his claim that he meets the criteria for Tier 1, and he has been unable to work since 2016.

23. I note the additional points raised by Mr H’s representative, but I agree with the Adjudicator’s Opinion.

Ombudsman’s decision

24. Mr H believes that he should be awarded Tier 1 IHER benefits under the Scheme as he considers that he meets the criteria set out in the 2014 Regulations, as he will not be able to gain employment before his normal retirement age. Also, that the Council acted in “haste” its initial decision about his capability.
25. The issue of Mr H’s performance capability and any actions by the Council is an employment matter and not within my remit.
26. In the matter of the IHER application, it is not for me to review the medical evidence and decide whether Mr H is entitled to Tier 1 IHER benefits. I am primarily concerned with the decision-making process. It is not relevant whether I agree or disagree with the actual decision made.
27. The Council were required to assess Mr H’s eligibility for IHER benefits and decide whether Mr H was entitled to Tier 1 or Tier 2 benefits in accordance with the 2014 Regulations.
28. I acknowledge there were procedural errors when Mr H made his ill health application, as the Council did not refer the matter to an IRMP when making the initial ill health decision. However, for me to uphold a complaint it is not simply the case that I must identify maladministration; I must be satisfied that the individual, as a result, sustained an injustice.
29. The outcome of Mr H’s case has not been adversely affected because, despite the initial procedural errors, Mr H was given the opportunity to provide all the medical evidence as part of the IDRP. This evidence was fully reviewed at Stage Two by an IRMP. So, I consider that even if the correct procedure had been followed initially, on the balance of probability, it was more likely than not that the same decision would have been reached, given the available medical evidence at the time.

30. Mr H has argued that the medical evidence including the GP report and the Consultant Psychiatrist report, demonstrate that he will be unable to work again. However, these reports assessed the matter some time after Mr H had left employment in August 2016, when additional information was available. It should also be noted that a difference of medical opinion between the IRMP and the GP/Consultant Psychiatrist is not sufficient for me to be able to say that the Council's acceptance of the IRMP opinion means that its decision was not properly made.
31. I acknowledge that Mr H's health has deteriorated but I am only considering the position as at August 2016.
32. I am satisfied that the relevant 2014 Regulations have been correctly applied and that the medical evidence was considered. I find no grounds to remit the decision back to the Council.
33. I do not uphold Mr H's complaint.

Anthony Arter

Pensions Ombudsman
12 January 2022