

Ombudsman's Determination

Applicant	Mr D
Scheme	Local Government Pension Scheme (Northern Ireland) (the Scheme)
Respondent	Northern Ireland Local Government Officers' Superannuation Committee (the Committee)

Outcome

1. I do not uphold Mr D's complaint and no further action is required by the Committee.

Complaint summary

2. Mr D's complaint concerns the Committee's decision to award him a Tier 2 ill health early retirement (**IHER**) pension. He believes that he is permanently incapable of undertaking any form of gainful employment, and so he should be entitled to Tier 1 benefits.

Background information, including submissions from the parties

3. The relevant rules and regulations are the Local Government Pension Scheme Regulations (Northern Ireland) 2014 (**the 2014 Regulations**).
4. Regulation 36 of the 2014 Regulations provides that an active member of the Scheme is entitled to a pension if her/his employment is terminated by the Scheme employer on the grounds of ill health and s/he satisfies the first and second conditions. The first condition is that the member is permanently (that is at least to normal pension age) incapable of discharging efficiently the duties of the employment s/he was engaged in. The second condition is that the member is not immediately capable of undertaking any "gainful employment". Gainful employment means paid employment for not less than 30 hours in each week for a period of not less than 12 months.
5. If the member satisfied both conditions, they are entitled to either a Tier 1 or Tier 2 pension. Tier 1 benefits are payable if a member is incapable of any gainful employment; that is, until their normal retirement age (**NRA**). Tier 2 benefits are

payable if the member is likely to become capable of some gainful employment before their NRA.

6. A decision as to whether a member is entitled to a pension under Regulation 36, is for the Committee to make after it has obtained a certified opinion from an independent registered medical practitioner (**IRMP**).
7. Relevant extracts from the 2014 Regulations are provided in the Appendix.
8. Independent Occupational Health (**Independent OH**) was the Committee's occupational health provider at the time.
9. Mr D was employed as a fulltime bus driver by Translink.
10. From 2015 onwards Mr D experienced discomfort in his hips and legs associated with varicose veins, he was also diagnosed with an umbilical hernia.
11. On 23 March 2016, Dr Courtney, an IRMP for Independent OH, provided his report (**the OH Report**) on Mr D's ability to undertake his role as a bus driver. The OH Report said:-
 - Mr D was suffering from pain in his legs caused by varicose veins and that he was awaiting surgery for this. He suffered from pain in his hips, particularly his left hip, and his right knee. At present, there was no formal diagnosis for this pain.
 - The varicose ulcer, associated with the varicose veins, on his left ankle had healed, but it was still susceptible to injury or breakdown.
 - The outcome of the pending surgery could not be predicted with any degree of certainty and the pain he felt in his hips and right knee only complicated matters further.
 - At this time, Mr D remained unfit to return to his role as a bus driver, although his symptoms may improve after the surgery.
12. On 9 May 2016, Mr D and his employer submitted an application for IHER to the Committee. Enclosed with the application was Mr D's job description and the OH Report.
13. On 7 June 2016, the Committee informed Mr D that he was required to attend an in-person assessment, on 17 June 2016, with an IRMP for an assessment on his ability to work.
14. After a meeting with Mr D on 17 June 2016, Dr Jenkinson, a specialist in OH medicine, gave his assessment on Mr D's fitness to work. Dr Jenkinson concluded that Mr D was unfit to continue in his role as a bus driver and said:
 - surgery for his varicose veins would be beneficial; however, it was unlikely to fully resolve his incapacity;

- he would likely continue to suffer from venous insufficiency (blood flow) in his legs, he also had slight symptoms of osteoarthritis in his right knee;
 - Mr D was unfit for any role that required prolonged periods of sitting, standing and walking, this included his role as bus driver; however
 - It was likely that Mr D would be capable of undertaking some form of gainful employment before reaching his NRA.
15. Dr Jenkinson sent the Committee a signed medical certificate and recommended that Mr D was entitled to receive Tier 2 IHER benefits.
 16. On 20 July 2016, the Committee informed Mr D that his IHER application was accepted, and he was entitled to Tier 2 benefits. It believed that with surgery and pain medication, he was likely to be able to return to some form of gainful employment before his NRA.
 17. On 7 August 2016, Mr D's employment as a bus driver was terminated by way of incapacity due to ill health.
 18. On 19 December 2016, Mr D made an appeal under stage one of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). He said that the symptoms associated with his varicose veins were still "relentless", despite having surgery to treat it in October 2016. The symptoms of the osteoarthritis in his right knee had also increased. He was unable to provide any medical evidence in support of his appeal as he was awaiting a post-surgery assessment.
 19. On 20 December 2016, the Committee acknowledged receipt of Mr D's IDRP appeal and said that it would provide a response within two months.
 20. The Committee forwarded Mr D's appeal onto Dr Jenkinson and asked him to confirm whether his opinion had changed, or remained the same, based on the comments made by Mr D.
 21. On 5 January 2017, Dr Jenkinson wrote to the Committee and said that his opinion remained unchanged. It was likely that Mr D would experience some improvement in his symptoms within the next three to six months post-surgery. No further treatment or therapies were required. In lieu of any substantive medical evidence that suggested otherwise, Tier 2 IHER benefits remained the most appropriate award for Mr D.
 22. On 25 January 2017, the Committee provided its stage one IDRP response. It noted that Mr D was still in the recovery period for the surgery to treat his varicose veins and that his pain medication was being modified. The decision to award him Tier 2 benefits remained unchanged as it was likely that post recovery, he would be able to undertake some gainful employment.
 23. On 5 July 2017, Mr D submitted an appeal under stage two of the Scheme's IDRP. He explained that he had an x-ray on both knees on 4 January 2017, the results of

which showed degeneration in his right knee with swelling in the left knee. He was prescribed stronger pain medication and creams; it was also suggested that he should consider physiotherapy and steroid injections in his right knee. His post-surgery assessment recommended that he might consider sclerotherapy on his left ankle to prevent any recurrent varicose vein associated venous ulcers.

24. In support of his appeal, Mr D provided a medical report from his GP, Dr A Leitch, dated 4 July 2017, which said:

- Mr D suffered from an umbilical hernia and left sapheno-femoral incompetence with subsequent venous ulceration on his left ankle;
- he continued to experience pain in his legs despite bilateral surgery in October 2016;
- this meant that he was unable to bear weight on his left leg, or keep it in any one position for long periods of time, so he was unable to undertake any work;
- he recently complained of bilateral knee pain, which required a referral to occupational therapy for walking aids;
- his mortgage lender should consider the possibility of freezing his mortgage until his post-operative recovery was complete; and
- he remained unfit for work, or work of a sedentary nature.

25. The Committee referred Mr D's stage two appeal, and the supporting evidence, onto Dr Turner and Dr Maguire, two OH consultants, neither of which had previously been involved in Mr D's IHER application.

26. On 19 October 2017, Dr Turner and Dr Maguire, through a joint report, explained that Mr D attended an in-person assessment on 6 October 2017, in relation to his stage two appeal. The report is summarised below:-

- Since his surgery in October 2016, Mr D had not suffered any further venous ulcers and he continued to wear his support stockings on a daily basis.
- The surgery was helpful, but it did not fully resolve the issues that he suffered from. In particular, he still complained of symptoms and discomfort in his left ankle, the location of a previous ulcerations.
- He was still unsuitable for his former role as a bus driver, as he would be unable to stop the bus and freely move about.
- There were many different forms of employment that offered adaptable settings for Mr D to work in that would allow him to get up and move about. This would ensure that his legs were not kept in the same position for too long.
- His umbilical hernia had not presented any symptoms or discomfort. It was noted that he now also presented a small inguinal hernia, albeit with little to no

symptoms. There was no surgical treatment scheduled or planned for either of the hernias.

- He was still awaiting a referral for physiotherapy, and steroid injections, for the osteoarthritis in his right knee. It was likely that, with treatment, these symptoms would improve, although, in the long-term, surgical intervention may be required.

27. In conclusion, Dr Turner and Dr Maguire said:

“Taking into account all of the medical evidence available, [Mr D] remains permanently incapable [of] returning to his job as a bus driver due to the very prolonged sitting required, and has a reduced likelihood of being capable of undertaking gainful employment. He is likely to become capable of undertaking gainful employment as defined by the LGPS Regulations before reaching [NRA] which does not involve prolonged sitting or standing.”

28. On 21 November 2017, the Committee wrote to Dr Turner for clarification on several points before it provided its stage two IDRPs response.

29. In response to the Committee’s request for clarification, Dr Turner explained that:-

- The options of physiotherapy and steroid injections were available for Mr D, if required. It was likely that these treatments would lead to an improvement in the symptoms associated with the osteoarthritis in his right knee.
- Surgery on his right knee was possible/available, but this was dependent upon the progression of his osteoarthritis. Although, at present, it was likely that Mr D was too young to be referred for surgery on his right knee.
- There were no further treatments planned for his legs other than the continued use of the support stockings.
- The new inguinal hernia occurred after his surgery in October 2016; however, it was small and did not require any treatment at present. There was no requirement for abdominal surgery unless either hernia presented discomfort for Mr D.
- She was not in receipt of the x-rays that Mr D had said were undertaken on his knees. Although, any problems he experienced were mainly in his right knee as he did not mention any discomfort in his left knee during the assessment.
- It was for Mr D’s consultant to decide whether it was appropriate, or necessary, to proceed with sclerotherapy on his left ankle.
- Mr D was permanently incapable of returning to his role as a bus driver, and his ability to undertake all forms of gainful employment was reduced. However, he was still able to fulfil some forms of employment, so Tier 2 benefits were recommended.

- It was possible that Mr D's GP had signed him off sick from work for symptoms/conditions unrelated to his IHER application. GPs do not generally understand the criteria under the 2014 Regulations for IHER.
30. The Committee made the decision to refer the matter onto its legal counsel (**the Counsel**) before responding to Mr D's stage two appeal. It provided the Counsel with the OH Report, copies of each IRMP's opinions, and any medical evidence submitted in support of the IHER application and subsequent appeals.
31. On 11 December 2017, the Counsel provided a summary of the conditions that Mr D suffered from that instigated his IHER application. It also provided a detailed summary of all the medical evidence submitted, and of each of the opinions made by each IRMP.
32. In summary, the Counsel said:-
- All the IRMP's were in agreement that Mr D was no longer able to fulfil his role as a bus driver. That is, he was unable to sit in one position for any length of time. There was also no medical evidence that contradicted the view of any of the IRMPs.
 - The IRMPs agreed that Mr D would see some improvement in the symptoms related to his varicose veins and venous ulcers/insufficiency following an appropriate recovery period post-surgery.
 - Dr Leitch only provided a view on Mr D's capacity to work as at the time of his IHER application. Dr Leitch had not expressed a view on the expected future course of Mr D's conditions. So, his opinion was not made in accordance with the test for IHER under the 2014 Regulations.
 - Dr Jenkinson indicated that, with the benefit of time, there may be improvements to Mr D's legs following the surgery in October 2016. There were no further treatments planned that could improve his venous problems. However, he was expected to be able to undertake some forms of employment that did not require him to sit, or stand, in one position for any prolonged periods of time.
 - Dr Turner and Dr Maguire agreed with Dr Jenkinson's opinion. Dr Turner believed that a difference of opinion between herself and Dr Leitch was down to Dr Leitch being unfamiliar with the 2014 Regulations and the IHER test criteria.
 - While Mr D was unable to undertake some forms of sedentary employment, this did not mean that he was completely incapable of all forms of gainful employment. There were likely many roles available that would allow him to regularly move about when required.
 - Mr D had not provided any additional medical evidence to support his comments under either stage one or two of the Scheme's IDRP, other than the report from Dr Leitch.

- The IRMPs had taken into account Mr D's current prognosis and the expected course of his conditions in relation to his ability to undertake gainful employment. Overall, the overriding opinion was that Tier 2 benefits remained appropriate as Mr D would likely be able to return to some form of employment before his NRA.

33. On 29 December 2017, the Committee provided its stage two IDR response and did not uphold Mr D's appeal, saying:-

- Since his surgery there was no evidence of any additional venous ulcers and that he continued to wear his support stockings. He was on appropriate pain relief medication for the osteoarthritis in his right knee with the possibility of a referral for physiotherapy and steroid injections. He was not experiencing any symptoms from either of his hernias and there was no requirement, at the time, for surgical intervention.
- It considered the opinion of each of the IRMPs and Dr Leitch's, all of which agreed that he was unable to undertake his role as a bus driver. There was also an agreement that his capacity for undertaking all forms of employment had diminished; however, he was still able to undertake some forms of employment.
- It was accepted that he was unable to bear weight on his legs nor stand, or sit, in any one position for extended periods of time. This reduced his capacity for gainful employment; however, in a number of sedentary roles, he would be able to get up and freely move around as and when he needed to.
- It took into consideration whether Dr Leitch's opinion conflicted with the opinions of the IRMPs. Overall, it was concluded that Dr Leitch was only looking at Mr D's present situation and had not considered the future progress of Mr D's conditions up to his NRA. This was likely because Dr Leitch was unfamiliar with the 2014 Regulations.
- As he was likely capable of some forms of gainful employment, before his NRA, the original decision to award him Tier 2 benefits remained appropriate.

Adjudicator's Opinion

34. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Committee. The Adjudicator's findings are summarised below:-

- Mr D's reason for applying for IHER was due to varicose veins and resultant venous ulcers that developed on his left ankle. However, he also suffered from abdominal and inguinal hernias and had early signs of osteoarthritis in his hips and right knee.
- On initial review, Dr Jenkinson, the first IRMP, believed that Mr D was permanently incapable of fulfilling his role as a bus driver as it required him to sit in one position for prolonged periods of time without the ability to get up and move

around. Dr Jenkinson also believed that Mr D was not immediately capable of undertaking alternative gainful employment. Subsequently, Mr D met both the conditions necessary for an IHER pension. Dr Jenkinson said that Mr D was eligible for a Tier 2 pension as it was likely he would be capable of gainful employment before reaching his NRA.

- Mr D underwent surgery on his legs to treat his varicose veins in October 2016. However, Mr D was of the view that the surgery provided insufficient relief to enable him to return to any form of employment. He said that he should be entitled to a Tier 1 pension and appealed the initial decision by Dr Jenkinson. Dr Jenkinson's opinion remained unchanged as Mr D was still in the post-surgery recovery period, the results of which were unlikely to be apparent until at least four to six months post-surgery.
- In support of his stage two IDRP, Mr D attended an in-person assessment with Dr Turner and Dr Maguire. Each of the IRMPs noted that Mr D was not experiencing any further symptoms related to the venous ulcers and that he was wearing his support stockings. He showed signs of early-stage osteoarthritis, but there were appropriate treatments available to Mr D, if required, or recommended. There was no immediate surgical intervention required to treat either of his hernias, as he was not experiencing any discomfort or symptoms.
- The Adjudicator said that in the first instance, and on appeal, each of the IRMPs understood the IHER criteria and had applied the correct test in accordance with the 2014 Regulations. Each of the IRMPs had taken into account the available medical evidence and had provided robust, clear and sufficient explanations for their opinions.
- The Adjudicator noted that the Committee, and the Counsel, asked Dr Turner additional questions to help better understand her opinion and that of Dr Maguire's. In particular, the Committee queried a slight difference of opinion expressed by Dr Leitch, Mr D's GP. The Adjudicator was satisfied, that Dr Turner's response, that the difference of opinion was down to Dr Leitch commenting on Mr D's symptoms at present, rather than commenting on the expected future course of Mr D's conditions, was a reasonable conclusion to reach.
- The Committee understood each IRMP's opinion, and where necessary, it had asked for clarification from an IRMP before making a decision on Mr D's appeal for a Tier 1 pension. The Adjudicator was satisfied that, as the decision maker, the Committee considered Mr D's appeals in line with the 2014 Regulations and that it had asked itself the correct questions.
- In the Adjudicator's view, there was no basis on which he could recommend that the decision be remitted back to the Committee to reconsider.

35. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D provided his further comments, which are summarised below:-

- The opinions of the IRMP's did not fully reflect his long-term health and wellbeing. Before the surgery in October 2016, he had been absent from work for almost two years.
- The OH Report said that the outcome of the surgery for the varicose veins could not be "predicted with any degree of certainty". It also made clear that the symptoms of the pain in his hips and right knee would also further complicate the outcome and benefits of the surgery.
- Dr Jenkinson's report of 5 January 2017 said that post-surgery, there had not been an improvement in his symptoms. It was expected that there would be improvements in his symptoms in four-to-six-month post-surgery. However, one year after the surgery, Dr Turner and Dr Maquire said that the surgery he underwent can be "helpful although it may not fully resolve the condition". This contradicted the view of Dr Leitch who believed he was unsuitable for any work, including sedentary work.
- The Counsel explained to Dr Turner that part of the reason he was awarded a Tier 2 IHER pension, was because it was expected that between four-to-six-month post-surgery, there should be an improvement in his symptoms. It asked Dr Turner to confirm if there had been an improvement since the surgery. Dr Turner, in his view, had not answered this question.
- He was now 60 years old and had not worked since 2014. He had now been referred to a surgeon for the inguinal hernia and he was on the waiting list for a knee replacement. At present, he walked with the aid of a walking stick and managed his other symptoms with pain relief medication. He was now registered as disabled and held a blue badge.

Ombudsman's decision

36. Mr D's complaint concerned the Committee's decision to award him a Tier 2 IHER pension instead of a Tier 1 IHER pension.
37. It may help if I explain that it is not my role to make a decision on Mr D's eligibility for an IHER pension under Regulation 36 of the 2014 Regulations. My role is to consider the decision-making process undertaken by the Committee. The issues that I need to consider are whether the relevant regulations have been correctly applied; whether the appropriate evidence has been obtained and considered; and whether the decision is supported by the available evidence.
38. If I am to uphold a complaint relating to IHER the evidence would need to support the view that the decision-making process was flawed. For example, the decision is not supported by the medical evidence that was available at the time, or the evidence

indicates that the Committee should not have relied on the IRMP's opinion because the IRMP did not understand the criteria for IHER, or there was an error/omission of fact or consideration of an irrelevant matter.

39. Mr D is entitled to an IHER pension under the Scheme, provided he satisfies the eligibility conditions under Regulation 36 1(a) and (b) of the 2014 Regulations. Regulations 38 and 81 require the Committee to obtain the opinion of an IRMP before making its decision. In this case, the Committee's appointed IRMP is Independent OH. The Committee is the decision maker in accordance with Regulations 36 and 81 of the 2014 Regulations. So, I am satisfied that the decision has been made by the appropriate decision maker.
40. At the time of the initial review Dr Jenkinson surmised that Mr D met both the necessary conditions under Regulation 36 of the 2014 Regulations. Consequently, Dr Jenkinson needed to then consider Mr D's eligibility for IHER Tier 1 or Tier 2.
41. Based on the evidence provided, Dr Jenkinson said that further treatment was unlikely to lead to a full resolution for Mr D's varicose veins, although his upcoming surgery in October 2016 would be helpful. Dr Jenkinson's view was that Mr D was unable to fulfil his role as a bus driver as he was unable to sit for prolonged periods of time. However, it was likely he would be able to undertake gainful employment before his NRA. That is, gainful employment that did not involve prolonged sitting, walking, or standing. So, he was eligible for Tier 2 benefits.
42. I am satisfied that, in the first instance, the evidence available supports the view that Dr Jenkinson understood the criteria for IHER from active status under the 2014 Regulations. Consequently, I find no reason why the Committee should not have relied on the opinion it received from Dr Jenkinson.
43. On appeal, the matter was again referred to Dr Jenkinson whose opinion remained unchanged. The Committee explained to Mr D that as he was still in the post-surgery recovery period, and it was likely that he would see further improvements to his symptoms within three to six months he would likely be capable of other forms of gainful employment.
44. Mr D requested that his appeal be reconsidered under IDR stage two and submitted a report by his GP, Dr Leitch, who said that his condition meant that he was unable to undertake any employment even that of a sedentary nature. The matter was referred on to Dr Turner and Dr Maguire who supported the opinion of Dr Jenkinson after a face-to-face assessment with Mr D.
45. I note that the Committee, before responding to Mr D with its stage two decision, requested additional information from Dr Turner. The aim of which was to add additional context and clarity to Dr Turner's and Dr Maguire's joint opinion, to help it better understand the advice provided.
46. I have reviewed all the information provided by Dr Turner and Dr Maguire, in connection with Dr Jenkinson's initial opinion. I note that while it had been said that

Mr D may see more promising results within three to six months post-surgery, there has never been any suggestion that the surgery would fully resolve the symptoms Mr D experienced regarding his varicose veins.

47. On appeal, what needed to be considered was Mr D's ability to undertake gainful employment. In particular, whether his varicose veins condition, osteoarthritis and hernias would prevent him from undertaking sedentary work, taking into consideration the available treatments and their potential efficacy, post-surgery. This is because there was no dispute that Mr D was unable to return to his role as a bus driver due to his medical conditions.
48. The difference of opinion between Dr Leitch and the IRMPs appears to be because Dr Leitch only considered Mr D's symptoms at a set point in time. Whereas the IRMPs were considering the expected future course of Mr D's conditions up until his NRA, as required under the relevant regulations. I am satisfied that this position was made clear when the Committee received information from Dr Turner and advice from the Counsel.
49. Dr Turner said that post surgery, Mr D had not experienced any further venous ulcers and that no further treatments were required beyond wearing his support stockings. She added that, regarding his osteoarthritis, appropriate treatments were available and would likely see beneficial results, if required. These included physiotherapy, steroid injections and, if necessary, surgery on his knee. She also noted that neither of Mr D's hernias presented any discomfort or symptoms, so surgery was not required at that time.
50. It was acknowledged that Mr D had a diminished likelihood of being able to undertake some forms of gainful employment. However, this did not mean that he was unable to undertake all forms of gainful employment. It was noted that most sedentary roles offered flexibility for an individual to get up and sit down as and when required, which was suitable for Mr D when also considering the future course of his conditions and their available treatments and potential efficacy.
51. Overall, I am satisfied that, on appeal, each of the IRMPs has understood the correct test that needed to be applied in determining Mr D's eligibility for either Tier 1 or Tier 2 benefits. The advice provided contained robust explanations that supported the original view that Mr D was capable of some forms of gainful employment and thereby eligible for Tier 2 benefits instead of Tier 1 benefits.
52. In requesting additional information from Dr Turner, the Committee has demonstrated that it also understood its own obligations under the 2014 Regulations. I find that the Committee asked itself, and the IRMPs, the correct questions before deciding on Mr D's appeal. Given that the decision made was supported by the available evidence and that there are no errors or omissions of fact, there is no reason to remit the matter back to the Committee to reconsider.
53. I note that Mr D's current circumstances have changed since the initial decision in 2016, and the subsequent appeals. However, this does not mean that the advice

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provided by the IRMP's, at the time, was incorrect, just that his conditions may not have followed the expected course that the IRMP's had anticipated at the time.

54. I do not uphold Mr D's complaint.

Anthony Arter CBE

Deputy Pensions Ombudsman

12 December 2023

Appendix

Local Government Pension Scheme Regulations (Northern Ireland) 2014

0. As at the date Mr D's employment ceased, Regulation 36 provided:

“**36.**—(1) Where an active member who has qualifying service for a period of two years or more ceases local government employment on the grounds that—

(a) the member's ill-health or infirmity of mind or body renders the member permanently incapable of discharging efficiently the duties of the employment the member was engaged in; and

(b) the member, as a result of ill-health or infirmity of mind or body, has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal pension age,

the Committee may, at the request of the employing authority, determine that the member's retirement pension comes into payment before the member's normal pension age in accordance with this regulation.

(2) If a member satisfies the conditions in paragraphs (1)(a) and (1)(b) then the member shall take early payment of a retirement pension.

(3) The amount of the retirement pension that a member who satisfies the conditions mentioned in paragraphs (1)(a) and (1)(b) receives is determined by which of the benefit tiers specified in paragraphs (4) and (5) that member qualifies for, calculated in accordance with regulation 39 (calculation of ill-health pension amounts).

(4) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking any 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; and

(b) is likely to become capable of undertaking any gainful employment before reaching normal pension age.

(6) Before determining whether a member who has ceased to hold a local government employment is entitled to a benefit under this regulation, the Committee shall obtain a certificate, in accordance with regulation 38 (role of the IRMP), from an IRMP qualified in occupational health medicine who is appointed by the Committee.”

1. Regulation 38 provided:

“**38.**—(1) A decision as to whether a member is entitled to early payment of retirement pension under regulation 36 (early payment of retirement pension

on ill-health grounds: active members) or 37 (early payment of retirement pension on ill-health grounds: deferred members), shall be made by the Committee after it has obtained a certificate from an IRMP as to—

(a) whether or not the member is suffering from a condition that renders the member permanently incapable of discharging efficiently the duties of the employment the member was engaged in, because of ill-health or infirmity of mind or body;

(b) whether as a result of that condition the member has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal pension age, and how long the member is unlikely to be capable of undertaking gainful employment; and

(c) where a member had reduced working hours and had reduced pay as a consequence, whether that reduction in working hours was wholly or partly as a consequence of the ill-health or infirmity of mind or body.

(2) Where the IRMP is considering an application under regulation 36 (early payment of retirement pension on ill-health grounds: active members), the IRMP shall further determine whether, as a result of that condition, the member—

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

(b) is likely to become capable of undertaking any gainful employment before reaching normal pension age.

(3) A certificate from an IRMP, obtained under paragraphs (1) and (2), shall include a statement that—

(a) that IRMP has not previously advised, or given an opinion on or otherwise been involved in the particular case for which the certificate has been requested; and

(b) that IRMP is not acting, and has not at any time acted, as the representative of the member, the employing authority or any other party in relation to the same case.

(4) The Committee and the IRMP shall have regard to guidance given by the Department when carrying out their function under this regulation, when making an ill-health determination.”

2. Regulation 81 provided:

“First instance determinations: ill-health

81.—(1) Where the Committee is considering whether a person who has ceased to hold a local government employment is entitled to a benefit under

regulation 36 (early payment of retirement pension on ill-health grounds: active members) or regulation 37 (early payment of retirement pension on ill-health grounds: deferred members), it shall refer for decision to the IRMP, who is qualified in occupational health medicine and who has been appointed by the Committee under regulation 36(6) and 37(2).

(2) The IRMP, in accordance with regulation 38 (role of the IRMP), shall supply to the Committee, when requested by the Committee, a certificate regarding its ill-health determination.”

3. Schedule 1 states:

“gainful employment” means paid employment for not less than thirty hours in each week for a period of not less than twelve months”

“permanently incapable” means that the member will, more likely than not, be incapable until at the earliest, the member’s normal pension age”

“IRMP” means an independent registered medical practitioner who is registered with the General Medical Council and—

(a) holds a diploma in occupational health medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA state; and for the purposes of this definition, “competent authority” has the meaning given by section 55(1) of the Medical Act 1983(**25**); or

(b) is an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA state”