

Ombudsman's Determination

Applicant	Mr D
Scheme	The Mars Pension Plan (the Plan)
Respondent	Mars Pension Trustees Limited (the Trustee)

Complaint Summary

1. Mr D's complaint against the Trustee concerns the Trustee's award of a partial disability pension. He says the Trustee's decision that he is capable of undertaking alternative employment elsewhere is wrong because his health is continuing to deteriorate. Mr D considers that he should have been given the highest award, equal to 60% of his Annual Earnings less the annual rate of State Incapacity Benefit, because he is incapable of undertaking alternative sedentary work.

Summary of the Ombudsman's Determination and reasons

2. The complaint should not be upheld against the Trustee because it correctly interpreted the Plan Rules and followed the correct process in reaching its decision regarding the amount of disability pension Mr D was entitled to under the Plan.

Detailed Determination

Material facts

3. Mr D was employed by Mars Chocolate UK Limited (**the Company**) as a machine operator until his employment was terminated on 16 February 2016, due to medical incapacity. During his employment with the Company, he was an active member of the Plan.
4. Since May 2014, Mr D has experienced pain in his wrists, hands, shoulders, neck, back and knees. His symptoms were initially diagnosed as a complex regional pain syndrome (**CRPS**), a condition which causes chronic pain. Following subsequent MRI scans and x-rays, he was diagnosed with degeneration in multiple joints. Mr D also has a history of irritable bowel syndrome (**IBS**), tinnitus, daily headaches (the cause of which has yet to be diagnosed), and 'mild degenerative subcortical cysts' affecting his left wrist, as revealed by an MRI scan dated 4 October 2011.

5. Mr D had been absent from work on sick leave due to his painful knees. During his absence, he was in receipt of benefits under the Company's Sickness Benefit Scheme, under which he was entitled to 104 weeks' sick pay. That period expired on 16 February 2016. Under the Company's disability pension policy (the **Policy**), an 'Associate' (effectively an employee) who had exhausted the 104 weeks sickness absence and had been in receipt of sick pay during that period, may qualify for a disability pension if he is incapable of performing his own job, which may include agreed permanent modifications. At 18 to 20 months of sickness absence, the Company's appointed independent occupational health physician would carry out a final independent medical assessment of whether the Associate is likely to return to work within 104 weeks. If such return is not possible, the Company would make a recommendation to the Trustee, taking into account the medical evidence, on whether the Associate meets the criteria for a disability pension and the level of disability pension to be awarded. The final decision, about the level of the disability pension award, would be made by the Trustee's Discretions Committee (the **Committee**) acting on the Company's recommendation.
6. Rule 12.00 of the Plan's 2006 consolidated trust deed and rules (the **2006 Rules**) provides for a Disability Pension as follows:

"12.01 If at any time an Associate being an Active Member or Limited Member of the [MARS Pension Plan (**MPP**) Section] before reaching Normal Pension Age [**NPA**]:

- (i) leaves Service and at that time has completed not less than two years of permanent employment after subtraction of aggregated periods of absence for ill-health and unauthorised absence ...;
- (ii) has been absent from Service by reason of ill-health or incapacity and in receipt of benefits under the Mars Sickness Benefit Scheme for the 104 consecutive weeks...;
- (iii) is in circumstances of Disability; and
- (iv) with the Associate's consent has been selected by the Trustee acting on the advice of the Company for retirement under this Rule 12.00."

the Associate shall be entitled to receive a Disability Pension in lieu of all other benefits payable to him under the Plan. A Disability Pension shall be payable with effect from the day after that on which the Associate leaves Service and in accordance with Rule 33.00 ..."

7. Rule 3.00 of the 2006 Rules defines "Disability" as:

"...in relation to an Associate retiring pursuant to Rule 12.00 or 29.00 circumstances such that the Associate is incapacitated or disabled by sickness or accident and is thereby prevented from performing his or her employment. The Trustee acting on the advice of the Employer shall have sole power to

determine whether or not any Associate is incapacitated or disabled to such an extent as to entitle such Associate to retire pursuant to Rule 12:00 or 29:00 ...”

8. Rule 3.00 states that the rate of Disability Pension payable to an Associate who is eligible for a Disability Pension under Rule 12.01 shall be equal to either:
 - “(a) 60% of the Associate’s Annual Earnings less the annual rate of State Incapacity Benefit ... or
 - (b) such lesser annual rate of pension as the Trustee at its discretion determines with the advice of the Company where it appears to the Company that such Associate is only partially incapacitated or disabled...”
9. The terms “partially incapacitated or disabled” referred to within paragraph (b) of the definition of Disability Pension in Rule 3.00 are not defined in the 2006 Rules.
10. Rule 33.03 of the 2006 Rules gives the Trustee the discretion, with Company consent, to reduce the amount of any Disability Pension at any time before the member has reached NPA or:

“..the earlier date (if any) on which the rate of Disability Pension is increased in accordance with the proviso to the respective definitions of those terms where it appears to the Company that such Member is only partially incapacitated or disabled or where such Member commences employment (whether full time or part time) with any employer PROVIDED that in relation to any such pension where the proviso to the definition of Disability applied and was satisfied, such reduction shall apply only during such period as the Member’s physical or mental condition is such that the proviso would not be satisfied.”
11. On 10 July 2014, Dr M, the Company’s independent occupational health physician, wrote to the Company saying he did not consider Mr D fit for a full operative role at present, due to severe knee pain which appeared to be degenerative osteoarthritis, and recommended that the Company consider trying him on lighter duties. He said, ‘apart from a change in role, to a non-manual one, it is hard to see what adjustments would lead to Mr D’s earlier return to work’.
12. Prior to Dr M’s final medical assessment, medical reports were obtained. In his report dated 11 August 2015, the Orthopaedic Surgeon acknowledged that Mr D had pain affecting both knees, and while they were not giving way, he felt unstable and vulnerable. He said that Mr D’s general health was good and there were no significant medical problems. When addressing the question of whether there were any work-related problems that needed to be considered, he replies that ‘clearly this is a difficult problem, investigations have not shown a serious issue in either knee however, a patellofemoral problem is probably the main cause, which is likely to be ongoing.’

13. The Chartered Psychologist explained, in his report dated 18 August 2015, that it was beyond his expertise to specifically comment on Mr D's medical conditions. The physical demands of Mr D's role would worsen his medical condition; if Mr D's medical condition continued, it may be helpful to consider an alternative less manual role.
14. The Consultant in anaesthesia and pain medicine stated in his report dated 6 July 2015 that, while Mr D's right knee was now more stable following surgery, he had disabling pain, and his left knee was becoming less stable. He stated that Mr D also experiences pain over his entire body. In his subsequent report, dated 29 September 2015, he acknowledged that he had not seen Mr D recently. He said that if Mr D's role included lifting and moving heavy items, a desk based job would be more appropriate. However, he would need to specifically meet with Mr D to assess his workload before providing his opinion.
15. Dr M met Mr D in October 2015 for a final medical assessment, following which he provided his report of 5 October 2015 (updated on 12 October 2015) (**Dr M's Report**). Dr M observed that Mr D could sit in a chair for approximately 45 minutes without moving too much. He acknowledged that Mr D still suffered from headaches; that he had told him that his health had gotten worse since their last meeting in April 2015; that Mr D had said that he could do very little without taking pain killers; that Mr D could not tolerate the medication he had been prescribed for musculoskeletal pain and that when he stopped taking the medication the pain had returned to his other joints; and that Mr D said his chest pain, from his 'oesophageal spasm', was worse than before taking the medication.
16. Mr D's additional comments, incorporated into Dr M's Report include that: -
 - He had told Dr M that he had to rest between lengths when swimming; and that his knee pain was much worse after exercising.
 - Dr M had failed to state, in his original report of 5 October 2015, that Dr M observed him constantly flexing his legs forward and his back, that he had been massaging his knees, while he was sitting, or to include that he had told Dr M he had taken tramadol (a strong painkiller available only on prescription). He commented that he had rested before their meeting.
 - When Dr M asked whether he felt he could do sedentary work, he told him he did not think he could, because it would cause him pain in his knees and lower back. He also said he could not sit for 15 minutes or more at any one time without experiencing pain.
17. Dr M's Report concluded that Mr D had received all modalities of treatment for his condition but his condition appeared to have deteriorated. Dr M did not consider on the balance of probabilities that Mr D was likely to return to his role as an operator before February 2016, but believed that he could manage a sedentary role. Dr M

confirmed that he had advised Mr D to consider what he might do in a sedentary role, had referred to the possibility for Mr D to retrain and highlighted the possibility of including flexible working, such as working from home, in whatever plans he has.

18. Dr M also completed the Company's Disability Pension checklist dated 7 October 2015 (the **Disability Checklist**), in which he recorded his findings. Dr M recorded that Mr D had developed a chronic pain condition that had been resistant to treatment and he would be unable to undertake the physical aspects of his operator role but would be fit to undertake alternative sedentary work. Dr M ticked the option stating that Mr D is "Capable of some future work – partial disability pension". Dr M's explanation for selecting this option was that Mr D was likely to be able to undertake sedentary work, providing he could mobilise from a seated position and some retraining may be necessary.
19. On 17 November 2015, the Company wrote to the Trustee confirming that Mr D met the definition of Disability under Rule 3.00 and was in circumstances of Disability as required under Rule 12.01(iii). The Company confirmed its view that Mr D was partially incapacitated and recommended to the Committee that Mr D should be awarded a Disability Pension of 40% of Annual Earnings on the basis that he was partially incapacitated (the **Recommendation**). The Company confirmed that it had considered Dr M's medical opinion in forming its view. The same day, the Company wrote to Mr D confirming that it had concluded that he 'would be capable of alternative sedentary work, provided he could mobilise from a seated position'. He was told that the Trustee would confirm its decision concerning his pension in due course.
20. In the period that followed, there was an exchange of correspondence between Mr D and the Company. He challenged the Company's assessment of his capacity for alternative sedentary work. In his letter of 21 November 2015, he said that he had limited abilities and a worsening condition, and was therefore surprised that the Company had considered him capable of doing sedentary work.
21. Mr D was seen by a consultant neurologist in December 2015, in connection with his headaches, which had returned in early 2015, pain in his right knee, and 'central pain somatization syndrome'. A letter dated 30 December 2015 from the consultant, stated that if Mr D lay down, his headaches clear after approximately 30 to 60 minutes and usually return in the early evening, that he has constant neck pain which tended to worsen his headaches, and that migraine was the most likely cause of his headaches.
22. On 23 February 2016, the Company asked the Committee to consider Mr D's case, and explained that it had delayed referring it until the Company had made sure Mr D's letter of 21 November 2015 had been considered. The Company confirmed that a copy of the letter had been given to Dr M, and that he had not changed his medical opinion.

23. The Committee approved the Recommendation on 25 February 2016, and agreed to review the award in three years' time. Mr D was notified of the decision the following day. In arriving at its decision, the Committee considered Dr M's Report, which referred to medical reports from the Orthopedic Surgeon, Chartered Psychologist, and Consultant in anaesthesia and pain. The Committee also considered the Recommendation and Mr D's letter of 21 November 2015.
24. On 21 March 2016, the Company received further comments and medical evidence from Mr D, including: -
 - a medical report dated 4 October 2011, indicating symptoms consistent with a mild degenerative change to his left hand;
 - a medical report dated 13 January 2016, concluding that he had 'mild cervical spondylosis';
 - results of an x-ray dated 26 February 2016, stating that he has a history of pain in his lower back with spasms, the cause of which was unknown;
 - a medical certificate dated 1 March 2016, certifying that he was unfit for work because of back and knee pain; and
 - a letter from his doctor, of the same date, supporting that he was suffering from pain in his back and neck, and that the recent scans showed that he had signs of 'wear and tear', which may account for some of his pain.
25. On 10 May 2016, the Company advised Mr D that the Trustee's decision had been reached after careful consideration of all the relevant evidence. He was advised of his right to formally complain to the Trustee. Mr D wrote to the Trustee in June 2016 and on 4 July 2016, complaining about the same issue.
26. On 4 July 2016, after receiving a copy of an MRI report from Mr D, dated 24 June 2016, which he said confirmed that degeneration was occurring in his lower back, and comments alleging that Dr M had ignored his view that a sedentary role would not be suitable for him due to his condition, the Company discussed his case with Dr M. A note, made at the time, records that Dr M said there was no evidence that Mr D's condition was getting worse; his back condition was normal for his age [43]; and it was unlikely his condition would have deteriorated so quickly since their last meeting. In his opinion, there was no medical evidence to support that Mr D was totally incapacitated.
27. On 28 July 2016, the Trustee wrote to Mr D under its Internal Dispute Resolution Procedure (**IDRP stage 1 response**) confirming that the Committee's decision remained unchanged.
28. In September 2016, Mr D's doctor advised that he was not fit for work due to back, neck and knee pain. The medical certificate confirms that he was attending

physiotherapy and orthopaedic clinics. The NHS information held by Mr D's doctor, generated in August the same year, indicated that he had a history of back pain dating back to 2016, a degenerative change in his spine possibly causing back pain in his lower back, and pain in both knees.

29. Following an initial appointment in July 2016, Mr D was diagnosed with 'L5S1 bilateral facet compression with altered sciatic neurodynamic (L5 nerve root compression)' in early October 2016. In his report Dr D, his physiotherapist, said his condition has:

" .. limited his ability to stand, walk to a few minutes only and sitting to about 1/2 hour. He has responded to current treatment and is now having times when he has little pain but he is still functionally quite limited. Treatment is ongoing."

30. On 2 February 2017, Dr M confirmed to the Company that, at the time of his meeting with Mr D in October 2015, the only medical condition preventing him from returning to work related to his knees; that condition would not stop him from doing alternative sedentary work, such as desk based work, where appropriate adjustments could be made to enable him to mobilise as necessary. After reviewing various medical reports, that had been provided since, his view was still that Mr D's health and capacity for sedentary work would have been the same, if the additional evidence Mr D has since provided had been made available to him at the time. He had noted that the condition affecting Mr D's lower back appeared to have arisen after his review in October 2015, as indicated in the medical reports. His opinion was still that Mr D was "partially incapacitated" for the purposes of the Plan rules and capable of other employment.
31. On 6 February 2017, the Trustee held a meeting to review Mr D's case, and upheld the original decision to award him a partial disability pension. The minutes record that the Trustee discussed his case in detail, including his complaint about Dr M. It considered Dr M's conduct in other cases, the period he had been retained by the Company and his relevant experience. The Trustee wrote to Mr D on 8 February 2017 (**IDRP stage 2 response**) confirming that the Plan Rules provide the Trustee with a discretion to award a partial disability pension where an Associate is only partially incapacitated or disabled, the Trustee was satisfied on the basis of the medical evidence that at the time of the assessment Mr D was partially incapacitated or disabled, subsequent information from Mr D did not alter this view and there was no evidence of misconduct by Dr M.
32. Mr D referred his complaint to this office after the completion of the Plan's IDRP. We issued a first preliminary decision on 25 January 2018, followed by a second preliminary decision on 30 July 2018, superseding the first preliminary decision. Mr D and the Trustee's Representative made further representations in response to the preliminary decisions.

Summary of Mr D's position

33. Mr D has made the following submissions:

- He is entitled to a full disability pension because his medical conditions worsened between the date of his final meeting with Dr M and the date he left the Company. If he had a single medical condition, he would have accepted the Trustee's decision to award him a partial disability pension, but he has multiple ailments, including osteoarthritis and a degenerative condition which will eventually require major surgery.
- The Trustee's decision was flawed because it was based mainly on Dr M's Report, which was flawed and biased. Its assessment of his capability for future work was not based on a proper review of his medical conditions and, given the medical evidence he presented to Dr M at the final interview, he ought to have been awarded the highest amount of pension. He says:
 - Dr M did not give a true picture of his medical conditions; he was either biased towards the Company or made assumptions about him and his health conditions. Dr M was 'very economical with the truth' and yet played a key role in both the decision making and the appeals process.
 - Contrary to what Dr M said in his Report, during the final interview, he did mention problems with his hands and wrists, which have since deteriorated, but Dr M did not record this or record the exact details of his medical problems. Rather Dr M generalised his pain to musculoskeletal pain, withheld information he obtained when he inspected his hands at their final meeting, and misrepresented diagnosis and facts from other doctors and reports (such as the Orthopaedic Surgeon). Dr M continued to downplay his condition on reviewing the further information provided as can be seen from Dr M's report of 2 February 2017.
 - The Company did not interview him at any time during the process. However, in making its recommendation to the Trustee, it is likely that the Company was influenced by Dr M, who, throughout the process, misdirected the Company for reasons unknown to him.
- He disagrees he can undertake sedentary work and argues that the Trustee's definition of sedentary work is too wide. Having only done manual work since leaving school, he has no formal training or suitable experience for office based roles and it would be difficult for him to retrain while managing his pain at the same time. He would most likely find it unbearable working in a quiet office environment because he suffers from tinnitus. Further, in recommending that he can carry out sedentary work in future, Dr M was predicting his future capability in breach of the British Medical Association's 2015 guidance on ill-health retirement (the **BMA Guidance**) entitled 'The Occupational Physician', which states that:

- “The occupational physician can only be asked to provide advice on the impact of the individual’s health on their ability to do their current job. Occupational physicians should not be asked to assess patient’s ability to obtain work in the future...The patient’s ability to obtain work in the future may, for example, be affected by the person’s mental, physical, social and educational capabilities in the absence of the illness, the availability of work and the economic circumstances: none of which can be foreseen by the occupational physician...”
- When he appealed the decision, rather than obtain an independent medical opinion the Company referred his case back to Dr M for a second “flawed” opinion. The application process has been stacked in favour of Mars in that it was Mars’ Doctor and Personnel who made the recommendation for his pension, Mars’ Trustee approved it and conducted the final appeal which was again based on the original Doctor’s advice. He is also defending himself against a leading law firm and QC, which is hardly fair.
- He was not told that he had been awarded a lower amount until May 2016, although the decision had been made much earlier.
- He disagrees that Rule 12.01 entitles the Trustee to award a partial disability pension because Rule 12.01 makes no reference to “other (sedentary) work” or to alternative employment and it is only if such reference were included in Rule 12.01 that a partial disability award could be made. The decision on the level of award should be based on the Associate being incapable of performing his / her employment. He was incapable of performing his employment, therefore he should have been awarded a full disability pension. Even if the Ombudsman decides to accept the Trustee’s interpretation that partial incapacity includes being able to undertake alternative sedentary work, he believes he is still entitled to a full disability pension and that Dr M ought to have decided that he was entitled to a full disability pension given the medical issue he presented to Dr M at the final interview.

Summary of the Trustee’s position

34. The Trustee has made the following submissions:

- In the event that the preliminary decision of the Deputy Pensions Ombudsman (**DPO**) is to uphold Mr D’s complaint, the Trustee requests an oral hearing in order for the DPO to hear oral arguments on the proper construction of the Plan Rules -, which is of wider significance to members in receipt of a partial disability pension and members who might be eligible in the future.
- The Trustee has interpreted the Rules relevant to a Disability Pension correctly in accordance with its long-standing practice. Rule 12.00 requires a member to be in “circumstances of Disability.” The definition of Disability requires that the member is “incapacitated or disabled by sickness or accident and is thereby prevented from

performing his or her employment.” ‘The words ‘incapacitated’ and ‘disabled’ are not capitalised or defined in the Rules and are therefore given their normal and natural meaning. The term “partially incapacitated or disabled” under Rule 3.00(i)(b) is also undefined and the terms are given their normal and natural meaning having regard to the wider pension context; and the requirement is satisfied where the member is able to perform alternative employment. It is accepted that “his or her employment” refers to the member’s normal employment with the Company.

- The Trustee has been advised that the construction that it has been applying is supported by Rule 33.03 of the 2006 Rules, which gives it discretion to reduce an award of disability pension where an individual has returned to work or recovers to the extent that they could do so. The historic Plan documentation also supports the Trustee’s interpretation of the Disability Pension Rules.
- The key medical condition Mr D complained about, and which formed the basis of his initial application, relates to his knee pain. Mr D raised several unrelated medical conditions at different stages of the formal complaint process, which were not raised until after the Trustee considered and awarded him a partial disability pension. The Trustee made its decision based on the information available to it at the time and the information Mr D provided after the partial disability pension was awarded is not relevant to the Trustee’s decision. Notwithstanding this, Dr M considered the further information and decided that his opinion remained unchanged.
- Dr M’s Report took into account Mr D’s comments made in response to Dr M’s initial report. While Dr M did not agree with Mr D’s remarks, there is no evidence that he disregarded or made light of them. The Trustee was satisfied that Dr M’s report addressed all aspects of the capacity test and that his recommendation was reasonable. The Trustee decided on the basis of appropriate and comprehensive medical evidence that, whilst Mr D was incapable of carrying on his former role with the Company, he was capable of undertaking alternative work. Specifically, the Trustee considered on the basis of the medical evidence, that Mr D was capable of undertaking alternative sedentary employment such as a desk based role where appropriate adjustments could be made to enable him to mobilise. The award of a partial disability pension was therefore correct and awarded in accordance with the Plan Rules. In reaching its decision, the Committee considered Dr M’s Report, the recommendations of the Company and Mr D’s letter of 21 November 2015. Dr M’s report was based on his own examination of Mr D and referred to medical reports of the Orthopaedic Surgeon, the Chartered Psychologist and the Consultant in anaesthesia and pain.
- Further, the process the Trustee followed in relation to Mr D’s application was impeccable. The Trustee acted on specialist medical advice from a doctor of many years’ experience with a specialism in occupational health. The Trustee gave full consideration to all the issues Mr D raised throughout the application process and afforded him the opportunity to comment on the medical evidence and provide

further information which was considered, the Trustee made its decision on the medical evidence available at the time but also considered the medical information Mr D provided after his partial disability pension was awarded.

Conclusions

35. I note the Trustee's request for an oral hearing. I do not consider that an oral hearing is necessary given the detailed evidence with supporting documents received from the Trustee and Mr D, including Mr D's further submissions in response to my preliminary determination of his complaint. I consider these sufficient for me to determine this matter.
36. I also note that Mr D has raised issues concerning the wording used in the Policy and the Company's decision making process. However, as the Company is not a party to this complaint, any issues relating to the Company's role in this matter falls outside the scope of this complaint and I do not comment on those issues or make any findings in relation to the Company.
37. With regards to his medical conditions, Mr D questions the Trustee's assertion that he raised unrelated issues during the IDRP process. Mr D asserts that all his ailments started during his time with the Company. And, given that the Trustee was taking a view on whether he could likely return to work before age 60, the Trustee should have looked at what impact his conditions will have over the long term.
38. Mr D has explained that he experiences pain whilst sitting, his knees are only pain free when kept straight. He currently requires knee and back supports to be able to walk approximately 200 metres before having to rest for 15-30 minutes. While his medication keeps his symptoms of widespread pain under control, this has little or no effect by the end of the day by which time he is usually housebound. Mr D has pointed out the Orthopaedic Surgeon acknowledged in his report that his symptoms persisted, and indicated that it would be advisable for him to put minimal strain on his knees. Mr D says this suggests that the Orthopaedic Surgeon was recommending that he minimise all forms of strain, not just those that are work-related. While the Orthopaedic Surgeon said that there was a good possibility he could do sedentary work, this was on the basis that he could mobilise from a seated position. Notwithstanding this, it is by no means certain that he will be able to do sedentary work. Dr M failed to consider the X-ray, MRI and his GP report he provided copies of at the time. These proved that his back conditions were getting worse, but Dr M dismissed his back pain as an "old" condition that he was using as grounds to challenge the Trustee's award of a partial incapacity pension. Dr M, in his view, was unable to explain or even mention his medical conditions accurately. The Trustee's inability to understand his conditions, and failure to recognise when they arose, indicates to him that Dr M did not communicate them adequately leading to a 'perverse outcome'.

39. Mr D has pointed out that, the Consultant in anaesthesia and pain medicine changed his mind from recommending a desk based role for him in September 2015, without seeing him beforehand, to acknowledging in his report of 30 August 2017, that “he cannot sit for any length of time...” His Personal Independence Payment (**PIP**) report dated 9 January 2017, states that he has a ‘walking capacity of 50-200m’ and that he needs an aid for personal care, getting dressed and preparing food.’
40. Mr D initially stated that this dispute boils down to four main questions. Firstly, whether Dr M was correct that he can carry out sedentary work despite the medical issues presented at the final interview. Secondly, whether Dr M was correct to predict his capability to undertake future work contrary to the BMA Guidance. The third issue relates to the Company’s Policy which I do not comment on as the Company is not a party to this complaint. Fourthly, whether full and partial disability should be decided by reference to the role the Associate was performing. I will address these within my decision below, in addition to a new allegation Mr D has since made, which concerns alleged misconduct on the part of the Trustee and its Representative: its legal advisers.
41. My role in this complaint against the Trustee is to consider whether, in awarding Mr D a partial disability pension, the Trustee identified the correct Rule, interpreted the Rule correctly, took into account all relevant factors, disregarded irrelevant factors and reached a decision that was not perverse. In addition, whether the Trustee’s decision making process was flawed. I can remit the matter to the Trustee to reconsider if I find maladministration and/or that the decision making process was flawed, but my role is not to decide whether Mr D is eligible for a full or partial disability pension or to overrule the opinion of the medical experts. Against this backdrop, I now turn to consider what I consider to be the two main issues in this complaint, namely the interpretation of the Disability Pension Rules, and the Trustee’s decision and decision making process.

The interpretation of the Disability Pension Rules

42. Under Rule 12.01, an Associate is entitled to a Disability Pension if he/she retires from active service prior to NPA, has completed not less than two years of permanent employment, has been absent from service by reason of ill health or incapacity for a period of over 104 weeks during which he/she was in receipt of the Company’s sickness benefits and is in “circumstances of Disability.”
43. The final decision as to whether Mr D meets the above eligibility test is for the Trustee to make, acting on the advice of the Company. It is a finding of fact; as opposed to the exercise of a discretion. Mr D either meets the eligibility requirements or he does not.
44. It is not in dispute that Mr D is eligible for a Disability Pension. The issue here is whether the Trustee, in awarding Mr D a lesser amount of pension under paragraph (i)(b) of the definition of Disability pension in Rule 3.00, failed to correctly interpret and apply the Disability Pension Rules. Therefore, the main issue which I propose to

focus on is the interpretation of “partially incapacitated or disabled” set out in paragraph (i)(b) of the definition of Disability Pension in Rule 3.00.

45. Where the first letter of a term is capitalised, this would usually indicate that those capitalised words have a specific definition set out in that document. The terms ‘Incapacity’ and ‘Disability’ are capitalised and defined terms. But the terms incapacitated and disabled, referred to under paragraph (i)(b) of the definition of Disability Pension in Rule 3.00, are consistently used in lower case throughout the Plan’s Disability Pension provisions. They are not defined terms.
46. In the absence of a specific definition of a word or phrase, the words used should be given their natural and ordinary meanings, unless to do so would result in an absurd outcome.
47. It therefore follows that, in the absence of a specific definition, “partially incapacitated or disabled” must be given their ordinary and natural meaning. The Oxford Dictionary’s definition of partially includes ‘to some extent, in part, partly, or limited.’ Incapacity is broadly defined as lack of capacity, or inability to deal with something in some way. These dictionary definitions would suggest that partially incapacitated or disabled means that a person has a limited ability, as opposed to complete inability, to function due to an impairment. It derives from the dictionary definitions that, in an employment context, a person may have a limited ability to carry out certain tasks or jobs but not other suitable tasks or jobs.
48. To interpret partially incapacitated or disabled in the context of the Rules as a whole, it is necessary to read paragraph (i)(b) of the definition of Disability Pension in Rule 3.00 in conjunction with the definition of Disability in Rule 3.00. The definition of Disability requires that an Associate seeking a Disability Pension must be prevented from performing his or her employment. The definition of Disability does not say only an Associate seeking a full disability pension must be unable to perform their employment with the Company. Rather, the definition requires that every Associate seeking a Disability Pension, whether or not they are fully or partially incapacitated or disabled, must be incapable of performing his or her employment with the Company.
49. Given that paragraph (i)(b) of the definition of Disability in Rule 3.00 allows the Trustee to award a lesser amount of pension to a partially disabled Associate, it follows that the decision on whether to award a partial disability pension cannot be based solely on an Associate’s ability to carry out the role he was employed for, but there must be further criteria by which to distinguish between a fully and partially disabled Associate. It is common practice within pensions for pension schemes to distinguish between a fully incapacitated or disabled and partially incapacitated or disabled member on the basis that a partially incapacitated or disabled member cannot perform the role for which they were employed but is capable of carrying out alternative employment. There is nothing in the wording of the 2006 Rules that excludes alternative employment from the scope of paragraph (i)(b) of the definition of Disability in Rule 3.00 or to suggest that this practice within pensions does not apply to the Plan.

50. Taking into account the dictionary definitions discussed above, the wording of Rule 3.00 and the customary interpretation of full and partial disability within pensions, I find that “partially incapacitated or disabled” under paragraph (i)(b) of the definition of Disability Pension in Rule 3.00 refers, by implication, to an Associate who cannot perform the role for which they were employed with the Company, but is able to carry out alternative work.
51. Mr D says that Rule 12.01 does not refer to "other (sedentary)" or "alternative work" and that it is only if Rule 12.01 makes such reference that the Trustee can award him a partial disability pension. I should clarify, firstly, that there is no dispute in this complaint that Mr D meets the criteria set out in Rule 12.01. Mr D disputes the award of a partial disability pension which the Trustee made pursuant to paragraph (i)(b) of the definition of Disability in Rule 3.00. I do not agree that either paragraph (i)(b) of the definition of Disability in Rule 3.00 or Rule 12.01 are to be interpreted as Mr D suggests. Rule 12.01 refers to a term ('Disability') which is subsequently defined. That definition requires the Associate to be prevented from performing his employment. Mr D meets that requirement. The definition of Disability Pension, however, provides for the amount of pension to be paid under Rule 12.01 and includes allowance for lesser amounts as determined by the Trustee where it is considered that only partial disability applies. This is further detailed in Rule 33.00.
52. There is no need, therefore, for the Rules to specifically refer to other sedentary or alternative work. The Rules provide for reduction of disability pensions where it is considered only partial disability applies. In the absence of a specific definition of partial disability, its natural meaning allows for the Trustee to consider that ability to carry out alternative work is relevant.
53. I am satisfied that the Trustee identified the relevant Plan Rules, correctly adopted the ordinary and natural meaning of partially incapacitated or disabled under the paragraph(i)(b) of the definition of Disability Pension in Rule 3.00 and applied the Rules correctly in awarding Mr D a partial disability pension.

The Trustee's decision and decision making process

54. The Trustee has a discretion under paragraph (i)(b) of the definition of Disability Pension in Rule 3.00 to award a partial disability acting on the Company's advice. The Policy also confirms that the Trustee makes its decision on the Company's advice. This means that the Company's advice together with the medical evidence and opinion upon which that advice was based, were relevant factors for the Trustee to take into account in reaching its decision. The Trustee was also required to consider those matters known to it at the time of the assessment.
55. I acknowledge that there is some disagreement between Mr D and the Trustee as to what aspects of his medical condition were considered. Mr D is particularly concerned that no account was taken of the problems he has with his hands, that his health has worsened since his final meeting with Dr M and says that the Trustee was wrong to award him a partial disability pension.

56. I would reiterate at this stage that my role is not to determine whether Dr M and the Trustee were wrong to decide that Mr D was capable of undertaking alternative employment. This is because matters relating to Dr M's conduct and professional judgment fall outside my jurisdiction. My role is to determine whether there was a reasonable basis for the Trustee's decision, which I appreciate may be a fine distinction to make but it is an important one nonetheless.
57. There is no evidence to support Mr D's assertion that at the time his case was considered by either the Trustee or Dr M, he had no capacity for alternative employment of any kind. In my opinion, the medical evidence available to the Trustee and Dr M at the time of their assessment did not materially differ from Dr M's opinion that Mr D has some capacity for work. I cannot find any inconsistency or difference in the medical opinion such as could render unreasonable, the conclusions in Dr M's Report. The Trustee's decision to award a partial disability pension is supported by Dr M's Report and I cannot see any reason why the Trustee should not have based its decision on Dr M's report.
58. Mr D provided further information after the Trustee's decision and Dr M was asked to review his opinion in light of the information from Mr D. Dr M decided that his view remained unchanged. The Trustee considered this further evidence and, as set out in the minutes for the Trustee's 6 February 2017 meeting and the IDRPs stage 2 response, and decided that its decision remained unchanged.
59. In my view, Dr M's report, the Disability Checklist and the subsequent report of 2 February 2017 addressed all the aspects of the Disability Pension criteria and provided the Trustee with a reasonable basis upon which to reach its decision. Dr M formed his medical opinion on the balance of probabilities at the time of the disability pension assessment and, subsequently, in light of further information, that Mr D was unlikely to return to his employment as a machine operator at Mars but was capable of undertaking sedentary work. He also noted that Mr D does not appear to have really considered alternative work and offered advice regarding retraining and the option to incorporate flexible working into his plans.
60. I have not seen any evidence to show that the Trustee did not consider relevant factors or did not fully consider Mr D's concerns. Dr M took into account relevant medical evidence from three other specialists, he examined Mr D in person, he also considered further information from Mr D. Dr M was the occupational health physician appointed under the Policy and he had the requisite occupational health specialism to comment on Mr D's condition. I appreciate that Mr D disagrees with Dr M's conclusions as to his eligibility for a partial disability pension, but that is not enough to say that Dr M's report and subsequent report is an inadequate basis for the Trustee's decision. Dr M's reports and the Trustee's IDRPs responses were sufficiently thorough and set out the reasons why Mr D satisfies the criteria for a partial disability pension.
61. I do not agree that Dr M's reports were flawed and do not agree that the Trustee's decision was flawed. I find no valid reason why the Trustee should not have relied on

Dr M's medical opinion. Therefore, in my view, the Trustee's decision was not perverse.

62. After submitting his complaint to this office in April 2017, I note that Mr D sent the Chartered Psychologist an email dated 30 July 2017 providing an update on his medical condition and asking whether, in light of this update, he considered that Mr D could carry out sedentary work. The Chartered Psychologist confirmed in his reply of 7 August 2017 that his recommendation, in his 18 August 2015 report, that if Mr D's medical condition continued, "an alternative less physical role within the company might usefully be considered" still stood. He confirmed he did not have the expertise to comment on Mr D's physical condition as his expertise is psychology, and only specialists in the appropriate field could comment on Mr D's physical condition. I do not consider that this further information from the Chartered Psychologist advances Mr D's case further.
63. Mr D raises a number of issues about Dr M's conduct in this matter. In summary, he has alleged that Dr M misrepresented and downplayed his medical conditions, was economical with the truth, acted in breach of the BMA guidance in commenting on his capabilities for future work, and was biased. I do not have jurisdiction to consider any matters relating to Dr M's conduct, his professional judgment or alleged breach of the BMA's guidance.
64. I do not agree with Mr D that the Trustee's decision making process was biased or unfair. The Company's Policy and the Plan Rules required the Trustee to reach its decision on the Company's advice, which was based on the medical opinion of Dr M, the Company's independent occupational health physician. I do not consider on the facts of this case that the Trustee was under any obligation to refer Mr D's case to another occupational health physician, other than Dr M, because there was no material disagreement in the medical opinion of all the specialists who reported to Dr M. The Trustee is required by law to have an internal dispute resolution procedure and is permitted to have a two-stage process administered within the Plan. There was no obligation on the Trustee to refer Mr D's complaint to an external party and I do not find any maladministration in this regard.
65. Mr D has also said that he was not informed about the decision that he would be awarded a partial disability pension until May 2016, despite the fact that this decision was made much earlier. I cannot see any evidence of delay by the Trustee in notifying Mr D about its decision. The Company referred the matter to the Trustee on 23 February 2016, the Trustee accepted the Company's recommendation on 25 February 2016 and notified Mr D with its decision the following day. I am satisfied that the Trustee informed Mr D of its decision within a reasonable period.
66. Now turning to Mr D's more recent allegation concerning the conduct of the Trustee and its legal advisers. Mr D says he has only recently noticed that a letter he apparently sent around 21 March 2016, included as part of the Trustee's earlier submissions, is virtually identical to the letter he subsequently sent appealing the Trustee's decision. Mr D has highlighted words and sentences he considers were

inserted or removed by either the Trustee or its legal advisers. Mr D says those alleged amendments were an attempt to deceive this office to make it appear that he was informed about the Committee's decision at an earlier stage in the process. Mr D categorically refutes that this was the case. He contends that, if the Trustee and its Representative were willing to submit a "fake letter" then, what other misrepresentations did they make to this office?

67. In response to the above allegation, the Trustee's Representative has forwarded an email that was sent on 21 March 2016, approximately 13 months before Mr D made his complaint to this office. Having compared the letter attached therein, with the copy of the undated and unsigned letter the Trustee says was received from Mr D at that time, they appear to me to be identical. In the absence of convincing evidence to the contrary, I can only reasonably conclude that Mr D used the letter as a template for his letter of appeal in circumstances that he cannot now recall.
68. In conclusion, the Trustee has correctly interpreted and applied the Disability Pension Rules and followed a proper decision making process. I find no valid evidence to support Mr D's claim that the Trustee or its Representative misled this office in the way he has described.
69. Therefore, I do not uphold Mr D's complaint.

Karen Johnston

Deputy Pensions Ombudsman

2 November 2018

Appendix

2006 Consolidated Trust Deed and Rules relating to the Mars Associates' Retirement Plan

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“3.00 DEFINITIONS

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“**Disability**” means in relation to an Associate retiring pursuant to Rule 12.00 or 29.00 circumstances such that the Associate is incapacitated or disabled by sickness or accident as is thereby prevented from performing his or her employment. The Trustee acting on the advice of the Employer shall have sole power to determine whether or not any Associate is incapacitated or disabled to such extent as to entitle such Associate to retire pursuant to Rule 12.00 or Rule 29.00 PROVIDED that if on and after the Revision Date the ill-health condition specified in paragraph 1 of Schedule 28 to the Finance Act 2004 is not met for any Member retiring under Rule 12.00 or 29.00 at an age under 50 (or under 55 on and from 6 April 2010 unless the Member is one to whom paragraphs 21 and 22 of Schedule 36 to the Finance Act 2004 apply) the provisions of Rule 41.00 shall apply.”

“**Disability Pension**” means:

- (i) in relation to an Associate who is retiring pursuant to Rule 12.01 an initial annual rate of pension which is equal to either:
 - (a) 60% of the Associate's Annual Earnings less the annual rate of State Incapacity Benefit payable pursuant to section 30B of the Social Security Contributions and Benefits Act 1992; or
 - (b) Such lesser annual rate of pension as the Trustee at its discretion determines with the advice of the Company where it appears to the Company that such Associate is only partially incapacitated or disabled

PROVIDED that in any case the Disability Pension shall not be less from Normal Pension Age (or earlier if a Member who would have had a right to receive a pension at an earlier time so requests at any time after the right would have arisen) than the pension to which the Member would have been entitled on the basis of the Rules in force at the time the Member withdrew from Service had the Member not at that time retired under Rule 12.00; or

...”

“12.00 DISABILITY RETIREMENT

12.01 If at any time an Associate being an Active Member or Limited Member of the MPP Section before reaching Normal Pension Age:

- (i) leaves Service and at that time has completed not less than two years of permanent employment after subtraction of aggregated periods of absence for ill-health and unauthorised absence (and in calculating the two year period of employment the Trustee, acting on the advice of the Company, shall have discretion to include a period or period of employment as a temporary associate);
- (ii) has been absent from Service by reason of ill-health or incapacity and in receipt of benefits under the Mars Sickness Benefit Scheme for the 104 consecutive weeks prior to the cessation of employment or for an aggregate period of 104 weeks where such periods of absence due to ill health or incapacity are linked by returns to Service of less than 13 weeks and are due to the same or a related condition;
- (iii) is in circumstances of Disability; and
- (iv) with the Associate's consent has been selected by the Trustee acting on the advice of the Company for retirement under this Rule 12:00.

the Associate shall be entitled to receive a Disability Pension in lieu of all other benefits payable to him under the Plan. A Disability Pension shall be payable with effect from the day after that on which the Associate leaves Service and in accordance with Rule 33.00 PROVIDED that a Disability Pension shall not be payable under the Plan in respect of any incapacity of disability:

- (a) incurred as a consequence of war, invasion, act of foreign enemy hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power; or
- (b) of a kind or type the like of which the Trustee may designate in respect of any particular Associate; or
- (c) of or to any particular class of Associate with the Trustee may designate from time to time arising during any specified period or periods of employment with the employers or for any specified period or periods of absence;
- (d) of or to any Associate who becomes incapacitated or disabled by reason of accident, injury, or occupational disease arising from or in the course of gainful employment other than with the Company or any Associated Company; or
- (e) of which the Associate was aware at the commencement of Service and which the Associate failed to disclose.

The Trustee acting on the advice of the Company shall have sole discretion to determine whether any benefit under the Plan is payable in respect of Disability suffered while outside the United Kingdom."

"Part D

PAYMENT OF BENEFITS

- 33.03 Notwithstanding the provisions of Rule 33.02 the Trustee (if consistent with the benefit being or remaining a scheme pension as defined in paragraph 2 of Schedule 28 to the Finance 2004) shall have discretion with the consent of the Company to reduce the amount of any Disability Pension at any time before the Member concerned has reached Normal Pension Age or the earlier date (if any) on which the rate of Disability Pension is increased in accordance with the proviso to the respective definitions of those terms where it appears to the Company that such Member is only partially incapacitated or disabled or where such Member commences employment (whether full time or part time) with any employer PROVIDED that in relation to any such pension where the proviso to the definition of Disability applied and was satisfied, such reduction shall apply only during such period as the Member's physical or mental condition is such that that proviso would be satisfied."