PO-19842

Ombudsman's Determination

Applicant	Mr D
Scheme	Local Government Pension Scheme
Respondents	South Yorkshire Police (**SYP**)
	South Yorkshire Pensions Authority (**SYPA**)

Outcome

1. Mr D's complaint is upheld and to put matters right SYP shall reconsider its decision not to pay Mr D's deferred benefits early on the grounds of ill health.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr D has complained that his application for the early payment of his deferred benefits on the grounds of ill health has not been considered properly.

Background information, including submissions from the parties

4. Mr D was employed by SYP as an ID officer until July 2015, when he took voluntary redundancy.

5. The relevant regulations are the Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended). As at the date Mr D's employment ceased, regulation 38 provided:

> "(1) A deferred member who, because of ill-health or infirmity of mind or body -
>
> (a) becomes permanently incapable of discharging efficiently the duties of the employment that member was engaged in at the date the member became a deferred member, and
>
> (b) is unlikely to be capable of undertaking gainful employment before normal pension age, or for at least three years, whichever is the sooner,

> may ask to receive payment of a retirement pension whatever the member's age.
>
> …
>
> (3) Before determining whether or not to agree to a request under paragraph (1), the deferred member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an IRMP as to whether the member is suffering from a condition that renders the member -
>
> (a) 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; and, if so,
>
> (b) whether as a result of that condition the member is unlikely to be capable of undertaking gainful employment before reaching normal pension age, or for at least three years, whichever is the sooner.
>
> …
>
> (8) An IRMP appointed under paragraph (6) may be the same IRMP who provided the first certificate under regulation 36(1) (role of the IRMP)."

6. "Permanently incapable" was defined as: "the member will, more likely than not, be incapable until at the earliest, the member's normal pension age". "Gainful employment" was defined as: "paid employment for not less than 30 hours in each week for a period of not less than 12 months".

7. Mr D had been referred to SYP's occupational health unit in February 2014. At the time he was on sick leave following surgery on his right shoulder. He was due to return to work on 20 February 2014 and SYP requested an assessment of his fitness to return to work. SYP described Mr D's role as "essentially a low risk job" but said he did deal with detainees who could pose a physical threat to him. SYP said the risk was minimal and officers could accompany the detainee if there was a perceived risk. Mr D was assessed by the occupational health unit on a number of occasions during 2014. He returned to work with adjustments. In particular, Mr D was not required to undertake any duties which might have required him to use self-defence techniques.

8. On 1 September 2015, Mr D wrote to SYP saying he had taken voluntary redundancy and his employment had ceased on 31 July 2015. He said he had contacted South Yorkshire Pension Authority (**SYPA**) to ask if his pension could be paid early because he was unable to work. He said he had been advised to contact SYP.

9. Mr D was assessed by a consultant occupational health physician, Dr Hynes, for SYP in September 2015. Dr Hynes wrote to SYP expressing the view that there was sufficient evidence to warrant referring Mr D to an independent registered medical

practitioner (**IRMP**). Summaries of Dr Hynes' report and other medical evidence relating to Mr D's case are provided in the attached Appendix.

10. SYP completed a task analysis form for the early release of preserved benefits on 30 September 2015. Mr D disagreed with the percentages attributed to the tasks making up his former role. SYP agreed that a former colleague be consulted and some percentages were amended. However, Mr D still did not agree with the percentages.

11. SYP's Head of Occupational Health, Ms Murphy, completed an assessment form on 2 March 2016. Mr D's case was then referred to an IRMP, Dr Williams. He expressed the view that Mr D was very likely to recover and become fit again. He said, on the balance of probabilities, Mr D would not meet the criteria for early release of pension payments.

12. SYP wrote to Mr D, on 19 April 2016, referring him to Dr Williams' report. It said it had assessed Mr D's case and, based on Dr Williams' report, had determined that his application for the early payment of his deferred benefits had not been successful. Mr D was informed that he had the right to appeal.

13. Mr D submitted an appeal on 1 June 2016. He referred to Ms Murphy's opinion that his condition was permanent and likely to degenerate further. He also referred to Dr Hynes' opinion that it would be difficult for him to sustain employment at the moment and that there was sufficient evidence to warrant referral to an IRMP. Mr D referred to Dr Williams' comment that the risk of assault had not been quantified. He said that "capture duties" envisaged him utilising self-defence techniques and referred to a previous email exchange in 2014. Mr D said self-defence was an important aspect of his former role. He said he was surprised that Dr Williams had not assessed the importance of this, when he was aware that Mr D was unable to cope with the required techniques.

14. Mr D's representative subsequently asked SYP to explain why Mr D had temporarily been taken off capture duties when he returned to work. SYP has explained that Mr D's former line manager was unable to give the reason but thought that it was because he was on recuperative duties. SYP also undertook another task analysis but Mr D did not agree with the percentages attributed to the tasks.

15. SYP issued a stage one appeal decision on 9 August 2016. It acknowledged the difference of opinion between Ms Murphy and Dr Williams. SYP said Dr Williams, as an IRMP, was the only one authorised to issue the necessary certificate; that is, to determine if a member fulfils the criteria for early payment of benefits. SYP said it had sought further clarification regarding the risk of assault. It quoted from three members of its staff. The first said:

> "ID staff have undergone personal safety training due to having direct contact with detainees. Suspect image capture is purely voluntary and all suspects at the point of having their image captured are cooperative. Image capture was also invariably conducted by two officers. As a result, I am not aware of a

single incident where an identification officer has had to put this training into practice."

16. The second said:

"[Mr D] was required to deal in close proximity with suspects. There would however, invariably have been other officers or members of staff available to assist him in this and by the fact that identification image captures require the consent of the suspect, the potential for confrontation or any physical risk was significantly reduced. Current systems no longer require ID staff to deal with suspects."

17. The third individual was a personal safety training supervisor. He had commented that there was only one aspect of the course which was considered physical and course attendees were not required to participate. SYP noted that Mr D had successfully passed his personal safety training and was considered able to fulfil all the duties required of an ID officer.

18. SYP referred to Dr Williams' comment that Mr D had degenerative disc disease but this was normal for his age. It noted that Mr D's disc prolapse had been identified over 20 years ago and there did not appear to be any significant new findings. It noted Mr D's shoulder appeared to have largely recovered. SYP declined Mr D's appeal.

19. Mr D made a further appeal. The key points in his appeal are summarised below:-

- Mr D acknowledged that the IRMP was the only one able to issue the necessary certificate but said this did not mean that Ms Murphy's assessment should be disregarded.
- Mr D said, if Dr Williams had been given information about the risk of assault, he would have had no choice but to issue the certificate.
- Mr D disagreed with the information provided about the requirement for self-defence training. He disagreed with the view that the fact that an individual had consented to image capture meant that it was unlikely that they would pose a threat.
- Mr D nevertheless expressed the view that information about self-defence training should have been given to Dr Williams. In particular, Mr D considered that the information provided by the personal safety training supervisor should have been given to Dr Williams. He pointed out that he was unable to perform the physical technique in question because of his shoulder problem.
- Mr D said one of the individuals canvassed was biased because of a previous disagreement with him.
- Mr D referred to a comment by Dr Williams to the effect that his degenerative disc disease was normal for his age. He said his consultant, Dr Ali, did not

regard this as a normal condition for his age. He said taking painkillers on a daily basis should not be considered normal.

- Mr D also said that the individual who had made the decision to decline his appeal was not medically trained.

20. Second stage appeals are undertaken by SYPA. It issued a decision on 20 January 2017. SYPA said there were sufficient grounds to remit Mr D's case for further consideration. Amongst other things, SYPA said it agreed with Mr D that it would have been useful for information about the risk of assault to have been given to the IRMP. It recommended an independent review of all the evidence, including the impact of risk assessments. SYPA also recommended that SYP separate the duties of decision maker and stage one adjudicator and ensure that decision letters were appropriately signed.

21. Mr D's case was referred to another IRMP, Dr Gemmell. In a report dated 20 May 2017, Dr Gemmell said Mr D was clearly capable of his role immediately before being suspended despite chronic back pain and sciatica. He said he did not accept that Mr D was incapable of that role or of seeking alternative employment of a similar nature.

22. SYP again declined Mr D's application for payment of his benefits.

Mr D's position

23. Mr D and his representative submitted a comprehensive statement of his complaint. What follows is, by necessity, a summary of the key points:-

- The initial decision to decline Mr D's application was based on Dr Williams' report. Dr Williams had acknowledged that Mr D did present as very disabled. However, he went on to say that Mr D was likely to recover and become fit again. Dr Williams should not have been considering the future of Mr D's condition. The ill health retirement rules clearly state that the applicant's condition at the time of the application should be assessed.

- Dr Williams said he could not state with any degree of certainty that Mr D would remain permanently unfit for his role. There is evidence to show that this is more than likely the case.

- Ms Murphy had concluded that, due to its nature, Mr D's condition was not going to improve and was more likely to degenerate further, with further loss of mobility.

- During his appeal, Mr D had highlighted the fact that Dr Williams had not mentioned the self-defence techniques he was required to adopt in the event of an assault. His duties did envisage him using these techniques.

- The appeal process did not adhere to SYP's guidance on its internal dispute resolution (**IDR**) procedure.

- Following the first stage appeal decision, SYP appointed a different IRMP instead of giving the information about self-defence to Dr Williams. As a result, the reports provided by the two IRMPs are very different. Dr Williams stated Mr D was very disabled; whilst Dr Gemmell said Mr D was clearly capable of his role. In addition, the question of self-defence was not addressed.

- Dr Gemmell referred to the fact that Mr D had applied for ill health retirement almost immediately after taking voluntary redundancy. However, Mr D's medical problems had become progressively worse over time and this was the logical time to make an application. Both Dr Hynes and Ms Murphy agreed that Mr D fulfilled the criteria to make an application.

- Mr D could have successfully applied for ill health retirement in 2002 when he ceased to undertake the role of mechanic. Instead, he agreed to continue in employment in another role.

- Dr Gemmell suggested 'unhappiness' was a material factor in exacerbating Mr D's chronic back pain. The idea that Mr D's back and shoulder problems are worse when he is unhappy is not supported by any medical evidence. Dr Gemmell did not acknowledge that Mr D had low job satisfaction because he felt unable to do his job. This was because his condition had worsened. In addition, Mr D is not an unhappy person; rather, he is a very happy and optimistic person with a positive outlook despite his health problems.

- Dr Gemmell said a risk assessment had been undertaken and Mr D's work environment was considered low risk. He referred to the fact that no incident of a detainee having needed restraint could be recalled. This is not relevant to assessing the risk of such an incident arising.

- Dr Gemmell suggested that Mr D's back became worse after he had been suspended in March 2015. This is not correct. Mr D's back had become progressively worse before this. It had resulted in him taking a prolonged absence from work which led to him being unfairly suspended. Dr Gemmell's ignorance of this led him to conclude that Mr D was capable of his role before the suspension. Dr Gemmell did not give sufficient weight to Dr Hynes' comments to the effect that Mr D's mobility was limited and he would find it difficult to sustain employment at that time.

- Mr D's GP has said that all the specialists who have seen Mr D have noted that his condition has got worse over the years. He classed Mr D as disabled and not capable of working. This view was supported by Dr Williams who said Mr D presented as very disabled. Dr Gemmell said he did not accept that there had been further deterioration in Mr D's condition but it is a degenerative condition; as has been acknowledged by previous doctors.

SYP's position

24. The key points in SYP's submission are summarised below:-

- It has followed the required procedure when considering Mr D's application for the early payment of his benefits. In particular, it obtained a report from an IRMP. Dr Williams did not support the application.
- Following Mr D's appeal, further enquiries were made, including obtaining another IRMP's opinion after SYPA's appeal decision. Dr Gemmell did not recommend early payment of Mr D's benefits.
- It is accepted that the timing of an application for early payment is a matter for Mr D.
- Although Dr Williams stated that Mr D presented as very disabled, he went on to say there was no pathological reason why his symptoms should have increased and no reason why they would not settle again as they had done before. Dr Williams said Mr D was very likely to recover and become fit again.
- It is accepted that the risk of assault was not quantified in Dr Williams' report. This information was not purposefully not passed on to him.
- It is submitted that, whilst Mr D was expected to be trained in self-defence, the reality was that this was not needed in practice. It is understood that ID staff are no longer required to undertake self-defence training.
- Guidance and procedure make it clear that a decision is made based on the IRMP's recommendation. The decision maker does not have to be medically qualified.
- All information, including Ms Murphy's opinion, was considered at the first stage appeal. However, only an IRMP can determine whether someone meets the criteria for early payment of benefits.
- SYPA accepted that the LGPS regulations do not preclude the first instance decision maker from reviewing a case at the first stage of an appeal. It stated that, as matter of good governance, it was preferable for an appeal to be undertaken by a different person. This view has been taken on board and other options are being considered.
- It notes that the regulations require a stage one adjudicator to write directly to an appellant. In Mr D's case, the letter was written by someone else acting under the direction of the adjudicator. Going forward, stage one decision letters will be sent directly from the adjudicator.

25. Having received an opinion from one of our Adjudicators, SYP made the following further submissions:-

- It did not cover self-defence training in the initial submission to an IRMP. On receipt of Dr Williams' report, it did investigate this issue.
- The course in question did not have a pass or fail; individuals were only required to attend. There was only one physical aspect to the course and individuals were not required to undertake this. The course was more about handling verbal conflict.
- It cannot find any written documentation relating to self-defence which was sent to Dr Gemmell. It believes that SYPA spoke to him.
- Dr Gemmell raised the issue of Mr D's suspension and it tried to find out why he had been suspended at the time. At the time, it believed it might have been due to Mr D's illness.
- Since receiving the adjudicator's opinion, it has identified that the suspension, between March and July 2015, related to a disciplinary matter. Mr D was aware of this and mentioned it in his appeal document.
- It concedes that it did not expressly state why it preferred the IRMP's view over other available evidence. It is not aware that this is a requirement under the guidance it works to or the LGPS regulations. If there is a part of the regulations which it has failed to comply with, it will make sure this is done in the future. It considers that it adequately updated and informed Mr D via telephone calls, meetings and written documents.
- It considers it unjust that it should be asked to pay Mr D any compensation for non-financial injustice because it followed procedure and kept him updated. It responded to questions from Mr D's family except when it did not have access to the required information.

SYPA's position

26. SYPA has explained that it is the administering authority and it is SYP which is the decision-maker in Mr D's case. It is the stage two appeal adjudicator and came to a decision to remit Mr D's case for reconsideration. It understands that SYP referred the case to another IRMP and subsequently confirmed its original decision.

Adjudicator's Opinion

27. Mr D's complaint was considered by one of our Adjudicators who concluded that further action was required by SYP. The Adjudicator's findings are summarised briefly below:-

- It was not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mr D's eligibility for payment of benefits under regulation 38. The Ombudsman was primarily concerned with the decision-making process. The issues considered included: whether the relevant regulations had been correctly applied; whether appropriate evidence had been obtained and considered; and whether the decision was supported by the available relevant evidence. Medical (and other) evidence was reviewed in order to determine whether it supported the decision made.

- However, the weight which was attached to any of the evidence was for SYP to decide (including giving some of it little or no weight)[1]. It was open to SYP to prefer evidence from its own advisers; unless there was a cogent reason why it should not, or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser. If the decision-making process was found to be flawed, the appropriate course of action was for the decision to be remitted for SYP to reconsider.

- Under regulation 38, it was for the deferred member's former scheme employer to determine whether or not to agree to the early payment of benefits. Before doing so, the employer was required to obtain a certificate from an IRMP as to whether the member met the eligibility criteria. The eligibility criteria were:-

  - That the member was permanently incapable of discharging efficiently the duties of the employment he or she was engaged in at the date he or she became a deferred member; and

  - That the member was unlikely to be capable of undertaking gainful employment before normal pension age or for at least three years, whichever was the sooner.

- However, the employer was not bound by the IRMP's opinion. Nor was it strictly true to say that only an IRMP could determine whether someone met the criteria for early payment of benefits. This information could equally well be found in evidence from other medical practitioners. A certificate from an IRMP was the minimum amount of evidence an employer was expected to consider. In many of the more straightforward cases, this may be the only evidence available to the employer and may well be sufficient. However, where a decision was disputed and alternative evidence was provided, SYP could be expected to consider and weigh up all relevant evidence. If it decided to accept the IRMP's recommendation, SYP should be able to give reasons for its decision.

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

- SYP had issued its first instance decision on 19 April 2016. It had referred to Dr Williams' opinion. In particular, SYP had referred to Dr Williams' view that there was no reason why Mr D's symptoms should not settle as they had done previously. It had said that Dr Williams could not state with any degree of certainty that Mr D would remain permanently unfit for his role. It had gone on to say that Dr Williams had concluded that the evidence indicated that Mr D was likely to recover and become fit again. SYP had not referred to any other evidence and had stated that the decision to decline Mr D's application had been based on Dr Williams' report. It was appropriate, therefore, to consider Dr Williams' report in detail.

- Having reviewed Dr Williams' report, the Adjudicator believed it was safe to say that he had understood the eligibility test set out in regulation 38; that is, Mr D had to be considered permanently unfit for his role with SYP. She noted Mr D had questioned why Dr Williams had considered the future course of his condition. He had argued that the regulations required his condition as at the time of application to be assessed. However, regulation 38 did refer to the member being "permanently incapable", which was defined as being incapable until, at the earliest, the member's normal pension age. It was for this reason that Dr Williams was required to advise on the future course of Mr D's condition.

- In order to assess Mr D's capacity to undertake the duties of his role with SYP, Dr Williams clearly had to be provided with appropriate details. In his report, he had described the role as relatively undemanding, with some walking, standing and sitting, and a requirement for Mr D to be able to defend himself. It was on this last point that Mr D had disagreed with the description of his role with SYP. Dr Williams had noted that the risk of assault had not been quantified.

- At stage one of the appeal process, Mr D had raised the issue of his self-defence capability. This had clearly been considered by SYP's occupational health unit on a number of occasions prior to the cessation of his employment. There appeared to have been some concern that the problems Mr D had experienced with his shoulder meant that he would not be able to utilise the self-defence techniques in question. The concern was sufficient to prompt an opinion being sought from Dr Hynes and Mr Ali. This was indicative of the need for self-defence capacity being integral to Mr D's duties. The Adjudicator accepted that the need might rarely, or never, arise but this did not mean that the capacity for self-defence did not form part of Mr D's duties.

- SYP had obtained further information about the self-defence capability requirements of Mr D's role. The Adjudicator noted that this largely related to the likelihood of the need for self-defence arising, which was not the relevant issue. The first question SYP needed to address was whether Mr D was required to undertake personal safety training as part of his role. The second question was whether he could have completed the course to the required

standard. She noted that the personal safety trainer had stated that there was only one aspect of the course which was considered physical and that attendees were not required to participate in this. This was relevant information. She noted also that SYP had said that Mr D had passed a personal safety course and was deemed fit to undertake all the duties of his role. However, she understood that this was the case in October 2014; nearly 12 months before Mr D's application for the early payment of his benefits. A more up to date assessment was needed.

- The Adjudicator noted that SYP had explained that ID staff were no longer required to undergo personal safety training. However, regulation 38 referred to the duties of the employment the member was engaged in at the date he or she became a deferred member. Thus, it was the duties of the role as Mr D undertook it for SYP in July 2015 against which he should be assessed; not the current requirements of the same or a similar role.

- Following the stage two appeal decision, SYP had sought an opinion from Dr Gemmell. It was not clear why SYP had opted to seek an opinion from another IRMP rather than provide additional information relating to self-defence for Dr Williams. In the Adjudicator's view, this would have been a perfectly acceptable approach. She did not, however, believe it was maladministration on the part of SYP to seek an opinion from another IRMP.

- In its decision letter, dated 23 May 2017, SYP had said its authorising officer had seen Dr Gemmell's report. It had quoted Dr Gemmell's view that Mr D had been capable of his role before his suspension and that he did not consider Mr D incapable of his role or a similar alternative role at that time. There was no indication, in SYP's letter, that it had considered any of the other evidence relating to Mr D's case and it gave no reason for preferring Dr Gemmell's view. The evidence suggested that SYP simply accepted Dr Gemmell's opinion without giving any consideration to the other available evidence.

- Dr Gemmell had not set out in detail what he understood the eligibility test to be. However, it was clear, from his report, that he had been assessing Mr D's capacity for undertaking his role with SYP. Dr Gemmell had described this role as sedentary with a high degree of data input. He had noted that it was relatively non-confrontational and a risk assessment had indicated no occurrence of violence in the memory of Mr D's line manager. As previously mentioned, the frequency with which Mr D might have to use his self-defence techniques was not the issue. Therefore, the fact that his manager could not remember an occasion on which the techniques were needed was not directly relevant to Mr D's case.

- Dr Gemmell had also noted that Mr D had completed a personal safety course in October 2014. He had said this demonstrated Mr D's ability to perform the duties of his role at that time and he did not accept that there had been any

deterioration since. This view did not appear to be entirely consistent with the evidence from Mr D's own treating physicians. For example, Mr Ali had noted that Mr D had had good relief of his symptoms following a nerve root injection in 2014 but was in pain and with limited movement when seen in January 2015. SYP had not asked Dr Gemmell to explain why he did not accept that there had been any deterioration in Mr D's condition since October 2014.

- Dr Gemmell had, in fact, accepted that Mr D's symptoms had worsened but he linked this to unhappiness related to his suspension. He had said it was "most telling" that Mr D's suspension and the escalation of his symptoms had occurred at the same time. However, Dr Gemmell had acknowledged that he did not know the reason for Mr D's suspension. Mr D had said he was suspended after taking prolonged absence from work because of problems with his back. If that was the case, the coincidence of his suspension and the deterioration in his symptoms would be expected. It would also have explained why Mr D applied for the early payment of his benefits not long after being made redundant. SYP had not provided this information for Dr Gemmell or asked him if it might have altered his opinion.

- Dr Gemmell appeared to have concluded that Mr D was unhappy in his role with SYP and that this was the reason for his continuing symptoms. He had said: "numerous reports" over the years had indicated Mr D was unhappy in his role and was seeking ill health retirement. He had also said Mr D had continued to refer to himself as a mechanic and this might have indicated that he did not find his ID role fulfilling. The Adjudicator said she had seen one report, dating from 2011, which mentioned Mr D had low job satisfaction and was seeking ill health retirement. She acknowledged that Mr D's previous role as a mechanic was mentioned in several reports. However, this was usually in the context of this being his previous role and a possible contributory factor in the development of his back condition. She had seen one report, in December 2015, where Mr D had been described as a retired mechanic. However, it had not been possible to say whether this was because Mr D had described himself as such or because the author had simply misunderstood that this was his previous role.

- SYP appeared to have taken Dr Gemmell's comments as to Mr D's pain being linked to his satisfaction, or otherwise, with his job at face value. It had not asked him to substantiate his opinion.

- On balance, the Adjudicator concluded that the evidence did not support a finding that Mr D's application for the early payment of his benefits had been considered in a proper manner. SYP had failed to clarify for either of the IRMPs whether Mr D was required to undertake personal safety training and what this entailed. It had failed to clarify the reason for Mr D's suspension when Dr Gemmell had speculated that it might be the reason for his symptoms

worsening. And it had failed to explain to Mr D why it preferred the IRMPs' views over the other available evidence.

- The Adjudicator had explained that she was not expressing a view as to whether or not Mr D should be paid his benefits under regulation 38. That decision was for SYP to make. The proper course of action was for SYP to review Mr D's application and come to a fresh decision. It was still possible that, following the review, SYP might conclude that Mr D did/does not meet the eligibility test in regulation 38. If that decision was supported by appropriate evidence and was clearly explained to Mr D, it would be a legitimate outcome of the review. In view of the fact that this would be a fresh decision by SYP, Mr D would, nevertheless, have the option to appeal if he was not satisfied with the decision.

- The Adjudicator also concluded that the circumstances of Mr D's case warranted a payment by SYP for non-financial injustice; commonly referred as distress and inconvenience. The failure to consider Mr D's application for the early payment of his benefits would have caused unnecessary stress at an already difficult time for Mr D.

- Mr D had brought a complaint against SYPA. However, the decision to pay benefits under regulation 38 was for SYP to make. SYPA only became involved at the second stage of the appeal procedure. It had dealt with Mr D's case promptly and provided an appropriately reasoned decision. The Adjudicator said she did not consider that there were any grounds to uphold the complaint against SYPA.

28. SYP did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. SYP provided its further comments which do not change the outcome substantially. I largely agree with the Adjudicator's Opinion and I will, therefore, only respond to the key points made by SYP for completeness.

Ombudsman's decision

29. Since receiving the Adjudicator's opinion, SYP has clarified the reason for Mr D's suspension. It states this related to a disciplinary matter and that Mr D would have been aware of this. It believes Mr D referred to this in his appeal. Mr D did disagree with SYP's decision to seek information from one of his line managers because of a previous dispute. This may be what SYP is referring to. Otherwise, there is no information about disciplinary matters in Mr D's submissions. Clearly, Dr Gemmell was not aware of the exact circumstances.

30. SYP has also stated that it did not provide Dr Gemmell with additional information about Mr D's self-defence requirements. It had sought further details after receiving Dr Williams' report but did not pass these on to Dr Gemmell. It believes that SYPA may have spoken to him. As noted above, the question of Mr D's fitness for self-

defence was considered by SYP's occupational health unit on a number of occasions. There was clearly some concern that he would not be able to utilise certain self-defence techniques. The concern was such that it prompted the occupational health unit to seek further advice from Dr Hynes and he, in turn, sought advice from Mr Ali.

31. SYP's current position is that Mr D was merely required to attend the course and was not required to participate in all techniques. However, if it was considered advisable that employees attend such a course, it must have been thought that there was some degree of risk that an individual would be called upon to use these techniques; however remote that risk might be. If an individual was deemed unfit to carry out the range of techniques being taught, it rather negated the value of his or her attendance.

32. SYP's initial decision relied heavily on Dr Williams' report. The evidence indicates that Dr Williams was not provided with all the relevant evidence relating to Mr D's then role with SYP. In response to Mr D's appeal, SYP sought another opinion; this time from Dr Gemmell. Again, it appears that Dr Gemmell was not provided with all the relevant information.

33. In addition, many of Dr Gemmell's comments were contradictory and speculative. For example, he did not accept that there had been a deterioration in Mr D's condition since October 2014 but accepted that his symptoms had worsened. He speculated that this was the result of Mr D's unhappiness in his role with SYP. This view appears to have been based on a previous expression of interest in ill health retirement on Mr D's part and references in his medical notes to his previous occupation. Dr Gemmell also suggested that Mr D had tried to colour his doctors' views. This was not an appropriate comment on his part; particularly since there was little or no evidence of this. Such comments should be set aside by SYP in reaching a decision.

34. On balance, I do not find that SYP considered Mr D's eligibility for benefits under regulation 38 in a proper manner. It simply accepted both Dr Williams' and Dr Gemmell's opinion at face value when there were flaws within both which required clarification. I consider it would be appropriate for SYP to revisit its decision.

35. I note SYP has asked where in the relevant regulations is the requirement to provide reasons for its preference for an IRMP's view. I acknowledge that such a requirement is not included in the regulations themselves. However, I am not confined to the requirements of the regulations in considering whether or not there has been maladministration. I consider it a matter of good practice that a decision maker explains why it has reached the decision it has. In cases of ill health retirement, the decision maker should be able to explain why it prefers one opinion to another; it must, after all, have a reason. Such good practice enables the member to understand the decision and either accept it or prepare a properly informed appeal.

36. SYP considers it would be unjust for it to be asked to pay Mr D any redress for non-financial injustice arising out of the maladministration that I have identified. It points out that it followed procedure and that it kept Mr D updated. I am happy to accept that SYP followed the requirements of the regulations in seeking opinions from IRMPs. I

also accept that it communicated with Mr D and his family. However, the fact remains that it did not consider Mr D's eligibility for early payment of his benefits on the grounds of incapacity in a proper manner. Inevitably, members who apply for their benefits on the grounds of incapacity are having to cope with poor health. A poorly considered decision, however unintentional, adds unnecessarily to that member's distress and inconvenience. Not least because the member then faces a further period of uncertainty when the decision is revisited. On balance, I find it appropriate that Mr D receive some redress for significant distress and inconvenience.

37. Therefore, I uphold Mr D's complaint.

Directions

38. Within 21 days of the date of this Determination, SYP shall seek an opinion from an IRMP who has not previously been involved in Mr D's case. On receipt of that opinion, SYP shall review its decision. It shall provide Mr D with its decision, together with its reasoning, within 21 days of receipt of the IRMP's opinion.

39. Within 14 days of the date of this Determination, SYP shall pay Mr D £500 for the significant distress and inconvenience he has suffered.

Anthony Arter

Pensions Ombudsman
10 September 2018

Appendix

Medical evidence

Occupational health unit 2014

40. Mr D was assessed by SYP's occupational health unit on a number of occasions during 2014. He had undergone surgery on his right shoulder in January 2014 and there were concerns about his fitness to return to work. In particular, there were concerns about his ability to utilise self-defence techniques if called upon to do so. It was also reported that he had experienced a flare-up of his back condition and, in July 2014, he received an injection into his spine. In August 2014, the occupational health unit sought advice from a consultant occupational health physician, Dr Hynes. He, in turn, sought advice from a consultant surgeon, Mr Ali.

Dr Hynes, 2 September 2014

41. Dr Hynes said he had seen Mr D on 2 September 2014. He said Mr D reported ongoing restriction of movement in his shoulder and this was confirmed on assessment. Dr Hynes also referred to Mr D's long-term history of back pain. He said Mr D had limited use of his right arm, which would raise issues with self-defence and his back was causing difficulty with prolonged sitting.

Mr Ali, consultant orthopaedic surgeon, 23 January 2015

42. In his letter to Dr Hynes, Mr Ali provided a history of Mr D's back condition dating back to 2002. He said he had become involved in Mr D's care in 2014. He said an MRI scan had shown a disc prolapse at L4/5 which was compressing the left S1 nerve root. Mr Ali said Mr D had received a left L5 nerve root injection, in 2014, which gave good relief of symptoms.

43. Mr Ali said he had seen Mr D that day and he was still in pain, with stiffness and limited movement in his back. He said he thought Mr D had a degenerative lumbar spine and prolapsed disc at L4/5 with compression of the left L5 nerve root. Mr Ali went on to say:

> "[Mr D] had conservative treatment and received various injections to the nerve root. [Mr D] will continue to have exacerbation and remission of his pain for some time to come. There is a possibility that [Mr D] might need surgery in the near future if his pain fails to be controlled by conservative means like injection and physiotherapy.
>
> I don't recommend [Mr D] to do any physical activity or to do any job which involves walking, running or lifting heavy objects as that exacerbates his pain. Office work might be suitable for the short term."

Dr Hynes, 17 September 2015

44. Dr Hynes reported that Mr D had told him he had left his employment in July 2015 because he felt he could no longer continue in view of his medical problems. He said Mr D had expected to be dismissed on the grounds of incapacity. Dr Hynes said it was evidence that Mr D's mobility was limited and he had reported ongoing symptoms in his back. He said:

> "Based on his current level of symptoms I think he would find it difficult to sustain employment at the moment."

45. Dr Hynes mentioned Mr D had a long history of back problems and had undergone surgery in 2002. He noted Mr D had recently had treatment, including injections into his spine. He said Mr D also had problems with his right arm.

Ms Shipley, extended scope practitioner, 2 December 2015

46. In a letter to Mr D's GP, Ms Shipley said she had reviewed Mr D. She noted Mr D had pain in his left leg and lower back, together with pins and needles and numbness in his left leg. She said Mr D had had an acute onset of symptoms in March 2015 and had been unable to walk. She noted this had improved but Mr D was still struggling to walk. Ms Shipley said the plan was to refer Mr D for an MRI and physiotherapy.

Ms Murphy, 2 March 2016

47. Ms Murphy said:

> "Due to chronic pain in his back and intermittent sciatica [Mr D] has problems with general household chores and day to day living requirements. He is unable to stand or sit for longer than 20 mins without pain/discomfort. In addition he has become depressed through a combination of the effects of pain/lack of mobility. Episodes of pain can vary from day to day and also the severity. He is unable to travel very far again due to pain and walking more than a short distance is difficult."

> "As he is unable to sit or stand and walk for any prolonged period he would find it difficult and at times impossible to carry out even a sedentary role. Even reasonable adjustments would not be enough to enable this man to return to gainful employment."

48. Ms Murphy said Mr D's degenerative disc disease was permanent and the frequency of pain and lack of mobility was likely to become more pronounced as he aged. She said it appeared the only treatment option was pain management with physiotherapy. She said Mr D's condition would not improve and it was more likely to degenerate further, leading to further loss of mobility and possibly an increase in the episodes of pain.

Dr Williams, 15 April 2016

49. In a letter to Ms Murphy, Dr Williams set out a summary of Mr D's medical history dating back to 1994. He said Mr D gave a long history of episodes of low back pain and episodes of either right or left leg symptoms. He said an MRI scan had shown disc degeneration, including disc prolapse at L4/5 and possibly L3/4. He noted Mr D had problems with his right shoulder which appeared to have largely recovered and were not affecting his fitness for work.

50. Dr Williams said, to be eligible for the early payment of benefits, an applicant had to be considered, on the balance of probabilities, permanently unfit for their role. He noted that Mr D had over 10 years to go to his normal retirement age. He then said Mr D's role was relatively undemanding, with some walking, standing and sitting, and a requirement to be able to defend himself. Dr Williams noted that the risk of assault had not been quantified.

51. Dr Williams said:

> "He has been found to have degenerative disc disease, however this is entirely normal for his age. Furthermore, the disc prolapse was first identified over twenty years ago, and there does not appear to be any significant new findings or substantial worsening of the degenerative changes. Back pain is so common it is regarded as 'normal', and in the great majority of cases it is mechanical, related more to how the back is being used and the posture of the back rather than any substantial underlying pathology. Even in the presence of degenerative changes it is generally not possible to link the degenerative findings and the actual symptoms. The treatment is activity, and those who are physically fit and active generally recover faster and are less disabled, with less likelihood of recurrence.
>
> Over the years his symptoms have come and gone, and he has been able to lead a normal life, working normally and undertaking DIY in between episodes. Furthermore, the orthopaedic assessments have not always found him to be a clear historian, or that his described symptoms fit with the underlying findings. It appears at times that he exaggerates his symptoms.
>
> On the basis of the objective information provided, there is no obvious reason why his symptoms should not settle again as they have done on every occasion in the past, with a return to full activity. He does now present as very disabled, however there is no clear pathological reason why his symptoms should have increased so substantially.
>
> Overall, therefore, I cannot say with any degree of certainty that he will remain permanently unfit for his role, and the evidence would indicate that he is very likely to recover and become fit again. On balance of probabilities he would not therefore meet the criteria for early release of pension payments."

52. A shorter version of the report was provided for SYP.

Mr Ivanov, consultant neurosurgeon and spinal surgeon, 17 November 2016

53. In a letter to Mr D's GP, Mr Ivanov said Mr D had a long-standing history of spinal problems. He said Mr D had persisting lower back pain and some left leg pain. Mr Ivanov said Mr D's walking was limited to approximately 200 yards and he walked with a stick. He said he had reviewed an MRI scan from 11 months previously and noted some degenerative changes, with narrowing of the L4/5 disc space. He said the nerve roots and spinal canal were capacious and there was no obvious nerve root compression. Mr Ivanov said a 2015 MRI scan had not shown anything of concern and no obvious surgical target. He said he planned to arrange a repeat MRI scan and would review Mr D afterwards.

Mr D's GP, 28 December 2016

54. In an open letter, Mr D's GP said he could confirm that Mr D had significant problems with his lower back. He said this had started following an accident in 2002. He said Mr D could not sit, stand or walk for long periods. The GP also said that Mr D had a problem with his right shoulder which caused him chronic pain despite having had an operation. He said Mr D also suffered from anxiety and depression because of the pain and provided details of his medication. The GP recommended that Mr D did not carry out any significant physical activity or undertake any job which required such activity. He advised that this would lead to an increase in Mr D's chronic pain and might lead to a further deterioration in his condition. He said:

> "Previous experience showed that MRI scan images can only reveal limited number of disc problems or nerve compression however the determination of pain caused can only be felt by the patient to various degrees of severity. It seems that the sciatic nerve root inflammation does cause [Mr D] extreme pain and debility … which make activities like driving uncomfortable and difficult in spite of analgesic remedies.
>
> [Mr D] has many related back problems including degeneration and disc prolapse which are permanent. He also has osteophytes encroaching on spinal foramina which could result in nerve compression and frequent pain. The lack of mobility will become more of a problem as he ages. His disability is no doubt likely to deteriorate further as he gets older."

55. The GP expressed the view that Mr D was unfit and incapable of any meaningful employment for any period of time.

Dr Gemmell, 20 May 2017

56. Dr Gemmell produced a lengthy ill health assessment report. A summary report was provided for SYP. Dr Gemmell's discussion of the case is summarised below: -

    - The evidence indicated that Mr D had experienced low back pain for many years. MRI scans had confirmed a number of prolapses.

- It was probable that Mr D's previous role as a mechanic had accelerated his widespread disc degeneration. It was difficult to suggest that it had caused the condition.

- It was remarkable that Mr D had remained working in the garage. His line manager had expressed frustration with the arrangement and indicated that he did not consider that Mr D's work justified his salary.

- The trigger for redeployment did not appear to be Mr D's poor attendance or concern by the occupational health physician. It appeared to be legal action taken by Mr D in which he alleged his back pain had been exacerbated by carrying out a task he had been expressly told not to do. The outcome of the legal action was not recorded. Mr Ali's report at the time indicated significant overlay for financial gain.

- The lack of occupational health records between 2003 and 2011 indicated that redeployment had been a success.

- Mr D may not have felt fulfilled by his new role. He continued to refer to himself as a mechanic in a number of medical reports from this time, which suggested he may have been embarrassed by the role. Some reports referred to Mr D's interest in early retirement on health grounds. He may, therefore, have been trying to colour the clinician's judgment as to his fitness for work by referring to his previous role and the conflict with his back condition.

- The MRI scans indicated widespread degeneration but this was not considered unusual for a man in his sixth decade of life. MRI scans correlate poorly with perceived pain; as noted by Mr D's GP.

- Mr D's role was recorded as being sedentary with a high degree of data input. It was relatively non-confrontational and a risk assessment indicated no occurrence of violence in the memory of his line manager. Mr D had, nonetheless, completed a personal safety course.

- It was most telling that Mr D's suspension from work and the escalation of his symptoms occurred simultaneously. It seemed plain that the two were linked and it was the reason for the suspension which had prompted Mr D to seek a means of not returning to work.

- Time away from work would allow any symptoms associated with unhappiness in the workplace or a lack of fulfilment to dissipate. Mr D's function could be expected to be restored.

- He did not consider Mr D to be permanently incapacitated by his condition and he thought he would be capable of productive sedentary work before state retirement age.

Mr Ivanov, 17 July 2017

57. In a letter to Mr D's GP, Mr Ivanov referred to the results of an MRI scan. He said the results showed a disc herniation which might explain Mr D's left leg symptoms. He said he would arrange for a nerve root block to be performed. Mr Ivanov said he expected Mr D's symptoms to improve significantly or resolve after the injection.