PO-23149

Ombudsman's Determination

Applicant	Dr T
Scheme	Teachers' Pensions Scheme (**the Scheme**)
Respondents	Teachers' Pensions (**TP**) Department for Education (**DfE**)

Outcome

1. I do not uphold Dr T's complaint and no further action is required by TP/DfE.

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

Complaint summary

3. Dr T's complaint is that he has been incorrectly refused an ill health retirement pension (**IHRP**).

Background information, including submissions from the parties

4. TP is the administrator of the Scheme. DfE is the Scheme Manager. The responsibility for decision making in ill health cases is divided between the two. At the initial application stage and also at the first stage of the internal dispute resolution procedure (**IDRP**), it is the responsibility of TP to make a decision taking into account a recommendation from the Scheme's medical adviser, (**OH Assist).** If a further appeal is made at the second stage of the IDRP, it is then the responsibility of DfE to make a decision, again after receiving the advice from the OH Assist.

5. The relevant regulations in Dr T's case are the Teachers' Pensions Regulations 2010 (SI2010/990) (as amended) (**the Regulations**) which came into force on 1 September 2010. Relevant sections of the Regulations are set out in the Appendix 1.

6. Dr T worked for Chatham Grammar School for Girls (**the Employer**) as a Teacher. Following Dr T's decision to opt out of the Scheme with effect from 1 April 2015, his last day of pensionable employment was 31 March 2015. Dr T had surgery to replace his aortic valve in June 2015. However, his recovery was complicated by the development of atrial fibrillation. This was successfully treated, and he subsequently returned to work in November 2015.

7. In November 2016, Dr T commenced long term sickness absence. His last day of employment was 31 August 2017.

8. Dr T made initial enquiries with regard to an ill health pension in October 2017. In November 2017, he provided medical information form signed on 25 September 2017, to TP. TP acknowledged this the same day but explained that he still must provide an ill health application form (**the Form**).

9. On 29 November 2017, Dr T sent an email to TP, enclosing part A of the Form, however the image provided was not to scale and TP was unable to decipher the content of the Form. Therefore, TP asked Dr T to provide a paper copy of the Form.

10. On 1 December 2017, TP received part B of the Form from Dr T's Employer confirming his last day of employment was 31 August 2017. However, as Dr T opted out of the Scheme on 31 March 2015, his last day of pensionable employment was taken by TP as 31 March 2015, for the purpose of the application.

11. On 6 December 2017, Dr T submitted his paper Form to TP. He was then referred by TP to the OH Assist. In his submission, Dr T provided medical evidence, extracts of which are set out in the Appendix 2. As his application was not made within six months of the end of his employment, it was an "out of service" application.

12. On 7 December 2017, an OH Assist Doctor, Dr Chapman, issued her report that said:

> "All the evidence indicates that Dr T is unable to cope with teaching large groups of students. There is no medical evidence to suggest that he is medically unfit to teach small groups of students or to act as an individual tutor. Nor is there evidence that his condition prevents him from undertaking other, less demanding employment, with fewer responsibilities. It is my opinion that this applicant **does not** meet the criteria for being permanently **incapacitated [for] teaching** as defined by the above Teachers' Pensions Regulations. In my opinion the person's ability to carry out any work **is not** impaired by more than 90% and is likely permanently to be so. The applicant therefore **does not meet the criteria for total incapacity**. (original emphasis)"

13. On 8 December 2017, TP sent Dr T a letter advising that his application had been rejected on the basis that his "health is such that it should not prevent you from continuing in the profession until your normal pension age."

14. Unhappy with TP's decision, Dr T appealed by invoking the Scheme's two-stage internal dispute resolution procedure (**IDRP**). In his submission, Dr T provided a report from his GP, Dr Mehta, dated 20 December 2017 that said:

> "He has had intensive investigations with a cardiologist regarding his atrial fibrillation and looking at the clinic letters can only confirm that he has reached a level of incapacity that he will find difficulty to teach in the future and he does not consider that he can be employable with the present state of his health."

15. TP referred Dr T's case to another doctor at OH Assist, Dr Wladyslawska, who issued her report on 3 January 2018 that said:

> "It is accepted that Dr T continues to experience recurrent episodes of atrial fibrillation causing disabling symptoms. It is acknowledged that Dr T feels unable to work. The opinion of his GP supporting this decision is also noted. However, given his good response to cardiac treatment and psychological interventions along with available option of ablation procedure which should help his atrial fibrillation it is not accepted that his current level of symptoms and associated incapacitating effects are permanent. It is expected that, with further appropriate treatment, his condition should improve sufficiently to cope with less demanding and less stressful teaching duties e.g. teaching small groups or one-to-one tutoring. It [sic] therefore not accepted that Dr T is permanently incapable of teaching."

16. On 3 January 2018, TP sent Dr T a letter rejecting his appeal under stage one of the IDRP. It said that following advice from Dr Wladyslawska, it has been determined that the original decision was correct.

17. On 22 February 2018, Dr T further appealed under the IDRP. In his submission, Dr T's main points were: -

- He strongly insisted that his uncertain future and inability to teach continued to fill him with anxiety, and he felt that his physical and mental health were on a downward spiral.
- He cannot walk or sit down for long periods of time. He usually has sleep disturbances leaving him lethargic and unable to concentrate during the day.
- He cannot function as an efficient teacher due to the unpredictable nature and severity of his episodes. He cannot understand how comments from his treating doctors, supporting his ill health retirement, had been put on one side.

18. TP referred Dr T's case to another doctor of OH Assist, Dr McElearney, who issued his report on 21 March 2018 that said:

> "He has developed PAT (Paroxysmal Atrial Tachycardia), it is triggered by stress- it is a well-recognised effect of adrenaline on the heart. Ablation surgery might help, but he had severe complications to previous surgery and is well within his rights to be reluctant…I have to agree that he is not capable of returning to teaching in any form. The criteria for Total Incapacity are more severe, the applicant has to be incapacitated by 90% for any work. It seems to me that work that was not inherently stressful would not precipitate the PAT. For TI we have to think wider than the field of Education into general employment. For example, Dr T is capable of being a gallery or museum guide, which are semi sedentary and non-stressful examples that spring to mind. I cannot advise that the criteria for Total Incapacity are met and my

advice is that he is not incapacitated by 90% on the basis of the submitted evidence."

19. On 21 March 2018, DfE sent Dr T a letter under stage two of the IDRP, rejecting his appeal following advice from Dr McElearney. It added that:

"All appeals against the non-award of benefits are considered on the basis of whether they show that the original decision arrived at following the application should not have been reached. The Department's medical adviser has considered most carefully all of the information which has been made available in support of your second stage appeal and has reviewed all information provided as part of the original application and subsequent first stage appeal. The medical adviser however, has been unable to recommend that you have become permanently incapacitated for any work as described above."

20. On 27 March 2018, Dr T sent TP a letter seeking clarification with regard to the medical advisers' opinions. He said that Dr McElearney concluded that he was permanently unfit to teach however previous doctors said otherwise.

21. On 3 April 2018, TP acknowledged Dr T's comments and informed him that his comments would be sent to medical advisers for comments.

22. On 10 April 2018, TP sent Dr T a letter explaining that Dr Chapman's response was that:

"Dr T opted out of the pension scheme in February 2015, he had major heart surgery in June 2015 and returned to work as a teacher in November 2015. He had frequent spells of short term absence from December 2015 onwards. He was able to carry out teaching duties between November 2015 and July 2016, I therefore could not state that he was permanently unfit for any teaching duties at the date of leaving pensionable employment. I stated that there was a link between his illness at the date of leaving pensionable service and the date of application for his pension as he had evidence of cardiac disease at that time. Dr Wladyslawska also considered that Dr T was not permanently unfit for teaching when he opted out of the pension scheme. Dr McElearney reached a different conclusion. I am unable to ask him why he reached that conclusion as he no longer works for OH Assist. I can advise that as an out of service teacher, you must satisfy the criteria for enhanced benefits but you can only be awarded accrued benefits."

23. Dr T did not accept Dr Chapman's comments and sought further clarification with regard to the inconsistencies with the medical opinions.

24. TP further sought comments from Dr Chapman and Dr Wladyslawska. On 24 April 2018, TP sent Dr T a letter explanation that:

"Dr Chapman has stated:-

> I should have agreed that Dr T was incapacitated at the date of leaving pensionable service, as he was on sickness absence. However he did return to teaching…There was insufficient evidence that Dr T was permanently unfit to undertake small group teaching or individual tutoring, I could therefore not advise that he was permanently unfit for any teaching duties.
>
> Dr Wladyslawska has stated:-
>
> …I considered [the] evidence provided, particularly his Cardiologists' opinions suggesting options of treatment that could be tried in his case with [a] view of better control of his symptoms. I therefore advised that his disabling symptoms cannot be considered as permanent and that Dr T is not permanently incapable of teaching. Dr McElearney who dealt with his 2nd dispute on 21/03/2018 accepted that Dr T experiences symptoms of stress associated with release of adrenaline and triggering PAF irrespective of whether he teaches large, small groups or one to one. It was also accepted that Dr T is well within his rights to be reluctant in relation to ablation procedure and that there are no other treatment options that are reasonable. I can therefore advise that the evidence available at the time of Dr McElearney's assessment provided clarification of Dr T's symptomatology and his prognosis and was sufficient to accept incapacity to teach."

25. On 28 April 2018, Dr T sent TP a letter raising further issues. He said that the main issue remained that he had been considered as "out of service", but his health condition had presented well into the period of his "in service" teaching, whilst he was making full contributions to the Scheme, before his IHRP application. This decision to opt out of the Scheme was solely based on the advice from the Pensions Administrator.

26. On 16 May 2018, TP sent Dr T a response saying that:

> "There is no provision in the regulations which would allow for your opt out election to be revoked, or to accept a backdated election to join the TPS now. I enclose a copy of the opt out election form you signed in January 2015. In section 2 it makes you aware of the rights you forfeit by opting out. It was also open to you to elect to opt back in to the TPS at anytime."

27. In June 2018, Dr T brought his complaint to us.

28. On 16 July 2018, TP sent us a formal response that has maintained its previous stance and added that:

> "The entitlement day for ill-health retirement is the latest of the following:
>
> …(c) the day which occurs 6 months before the date of the medical report following consideration of which the Secretary of State determines that P satisfies Condition 1 (where P satisfies Conditions 1, 2 and 3) or Condition 4 (where P does not satisfy Conditions 1, 2 and 3)…However as stated…Dr T had previously opted out of the

TPS on 1 April 2015 and his last day of pensionable employment was therefore 31 March 2015. Given this was more than 6 months prior to his ill-health application being made, this was considered under Condition 4 above…With regard to Dr T's assertion that he was advised to opt out of the TPS, ultimately to his disadvantage in terms of his application for ill health benefits, I must make it clear that employees of TP are not registered financial advisers, and so are not allowed to give advice."

29. Dr T made additional comments in August 2018:

- He referred to his current health condition having not improved hence he was unable to obtain gainful employment.
- He referred to Conditions 1,2,3, and 4 of the criteria having been met by him. He also said that his permanent incapacity for teaching has been proven under the Regulations.

Adjudicator's Opinion

30. Dr T's complaint was considered by one of our Adjudicators who concluded that no further action was required by TP/DfE. The Adjudicator's findings are summarised below:-

- Under Regulation 60, retirement benefits become payable if a 'Case' applies to the individual's reckonable service. The Cases are set out in Schedule 7 to the Regulations and ill health retirement is covered by Case C.
- In order to fall within Case C, Dr T had to make an application for an ill health pension on that basis and satisfy the Condition 4 in that his "ability to carry out any work [was] impaired by more than 90% and [was] likely to be impaired by more than 90% permanently."
- According to Regulation 107 if a teacher was in pensionable employment immediately before he/she became incapacitated, his/her application should be made within 2 years after the end of the pensionable employment in order to be treated as an "in-service" application. For such applications, early access to the Scheme benefits is awarded if the applicant is determined to be incapacitated for all work.
- Those that are "out of service" at the time of the application are required to meet the requirements of "condition 4" in order to qualify for early retirement Scheme benefits without enhancement.
- Dr T opted out of the Scheme on 31 March 2015. As this was his last day of pensionable employment, he became an "out of service" member of the Scheme. To be eligible for an IHRP under the Scheme, Dr T had to show that his ability to carry out any work be permanently impaired by more than 90%.

- Dr T's application was considered three times in total; first at the initial application and twice more on appeal. Dr Chapman said that Dr T could undertake small group teaching or individual tutoring, therefore she concluded that he was not permanently unfit for any teaching and could undertake a less demanding job with fewer responsibilities. Dr Wladyslawska said that Dr T's disabling symptoms could not be considered permanent and that Dr T was not permanently incapable of teaching. Dr McElearney who dealt with his second appeal, concluded there was sufficient evidence to accept Dr T's permanent incapacity to teach however she was of the view that Dr T could undertake a less demanding role in general employment such as a gallery or museum guide, which are semi sedentary and non-stressful jobs.

- Dr T's GP was of the opinion that he had reached a level of incapacity such as he would find difficult to teach and he did not consider that Dr T was fit for any work. Dr T said that TP has taken little notice of his GP's opinion. The Adjudicator noted that consideration was given to Dr Mehta's opinion at every stage of the application, and, the Adjudicator explained that the weight which is attached to any of the evidence is for TP to decide (including giving some of it little or no weight).

- Dr T asserts that he met Conditions 1,2,3 and 4. However, in his case, as he applied for an ill health pension more than 2 years after his last day of pensionable employment, only Condition 4 applied in his case. Dr T could not be considered for an IHRP from active status as he left the Scheme in March 2015. It is unfortunate that there were inconsistencies in the Scheme's medical advisers' opinions, but in any event, Dr T did not pass Condition 4 and therefore was not eligible for an ill health pension. The Adjudicator noted that Dr Chapman did agree with Dr McElearney in as much as she was of the opinion that Dr T's condition did not prevent him from undertaking less demanding roles.

- The Adjudicator was of the opinion, that in considering the initial application, and the first and second stage appeals, both TP and DfE had asked themselves the right questions and taken relevant, and no irrelevant, matters into account. In addition, they obtained advice from the Scheme's medical advisers and considered the test as set out in the Regulations. Therefore, shewas satisfied that they had applied the Regulations properly.

- Clearly, there is a difference of medical opinion between Dr Mehta and the OH Assist doctors. However, this is not sufficient for the Ombudsman to say that TP/DfE's preference for the opinion of its medical advisers means that its decision was not properly made. Therefore, the Adjudicator's opinion was that this complaint should not be upheld.

31. Dr T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr T provided his further comments which do not change the outcome. I

agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Dr T for completeness.

32. Dr T said that:

> "The emphasis for this appropriate material rests with my GP who had documented my state of health prior to and after my operation concerning my heart disease. The GP's comments are fundamental to this case and seem to exist as tacit evidence, with focus on inconsistent medical advisers reports that are plainly wrong based on the medical evidence and ethically in error in suggesting further invasive surgery without my full medical background and my GP's opinion. As an outcome, I still feel that the medical advisers comments are flawed, due to the decision not to seek further clarification from my GP at any time. This is the cogent reason why TP/DfE should have requested clarification from my GP, and not solely from inconsistent and ethically dubious medical reports."

Ombudsman's decision

33. It is not my role to review the medical evidence and come to a decision of my own as to Dr T's eligibility for payment of ill health retirement benefits under the 2010 Regulations. My role is primarily concerned with the decision making process. Medical (and other) evidence is reviewed in order to determine whether it supported the decision made. The issues considered include: whether the relevant regulations have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the available relevant evidence.

34. However, the weight which is attached to any of the evidence is for TP/DfE to decide (including giving some of it little or no weight). It is open to TP/DfE to prefer evidence from its own medical advisers; unless there is 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 regulations by the medical adviser. If the decision making process is found to be flawed, the appropriate course of action is for the decision to be remitted for TP to reconsider. I have reviewed Dr T's case on this basis.

35. It is my view that the OH Assist reports applied the correct test under the Regulations, covered all the necessary requirements and provided TP/DfE with a comprehensive opinion in order for it to reach a decision. I have not seen any evidence to show that it did not review any aspect of Dr T's concerns or condition. All OH Assist Doctors' opinions took into account relevant medical evidence. I appreciate that Dr T disagrees with the TP/DfE's decision not to grant him an ill health pension. However, Dr T's disagreement is not a sufficient reason for me to remit the matter back to TP/DfE for his IHRP application to be reconsidered.

36. Therefore, I do not uphold Dr T's complaint.

Karen Johnston

Deputy Pensions Ombudsman
8 March 2019

Appendix 1

The Teachers' Pensions Regulations 2010 (SI2010/990) (as amended)

37. Schedule 7, paragraph 3, 'Case C: ill-health retirement', states: -

> "(1) Except as provided in paragraph 4, a person (P) falls within this paragraph if—
>
> (a) P was in pensionable employment at any time after 31st March 1972,
>
> (b) P ceases to be in pensionable employment, excluded employment, on non-pensionable sick leave, on non-pensionable family leave or on a career break,
>
> (c) P satisfies either Conditions 1, 2 and 3 or Condition 4, and
>
> (d) P makes an application under regulation 107 for retirement benefits on the basis that Case C, and no other Case (apart from Case A), applies to P's reckonable service.
>
> (2) Condition 1 is that P is incapacitated and is likely to be incapacitated permanently.
>
> (3) Condition 2 is that immediately before satisfying Condition 1—
>
> (a) P was in pensionable employment,
>
> (b) or
>
> (c) P was, with the consent of P's employer, on non-pensionable sick leave, on non-pensionable family leave or on a career break which, in every case, followed on immediately after a period of pensionable employment.
>
> (4) Condition 3 is that P's application under regulation 107—
>
> (a) is made within two years after the end of pensionable employment, and
>
> (b) is signed by P's employer.
>
> (5) Condition 4 is that P's ability to carry out any work is impaired by more than 90% and is likely to be impaired by more than 90% permanently.

38. "Incapacitated" is defined as:

> "unfit by reason of illness or injury and despite appropriate medical treatment to serve as a teacher, organiser or supervisor."

39. Regulation 107 states: -

> "107 Payment of benefits on application to Secretary of State

(1) Benefits under these Regulations are payable by the Secretary of State.

(2) Despite any provision of these Regulations according to which a benefit becomes payable at a certain time, no benefit is to be paid unless paragraphs (3) to (5) have been complied with.

(3) A written application for payment must be made to the Secretary of State.

(4) The applicant must provide the Secretary of State with such relevant information in the applicant's possession or which the applicant can reasonably be expected to obtain as the Secretary of State may specify in writing.

(5) An application for ill-health retirement benefits, or for a short-service serious ill-health grant, must be accompanied by all the medical evidence necessary for the Secretary of State to determine that the applicant is entitled to the benefit …"

40. Regulation 65 provided for "Total incapacity benefits" as follows:-

"(1) This regulation applies where -

(a) an ill-health pension becomes payable to a person (P) because P satisfies Conditions 1, 2 and 3 set out in paragraph 3 of Schedule 7 (Case C: ill-health retirement), and

(b) P satisfies Conditions A and B.

(2) P satisfies Condition A if P's ability to carry out any work is impaired by more than 90% and is likely to be impaired by more than 90% permanently.

(3) P satisfies Condition B if immediately before satisfying Condition A -

(a) P was in pensionable employment,

(b) P was paying contributions under regulation C9 of TPR 1997 or regulation 19 (election to pay contributions by a person serving in a reserve force), or

(c) P was taking a period of non-pensionable sick leave, a period of non-pensionable family leave or a career break which, in every case, followed on immediately after a period of pensionable employment …"

Appendix 2

Medical Evidence

Dr Adrian Stewart, Consultant Cardiologist, dated 29 November 2016

> "Dr T's prognosis from his aortic valve surgery is good. Although he will need an annual cardiology check-up, which after 5-years will include an echocardiogram, I would not anticipate any further surgery within the next 15 years. His prognosis from paroxysmal atrial fibrillation is unfortunately less certain. In some patients the psychological aspects of this condition [are] difficult to treat, because of the unpredictability of the condition. Some patients have a specific trigger such as stress. In patients who do not respond to medication, there is always the possibility of pulmonary vein ablation and I am not sure whether Dr T or his GP are considering this approach. I can understand that avoiding stressful situation may be an alternative approach. This may be the reason for Dr T to retire on medical grounds."

Dr Adrian Stewart, Consultant Cardiologist, dated 4 January 2017

> "I have organised for him to have ECG monitoring when he is in the work place. This should answer the question of whether his palpitations are pure stress induced, or whether he is in fact having runs of atrial fibrillation. I intend to see Dr T with the results of these investigations and with his permission, I am happy to pass these results to you as well."

Dr Takeda, Consultant Cardiologist, dated 18 July 2017

> "I have said should he get a recurrence in AF he could easily just double the Bisoprolol to 2.5mg daily…He had an echo done on the 29th June which showed normal LV function with mild basal septal hypertrophy. The tissue aortic valve was functionally normal reassuringly. I have simply asked for an annual follow up for Dr T but would of course be happy to see him if any problems arise in the interim."

Jodi Teale, Psychological Wellbeing Practitioner, dated 22 March 2017

> "On discussion with the client they have been put forward for CBT based Guided Self-Help well-being session to help with their current difficulties. The client will then be discharged from our service following their session booked for Monday 27th March 2017."

Dr P Mehta, GP, dated 17 January 2017

> "In short if [sic] appears that Dr T does have paroxysmal atrial fibrillation possibly stress induced which are situational in the presence of a large group or class which is having a significant impact on his health."