PO-28801

Ombudsman's Determination

Applicant:	Mr H
Scheme:	Shell Contributory Pension Fund (**SCPF**)
Respondent:	Shell International Limited (**SIL**)

Outcome

1. I do not uphold Mr H's complaint and no further action is required by Shell International Limited.

Complaint summary

2. Mr H has complained that he has not been awarded the appropriate level of incapacity retirement benefits.

Background information, including submissions from the parties

Background

3. Mr H was employed by SIL until July 2012, when he retired on the grounds of incapacity. He was then aged 51. Mr H was awarded a Partial Incapacity pension, which was to be reviewed after two[1] years.

4. The SCPF is governed by Trust Deed and Regulations effective from January 2009 (as amended). Regulation 25 in Part A applies. It states:

> "(1)(a) A Member who leaves the Company Service as a Member of the Fund accruing Accredited Service with the consent of his Employing Company because of physical or mental incapacity may, at the option of the Employing Company, be granted an Incapacity pension …"

5. Regulation 25 provides for two levels of Incapacity pension: a Total Incapacity pension or a Partial Incapacity pension. Total and Partial Incapacity are defined as:

[1] The incapacity certificate referred to three years but, in subsequent correspondence with Mr H, SIL confirmed it had agreed to two years.

> "For the purposes of this Regulation "Total Incapacity" means physical or mental impairment and deterioration which, in the opinion of the Employing Company acting on medical advice from a registered medical practitioner who has so certified, is such as to make it unlikely that the Member will ever again obtain employment and "Partial Incapacity" means physical or mental impairment and deterioration which in the opinion of the Employing Company acting on medical advice from a registered medical practitioner who has so certified, is such as to prevent the Member from following his occupation (and will continue to do so), and which seriously impairs his earning capacity."

6. Regulation 25 also provides:

> "The Employing Company acting upon medical advice shall be entitled from time to time before the Member's Normal Pension Pivot Date[2] to review the question whether a Member in receipt of a pension under this Regulation still suffers from any incapacity and whether such incapacity constitutes Total Incapacity or Partial Incapacity and to direct the Trustee to discontinue or adjust the pension payable accordingly."

7. On 22 November 2013, Mr H wrote to SIL outlining his current medical conditions. He explained that his conditions were deteriorating and his ability to undertake activities outside of his home had been curtailed. Mr H said he was not able to undertake any employment due to the unpredictability and deteriorating nature of his medical conditions. He enclosed a supporting letter from his GP. Summaries of and extracts from the medical evidence relating to Mr H's case are provided in the Appendix.

8. On 11 December 2013, SIL referred Mr H's case to its medical advisers; Shell Health Services (**Shell Health**). It said that Mr H's first review was due in August 2015, but asked Shell Health for its recommendations. Shell Health sought reports from Mr H's specialists.

9. Shell Health responded to SIL on 25 April 2014. Its advice is summarised as follows:-

   - The main issue limiting Mr H's ability to work was his gastrointestinal symptoms.
   - The evidence from Mr H's specialists[3] indicated that his medical conditions were largely unchanged from 2012. The specialists felt that Mr H's condition was unlikely to improve dramatically in the future.
   - The important issue was to determine whether Mr H met the criteria for a Total Incapacity pension. The Shell Health doctor quoted the definitions for Total and Partial Incapacity.

[2] The last day of the month in which a Member attains [age 60].
[3] SIL has confirmed that Shell Health did not share the specialists' reports with it because of patient confidentiality.

- There was not enough evidence to say it was unlikely that Mr H would ever again obtain employment. There were two reasons for this:-

  - There had been no objective deterioration in Mr H's conditions; although it was acknowledged that he perceived that his symptoms had worsened. Symptoms could wax and wane and, whilst they had waned since 2012, there was no evidence to say that they would not improve in the future.

  - It was felt that some form of work might still be possible before normal retirement age. Mr H's condition might limit commuting, but could potentially allow for working from home. The medical decision did not take into account non-medical factors, such as the availability of work or whether someone was employable.

- The recommendation was to continue Mr H's Partial Incapacity pension with a further review in three years.

10. SIL sought clarification from Shell Health on the following points:-

    - Mr H considered that his condition had deteriorated since 2012. Shell Health had acknowledged that Mr H's condition had "waned" since 2012. It was asked to clarify whether Mr H's condition had deteriorated or whether it was his perception that this was the case.

    - Shell Health had referred to Mr H potentially working from home. Mr H did not consider this to be possible. Shell Health was asked to clarify whether the non-medical factors referred to meant that it had not taken any account of the fact that home-working opportunities might be vastly limited within the marketplace.

11. In its response, Shell Health said, with any chronic medical condition, there was some variability with symptoms; they could "wax and wane". It said, although Mr H felt that his symptoms had worsened since 2012, there might be some limited improvement in the next few years. It said there was no objective deterioration in Mr H's conditions which would account for the deterioration in symptoms. With regard to home-working, Shell Health said the fact that Mr H had not been able to find work did not support an incapacity decision.

12. SIL wrote to Mr H, on 14 May 2014, informing him it had decided to continue paying him a Partial Incapacity pension. It provided a copy of the advice it had received from Shell Health.

13. On 1 January 2015, Mr H wrote to SIL requesting a further review of his incapacity pension. He said he had now been diagnosed with sleep apnoea and enclosed a sleep study report dated 28 November 2014. SIL referred Mr H's case to Shell Health on 21 January 2015. On 17 February 2015, SIL contacted Shell Health to say it had been informed, by Mr H's wife, that his sleep apnoea was not being treated any further and he had been unable to tolerate the mask provided for him. SIL sought an update from Shell Health, on 11 March 2015, and was informed that there was a

process query it was waiting on. On 16 March 2015, Shell Health informed SIL that the process query had been clarified and it would write to Mr H's GP. SIL sought a further update on 15 April 2015 and was informed Shell Health was waiting on the GP's report.

14. Shell Health emailed SIL, on 29 April 2015, explaining that it had received a report from Mr H's GP in addition to the specialists' reports it had received previously. Shell Health said the GP had confirmed its understanding of the medical facts. It said:

> "At this point, in our view, he continues to meet the definition of partial incapacity as laid out in the SCPF rules, but does not meet the definition for total incapacity.
>
> The main reason for this is that several of his conditions may be amenable to further/ongoing treatment.
>
> Our advice is advisory only and the final decision as to whether his incapacity pension is uplifted remains a decision for the business/pension fund."

15. On 13 May 2015, SIL wrote to Mr H informing him that the outcome of the review was that he continued to meet the definition of Partial Incapacity, but not the definition of Total Incapacity. SIL said the main reason for its decision was that the medical advice had said that many of Mr H's conditions might be amenable to ongoing or further treatment. It said the decision had been based upon medical advice from Mr H's GP and reports from his specialists.

16. In response to a query from Mr H's wife, SIL informed him he could request copies of the medical reports considered by Shell Health by contacting it directly. It said Mr H could appeal its decision and, if he did so, it asked that he consent to it seeing Shell Health's response.

17. Shell Health provided Mr H with a copy of his medical file on 27 July 2015. In response to questions raised by Mr H, Shell Health said[4]:-

- Two of his conditions were amenable to treatment: depression and sleep apnoea. Depression, in particular, could significantly interact with other medical conditions and, if treated, symptoms and impairment could improve.

- Two of his conditions were chronic but stable: ischaemic heart disease and bowel symptoms. This had been confirmed by the most recent letters from his specialists.

- Mr H had mentioned not being in employment. The key issue was whether he met the definition set out in the SCPF Regulations; not whether he was in employment.

[4] SIL has confirmed that this letter was not shared with it at the time because Shell Health was of the view that Mr H had only given consent for communication between his GP and Shell Health.

- Mr H's whole file had been reviewed. The main reason he had been awarded a Partial Incapacity pension was the difficulties he had with foreign travel and commuting.

- Some of Mr H's conditions were amenable to treatment but the long-term conditions, which had led to the original decision, might allow some form of working before normal retirement age; for example, working from home. For this reason, it did not consider that Mr H met the definition of Total Incapacity.

- It was willing to discuss Mr H's case with his GP, provided that he gave consent to this. Mr H was asked to bear in mind that his GP did not have expertise in advising on the SCPF.

18. On 31 July 2015, SIL wrote to Mr H asking if he wished to appeal its decision and setting out what he should do if so.

19. On 25 February 2016, Mr H contacted Shell Health by email providing consent for it to discuss his case with his GP. On 26 April 2016, Shell Health informed SIL that it had received a note from Mr H's GP[5]. It said this did not provide any additional medical evidence and, therefore, its April 2015 advice remained extant.

20. Mr H wrote to SIL, on 22 August 2016, asking it to reconsider his application for a Total Incapacity pension. He submitted a report from a consultant physician, Dr Thillainayagam dated 30 June 2016. SIL forwarded the report to Shell Health and asked if it was still reviewing Mr H's case. It appears that the report sent to Shell Health was incomplete and SIL requested a complete copy from Mr H. This was sent to Shell Health on 10 October 2016. Shell Health responded, on the same day, saying that there was no new information about Mr H's condition in the report. It noted that Dr Thillainayagam was going to try some other treatments and said it would be useful if Mr H could provide an update to see if there was any change to his condition following this. Shell Health said Dr Thillainayagam seemed quite optimistic that he would be able to help Mr H.

21. Also on 10 October 2016, Mr H re-submitted the November 2014 report from a consultant respiratory physician, Dr Coulter, relating to his sleep apnoea.

22. On 18 October 2016, SIL wrote to Mr H saying Shell Health had reviewed Dr Thillainayagam's report and considered that it did not give any new or different information about his condition. It said Shell Health's advice was still that Mr H did not meet the definition of Total Incapacity and, having considered this advice, it had decided there should be no change to his pension award. SIL noted that Dr Thillainayagam had proposed further investigations and asked Mr H to provide any follow up reports for further review.

[5] Copy not provided.

23. SIL received Mr H's letter of 10 October 2016, enclosing the sleep study report, on 24 October 2016. It referred the report to Shell Health, which confirmed that it was aware of Mr H's sleep apnoea and this had been part of its assessments to date.

24. On 3 November 2016, SIL wrote to Mr H informing him that it had received further advice from Shell Health in relation to the sleep apnoea report. It said Shell Health had confirmed that it was aware of and had taken account of this condition in undertaking its assessment. SIL said there had been no change to Shell Health's assessment of Mr H's condition. SIL said, as there was no new evidence or a change in the advice it had received, its decision not to award a Total Incapacity pension stood. It noted that Mr H wished to appeal and asked that he consent to release the letter from Shell Health dated 27 July 2015.

25. Mr H submitted a dispute under SIL's "Incapacity Dispute Procedure" (**IDP**) in January 2017.

26. SIL issued a stage one IDP decision on 19 April 2017[6]. The IDP decision-maker said she had reviewed reports and correspondence relating to the initial decision to award a Partial Incapacity pension and the subsequent reviews. She said she had reviewed correspondence from Mr H and the letter he had consented to SIL seeing. She said she had also interviewed the doctor at Shell Health who was managing Mr H's case. The IDP decision-maker said she agreed with SIL's decisions, in May 2015 and October 2016, not to award Mr H a Total Incapacity pension. Her decision is summarised as follows:-

2015 Decision

- She was satisfied that advice had been sought from Shell Health doctors before each decision had been taken.

- The advice, at both times, had been that Mr H's long term conditions might allow some form of working; in particular, working from home. Also, for so long as there were untried treatment options which might address Mr H's conditions to an extent such that further employment remained possible, it was not possible to conclude that it was unlikely that he would ever again obtain employment.

- Shell Health had advised that there had been no significant change to Mr H's conditions since the initial decision, in 2012, to award him a Partial Incapacity pension.

- Updated information had been sought from Mr H's GP by Shell Health. This had been taken into account by Shell Health in advising that Mr H did not meet the definition of Total Incapacity. Shell Health had advised that it would be possible for Mr H to work for a company or as self-employed in a capacity which did not require frequent travel, was closer to his home or involved home working.

[6] It appears that Mr H did not receive this and chased up the response in September 2017. The stage one IDP decision was then re-issued.

- With regard to Mr H's sleep apnoea, there remained treatment options which could prove successful and were yet to be explored. In particular, Continuous Positive Airway Pressure (**CPAP**) therapy remained possible. Mr H's consultant respiratory physician had said he hoped CPAP therapy would improve many of his symptoms. Mr H had not pursued this option because he could not tolerate it. Shell Health had advised that there was no underlying reason why it would not be appropriate for Mr H in the long term and, if he persevered with it, it offered a proven prospect of success.

- Shell Health had advised that many people with similar conditions and symptoms to Mr H's could and did continue to work and reasonable adjustments could be made to support this.

- Mr H's depression remained potentially treatable. Subsequent to the 2015 decision, Mr H had received an NHS letter suggesting he might benefit from using online resources and he had been referred to a local support service. This appeared to confirm Shell Health's view that Mr H's depression might be amenable to treatment.

- Mr H's cardiac condition was under appropriate management and was not of a nature or severity which rendered him unlikely ever again to obtain employment.

2016 Decision

- Mr H had provided further information relating to his sleep apnoea. Shell Health had confirmed that it had been aware of Mr H's sleep apnoea and that there was no change to its assessment of his condition.

- Mr H had provided a report from his consultant. In this, the consultant had indicated that he was optimistic that he could improve Mr H's condition and had suggested further investigation and a possible increase in medication. This supported Shell Health's opinion that Mr H's condition remained potentially amenable to treatment.

- Shell Health had been aware of and taken account of Mr H's GP's statement that it appeared unlikely that Mr H would return to work. It had noted that this statement had been made in relation to the provision of medical certificates; not the definition of Total Incapacity.

27. In October 2017, Mr H wrote to SIL saying he wished to dispute the outcome of the stage one IDP.

28. SIL issued a stage two IDP decision on 20 December 2017. The IDP decision-maker said he had reviewed reports and correspondence relating to the initial decision to award a Partial Incapacity pension and the subsequent reviews. He said he had reviewed the correspondence which Mr H had provided consent for SIL to see and had interviewed the doctor at Shell Health who had dealt with the case. The IDP decision-maker said he had concluded that stage one of the IDP had been

undertaken correctly and SIL's decisions, in 2015 and 2016, were correct. He referred to the definition of Total Incapacity (see paragraph 5) and said:

> "… I am satisfied that the advice of Shell Health doctors, as registered medical practitioners and consultant occupational health physicians, was sought before each of the decisions at dispute was taken. In general terms, the advice from Shell Health at both times was that your long term conditions may allow some form of employment, in particular working from home. Also, for so long as there remain untried treatments that may address your conditions to an extent that further employment remains possible, it was not possible to conclude that it was unlikely that you will ever again obtain employment – It is important to understand that the bar to meet the definition of Total Incapacity is a high one."

29. The IDP decision-maker informed Mr H that SIL intended to conduct another review in 2018 and it was happy to agree to his request that the review be carried out by a doctor who had not previously been involved.

30. Mr H contacted the Pensions Advisory Service (now the Pensions Ombudsman's (**TPO's**) Early Resolution Service) in February 2018. Mr H's adviser wrote to SIL on 23 April 2018. It appears that this letter did not reach the addressee. The adviser sent a further letter on 17 September 2018 and then, on being advised of non-receipt, re-sent the earlier letter. SIL provided its response on 6 November 2018.

Mr H's position

31. Mr H submits:-

- He was not given a Total Incapacity pension in 2012 and he was advised that the medical advisers were divided in their opinions. He was advised to accept a Partial Incapacity pension and that this could be altered to Total Incapacity on review if he had no ability to work.
- Since 2012, he has complied with all requests for review and presented medical information with transparency.
- Since being awarded a Partial Incapacity pension in 2012, he has developed additional medical complications and his physical impairment has increased. His additional medical conditions have not been fully appreciated or understood. The interaction between his various medications and treatments has not been taken into account.
- SIL has ignored expert medical advice from his GP and numerous specialist consultants, who understand his complex medical conditions. SIL does not acknowledge expert medical opinion from the doctors who have been treating him for many years.
- He disagrees that SIL has not received advice from a registered medical practitioner to the effect that it is unlikely that he will ever again obtain

employment. His GP and Drs Kurbaan and Thillainayagam have repeatedly provided documents detailing their opinions that it is unlikely that he will ever again obtain employment.

- At no time did the doctors at Shell Health examine him. They do not know him as well as his own treating physicians. It is unreasonable for Shell Health to ignore the medical opinions provided by his own treating physicians.

- The Shell Health doctors are not specialists in his conditions; unlike his own treating physicians, who are in direct opposition to the opinion of the Shell Health doctors as to his employability.

- He disagrees that there has been no material deterioration in his condition since 2012. He has developed further medical conditions and, despite undertaking all treatment recommended by his specialists, he continues to have severe symptoms.

- Shell Health has failed to appreciate that reasonable adjustments made in 2012 included working from home. It was determined that he was unable to manage working from home and, therefore, he was deemed unfit for work. It is inconsistent to say he would be able to work from home for another company. The premise for terminating his employment with SIL would, by extrapolation, mean that he would be unable to work from home for any other company.

- SIL acted incorrectly in terminating his employment due to medical conditions. At the time, he was working from home. SIL later stated that he would be capable of working from home for another company. His employment was unfairly terminated.

- SIL has been slow to respond to his applications.

- He has been unable to support his family on his Partial Incapacity pension. His wife had to return to work full-time until she was diagnosed with cancer in 2016. He has not paid National Insurance contributions since 2012 and cannot apply for Employment Support Allowance (**ESA**). He has debts in excess of £50,000.

- He has been in receipt of Personal Independence Payment (**PIP**) since 2017. He was assessed as having a significant disability. He has recently been awarded a ‘Blue Badge’.

- He would like to be paid a Total Incapacity pension with effect from 2012 and for his National Insurance contributions to be paid with effect from 2012.

SIL's position

32. SIL submits:-

- The Trust Deed and Regulations prescribe the circumstances in which a Total Incapacity pension can be granted to a member. In the absence of medical advice from a registered medical practitioner, who has certified that the member's condition is such that it is unlikely that the member will ever again obtain employment, no discretion to grant a pension arises.

- It has not received such advice in Mr H's case and, therefore, it has never been open to it to direct the SCPF Trustee to grant him a Total Incapacity pension.

- Mr H's medical condition has been reviewed by occupational physicians at Shell Health at the time his employment terminated and at each subsequent review. Shell Health has considered medical information provided by Mr H's doctors. SIL considers it reasonable to rely of the advice of its own occupational health advisers when making a decision about the award of an incapacity pension.

- At various times, it has raised questions with Shell Health in order to better understand the advice received and what the advice was based on. At no time has it received advice to the effect that Mr H's condition was such that he met the criteria for a Total Incapacity pension.

- It has granted power of attorney to certain individuals to make decisions relating to incapacity pensions.

- There is no evidence of inconsistency in the advice provided by Shell Health at the time Mr H's employment was terminated. Shell Health advised that Mr H was not capable of returning to his role because of the requirement for foreign travel. Shell Health advised that Mr H was not capable of work in the short term but might be able to work at some time in the future.

- As occupational health specialists, Shell Health has the benefit of advice from an individual's GP and any external specialists in addition to its familiarity with roles within SIL. Shell Health has experience of applying the incapacity criteria under the SCPF when providing advice.

- In Mr H's case, the correspondence indicates that Shell Health not only considered the various specialists' reports provided by or on behalf of Mr H but also actively sought opinion from his specialists. None of these changed Shell Health's understanding of the medical outlook.

- Mr H was considered unfit to work in the role he was undertaking in 2012. Prior to terminating his employment, attempts were made to accommodate Mr H working from home, but these were unsuccessful. In particular, Mr H's role involved frequent business travel which he would not be able to sustain. This is consistent with the advice that it could not be said that it was unlikely that he would ever

again obtain employment. The test for Total Incapacity is not specific to employment with SIL.

- The first letter from Mr H's TPO adviser did not reach the addressee at SIL. The follow up letter was acknowledged and a response provided in a timely manner.

Adjudicator's Opinion

33. Mr H's complaint was considered by one of our Adjudicators who concluded that no further action was required by SIL. The Adjudicator's findings are summarised below:-

- In the case of a complaint concerning a decision about an award of incapacity retirement benefits, the Pensions Ombudsman would consider whether the decision-maker had: (i) gone about making the decision in the right way; and (ii) made a decision which was supported by the evidence.

- Members' entitlements to benefits when taking early retirement due to incapacity were determined by the scheme rules or regulations. The scheme rules or regulations determined the circumstances in which members were eligible for incapacity benefits, the conditions which they had to satisfy, and the way in which decisions about incapacity benefits had to be taken.

- In Mr H's case, Regulation 25 and the definitions of Total and Partial Incapacity were the relevant provisions. In order to receive a Total Incapacity pension, Mr H had to satisfy the definition of Total Incapacity; that is, he had to be considered unlikely to be able ever again to obtain employment because of his incapacity. Unlike the definition of Partial Incapacity, the employment referred to in the definition of Total Incapacity did not have to be Mr H's "occupation"; that is, the same as or similar to the role he had undertaken at SIL. It encompassed any employment, including any part-time employment.

- Mr H's complaint concerned the reviews undertaken between 2014 and 2016. Under Regulation 25, SIL was entitled to review whether a member in receipt of an incapacity pension was still suffering from any incapacity and, if so, whether it was Total or Partial Incapacity. Regulation 25 provided for SIL to direct the SCPF trustee to discontinue or adjust the pension accordingly. Regulation 25 also required SIL to obtain medical advice before making a decision.

- In Mr H's case, SIL had asked Shell Health to review his state of health, having received correspondence from Mr H indicating that his health had deteriorated. Mr H had provided a letter from his GP and Shell Health had sought reports from his specialists.

- SIL had confirmed that Shell Health had not shared the specialists' reports with it for reasons of patient confidentiality. Mr H had subsequently been asked for his consent to Shell Health sharing its letter of 25 July 2015 with SIL. It appeared that SIL had not reviewed any of the medical evidence itself, even the reports which

Mr H provided directly to it. It had opted to refer these to Shell Health for review and to rely solely on Shell Health for medical advice.

- The decision as to whether Mr H was still suffering from incapacity and whether this amounted to Total or Partial Incapacity was for SIL to make. Although SIL said its decision had been based upon medical advice from Mr H's GP and reports from his specialists, in reality, it had been based upon the advice from Shell Health. Ideally, SIL would review all of the relevant evidence itself before making a decision. Otherwise, it ran the risk of being viewed as following the advice from Shell Health blindly.

- It had to be acknowledged, however, that SIL could only review medical evidence from a lay perspective; as did the Ombudsman. It would not be expected to challenge a medical opinion per se. It could, however, be expected to check whether there had been any errors or omissions of fact or misunderstanding of the regulations on the part of the Shell Health doctors. It could be expected to consider whether the advice from Shell Health was at odds with views expressed by the member's own doctors. It could not do this if it did not review all of the available medical evidence itself. This was not to say that it was not open to SIL to prefer the advice it received from Shell Health; unless there was a cogent reason why it should not do so, such as an error of fact or a misunderstanding.

- Shell Health had advised that there had been no objective deterioration in Mr H's conditions and that there was no evidence that they would not improve in the future. It had referred to "several of his conditions" being amenable to treatment. SIL had informed Mr H that the main reason for its decision to maintain his Partial Incapacity was that "many" of his conditions might be amenable to ongoing or further treatment. Shell Health had not specified which conditions it was referring to or what treatment it had in mind.

- In the Adjudicator's view, it would not have been possible for Mr H to fully understand the reasons for SIL's decision on the basis of the limited information provided to SIL by Shell Health. Nor, in her opinion, would SIL have been able to clarify matters for Mr H at that time.

- The Adjudicator acknowledged that SIL had sought clarification from Shell Health concerning Mr H's perception of his symptoms and the reference to home-working. However, it had not asked for any further detail as to the conditions Shell Health was referring to or the treatment it had in mind. It was difficult to conclude that SIL had come to a properly informed and considered decision on the basis of the rather sparse advice it had received from Shell Health.

- In fact, Mr H had sought further clarification from Shell Health himself. As a result, Shell Health had explained that it considered Mr H's depression and sleep apnoea to be amenable to treatment. It considered his bowel and heart conditions to be stable and not a bar to some form of employment; in particular, working from home.

- The evidence indicated that, at the time of the 2014/15 review decision, the advice from Shell Health was not wholly inconsistent with the reports from Mr H's doctors. Dr Kurbaan had given a positive prognosis for Mr H's heart condition. Professor Saunders had said Mr H's bowel condition was unlikely to improve dramatically. Mr H had recently been diagnosed with sleep apnoea and the expectation was that this could be improved with treatment. His GP had anticipated that Mr H's depression could be treated with medication. At that stage, Mr H's doctors had not expressed the view that he was incapacitated for all employment.

- It was the Adjudicator's opinion that the initial advice from Shell Health had lacked the detail needed for SIL to reach a properly informed decision. However, the evidence, and in particular Shell Health's letter of 25 July 2015, did not suggest that further detail would have changed the outcome.

- The advice from Shell Health was that, even with his serious health conditions, Mr H was capable of some form of work. It had referred to working from home. Mr H had pointed out that he had tried working from home for SIL and this had been unsuccessful. It did not follow, however, that he would be unable to work from home for another company in some other capacity.

- The Adjudicator said she recognised that Mr H's options for employment must be severely curtailed by his incapacity. However, the evidence did not indicate that the advice from Shell Health was such that SIL's reliance on that advice amounted to maladministration. It was the case that the definition of Total Incapacity presented a significant hurdle for a member to surmount. This was because it required incapacity for all employment.

- The Adjudicator said she had not identified any error or omission of fact on the part of Shell Health and its doctors appeared to have understood the definition of Total Incapacity. She acknowledged that, in their more recent reports, Mr H's doctors had expressed the view that he was incapable of any regular employment or a return to the workforce. It was not clear whether the doctors were aware of the strict definition of Total Incapacity which applied. In any event, this amounted to a difference of opinion between Shell Health and Mr H's doctors, which, in and of itself, would not be sufficient to find that SIL could/should not have relied on the advice it had received from Shell Health.

- Mr H had pointed out that Shell Health had not examined him. He was of the view that SIL had ignored expert medical advice in reaching its decision. The weight which it attached to any of the evidence was for SIL to decide, including giving little or no weight to some[7]. The fact that SIL gave more weight to the advice from Shell Health than it did to the evidence from Mr H's doctors was not the same as ignoring that evidence. Since the question to be addressed under Regulation 25

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

was one of Mr H's capacity for employment, it was not inappropriate for SIL to have sought advice from occupational health experts.

- Mr H had said that SIL had been slow to respond. The Adjudicator said she had not identified any undue delay on SIL's part. It had been pro-active in chasing up Mr H's case with Shell Health and the time taken appeared to have been down to waiting on doctors' reports. Mr H had not received the stage one IDP response until nine months after his application, but it had been issued earlier and had not reached him. There had been a delay in responding to Mr H's adviser in 2018 but, again, this appeared to be because a letter had not arrived.

34. Mr H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr H provided further comments which are summarised below. I have considered Mr H's comments but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

Mr H's further comments

35. Mr H submits:-

- He was medically retired in 2012 as a result of his inability to undertake any work tasks reliably and consistently for his employer, despite workplace adjustments. Despite SIL being a major employer with over 100,000 positions, there was no position for which he was deemed medically fit.

- He had been unable to undertake his usual employment, which included international and domestic travel, since 2010. He had been undertaking work from home but had been found to be unreliable and inconsistent. He had been unable to meet his work task requirements and had frequent, prolonged sick leave at this time.

- It is unreasonable to assume he is able to work from home for another employer but not his former employer. If he had been unable to work from home for his former employer, with reasonable adjustments, in 2010, it would be logical that he would not be able to work for another employer with the same adjustments.

- His medical conditions are permanent, progressive and deteriorating. Since 2013, he has developed complications. SIL has not taken the complex interplay between his conditions into account. There are few people with both of his conditions and the impact of both conditions on his ability to undertake the tasks of daily living has not been appreciated.

- He disagrees that there has been no objective deterioration in his conditions. Nor does he agree that his symptoms wax and wane because of the nature of his conditions. All attempts to improve his conditions with medication have not improved his symptoms.

Ombudsman's decision

36. I think it would be helpful to clarify that the matters before me are the 2015 and 2016 decisions by SIL to maintain Mr H's award of a Partial Incapacity pension. The evidence which is relevant to my Determination of Mr H's complaint, is the evidence which relates to the situation as it was when those decisions were made. I say this because Mr H has submitted medical evidence which relates to the progress of his health since and his circumstances as they are now. This evidence does not assist me in determining whether SIL's decisions in 2015 and 2016 were properly made.

37. For the purposes of the 2009 Trust Deed and Regulations, Total Incapacity is defined as:

> "… physical or mental impairment and deterioration which, in the opinion of the Employing Company acting on medical advice from a registered medical practitioner who has so certified, is such as to make it unlikely that the Member will ever again obtain employment …"

38. In contrast, Partial Incapacity is defined as:

> "… physical or mental impairment and deterioration which in the opinion of the Employing Company acting on medical advice from a registered medical practitioner who has so certified, is such as to prevent the Member from following his occupation (and will continue to do so), and which seriously impairs his earning capacity …"

39. In the definition of Total Incapacity the word "employment" is unqualified; whereas, the definition of Partial Incapacity refers to the Member's occupation. In other words, to satisfy the definition of Partial Incapacity, the Member must be considered permanently incapacitated from undertaking the role for which he was employed by SIL. In order to satisfy the definition of Total Incapacity, the Member must be considered permanently incapacitated from undertaking any employment. This is a much more stringent eligibility test and is reflected in the fact that the pension payable on Total Incapacity is higher than that payable on Partial Incapacity.

40. I acknowledge Mr H's point that SIL has a large workforce. Its website states that it employs around 6,000 people in the UK. However, the fact that SIL was unable to accommodate Mr H's needs in 2012 does not mean, in and of itself, that he satisfied the definition of Total Incapacity. Mr H argues that, because he was unable to continue to work for SIL with reasonable adjustments, including working from home, it follows that he would be unable to work for another employer. However, Mr H is overlooking the wide-ranging scope of the term "employment" in the definition of Total Incapacity. It means any employment, including part-time work at any level. As my Adjudicator said, this is a significant hurdle for a Member to surmount.

41. The task for me is to consider whether SIL reached its 2015 and 2016 decisions in a proper manner. This requires me to consider whether it applied the 2009 Trust Deed

and Regulations correctly and whether the decisions were supported by the available relevant evidence.

42. SIL was required to come to an opinion as to whether Mr T continued to satisfy the definition of Partial Incapacity or satisfied the definition of Total Incapacity. In doing so, it was required to act on medical advice from a registered medical practitioner when making its decisions. This did not have to be Shell Health, but I do not find that it was inappropriate for SIL to consult with its own doctors. Nor do I find it inappropriate for SIL to seek advice from occupational health physicians. I appreciate Mr H's concern that the Shell Health doctors were not specialists in his conditions. However, the matter which SIL was required to address was Mr H's capacity for employment. This required the medical advisers to assess the effect Mr H's health would have on his ability to work, which is within the scope of an occupational health physician's specialism.

43. Equally, there is no requirement under the 2009 Trust Deed and Rules for SIL to consider evidence from a Member's own doctors. However, it is required to form an opinion and, to do so, it should weigh up all of the relevant evidence available to it. This would enable SIL to come to an informed opinion which is then more easily communicated to the Member. I note that the IDP decision-makers did review and refer to medical reports supplied by Mr H.

44. In coming to an opinion, it is for SIL to decide how much weight should be allocated to any of the evidence. It is open to SIL to accept the advice it receives from Shell Health; unless there is a good reason for it not to do so. My Adjudicator outlined the kind of things which SIL might be expected to consider before accepting the advice from Shell Health.

45. In Mr H's case, the advice from Shell Health in 2015 was not inconsistent with the views expressed by his own doctors. For example, in February 2014, Dr Kurbaan had said that Mr H was able to manage his usual activities but struggled if he pushed himself. In March 2014, Professor Saunders had said that Mr H was incapacitated by his symptoms and was unlikely to improve dramatically. He did not, however, comment on Mr H's likely future capacity for employment. In November 2014, Dr Coulter expected treatment to improve Mr H's sleep apnoea symptoms. Mr H's GP, in April 2015, noted that Mr H's medication for his heart condition was exacerbating his abdominal symptoms. He also mentioned that Mr H's depression was being treated through the community mental health team and might require medication. He did not comment on Mr H's likely future capacity for employment.

46. I acknowledge that, by 2016/17, Mr H's own doctors were of the view that he was not fit to undertake any regular employment, including part-time employment. Shell Health took a different view. The main difference appears to be that Shell Health was of the opinion that home-working might be an option for Mr H. I have noted Mr H's comments concerning his inability to sustain working from home for SIL. It does not follow, however, that this means he would have been unable to work from home in some other capacity for another employer. I do not find that this difference in opinion

between Shell Health and Mr H's doctors, on the feasibility of him being able to undertake some employment, is sufficient for me to conclude that SIL should not have relied on Shell Health's advice.

47. I appreciate that Mr H's health has a significant negative impact on his life. However, I do not find that SIL's decisions, in 2015 and 2016, to maintain Mr H's Partial Incapacity award were improperly reached. Therefore, I do not uphold Mr H's complaint.

48. Mr H's health appears to have deteriorated since. I note that SIL intended to review his award again in 2018. This is, however, outside the scope of my current investigation and Determination.

Anthony Arter
Pensions Ombudsman

15 December 2021

Appendix

Medical evidence

49. Dr Kurbaan, consultant cardiologist, 13 February 2014

    In a letter to Shell Health, Dr Kurbaan said Mr H had been under his care since March 2012. He said, when he had last seen him, Mr H was able to manage his usual activities without any major restriction, but he did struggle when he pushed himself. Dr Kurbaan explained that Mr H's main issue was his bowel condition, which was quite debilitating. He described Mr H's bowel symptoms and the effect they had on his life. Dr Kurbaan concluded by saying that, from a cardiac perspective, Mr H's prognosis was reasonably good and referred to the results of tests from 2012.

50. Professor Saunders, consultant gastroenterologist, 12 March 2014

    In a letter to Shell Health, Professor Saunders said Mr H had had a total colectomy and had subsequent regular examinations. He said Mr H was symptomatic and incapacitated as a result of his bowel symptoms. Professor Saunders explained that it had been difficult to find a satisfactory combination of medication for Mr H. He expressed the view that Mr H's general condition was unlikely to improve dramatically, but he was confident that the polyposis could be kept in check with regular surveillance.

51. Dr Coulter, consultant respiratory physician, 28 November 2014

    In a report for Mr H's GP, Dr Coulter outlined the results of an overnight sleep study. She said this had shown severe obstructive sleep apnoea. Dr Coulter said Mr H was keen to explore treatment options and she had explained that CPAP was the best treatment for him, which Mr H had agreed to trial. She said she would hope that this would improve Mr H's symptoms.

52. Mr H's GP, 13 April 2015

    In a letter to Shell Health, Mr H's GP confirmed that Mr H had been told he had a good prognosis for his ischaemic heart disease. However, he explained that the medication which Mr H took for his heart disease was exacerbating his abdominal symptoms. He also explained that Mr H had become depressed as a result. The GP said Mr H's sleep apnoea had been described as severe but, if he could get on with the equipment, he should feel less sleepy during the day and his energy levels should improve. The GP concluded:

    > "Therefore I think [Mr H] is in a difficult position because his continuing bowel symptoms do not seem amenable to any treatment at the current time despite being seen by top specialists in their field. His ischaemic heart disease is well controlled, but the medication is exacerbating his bowel symptoms. His sleep apnoea will hopefully be controlled through his use of CPAP. His depressive symptoms are being treated through the community mental health team, but

> may necessitate some anti-depressant medication if [Mr H] is willing to take this."

53. Mr H's GP, 14 June 2016

In an open letter, Mr H's GP queried whether Mr H needed to continue to have medical certificates because it appeared very unlikely that he would return to work.

54. Dr Thillainayagam, consultant physician, 30 June 2016

In a letter to Mr H's GP, Dr Thillainayagam began by providing a comprehensive description of Mr H's medical conditions and symptoms. He explained the approach he was going to take to help Mr H and the tests he had arranged. Dr Thillainayagam concluded by saying that he had reassured Mr H that he would be able to help.

55. Mr H's GP, 13 September 2017

Mr H's GP said Mr H had had a total colectomy in 2009, had been diagnosed with ischaemic heart disease in 2010, with new onset palpitations in 2017, and sleep apnoea in 2014.

The GP said Mr H's cardiac condition, including swelling in his lower limbs in the summer months, was managed by cardiologists; his sleep apnoea was managed by a sleep clinic; and ongoing surveillance of his bowel by gastroenterologists. The GP described Mr H's symptoms. He explained that Mr H's use of a CPAP machine was complicated by his medication. The GP explained that a combination of Mr H's symptoms and medication meant that he was tired and sleepy during the day and he was unable to sustain activities. He said Mr H's conditions were permanent and his symptoms were unpredictable, despite his compliance with treatment. The GP said Mr H's symptoms were deteriorating over time and were difficult and complex to manage. He explained that one of the effects of Mr H's bowel condition was severe social limitation and he expressed the opinion that Mr H was unable to undertake any employment.

56. Dr Kurbaan, consultant cardiologist, 19 September 2017

Dr Kurbaan said Mr H had a history of cardiac problems dating back to 2010 and had had an angioplasty and stent insertion. He said Mr H's condition was complicated and he had major problems with fluid balance as a result of his bowel condition. Dr Kurbaan said Mr H's situation was further complicated by Mr H's sleep apnoea and depression. He expressed the view that, although Mr H functioned on a day-to-day basis, he was not fit to undertake any regular employment. He said Mr H was currently stable but he did not think that Mr H's situation would improve significantly.

57. Dr Thillainayagam, consultant physician, 26 September 2017

Dr Thillainayagam listed Mr H's medical conditions. He said Mr H continued to be disabled by his bowel symptoms and felt continually tired and unwell. Dr Thillainayagam concluded:

> “Whilst I know that [Mr H] will get better and better slowly with regard to a number of his ongoing problems, I cannot foresee him being well enough to return to the workforce even part-time.”