PO-11070

Ombudsman's Determination

Applicant	Mr R
Scheme	Principal Civil Service Pension Scheme (**the Scheme**)
Respondents	Cabinet Office, MyCSP, Ministry of Defence (**MOD**)

Outcome

1. I do not uphold Mr R's complaint and no further action is required by the Cabinet Office, the MOD, or MyCSP.

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

Complaint summary

3. Mr R complains that he has not been awarded an ill health pension, despite being unable to perform his role. He is unhappy about the way in which his ill health application has been considered, the processes adopted by the medical advisers when they were making a decision on whether his incapacity was permanent, the time taken to make the original decision, and the lengthy appeals process that followed. He has also raised concerns that the ill health retirement provision discriminates against him on age and disability grounds.

Background information, including submissions from the parties

4. Mr R worked as a firearms officer for the MOD and was a member of the Scheme. On 29 December 2014, Mr R made an application for ill health retirement. On 15 January 2015, his employer completed its section of the application form and sent it to Health Assured, which provides Occupational Health Specialists, referred to as Scheme Medical Advisers (**SMA's**). On 26 March 2014, Mr R was reviewed by an SMA, following which his application for ill health retirement was declined on the basis that, on balance of probabilities, Mr R was not permanently incapacitated until his normal retirement age (**NRA**) of 60. Mr R was aged 29 at the time. On 14 April 2015, Mr R's employer notified him of this decision.

5. On 22 April 2015, Mr R signed appeal paperwork for his application to be reviewed under the three stage ill health appeals process. There was a delay caused by an

outdated form being completed the employer issued a new form which had to be completed by Mr R and the Employer. On 25 May 2015, the employer signed the appeal paperwork and on 16 June 2015, Health Assured acknowledged receipt.

6. A consultation was arranged for Mr R to be seen by another SMA on 21 July 2015. On 28 July 2015, the stage one response was issued and Mr R's appeal was not upheld. It was passed to stage two for reconsideration.

7. On 8 September 2015, the stage two response was issued. The SMA reviewing the appeal, Dr Gallagher, had doubts about whether Mr R could, or should be expected to, return to his role as a firearms officer before his NRA. Dr Gallagher referred the appeal to stage three, to be considered by the medial appeals board, as he believed it would be better placed to deal with the issue of whether Mr R was considered permanently incapacitated, as it allowed the opportunity for Mr R to be assessed directly by two further specialists. Dr Gallagher explained in his report that the chair of the appeals board would be a consultant occupational physician who "would have the option of choosing an appropriate further specialist to consider [Mr R's] appeal."

8. The medical appeals board was formed of two consultant occupational physicians and it was convened to consider Mr R's appeal on 12 October 2015. On 16 October 2015, the medical appeal board issued its decision not to uphold the appeal. In summary it said that, on the balance of probabilities, Mr R is not likely to be permanently incapacitated until NRA. The report said that Mr R had just started a new course of treatment and more sessions were required before its results could be judged, but the outlook was positive. However, in the event that this treatment did not succeed it suggested alternative treatments that were likely to improve his condition to the extent that he would be able to fulfil the role of firearms officer before NRA.

9. Mr R then raised a complaint through the internal dispute resolution procedure (**IDRP**) which was considered by MyCSP, the Scheme administrators, at stage one and the Cabinet Office at stage two. Mr R's complaint was not upheld and he brought his complaint to this Office for consideration.

Adjudicator's Opinion

10. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Cabinet Office, the MOD or MyCSP. The Adjudicator's findings are summarised briefly below:-

    - It is not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mr R's eligibility for payment of benefits under Regulation D.4. The Ombudsman 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. However, the weight which is attached to any of the evidence is for the decision maker to decide, including giving some of it little or no weight. It is open to the decision maker to prefer evidence from its own 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 the employer to reconsider.

- The Scheme Regulations outline the two tiers of ill health retirement available. In order to qualify for the upper tier a member must, in the SMA's opinion, be permanently incapable of gainful employment up until normal retirement date. For the lower tier a member must, in the SMA's opinion, be permanently incapable of doing his own or a comparable job up to normal retirement date.

- It is important to note that the Regulations require the SMA to be of the opinion that the member has a permanent breakdown in health, leading to incapacity for employment. Where the SMA does not agree, ill health retirement cannot be granted. An Ombudsman would expect the SMA to consider permanent incapacity on the balance of probabilities, taking into account what treatments are available and how likely it is, in the SMA's opinion, that the treatments will be effective.

- When Mr R's ill health application was originally under consideration the SMA considered the treatments Mr R had already received, the further treatments available and what impact those treatments were likely to have on his condition. The SMA concluded that, on the balance of probabilities, Mr R was not permanently incapacitated. This was reconsidered at each stage of the appeal with the same outcome, apart from stage two where the appeal was progressed to stage three for the question of permanency to be addressed. The Adjudicator is satisfied that the SMA's have taken all of the medical evidence in to account and that they have considered permanency in the manner that the Ombudsman would expect. As has already been mentioned, more weight can be placed on some evidence than that placed on other evidence and it is for the SMA to decide what is material.

- It is noted that Mr R has raised concern that the medical appeals board, at stage three, was not properly formed, as the second member of the medical appeals board was not a specialist in the discipline of his condition. The Scheme Regulations are silent on the formation of the medical appeals board and the "Medical Reviews and Appeals Guide" simply says "a second accredited specialist". While Dr Gallagher used the terms "appropriate" and "relevant" further specialist, the Adjudicator does not agree that this necessarily means a specialist in the field of the applicants' condition. This could equally mean an occupational health specialist, which could be said to be both relevant and appropriate for considering a work related incapacity. This accords with Dr Gallagher's letter, dated 8 September 2015, to the chair of the medical appeals board, requesting the

formation of that same board, in which he said “it might be appropriate to enlist the assistance of a consultant psychiatrist or a consultant occupational physician”. It was a consultant occupational physician that was enlisted.

- It is also noted that the Cabinet Office said, in its IDRP stage two response, “a second medical practitioner who will if possible be an accredited specialist in a discipline appropriate to the case.” The Adjudicator acknowledged the benefit that this approach could offer, and that it may be prudent for the medical appeals board to include a specialist appropriate to the condition under consideration. However, as the Scheme Regulations, overriding legislation and guidance available, do not require this the Adjudicator did not find maladministration in the appointment of the second member.

- Mr R feels that the time taken to consider his ill health retirement and the subsequent appeals process was unreasonable. The Adjudicator did not agree with this position as the ill health retirement process is, by necessity, a long process. It requires consultations to be arranged and carried out, review of the medical evidence submitted and medical opinions to be sought from treating practitioners and specialists. Mr R’s particular case has not taken longer than the norm and there were not any unnecessary delays, other than that caused by the incorrect form, which the MOD corrected in a reasonable time frame. It is necessary for the SMA to obtain medical evidence from the applicant’s treating specialist or physician, therefore a delay while doing this is unavoidable. The appeals process is lengthy, however, the three stage approach allows for review on three separate occasions, by different SMA’s, with the possibility of further assessment, giving an applicant a greater opportunity to present their case. This seems reasonable in the circumstances.

- Turning to Mr R’s point that the ill health retirement provisions discriminate against him on grounds of age and disability, the Adjudicator did not agree. Some noteworthy comments were made in relation to ill health provisions by the Employment Appeal Tribunal (**EAT**) in, The Trustees of Swansea University Pension & Assurance Scheme and another v Williams [2015] ICR 1197, and is applicable to this complaint. The EAT said that ill-health retirement provisions under a scheme are set up to benefit disabled people. Non-disabled people would not qualify for ill-health retirement. The judge said that "treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous.” The pension scheme regulations in question, taken overall, favoured those who were disabled. Therefore, the judge said that it would not be right to say on the one hand that the scheme fulfilled an obligation under the Equality Act, by giving an advantage to disabled members over non-disabled members, but in doing so then falls foul of another. The Scheme Regulations favour those who are disabled, regardless of their age, so I cannot agree that the ill heath retirement provisions are discriminatory.

- The Adjudicator did not find fault or maladministration in the decision making process. Instead, the Adjudicator found that Mr R's ill health retirement had been considered in accordance with the Scheme Regulations in the manner that an Ombudsman would expect.

11. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr R 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 Mr R for completeness.

Ombudsman's decision

12. Mr R feels that the medical appeals board was not correctly formed. He says that if the Regulations are silent and the guidance says "a second accredited specialist", this should be interpreted in line with the MOD's comment in the second stage of IDRP that "a second medical practitioner who will if possible be an accredited specialist in a discipline appropriate to the case."

13. I agree with the comments that the Adjudicator made, in that it may be prudent to include a specialist in a discipline relevant to the case. I acknowledge that this would be of benefit to some applicants for ill health retirement, equally it could disadvantage others. However, my role is to review the ill health process, to ensure that it has been carried out in line with the appropriate regulations and legislation.

14. Where the regulations are silent I would expect the available guidance, if reasonable, to be followed. In this case the guidance available is the "Medical Reviews and Appeals Guide" which says "a second accredited specialist". This guidance does not state that the specialist needs to be relevant. In theory a specialist in any field could be appointed. Yet it makes sense for a specialist to be relevant and this seems to have been accepted by all parties. Nevertheless, the term "relevant" is not limited to the discipline to which the member's incapacity falls. It could be equally relevant to have an occupational specialist when incapacity and permanency are being considered in relation to Mr R's occupation.

15. Therefore, I do not agree that the medical appeals board was incorrectly constituted. It has been formed in accordance with the guidance available. While the Cabinet Office has said that a specialist in the field appropriate to the applicant's case would be preferred, it did not say that a specialist in the field appropriate to the applicant's case is required. If that was its position it would have upheld Mr R's appeal at IDRP stage two, but it did not.

16. In August 2016, Mr R commissioned a private medical report from a Consultant Psychiatrist to support his view that the medical appeals board was not correctly constituted, and should have included a specialist in the field appropriate to his case. Whether or not there was an advantage to be had by including such a specialist is not

something I can consider provided that the appeals board was appointed in accordance with the regulations and guidance, and I am satisfied that it was.

17. Mr R has also said that, during consideration of his ill health retirement, no specialist medical evidence was sought or obtained, nor was he requested to produce any. Medical evidence would usually be obtained from the medical professionals treating the applicant, and medical evidence was obtained from Occupational Health and Mr R's General Practitioner. The SMP is not required to obtain a second opinion from a specialist, it is up to the SMP to decide what further medical evidence is required before forming an opinion, as long as there is no error or omission of fact, or a misunderstanding of the relevant regulations by the SMP. I am satisfied that the SMP's involved in this case have the correct understanding of the regulations, and that no error or omission of fact has occurred.

18. Therefore, I do not uphold Mr R's complaint.

Anthony Arter

Pensions Ombudsman
18 September 2017