PO-12816

Ombudsman's Determination

Applicant	Mr S
Scheme	Railways Pension Scheme (**RPS**)
Respondents	Railways Pension Trustee Company Limited (the **Trustee**)
	Arriva Trains Wales Section Pensions Committee (the **Committee**)
	RPMI Limited (**RPMI**) (the RPS administrator)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by the Trustee, the Committee or RPMI.

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

Complaint summary

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3. Mr S has complained that he has been refused an ill health early retirement pension.

Background information, including submissions from the parties

Background

4. Mr S was a member of the RPS from October 2008 to February 2015, when his employment ceased.

5. Mr S went on long term sickness absence in August 2014. He was reviewed by his employer's occupational health advisers, Capita Health and Wellbeing (**CHW**), in September 2014. The occupational health physician considered Mr S fit to return to his normal duties and suggested a two week phased return. Mr S did not return to work and he was reviewed by CHW again in October 2014. The doctor suggested he discuss amended duties with his line manager. At a further review in December 2014, the CHW doctor said Mr S was fit for restricted duties and suggested a phased return to work. In January 2015, the occupational health doctor (now provided by Medigold Health Consultancy Limited (**Medigold**)) said Mr S was not fit for work and suggested a review in one month.

6. Mr S applied for incapacity retirement benefits in March 2015. A CHW doctor completed part of the application form. He said Mr S was suffering from a depressive illness. He indicated that this was more than a temporary condition. In answer to the questions as to whether Mr S was fit to perform his own or other duties, the doctor ticked the boxes marked "currently uncertain prognosis". He ticked a box indicating he did not consider Mr S to meet the HMRC incapacity criteria[1].

7. The relevant provisions are found in the Arriva Trains Wales Shared Cost Section of the RPS rules. Rule 5D provides for early retirement through incapacity.

8. "Incapacity" is defined as:

> "bodily or mental incapacity or physical infirmity which, in the opinion of the Trustee on such evidence as it may require, shall prevent, otherwise than temporarily, the Member carrying out his duties, or any other duties which in the opinion of the Trustee are suitable for him."

9. Responsibility for decisions relating to incapacity retirement has been delegated to the Committee. Mr S' application was considered by the Committee on 2 July 2015. The minutes of the Committee's meeting have been provided. The Committee declined Mr S' application on the basis that it did not consider his condition was "other than temporary".

10. In August 2015, Mr S appealed the decision and was informed he should provide additional medical evidence before his appeal would be considered. Mr S provided RPMI with a copy of his medical records. His case was referred back to the Committee. RPMI asked the Committee's medical adviser if it would be beneficial to obtain a further medical report for the Committee. On his advice, a further report was obtained. Mr S also provided a copy of a letter, from the DWP, confirming he was in receipt of Employment and Support Allowance (**ESA**). Summaries of the medical evidence relating to Mr S' case are provided in an appendix to this opinion.

11. The Committee reconsidered Mr S' application in March 2016. It declined his appeal on the basis that, whilst he would not be able to return to his previous role, he might be able to return to full time suitable employment. The Committee noted that Mr S had not had all the treatment options available to him and took the view that, if he engaged with the available treatment, he might recover sufficiently to return to full time suitable employment. The Committee decided Mr S did not meet the criteria for an incapacity retirement pension and agreed it should defer making a decision until Mr S had explored further treatments.

[1] Schedule 28 Finance Act 2004

12. Mr S was informed of the Committee's decision. It was suggested that a report obtained from a consultant psychiatrist, Dr Meehan, be sent to Mr S' GP and Mr S was asked for his consent for this to happen. He has not provided written authority for RPMI to send Dr Meehan's report to his GP. Mr S has explained that Dr Meehan sent a copy of her report to him and his GP has already seen it.

13. In July 2016, Mr S was awarded a Personal Independence Payment (**PIP**) at the standard rate for the period August 2015 to August 2018.

Mr S' position

14. The key points in Mr S' submission are summarised below:-

- The decision referred to him exploring further treatment but he has tried different medication and counselling. His local mental health team would like him to see a psychiatrist but the waiting list is 18-24 months. He has now been undergoing treatment for nearly six years without obvious improvement. He is going to need treatment for the rest of his life.
- He is still unable to leave his apartment except for doctors' appointments and mental health appointments.
- The Committee's reference to him exploring further treatment is a very open-ended way of declining his application. He feels this is unfair and prejudiced because of his condition, which is not fairly recognised in society.
- Decisions have been made on the balance of probabilities which he does not consider an appropriate approach to such an important matter.
- Dr Weddell only saw him for 10 minutes and cannot know how he feels. He just tried to "bully" him into returning to his former role.

The respondents' submission

15. A joint submission was received from the respondents. This is summarised below:-

- The RPS rules require the Committee to consider an application for incapacity benefits in accordance with the definition of incapacity (see above).
- The Committee declined Mr S' application because it did not consider his condition was "other than temporary" and he did not, therefore, meet the criteria set out in the RPS rules. Following Mr S' appeal, the Committee concluded that Mr S had not had all the treatment options and, if he engaged with the treatment, he might recover sufficiently to return to suitable full time employment.

Adjudicator's Opinion

16. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee, the Committee or RPMI. 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 as to whether or not Mr S should receive an incapacity pension. His concern was with the Committee's decision making process. The medical (and other) evidence was reviewed in order to determine whether it was appropriate and supportive of the Committee's decision. The weight which was attached to any of the evidence was for the Committee to determine, including giving it little or no weight. It was open to the Committee to prefer the advice it received from its own medical adviser unless there was a cogent reason why it should not, or should not without seeking clarification. Such reasons might include errors or omissions of fact or a misunderstanding of the relevant rules. If the decision making process was found to be flawed, the decision could be remitted to the Committee for reconsideration.

- In order to be eligible to receive an incapacity pension, Mr S had to be suffering from a condition which prevented him from carrying out his former duties, or any other duties the Committee considered to be suitable for him, "otherwise than temporarily".

- The Committee's initial decision was that Mr S did not meet the above criteria. It was not possible to tell from the minutes of the Committee's meeting what was taken into account in reaching the decision. Mr S was considered unfit for work at that time. If the Committee was of the view that he did not meet the criteria for an incapacity pension, it must have been because it expected him to recover sufficiently to resume his duties or other duties it had identified as suitable for him. It was not clear how it formed this view on the basis of the evidence then available to it. It was not possible to find, on the basis of the available evidence, that Mr S' application was considered in a proper manner.

- However, before Mr S' complaint could be upheld, it was necessary to consider whether he had suffered any injustice which has not been redressed. It was possible that the appeal process had provided appropriate redress.

- At stage one of the appeal process, Mr S' application was referred back to the Committee and further medical advice was obtained. No error or omission of fact was identified in Dr Meehan's and Dr Weddell's reports which might have required clarification. They were both asked to give opinions as to whether Mr S was permanently incapable of undertaking his former job or any other full time employment. The last question does not follow exactly the wording of the incapacity definition. However, if Mr S was not considered permanently incapable of other full time employment, he would not meet the second limb of the incapacity definition. In other words, if the expectation was that Mr S would

recover sufficiently, at some time before his normal retirement age, to undertake some full time employment, this would encompass the other suitable duties test.

- Unfortunately, Dr Meehan declined to give a view. She said it would depend upon the extent to which Mr S was able to address his psychological difficulties through a change in medication and extended therapy. It could, perhaps, have been explained to Dr Meehan that she was only being asked to give a view, on the balance of probabilities basis, on the likely outcome of this treatment. Dr Weddell, on the other hand, did express a view. He thought Mr S would, with appropriate treatment, be able to perform alternative full time employment in a supportive and accepting environment. No reason was identified to suggest the Committee should not have relied on Dr Weddell's report, or that of Dr Meehan, in coming to its decision.

- Mr S is in receipt of ESA and PIP. However, whilst this was evidence that he was currently unfit for any work, these benefits were awarded under different criteria. In particular, there is no requirement for Mr S' incapacity to be permanent. His PIP had been awarded until August 2018.

- On the basis of Dr Weddell's report, the Committee decided to defer making a decision until Mr S had explored the further treatment options recommended by Dr Meehan. Strictly, the Committee should have come to a decision as to whether, on the balance of probabilities, Mr S met the criteria for an incapacity pension when his employment ceased. However, the decision to defer making a decision does not, in the particular circumstances of Mr S' case, appear to cause him any injustice.

17. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr S for completeness.

Ombudsman's decision

18. It is clear that Mr S is currently in very poor health. This is evident from the involvement of his local mental health team and the fact that he has been awarded PIP. However, the Committee must also consider what the likely future state of Mr S' health will be. I note his comment concerning the use of the balance of probabilities burden of proof. This is the appropriate approach for the Committee to take. It is not required to determine "beyond a reasonable doubt" that Mr S will recover sufficiently to undertake suitable full-time employment.

19. It is accepted that Mr S is permanently incapable of returning to his former role. However, in order to qualify for the early payment of his benefits, Mr S must also be considered permanently incapable of "any other duties which in the opinion of the

Trustee are suitable for him". It is this second limb of the eligibility test which the Committee decided Mr S did not meet. "Any other duties" is a very broad brush term. Dr Weddell did not use these words but he did express the view that Mr S should be "able to perform alternative full time employment in a supportive and accepting environment". It would be overly pedantic to require doctors to stick rigidly to the wording of the relevant rule in their reports. Provided the wording used does not stray too far from that of the relevant rule and it is still possible to be satisfied that the doctor had the correct test in mind, re-wording the eligibility criteria is acceptable. I find that Dr Weddell's report was sufficiently clearly expressed for the Committee to base its decision on his view.

20. Mr S disagrees with Dr Weddell's view. So far as his medical opinion is concerned, Dr Weddell is not within my jurisdiction. As has been explained, my concern is with the decision making process undertaken by the Committee. My review of Dr Weddell's report is undertaken from the point of view of considering whether there was any reason why the Committee should not have relied on it in coming to its decision. A difference of opinion (even between doctors) is not sufficient for me to find that the Committee should not have relied on Dr Weddell's report.

21. I understand Mr S' concern that mental health issues are not always treated favourably within the wider society. However, I have seen no evidence to suggest that the Committee did not treat his application fairly or that it was prejudiced because his application related to his mental health, rather than a physical condition.

22. Therefore, I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman
28 April 2017

Appendix

Medical evidence

23. Copies of Mr S' medical records have been provided. This evidence has been reviewed but it would not be practical to provide summaries of all the medical reports contained therein here. The key reports considered in Mr S' case are summarised below.

Dr Meehan (consultant psychiatrist), 27 January 2016

24. Dr Meehan was asked to provide a report by the RPS' medical advisers. She saw Mr S on 18 January 2016. Having provided a comprehensive history of Mr S' case, Dr Meehan said,

> "In my opinion, [Mr S'] disability is at a level which warrants a referral to a Consultant Psychiatrist and local Community Mental Health Team (CMHT). His medication regime needs to be reviewed and he may benefit from a change in anti-depressant medication … In addition, psychosocial interventions are going to be very important … [Mr S] should be offered longer-term psychotherapy … Other psychosocial interventions that are likely to be helpful include attendance at a local support group … and graded exposure to feared social situations with the support of a practitioner from the CMHT.
>
> I am reluctant to give a definite prognosis at this stage as a lot will depend upon how well [Mr S] engages with and makes use of the various interventions outlined above. In his favour are the fact that he acknowledges … and the fact that he has engaged well with CBT and is keen to undertake further therapy. Less positive prognostic indicators are his age and the pervasive nature of his difficulties. Regarding his depression, [Mr S] has already had at least three episodes of moderate to severe depression with suicidal thinking and he is likely to have further episodes in the future, especially when under increased stress."

25. Dr Meehan expressed the view that Mr S was permanently incapable of undertaking his former job with Arriva Trains. She said Mr S had found the core duties of his job very stressful, to the extent that he avoided carrying them out. She said this situation was unlikely to change even if Mr S successfully addressed his other difficulties. Dr Meehan said the increased stress would be likely to lead to further protracted episodes of depression. In answer to the question of whether Mr S was permanently incapable of undertaking other full time employment, Dr Meehan said she was unable to give a definitive answer. She said it would depend upon the extent to which Mr S was able to address his psychological difficulties through a change in medication and extended therapy.

Dr Weddell (occupational health physician), 15 February 2016

26. Dr Weddell provided a summary of Dr Meehan's report. He expressed the view that Mr S' incapacity should be seen as more than temporary. He noted Mr S had been unwell since August 2014 and remained symptomatic despite treatment. Dr Weddell said he would agree with Dr Meehan's comment to the effect that the prognosis depended upon how well Mr S engaged with and used the various treatment options.

27. Dr Weddell noted that Dr Meehan was of the view that Mr S was permanently incapable of undertaking his former job. He went on to say it was his opinion that, even with further treatment, there would be a risk that increased levels of stress associated with Mr S' former role would lead to further episodes of depression and sickness absence. Dr Weddell said Dr Meehan was of the view that Mr S would be able to undertake alternative full time employment. He concluded,

> "In my opinion, [Mr S] needs further treatment for his anxiety and depression as described above. He should be referred to a consultant psychiatrist and he should be under the care of a Community Mental Health Team. With appropriate treatment intervention, he should, on the balance of probabilities, be able to perform alternative full time employment in a supportive and accepting environment."