PO-18032

Ombudsman's Determination

Applicant	Mr I
Scheme	Principal Civil Service Pension Scheme (**CSPS**)
Respondents	Cabinet Office (**CO**), MyCSP, HM Revenue & Customs (**HMRC**)

Outcome

1. I do not uphold Mr I's complaint and no further action is required by CO, MyCSP or HMRC.

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

Complaint summary

3. Mr I has complained that HMRC mishandled his application for ill-health retirement, resulting in unnecessary legal and medical costs.

Background information, including submissions from the parties

4. Mr I joined the Civil Service on 18 August 1980 and was enrolled onto the 1972 (classic) section of the CSPS.

5. Following absences from his employment with HMRC due to depression and anxiety, Mr I submitted an application for retirement on medical grounds on 19 January 2015.

6. HMRC's role was to assess Mr I's application in accordance with the criteria for retirement on medical grounds, as detailed in the CSPS rules (1972 section). These were:-

> "Retirement on medical grounds" means retirement from the Civil Service with a medical certificate issued by the Scheme Medical Adviser which states that the person concerned is prevented by ill-health from discharging his duties, and that his ill-health is likely to be permanent".

7. HMRC referred Mr I's application to a medical adviser (**the first medical adviser**), who reviewed the following evidence:

   - the referral papers;

- a report from Mr I's General Practitioner (**GP**), dated 12 March 2015;
- notes relating to a telephone conversation on 18 December 2014 between an occupational health adviser and Mr I's wife.

8. The first medical adviser reached the view that the available medical evidence suggested Mr I was unable to discharge his duties at that time. However, he also noted that Mr I's treatment up to that point had been limited. In his opinion, further treatment could be expected to result in an improvement in Mr I's condition, sufficient to enable him to return to work. On this basis, the first medical adviser issued a certificate refusing Mr I's application.

9. HMRC wrote to Mr I on 5 August 2015 to tell him he was being dismissed on the ground of medical inefficiency. His last day of service was 5 September 2015.

10. Mr I submitted an appeal to HMRC, though his Solicitor, on 12 July 2015. He provided the following additional evidence:-

    - a consultant psychiatrist's report, dated 25 June 2015;
    - a report from Mr I's GP, dated 7 July 2015.

11. HMRC asked a doctor not previously involved with Mr I's case to review his appeal (**the second medical adviser**). The following initial comments were provided by the second medical adviser:-

    > "In the first instance, my preference would be to seek a further report from the consultant psychiatrist who has reported … This would help me to further my understanding of the likely impact on Mr I's health, should he attempt to return to work before reaching the scheme pension age of 60 … approximately 7.5 years from now".

12. Accordingly, HMRC obtained Mr I's consent to approach his consultant psychiatrist.

13. The second medical adviser sent HMRC an interim report on 2 December 2015. He listed the following medical evidence:-

    - the report dated 7 July 2015 from Mr I's GP;
    - reports from Mr I's consultant psychiatrist, dated 25 June 2015 and 7 July 2015;
    - a clarification report from Mr I's consultant psychiatrist dated, 31 October 2015.

14. On the basis of this evidence, the second medical adviser considered a face to face appointment with a doctor, who had not previously been involved with Mr I's case, could help shed further light on his eligibility for retirement on medical grounds. This consultation took place on 14 December 2015, and resulted in a medical report of the same date.

15. On 28 December 2015, the second medical adviser sent HMRC his report. He listed reasons for rejecting and upholding the appeal. The grounds for rejecting it were as follows:-

    - There were extensive untried treatments.
    - Mr I's consultant psychiatrist did not consider his ill-health to be so severe that it would prevent him from returning to work at some point in the future.
    - In the consultant psychiatrist's view, it would not be appropriate to support Mr I's application solely because he could not resolve the situational factors at HMRC which had caused his anxiety and depression.

16. On the other hand, the doctor who carried out the one to one assessment of Mr I, and his GP, both reached the conclusion that his employment with HMRC was likely to be a significant factor reinforcing his depression and anxiety.

17. The second medical adviser considered that Mr I's case was finely balanced. His conclusion was that, on the balance of probabilities, "adverse situational factors would represent an insurmountable psychological block which permanently prevents [Mr I] from successfully returning to [work]". Accordingly, he issued a medical certificate authorising Mr I's retirement on medical grounds.

18. Mr I's Solicitor emailed HMRC on his behalf on 14 March 2016. He complained that the initial application had been rejected even though Mr I had not been offered a face to face medical assessment. The Solicitor submitted that, had such an assessment taken place as part of the original application, Mr I would probably have been granted retirement on medical grounds at that point, and there would have been no need for an appeal. As such, Mr I would not have incurred the medical and legal costs associated with the appeal. The Solicitor invited HMRC to reimburse some, if not all, of the medical and legal costs related to the appeal, to Mr I.

19. The complaint was considered under the CSPS's internal dispute resolution procedure (**IDRP**). CO issued the stage 2 IDRP decision on 19 June 2017, making the following points:-

    - The first medical adviser took the view that a face to face appointment with a doctor was not required in order to reach an opinion as to Mr I's eligibility for retirement on medical grounds.
    - Mr I provided additional medical reports with his appeal, which led the second medical adviser to conclude that a face to face doctor's appointment could assist in the assessment of his eligibility for retirement on medical grounds.
    - There was insufficient evidence to suggest that, had there been a face to face assessment at the time of the initial application, the decision would have been different at that stage.

- There is no requirement for a member to have legal representation during the appeals process. In cases where a member is unable or unfit to handle the appeal personally, they can authorise a relative, friend, Trade Union representative or other professional to act on their behalf. In these circumstances, HMRC could not reasonably be held responsible for Mr I's decision to pay for the services of a Solicitor.

Adjudicator's Opinion

20. Mr I's complaint was considered by one of our Adjudicators, who concluded that no further action was required by CO, MyCSP or HMRC. The Adjudicator's findings are summarised briefly below:-

- The CSPS rules did not allow Mr I to retire on medical grounds unless a medical adviser provided a certificate which confirmed that his ill-health prevented him from discharging his duties. The certificate also had to confirm that Mr I's ill-health was likely to be permanent.

- The first medical adviser referred to the correct CSPS criteria. He reached the conclusion that further treatment was available to Mr I, which could be expected to enable him to return to work, and that his ill-health was unlikely to be permanent. Accordingly, he issued a certificate declining to grant Mr I retirement on medical grounds.

- The first medical adviser came to this determination on the basis of a report from Mr I's GP and notes produced in respect of a telephone conversation between Mr I's wife and an occupational health adviser. The Adjudicator considered that this was sufficient medical evidence to enable the medical adviser to make a judgment as to Mr I's eligibility for retirement on medical grounds. As such, the decision that a face to face appointment was unnecessary was not flawed.

- The second medical adviser reached the opinion that Mr I was entitled to medical retirement on the basis of evidence which was not available to the first medical adviser. This evidence consisted of two reports which concluded that Mr I's role at HMRC would probably make it more difficult for him to recover from his depression and anxiety. That does not mean that the original decision was flawed.

- The appeals process did not require Mr I to use the services of a Solicitor. He made this choice and as such, HMRC cannot be held responsible for the medical and legal costs related to the appeal.

21. Mr I did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr I's wife provided 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 I's wife for completeness. In summary, these are:-

- The notes of the telephone conversation which she had with the occupational health adviser on 18 December 2014 stated that "Mr I is unlikely to return to work".

- In his report dated 12 March 2015, Mr I's GP noted that his depression and anxiety were related to "perception of breakdown in relations with employer", and that he was "unfit for work". Further, that "I can identify no adjustments that would enable Mr I to return to work". In these circumstances, Mr I should have been offered a face to face medical appointment before a decision was reached as to whether to permit him to retire on medical grounds.

- No useful help or advice was forthcoming from Trade Union representatives or HMRC during the appeals process. Since Mr I was suffering from severe depression and anxiety, it was essential to obtain the correct advice and representation. Without the services of the Solicitor, it is likely the appeal would have been unsuccessful.

- The first medical adviser and the second medical adviser both considered that further treatments were available to Mr I. However, while the first medical adviser reached the conclusion that Mr I's ill-health was unlikely to be permanent, the second medical adviser's view was that "Mr I is permanently incapable of performing his previous role". There seems to be no compelling reason for this difference of opinion.

- The second medical adviser determined, on the basis of medical evidence which was not available to the first medical adviser, that Mr I's ill-health was likely, on balance, to prevent him from returning to work. So the first medical adviser should have requested further medical evidence before reaching his decision. Had he done so, Mr I's application would probably have succeeded at the outset, and the appeal would not have been necessary.

Ombudsman's decision

22. The only circumstance in which I could instruct HMRC to pay Mr I the medical and legal costs related to his appeal is if there is evidence that HMRC's decision-making process during its consideration of the initial application was flawed.

23. HMRC cannot ignore what the CSPS rules say. Those rules do not permit HMRC to grant Mr I retirement on medical grounds unless a medical adviser has provided a certificate confirming his ill-health prevented him from discharging his duties. The certificate also had to confirm that his ill-health was likely to be permanent. The first medical adviser determined that there was insufficient evidence that Mr I's ill-health was likely to be permanent. As a result, he issued a certificate declining to authorise medical retirement. On this basis, and in accordance with the CSPS rules, HMRC rejected Mr I's initial application to retire on medical grounds.

24. Having said that, HMRC can be expected to make sure the medical advisers arrive at their decisions in a proper manner. I have to be satisfied that HMRC ensured that the medical advisers applied the correct eligibility tests and that there has been no error or omission of fact or misunderstanding of the relevant regulation in their reports.

25. In his report to HMRC dated 23 March 2015, the first medical adviser noted that further treatments were available to Mr I. He took the view that these treatments could be expected to lead to an improvement in Mr I's condition, such that he could be expected to return to work eventually. Accordingly, the first medical adviser reached the conclusion that Mr I's ill-health was unlikely to be permanent.

26. As such, in his report, the first medical adviser considered whether the available medical evidence established that Mr I's ill-health prevented him from discharging his duties, and that his ill-health was likely to be permanent. He concluded that, on balance, the test was not met. In light of this, I am satisfied that the first medical adviser had the correct criteria in mind when he assessed Mr I's application for medical retirement.

27. Mr I's wife has pointed out that an occupational health adviser, in a report submitted to HMRC following a telephone conversation with her and dated 18 December 2014, said that Mr I is "unlikely to return to work". She has also referred to the report from Mr I's GP, dated 12 March 2015, which says Mr I's ill-health was related to the perception of a breakdown in his relations with HMRC. The GP also stated that he did not consider there were any adjustments which could be expected to enable Mr I to return to work.

28. However, the occupational health adviser's report also contains a passage which reads, "*without the benefit of treatment*, there would be a significant impact on [Mr I's] ability to carry out normal daily activities". This is consistent with the first medical adviser's determination that further treatment options were available to Mr I, which could be expected to result in an improvement in his ill-health.

29. On that basis, the first medical adviser took the view that Mr I's ill-health was unlikely to be permanent, and that he was therefore not eligible for medical retirement under the CSPS rules. As such, the occupational health adviser's opinion that Mr I was unlikely to return to work at HMRC does not mean that the first medical adviser's decision to dismiss the application was flawed. In these circumstances, I see no reason to conclude that HMRC should have questioned the validity of the first medical adviser's decision, or that it should have insisted that Mr I be offered a face to face consultation.

30. Mr I's wife has also complained that, whilst both the first and second medical advisers noted that further treatment options were available to Mr I, the latter concluded that Mr I was permanently unable to perform his previous role, while the former did not. The second medical adviser had sight of additional evidence which was not available to the first medical adviser. This evidence consisted of two reports from Mr I's consultant psychiatrist, dated 25 June 2015 and 7 July 2015, and a report from his

GP dated 7 July 2015, as well as the report submitted by the doctor who carried out the face to face assessment. The second medical adviser concluded that Mr I was unlikely to be able to return to work at any point in the future and provided a certificate authorising medical retirement on that basis.

31. In my judgment, it is notable that the second medical adviser highlighted that Mr I's case remained balanced, even with this additional medical evidence, and that he listed several reasons for rejecting the appeal. The second medical adviser's conclusions do not imply that those reached by the first medical adviser were necessarily wrong or lacked a proper evidential basis.

32. There was no requirement for Mr I to engage the services of a Solicitor. That was his choice. There were alternatives – for example, he could have been represented by a relative or a friend. These options may not have involved any financial outlay.

33. As far as the medical costs associated with the appeal are concerned; it is up to the member to provide evidence supporting their appeal and pay the related fees. I cannot require HMRC to reimburse these expenses.

34. Therefore, I do not uphold Mr I's complaint.

Karen Johnston

Deputy Pensions Ombudsman
18 September 2017

Appendix

The factsheet "Ill-health Retirement – Guide for members"

35. This guide reads:-

"Scheme Medical Adviser Actions

If the Scheme Medical Adviser decides that there is enough information to complete an assessment without them having to obtain further information, they will produce an outcome report and certificate within 10 working days of receipt of your application. For information see '*The Scheme Medical Adviser's assessment report*'. If the Scheme Medical Adviser needs further evidence, they will obtain this:

Through a personal consultation with you or;

Through obtaining a third party report from your doctor and/or specialist.

Sometimes they will do both. They will keep you and your employer informed where this is happening.

The Scheme Medical Adviser's assessment report

Once the Scheme Medical Adviser has completed their assessment, they will produce an outcome report and certificate for your employer. Your consent is needed for them to send the outcome report to your employer. The report will confirm whether or not you have a qualifying medical reason for ill-health retirement.

Please note:

Your employer cannot offer ill-health retirement without a report and certificate from the Scheme Medical Adviser confirming that you have a qualifying medical reason for ill-health retirement.

You will automatically be sent a copy of the report at the same time as it is sent to your employer (if you have consented to this). However, you can ask to see a copy of it before it is sent to your employer. You will have **5 working days from the date the report is issued to you to:**

ask the Scheme Medical Adviser to correct any factual errors in the report;

withdraw consent for the report to be sent to your employer.

You will only be given one opportunity to ask for factual errors to be corrected and must contact the Scheme Medical Adviser within 5 working days of the

date the report is sent to you, to ask for any such errors to be corrected. See *'Correcting Factual Errors in the Scheme Medical Adviser's report'*.

If you have asked for the report to be amended, the Scheme Medical Adviser will write to you, either providing a copy of the amended report or telling you that they will not make changes to it.

If you have requested that the report is amended, the Scheme Medical Adviser can no longer send any report to your employer without your renewed consent to do so. **It is therefore essential that you contact them within 5 working days of the date on the corrected report (or the letter telling you that they will not make changes to the report), to inform them whether you wish them to release the report to your employer or not**. If they do not hear from you within this timescale, they will inform your employer that they do not have your consent to release the report and that they are therefore unable to provide any advice. Please read '*Withdrawing consent for the Scheme Medical Adviser to send their report to your employer'* to understand the impact this will have on your ill-health retirement assessment.

If the Scheme Medical Adviser does not support ill-health retirement after your assessment has been completed, you or your employer can progress with any plans you or they may have, to end your employment. You have a right to appeal against the ill-health retirement assessment, within specified time limits – see '*What if I disagree with the Scheme Medical Adviser's assessment?*' for more information about this. An appeal can continue if your service is terminated after your employer has told you the results of your ill-health retirement assessment, as long as the appeal is made within the specified time limits.

Please note:

The final decision on ill-health retirement rests with your employer, even if the Scheme Medical Adviser has confirmed that you satisfy the scheme criteria for ill-health retirement, but it cannot be offered unless the Scheme Medical Adviser has confirmed that you satisfy the scheme criteria for ill-health retirement.

What if I disagree with the Scheme Medical Adviser's assessment?

If you disagree with the content of the report and your disagreement relates to medical opinion (rather than factual errors), or you have additional evidence you would like to be taken into account, the only way to challenge this is to follow the formal appeals procedure.

The Medical Reviews and Appeals Guide provides details of the appeals procedure. Your employer should give you a copy of this guidance. The guidance can also be found here.

You cannot appeal against the Scheme Medical Adviser's assessment if you withdraw consent for the report and certificate confirming whether or not you have a qualifying medical reason for ill-health retirement to be issued to your employer (see 'Withdrawing consent for the Scheme Medical Adviser to send their report to your employer').

The appeal period does not start until your employer has formally told you whether or not your ill-health retirement assessment has been successful.

What if I have a query or complaint about aspects of the ill-health retirement process?

Complaints

Where you raise a complaint, your employer must first decide whether it refers to the Scheme Medical Adviser and, if so, that they want them to investigate. Your employer may be able to respond to your complaint themselves, explaining any problems or delays. If they do feel that it is appropriate to refer the complaint to the Scheme Medical Adviser, they will ask you to complete form Med 9, or they may complete the form on your behalf. Whoever is making the complaint should complete section 1 of the form. Your employer or MyCSP should complete section 2 of the form.

All complaints must be sent by your employer on form Med 9 to the Scheme Medical Adviser. The Scheme Medical Adviser will tell your employer when they have received the Med 9 form within 2 working days and will normally provide a full reply within 10 working days, or 21 working days if the complaint requires further investigation by a clinician. They will tell your employer which timeline applies. The reply will be provided to your employer. Where the case concerns a complaint you have made, your employer must give you written details about the outcome.

How to escalate a complaint

If you are dissatisfied with the response from the Scheme Medical Adviser, you should tell your employer. If your employer feels the matter has been resolved, they must explain their reasons to you. If they disagree with you that your complaint remains unresolved or they have made a complaint that remains unresolved, they will escalate the complaint to the Scheme Medical Adviser's account manager. The Account Manager will acknowledge receipt of the complaint within 2 working days and aim to provide a full reply to your employer within 10 working days.

The Medical Reviews and Appeals Guide can be found online …

This guide advises the following:-

Ill-Health Retirement Criteria

The criteria applied when considering a case under the Medical Appeal process are the same as for medical retirement, but depend on whether the person is a member of classic or premium, classic plus, or nuvos.

Ill-Health Retirement Criteria in Classic

The criteria for ill-health retirement in classic are that an individual is prevented by ill-health from discharging his/her duties and that the ill-health is likely to be permanent.

Process

The procedure has three separate stages, at any of which the appeal may be upheld.

Stage 1

Action by member

Members must appeal in writing and complete part 1 of form APP1, returning it to the employer or former employer.

The member must appeal within three months of the date when the employer notifies them in writing about the content in the medical retirement or refusal certificate. The employer must issue a medical appeal form (APP1 P1) with their decision. Members wishing to appeal against a refusal to grant medical retirement retrospectively or EPPA must do so within three months of the date when the employer tells them that their application was not successful. Where a member is unfit to make an appeal personally, a relative, friend or Trade Union representative may – with the member's consent – appeal on their behalf during the three month period.

Members can appeal with or without any significant new medical evidence to support their case. However, failure to submit such evidence at this stage of the appeal means that it is most unlikely that the case can progress beyond Stage 2. If the member is not supplying significant new medical evidence with their appeal, they should indicate this on the form.

Please note: if exceptionally the member cannot meet the three month deadline because of delays beyond their control, employers may ask, on their behalf, MyCSP to consider allowing them an extension.

Action by Capita Health & Wellbeing

A senior physician will consider the appeal in the light of the medical evidence previously considered, plus any additional reports provided by the appellant and recommend whether the original assessment is supported or overturned. This will usually (but not always) be the senior physician who made the

original decision. If the appeal is not supported and the member has not been examined by Capita Health & Wellbeing as part of the decision-making process, he or she will be offered an appointment, whenever practicable, to gather any additional information and to explain the reasons for the recommendation.

Capita Health & Wellbeing will inform the employer of the result of the Stage 1 review and of any further action to be taken. They will aim to clear all cases within 10 working days of receipt. If the senior physician upholds the appeal, the employer must decide whether to accept the assessment, informing the member accordingly. If the employer rejects the senior physician's findings, they must give a full explanation to the member of why they do so".