PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mr P Leaning
Scheme	Local Government Pension Scheme (**LGPS**)
Respondent(s)	North Lincolnshire Council (**NLC**)

Subject

Mr Leaning has complained that his eligibility for ill health retirement benefits has not been properly assessed. He is of the opinion that he should have been awarded Tier 1 benefits rather than Tier 3. Mr Leaning says that failure to properly assess his eligibility for benefit has caused him great stress.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against NLC because they failed to consider Mr Leaning's eligibility for benefit under Regulation 20 in the proper manner.

DETAILED DETERMINATION

Material Facts

1. In 2012, Mr Leaning was awarded Tier 3 benefits under Regulation 20 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI 2007/116) (as amended) (see Appendix).

2. Mr Leaning was employed by NLC as a Road Worker. He went on sickness absence, in November 2011, suffering from back pain. In January 2012, NLC were advised by their Occupational Health Practitioner that it was unlikely that Mr Leaning would return to work until there was a considerable improvement in his mobility. A report was obtained from Mr Leaning's Consultant Orthopaedic Surgeon, Mr Chambers.

3. Mr Leaning saw Mr Chambers on 5 January 2012. He diagnosed severe bilateral hip osteoarthritis and advanced lumbar spondylosis. In a letter to Mr Leaning's GP, dated 11 January 2012, Mr Chambers said that x-rays had shown severe degenerative features in both hips and Mr Leaning's lumbar spine also showed severe arthritic features with extensive marginal osteophytes. He said he thought symptom control could only be helped with hip replacements.

4. Mr Leaning was seen by NLC's Occupational Health Physician, Dr Deacon, on 1 February 2012. Dr Deacon advised that Mr Leaning had been absent from work due to generalised arthritis affecting his hips, pelvis and lower spine. He said Mr Leaning was developing arthritic symptoms in his neck, hands and fingers. Dr Deacon said that Mr Leaning was taking anti-inflammatory analgesic medication, but that this had not been effective in controlling his symptoms. He said it was possible that Mr Leaning would undergo two hip replacements in the coming eight to nine months. Dr Deacon thought that it was possible that Mr Leaning would be able to return to work later that year. He did not think that Mr Leaning would be suited to returning to his former role or any heavy manual work, but thought that he would be able to undertake sedentary work and work involving walking or driving. Dr Deacon was of the view that Mr Leaning would meet the criteria for ill health retirement.

5. In a report to NLC's occupational health advisers dated 24 April 2012, Mr Chambers confirmed the diagnosis of bilateral severe hip osteoarthritis and advanced lumbar spondylosis. He noted that Mr Leaning had been prescribed

painkillers, but had suffered considerable side effects. Mr Chambers said that Mr Leaning's life had been "greatly disturbed" by the severity of his arthritis and he had been offered hip replacement. Mr Chambers said it usually took three months to recover from hip replacement surgery and return to work, but that the arthritic features in Mr Leaning's left hip might prevent this. He thought Mr Leaning would also need a left hip replacement. Mr Chambers said that the prognosis was "somewhat guarded" because of Mr Leaning's longstanding lower back pain. Mr Chambers thought that the hip replacement surgery may have some positive influence on Mr Leaning's back pain, but said that this was unpredictable. Mr Chambers went on to say,

> "Following hip replacement surgery, heavy, manual work should not be performed because of the risk of dislocation and also early wear and failure of the implant. However, work that involves operating light machinery, walking moderate distances, using ladders, etc., can be undertaken. I believe his current job involves working for the Highways Agency using pneumatic machinery. I feel this has the potential of having a deleterious effect on implants and do not advise this."

6. Mr Leaning applied for ill health retirement on 5 March 2012. His application was referred to a Consultant Occupational Physician, Dr Anderson. Mr Leaning underwent a right hip replacement on 28 March 2012. Dr Anderson reported on 14 May 2012. He said that he had seen Mr Leaning's application form, absence history, job description and redeployment assessment, occupational health notes dated 3 and 30 January 2012, associated reports and functional assessments, and Mr Chambers' report of 24 April 2012. Dr Anderson said,

> "Mr Leaning is a 60 year old roadworker with 5 years to normal retirement age and has been absent from work since 21 November 2011. This has been as a result of significant problems with his hips and back which have limited his capacity for physical activity and also have limited his mobility.
>
> As noted in Dr Deacon's report … he is likely to require surgery to his hips and indeed has now had surgery to his right hip. The expected period of recovery following this is about 3 months and this is likely to be a similar case for the other hip when it is done. It is possible that his overall outlook may be affected by back pain, but this is likely to be difficult to predict at this stage. It is clear however that he should not undertake heavy manual work in the future as this would be detrimental to his hip replacements and in my opinion he will not again be suitable for the job he is currently undertaking.

> Assuming a good result from his hip surgery however he should be able to carry out other limited work which does not involve such heavy physical activity and this is likely to be possible within 3 years of leaving employment …"

7. Dr Anderson completed a certificate stating that it was likely that Mr Leaning would be capable of undertaking gainful employment within three years of leaving employment with NLC – Tier 3 benefits.

8. NLC wrote to Mr Leaning, on 11 June 2012, saying that the independent registered medical practitioner (**IRMP**) had certified that he was permanently incapable of discharging efficiently the duties of his current post and had a reduced likelihood of being capable of undertaking any gainful employment before age 65. They also said that the IRMP had certified that Mr Leaning would be capable of undertaking gainful employment within three years of leaving. NLC said that Mr Leaning was, therefore, entitled to Tier 3 benefits.

9. Mr Leaning appealed against the decision to award him Tier 3 benefits. He said that no contact had been made with his GP, who dealt with his day to day health, and the Occupational Health report had not mentioned that he had been diagnosed with advanced lumbar spondylitis. Mr Leaning said that they had only contacted Mr Chambers who was not dealing with this condition.

10. NLC asked their occupational health advisers to confirm what information had been used in considering Mr Leaning's application for ill health retirement. They confirmed that Mr Leaning had been seen by the Occupational Health Practitioner and Dr Deacon and that a report had been obtained from Mr Chambers. The occupational health advisers confirmed that they had not requested information from Mr Leaning's GP. NLC then asked their occupational health advisers to request information from the GP.

11. Mr Leaning's case was referred to a second independent registered medical practitioner, Dr Woollands, on 20 July 2012. His employment ceased on 6 September 2012.

12. Mr Leaning's GP provided a report on 13 September 2012. The GP said that x-rays had shown gross osteoarthritic changes in both of Mr Leaning's hips and significant arthritic changes in his lumbar spine. She said that he had been referred to an Orthopaedic Consultant, who had diagnosed bi-lateral severe hip

osteoarthritis and advanced lumbar spondylosis. The GP explained that Mr Leaning had undergone right hip replacement, but had been advised that, because of his lumbar problem and left hip osteoarthritis, recovery could be delayed. She said that he had been given an exercise programme and had made good progress. The GP mentioned that Mr Leaning could now walk with one stick rather than two. She said that he was still taking painkillers for his back and left hip pain, but was not on any other regular medication. The GP said that, when Mr Leaning was eventually able to have his left hip replacement, he would still have significant problems with pain and restricted movement in his back.

13. Dr Woollands provided a report on 1 October 2012. Under diagnosis, he listed severe osteoarthritis left hip, advanced lumbar spondylosis and right total hip replacement. Dr Woollands noted that he had seen reports from Mr Chambers dated 11 January and 24 April 2012 and the 13 September 2012 report from Mr Leaning's GP, together with occupational health records. Dr Woolland commented,

> "Basis of Appeal against Tier 3 decision of IRMP was information from GP was not obtained and considered. GP report of 14/09/12 (*sic*) (includes report from treating specialist to GP dated 11/01/12) considered in this review. All information in GP report is relevant for the date of the IRMP decision.
>
> Treating specialist states that usually the outcome of hip replacement surgery is very good with restoration of mobility, range of movement and great reduction in levels of pain with usually recovery after the operation in 3 months before returning to work.
>
> Established functional limitations incompatible with duties of roadworker.
>
> When recovered from left hip replacement surgery could probably undertake a variety of work activities not involving heavy manual work or pneumatic machinery within 3 years."

14. On 15 October 2012, NLC notified Mr Leaning that, on the basis of Dr Woollands' review, his appeal had been declined.

15. Mr Leaning appealed further and provided copies of the report from his GP dated 13 September 2012 and a further letter dated 17 December 2012. In her letter of 17 December 2012, the GP said that Mr Leaning had made a good recovery from his right hip surgery but was still suffering significant symptoms in his left hip and lower back. She said that Mr Leaning was unable to walk any

distance without a stick and was unable to stand for any length of time because of pain in his lower back. The GP said that Mr Leaning was attending the Orthopaedic Clinic for review and was on a waiting list for his left hip replacement. She said that Mr Leaning had worked as a road worker all his working life and had had to retire on ill health grounds. She said that, in view of this and his continuing symptoms, he was unlikely to be able to find any suitable work in the future.

16. NLC wrote to Mr Leaning, on 8 March 2013, declining his appeal.

17. Mr Leaning appealed further on the basis that full account had not been taken of the diagnosis of osteoarthritis and advanced lumbar spondylosis rather than references to back pain. He felt that there had been too much emphasis placed on his hip replacements rather than a consideration of his condition as a whole. Mr Leaning submitted a letter, dated 22 April 2013, from an Orthopaedic Registrar, Miss Shepherd to the Pain Clinic and another, dated 23 April 2013, to his GP.

18. In her letter to the GP, Miss Shepherd said that she was rather shocked at Mr Leaning's appearance because he appeared to be in significant pain. She noted that Mr Leaning was now asymptomatic in his right hip but had pain in his left hip. Miss Shepherd went on to say that Mr Leaning felt that his hip pain was insignificant compared to the pain in his back. She said that, as the symptoms in his left hip were not a primary concern at that point, surgery to Mr Leaning's left hip could be delayed unless he felt that it was needed. Miss Shepherd said that she was concerned at the deterioration in Mr Leaning's back pain. She thought Mr Leaning's symptoms stemmed from osteoarthritic spinal joint disease and she had referred him to a Pain Clinic. In her letter to the Pain Clinic, Miss Shepherd said that Mr Leaning was under Mr Chambers' care for bilateral hip osteoarthritis, but she was concerned about his back pain. She mentioned that previous x-rays had shown Mr Leaning had significant spondylosis of the lumbar spine.

19. Mr Leaning's appeal was reviewed by East Riding Pension Fund (**ERPF**). They wrote to him, on 4 July 2013, declining his appeal on the grounds that there was not "conclusive evidence that [he was] incapable of undertaking gainful

employment within three years of leaving [his] current employment". ERPF made the following points:

- NLC had complied with the LGPS Regulations by referring Mr Leaning's case to Dr Anderson and Dr Woollands; both of who met the IRMP requirements.
- The reports provided by Mr Leaning's GP, Mr Chambers and Miss Shepherd had all been considered. However, because they were not qualified in occupational health medicine, they could not determine whether the criteria for ill health retirement had been met.
- Mr Leaning's GP had expressed the view that it was very unlikely that he would be able to find suitable work. However, the LGPS criteria for ill health retirement were based on physical and mental capacity for gainful employment rather than the likelihood of finding employment.
- It was not disputed that Mr Leaning was having to cope with significant pain as a result of osteoarthritis and advanced lumbar spondylosis. However, the test which had to be applied was whether he was permanently incapable of discharging efficiently the duties of his former role. Both Dr Anderson and Dr Woollands agreed that he was.
- It was then necessary to assess whether Mr Leaning met the criteria for Tier 2 benefits at the point he ceased to be employed by NLC. That is, was he unlikely to be capable of undertaking any gainful employment within three years of leaving but likely to be capable of undertaking gainful employment before age 65.
- Dr Anderson thought that, assuming a good result from his right hip surgery, Mr Leaning would be able to carry out work which did not involve heavy physical activity within three years of leaving his employment with NLC. Dr Woollands agreed with this. Mr Chambers had qualified his view on the grounds that problems with Mr Leaning's left hip might prevent recovery within three months. However, the expected good result appeared to have been achieved because Miss Shepherd had said that he was now asymptomatic in his right hip and his left hip was not a concern.

- Mr Leaning was of the opinion that no account had been taken of his diagnosis of osteoarthritis and advanced lumbar spondylosis. However, Dr Anderson had clearly referred to a diagnosis of bilateral severe hip osteoarthritis and advanced lumbar spondylosis.
- Mr Leaning was of the opinion that there had been too much emphasis on his hip replacements. They took the view that all aspects of his medical condition had been considered. Mr Leaning's GP had been asked to provide information about all of Mr Leaning's current and previous health problems and this evidence had been considered by Dr Woollands.
- The recent evidence provided by Mr Leaning indicated that treatment options to control his pain were still being considered.
- Mr Leaning had asked why no account had been taken of his having osteoarthritic spinal joint disease. This was because it was only suspected at that time and had not been confirmed.

20. The LGPS Regulations provide for a review of Tier 3 benefits after they have been in payment for 18 months. Mr Leaning's situation has been reviewed. He underwent a further medical and submitted a letter from his consultant and a letter from the Department for Work and Pensions (**DWP**) dated 12 July 2013. The DWP's letter stated that they had determined that Mr Leaning was not fit for work and would not be reassessed within 24 months. Mr Leaning has now been awarded Tier 2 benefits. He will receive a 25% enhancement to his pension with effect from 18 February 2014; that is, the date of the IRMP's certificate.

21. The 18 month review was carried out by Dr Anderson. NLC say that he reported,

> "… in addition to the information from the original decision, there was additional information in relation to ongoing health problems, and this suggests to me that there has been little in the way of progress and that he continues to have difficulties with pain in his back and also with mobility which have not fully responded to treatment"

22. NLC say that Dr Anderson noted that Mr Leaning was complying with all appropriate medication and advice and was waiting for further surgery to his left hip. They say that Dr Anderson said,

> "… even with that I think it likely, on balance of probabilities, that he is not likely to be capable of gainful employment within 3 years of the original decision as a result of continuing ill health. I therefore considered that he would meet the criteria for second tier benefits."

Summary of NLC's Position

23. A summary of the key points from NLC's submission is provided below:

- They have followed the procedures laid down in the LGPS Regulations in relation to the award of ill health retirement benefits to Mr Leaning.
- Mr Leaning did appeal against the award of Tier 3 benefits, but he did not state that he thought that he should have been awarded Tier 1 benefits. It was not until they received correspondence from the Ombudsman's office, in February 2014, that they became aware that he thought he should have been awarded Tier 1 benefits.
- Evidence relating to Mr Leaning's diagnosis of arthritis was recorded in the occupational health report. This confirmed that the arthritis predominantly affected Mr Leaning's hips and back. Dr Deacon confirmed this in his report of 1 February 2012. He had taken this information into account when identifying Tier 3 as the appropriate level of benefit.
- All the medical evidence was reconsidered as part of the appeal procedure, including evidence from Mr Leaning's GP and specialists.The LGPS Regulations require them to obtain a medical certificate provided by ERPF which has been signed by an IRMP. The LGPS Regulations do not require them to obtain information from a GP when assessing the appropriate tier of benefit. They did instruct their occupational health providers to contact Mr Leaning's GP and this information was made available to Dr Woollands.
- They would be found lacking if it was proven that they had not taken account of the certificates signed by the IRMP. They consider that they acted correctly in awarding Tier 3 benefits on the basis of the IRMP's certificate and in subsequently awarding Tier 2 benefits on the basis of the new certificate provided after the 18 month review.

- The IRMP must be recognised by ERPF and listed on their official list. Both Dr Anderson and Dr Woollands are on ERPF's list of IRMP.
- The first determination was made by Dr Anderson and they are satisfied that he used all the medical evidence available to him in reaching his decision.
- Dr Anderson refers to the occupational health reports, functional assessments and Mr Chambers' report of 24 April 2012. Mr Chambers had identified advanced lumbar spondylosis. This confirms that Dr Anderson had taken this information into account when confirming Tier 3 as the appropriate level of benefit.Mr Chambers stated that work involving operating light machinery, walking moderate distances, using ladders, etc. could be undertaken following hip replacement. He is a medical expert and they have relied on his medical opinion in identifying the appropriate tier of benefit for Mr Leaning.
- On appeal from Mr Leaning, the case was referred to Dr Woollands who was not employed by their occupational health provider and had no previous knowledge of the case in line with recent guidance from the Ombudsman.
- Up to date information was obtained from Mr Leaning's GP and specialists and this was provided for Dr Woollands. He also referred to Mr Chambers' report and to the GP's report of 14 September 2012.
- Dr Woollands' list of primary medical conditions and reports indicates that he had taken all the medical evidence into account, including evidence the Mr Leaning had osteoarthritis spinal joint disease. He listed advanced lumber spondylosis, osteoarthritis in the left hip and right hip replacement in his report. Dr Woollands referred to progressive hip and back pain in the medical history and confirmed that he had taken all the available medical reports into account.
- Dr Woolland commented that Mr Chambers had said that the outcome of hip replacement surgery is usually very good, with restoration of mobility, range of movement and great reduction in the level of pain. They did not feel it necessary to specifically as about the impact of Mr Leaning's back condition. The expectation of both Mr Chambers and Dr

Woollands was the same; Mr Leaning's pain would lessen following hip replacement.

- The letter from Mr Leaning's GP dated 17 December 2012 was not available at the time of the original decision. The GP expressed the view that Mr Leaning was unlikely to be able to find any suitable work in the future. This is his general medical opinion and is not an assessment against the LGPS ill health retirement criteria.
- On all occasions, the decision of the IRMP was based on the medical evidence available at the time of assessment. The assessment was made against the LGPS criteria.
- They understood from the medical reports that the recommendation to undertake replacements of both hips was part of the medical solution to improve Mr Leaning's mobility. It was hoped that this would have an effect on the level of pain he was experiencing in his back. As both the IRMP and Mr Chambers were not able to provide "conclusive medical opinion" on the effect that the hip replacement operations would have, the only option available to them under Regulation 20 was to award Tier 3 benefits.
- When Mr Leaning appealed further, this was treated as an application under the internal dispute resolution (IDR) procedure because he had, by then, left their employment. The IDR procedure can only be invoked after the individual has left employment.
- They have followed the appeal procedure as set out by ERPF's IDR procedure. It is unfortunate that ensuring that the procedure is properly carried out takes a certain amount of time. Throughout the process they have responded to Mr Leaning's requests promptly.
- The Specified Officer, at stage one of the appeal process, considered all of the previous evidence plus the additional report from Mr Leaning's GP. The outcome was that, as no new evidence had been provided, the tier should remain at level 3.
- Stage two of the IDR procedure was undertaken by ERPF and they agreed with the previous decisions.

- The evidence from Miss Shepherd was not available before Mr Leaning's stage two appeal. She is not qualified to assess Mr Leaning's condition against the LGPS ill health retirement criteria.
- It was not until Dr Anderson's 18 month review that additional medical evidence was provided to them and, once they had this, they increased the award from Tier 3 to Tier 2.
- The LGPS Regulations do not allow the Tier 2 benefits to be backdated prior to the date of the certificate signed by Dr Anderson on 19 February 2013.

Conclusions

24. When Mr Leaning's employment with NLC ceased, he was awarded Tier 3 benefits under Regulation 20. In other words, NLC were then of the opinion that, whilst he was unable to perform the duties of his job with them and had a reduced likelihood of undertaking any gainful employment before age 65, he was likely to be able to undertake some gainful employment within the following three years. Mr Leaning believes that he should have been awarded Tier 1 benefits. That is, he considers that there was no reasonable prospect of him being capable of undertaking any gainful employment before age 65. NLC say that they were unaware that Mr Leaning thought that he should have been awarded Tier 1 benefits. This is largely irrelevant to his case. All that NLC needed to know for the appeal process was that Mr Leaning disagreed with the Tier 3 award; he did not need to specify that he felt that Tier 1 was appropriate. It is, after all, NLC's responsibility to ensure that the correct tier is awarded.

25. It was for NLC to make the decision under Regulation 20. Before doing so, they were required to ask an IRMP to provide a certificate giving an opinion as to whether Mr Leaning was permanently unable to perform the duties of his job with them and whether he had a reduced likelihood of undertaking gainful employment before age 65. They would indeed be expected to take the IRMP's certificate in account when reaching a decision and would be criticised if they did not. However, NLC were not bound by the opinion expressed by the IRMP; they had to come to a decision of their own as to whether Mr Leaning should receive a benefit under Regulation 20 and, if so, which tier. Having said that, it was for NLC to weigh up the available evidence and it was open to them to prefer the

advice from the IRMP. Unless, that is, there was some reason, such as a factual error or omission or a misunderstanding of the Regulations within the IRMP's advice. In such circumstances, NLC could be expected to seek clarification before proceeding to a decision.

26. The letter sent to Mr Leaning in June 2012 does not give the impression of there being the kind of active decision making by NLC that Regulation 20 calls for. Rather, they appeared to be simply notifying Mr Leaning of the IRMP's opinion. NLC did, however, take a more proactive role when Mr Leaning appealed. For example, they asked their medical advisers to contact Mr Leaning's GP.

27. Dr Anderson said that he had seen Mr Leaning's application form, absence history, job description and redeployment assessment, occupational health notes dated 3 and 30 January 2012, associated reports and functional assessments, and Mr Chambers' report of 24 April 2012. He said he thought Mr Leaning would need three months to recover from each of his hip replacements. Dr Anderson does not appear to have shared Mr Chambers' view that the effect of Mr Leaning's left hip would be to slow down his recovery from the right hip replacement. He did not refer to Mr Chambers' note of caution as to prognosis nor explain why he took a different view. Both Dr Anderson and Mr Chambers thought that Mr Leaning's prognosis might be affected by his back pain and both commented that this was difficult to predict.

28. Dr Anderson did not think that Mr Leaning would be able to return to his former role. However, he thought that, assuming there was a good result from the hip surgery, Mr Leaning would be able to carry out work which did not involve heavy physical activity within three years of leaving employment. This is not dissimilar to Mr Chambers' view that heavy manual work should not be performed following hip replacement, but work operating light machinery, walking moderate distances and using ladders could be undertaken. However, it is not clear whether Mr Chambers was referring to Mr Leaning in particular or making a general statement as to what might be possible after hip replacement. Neither doctor expressed a clear view on the future contribution from Mr Leaning's lumbar spondylosis. Mr Chambers thought that the hip replacement might have a positive effect but that the back pain might be unpredictable. Dr Anderson thought Mr Leaning's "outlook" may be affected by his back pain, but said it was difficult to predict at that stage.

29. It is not unusual for medical advisers to be wary of providing a prediction as to the future course of the member's condition for the purposes of Regulation 20. However, they do not need to provide a "conclusive medical opinion", as NLC have suggested; they need only consider what is more likely than not to be the outcome, on the balance of probabilities.

30. The question NLC needed answered was whether, even after hip replacement surgery, Mr Leaning's back condition was, on the balance of probabilities, going to prevent him from undertaking gainful employment for the following three years or longer. I do not find that this question was addressed by either Mr Chambers or Dr Anderson and NLC did not follow it up before making a decision.

31. It is not sufficient for medical advisers simply to refer to a piece of evidence or list a report if they do not then go on to discuss the relevant issue. NLC are, in effect, suggesting that I make assumptions about what the medical advisers took into account and why. This is neither safe nor fair to Mr Leaning. Both he and NLC need to be clear as to why the medical adviser is making the recommendation he is.

32. Mr Leaning appealed on the basis that no report had been obtained from his GP and because he felt that the spondylosis in his lumbar spine had not been given due consideration. It is true that the LGPS Regulations do not specify that a report should be obtained from the applicant's GP under Regulation 20. However, NLC have an overarching responsibility to come to a decision in a proper manner and this means obtaining and considering relevant evidence. There is nothing to stop them seeking evidence from other sources than just the IRMP. The fact that a medical adviser is not an IRMP for the purposes of the LGPS Regulations does not mean that they are not "qualified" to give an opinion as to the applicant's likely capacity for employment. Nor does it mean that such an opinion should be set aside for that reason alone.

33. A report was subsequently obtained from Mr Leaning's GP and this was reviewed by another IRMP. The GP's report mentioned that that x-rays had shown gross osteoarthritic changes in both of Mr Leaning's hips and significant arthritic changes in his lumbar spine. She said that he had been diagnosed with bi-lateral severe hip osteoarthritis and advanced lumbar spondylosis. The GP expressed

the view that, when Mr Leaning was eventually able to have his left hip replacement, he would still have significant problems with pain and restricted movement in his back. Dr Woollands did mention the diagnosis of advanced lumbar spondylosis, but his assessment of Mr Leaning's incapacity focussed solely on his recovery from hip replacement surgery. He expressed no view as to whether Mr Leaning's back pain would prevent him from undertaking gainful employment even if he were to have a left hip replacement. NLC did not ask Dr Woolland for his views on the impact of Mr Leaning's back condition. His appeal was declined on the basis of the advice from Dr Woolland.

34. NLC point out that both Mr Chambers and Dr Woolland expected Mr Leaning's back pain to lessen following his hip replacements. This does not go far enough in answering the question of whether he would be capable of undertaking gainful employment within the three years following the cessation of his employment or at some time before his 65th birthday. It is not safe to assume that Mr Leaning would be capable of undertaking gainful employment simply because his pain was expected to lessen.

35. When Mr Leaning appealed further, he submitted some correspondence from an Orthopaedic Registrar. In her letters to the Pain Clinic and the GP, Miss Shepherd noted that Mr Leaning was now asymptomatic in his right hip but still had some pain in his left hip. However, she was most concerned about Mr Leaning's back pain which she thought stemmed from osteoarthritic spinal joint disease. Miss Shepherd mentioned that previous x-rays had shown Mr Leaning had significant spondylosis of the lumbar spine. It is true that Miss Shepherd's letters were not available when the original decision was made, but she was referring to other evidence relating to Mr Leaning's back condition which was.

36. Mr Leaning's case was reviewed by ERPF. In answer to Mr Leaning's concern that insufficient consideration had been given to the effect of his back condition, ERPF noted that Dr Anderson had referred to it. This true, but Dr Anderson did not actually express a view as to the likely impact of Mr Leaning's back condition; other than to say that it was difficult to predict. ERPF also said that they had not given further consideration to Mr Leaning's osteoarthritic spinal joint disease because it was only suspected at that time and had not been confirmed. In fact, Mr Leaning had already been diagnosed with advanced lumbar spondylosis. Miss

Shepherd was expressing the view that this was the likely cause of his ongoing symptoms.

37. It is not my role to review the medical evidence and come to a decision of my own as to Mr Leaning's eligibility for a benefit or at what Tier. I am primarily concerned with the way in which NLC reached the decisions they did. If I find that the decision making process was flawed, the correct course of action is for me to refer the matter back to NLC (as the first instance decision maker) to review.

38. I find that the contribution from Mr Leaning's lumbar spondylosis to his ongoing incapacity was not given due consideration before the decision to award Tier 3 benefits was made. Nor do I find that this omission was addressed by the appeal process. I do not, therefore, find that the decision was made in a proper manner and I am referring it back to NLC for review. I should make it clear that, in doing so, I am not expressing a view as to what the outcome of that review should be.

39. What NLC need to decide, with advice from an IRMP, is whether Mr Leaning's lumbar spondylosis was likely, on the balance of probabilities, to prevent him from undertaking gainful employment either for the three years following the termination of his employment with them or for the four years and eight months to normal retirement age. The added difficulty they will have is determining what the decision should have been in September 2012 when Mr Leaning's employment ceased. The decision must be made without the benefit of hindsight. The evidence used to make the decision must, therefore, either have been available in September 2012 or relate to that period. In other words, there is nothing to prevent NLC (or Mr Leaning) from obtaining additional evidence before the decision is reviewed, but any medical opinion must relate to the situation in 2012. The doctors must be asked what their opinion would have been had they been asked in 2012.

40. I have no doubt that NLC undertook their role in assessing Mr Leaning's eligibility for benefit in good faith. They have pointed out that they followed the appeal process and that this inevitably takes time to conclude. I am happy to acknowledge this but it is missing the point. Had a decision been made in the proper manner in the first place, the need for appeal might have been avoided altogether. This is not to say that Mr Leaning would necessarily have been

awarded the higher benefits but he would have been more reassured that his case had been considered correctly and might have felt more able to accept the decision. The failure to make a decision in the proper manner will have caused Mr Leaning additional stress at a difficult time for him. I consider that this should be recognised by payment of a modest amount of compensation. I have made directions accordingly.

41. NLC have pointed out that there is no scope under the LGPS Regulations for them to backdate an award before the date of Dr Anderson's second certificate. This is true of the 18 month review decision. However, I am directing them to re-take their original decision and, if it is found to be incorrect, the revised benefits are payable from the day after Mr Leaning's employment ceased.

Directions

42. Within 21 days of the date of my determination, NLC will refer Mr Leaning's case to an IRMP for a certified opinion as to the effect of his lumbar spondylosis on his capacity for gainful employment. Upon receipt of the IRMP's opinion, NLC will review Mr Leaning's case. Should they determine that he would have been eligible for benefits at either Tier 2 or Tier 1 in September 2012, they will pay him arrears of benefit, together with simple interest at the rates quoted by the reference banks for the time being.

43. Within the same 21 days, NLC will pay Mr Leaning £250 in recognition of the additional stress he has suffered as a consequence of the failure to consider his eligibility in the proper manner.

Jane Irvine
Deputy Pensions Ombudsman

28 November 2014

Appendix

Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI 2007/116) (as amended)

As at the date Mr Leaning's employment ceased, Regulation 20 provided,

"(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5 –

(a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and
(b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age,

they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2) [Tier 1], (3) [Tier 2] or (4) [Tier 3], as the case may be.

(2) If the authority determine that there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age, his benefits are increased –

(a) as if the date on which he leaves his employment were his normal retirement age; and
(b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.

(3) If the authority determine that, although he is not capable of undertaking gainful employment within three years of leaving his employment, it is likely that he will be capable of undertaking any gainful employment before his normal retirement age, his benefits are increased –

(a) as if the date on which he leaves his employment were his normal retirement age; and
(b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.

(4) If the authority determine that it is likely that he will be capable of undertaking gainful employment within three years of leaving his employment, or normal retirement age if earlier, his benefits –

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and
(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in

occupational health medicine ("IRMP") as to whether in his opinion the member is suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition he has a reduced likelihood of being capable of undertaking any gainful employment before reaching his normal retirement age.

…

(7) (a) Subject to sub-paragraph (c), once benefits under paragraph (4) have been in payment to a person for 18 months, the authority shall make inquiries as to his current employment.
(b) If he is not in gainful employment, the authority shall obtain a further certificate from an independent registered medical practitioner as to the matters set out in paragraph (5).
(c) Sub-paragraph (a) does not apply where a person reaches normal retirement age.

…

(14) In this regulation –
"gainful employment" means paid employment for not less than 30 hours in each week for a period of not less than 12 months;

"permanently incapable" means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday; and

""an independent registered medical practitioner ("IRMP") qualified in occupational health medicine" means a practitioner who is registered with the General Medical Council and -

(a) holds a diploma in occupational health medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA state; and for the purposes of this definition, "competent authority" has the meaning given by section 55(1) of the Medical Act 1983; or
(b) is an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA state." …"