PO-6365

Ombudsman's Determination

Applicant	Mr L
Scheme	Railways Pension Scheme Arriva Trains Wales Section (**the Scheme**)
Respondents	RPMI Arriva Trains Wales Section Pensions Committee (**the Committee**)

Ombudsman's Determination and reasons

1. Mr L's complaint is upheld and to put matters right the Committee should pay Mr L £750 for distress and inconvenience caused plus simple interest on the incapacity benefits that would have been payable in June 2014.

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

Complaint summary

3. In September 2014 Mr L complained to our Service that he had been refused incapacity benefits under the Scheme. In July 2015 the Committee awarded Mr L incapacity benefits backdated to when his employment ended with Arriva Trains Wales in April 2013. Mr L says the award was not timely made. He is claiming a sum for distress and inconvenience and seeking reimbursement of legal and medical fees paid.

Background information, including submissions from the parties

4. As relevant Rule 5D ('Early Retirement through Incapacity) says:

> "A member who leaves Service because of Incapacity before Pension Age having completed at least 5 years' Qualifying Membership shall receive immediate benefits calculated as described in Rule 5A…and Rule 5B…and payable from the day after the date of leaving Service."

5. Pension Age is 60.

6. Incapacity is defined under Rule 1 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."

7. The Committee exercises control over the Arriva Trains Wales section of the Scheme and RPMI are responsible for the day-to-day administration under delegated authority from the Committee.

8. Mr L was a Control Manager with Arriva Trains Wales. In November 2011 he was knocked down by a car. Subsequent x-rays showed a fracture of his right fibula. He remained absent from work until his employment was terminated in April 2013 on grounds of capability. The same month the Department for Work and Pensions awarded Mr L a Disability Living Allowance (Mobility: higher rate, Care: lower rate).

9. In June 2013 Arriva Trains Wales received Mr L's application for incapacity benefits. This and various documentation was considered by the Committee in consultation with a doctor from the Scheme Medical Advisor (BUPA Occupational Health Limited – **BUPA**). The Committee declined Mr L's application. The minutes of the Committee's meeting of 18 September 2013 said:

> "The Committee reviewed and considered the documentation including the member's previous skills, qualifications and work experience, and the Medical Advisor's assessment of the limitations and functional abilities of [Mr L] at the point of leaving service and to undertake work in the future.
>
> From the available evidence, the Committee was satisfied that [Mr L] was unlikely ever to be able to return to his old job, but did consider that he would be suitable for other duties now and in the future.
>
> The key reason for this decision was that in the letter dated 7 May 2013 from the Foot and Ankle clinic it stated that [Mr L] could use a gym and could use a cross trainer for 25 minutes 5 times a week, as well as a bike. He was not using an analgesic but looking to try these.
>
> The Committee noted that some of the evidence provided was contradictory, however it was satisfied that [Mr L] was able to work in non-safety critical duties."

10. In October 2013 RPMI notified Mr L that his application had been turned down by the Committee:

> "In considering your application and the medical evidence available, the Pensions Committee was not satisfied that you were not, or would not become, capable of undertaking any other duties."

11. Mr L requested a copy of the Committees notes of the decision making process and the Scheme rules. While the latter was provided RPMI notified Mr L that there were

no notes, but the letter advising that his application had been declined set out the Committee's decision and reasoning.

12. Acting on behalf of Mr L, Wace Morgan Solicitors invoked the Scheme's internal dispute resolution (**IDR**) procedures.

13. The stage one appeal included new commissioned reports from Mr Heron (Consultant Orthopaedic Foot and Ankle Surgeon at 'The Foot & Ankle Clinic') dated 21 October 2013, Dr Fletcher (Consultant Psychiatrist) dated 7 January 2014 and Dr Richards (Accredited Specialist in Occupational Medicine) dated 4 February 2014. A report was also enclosed from Dr Matthews (Consultant Physician) to Mr L's GP dated 10 December 2013

14. Mr Heron in his report, among other things, said:

- Mr L's symptoms were very much the same as six months ago.
- The previous improvement had not continued.
- His symptoms seemed very much related to the proximal and lateral aspect of his right calf, where his hypertrophic fibula union was.
- Mr L identified a deep-seated ache there.
- While on occasions he could do a fair amount of exercise, equally there were days he could only really manage a few minutes up and about weight bearing.
- He also had a widespread sensation below the level of the knee on the right side which it was best for a Neurologist to examine.
- It was worth obtaining the opinion from a limb reconstruction surgeon in terms of the pros and cons of bone grafting and placing of his fibula fracture.

15. Dr Mathews, among other things, said:

- Mr L had had to reduce his activity levels due to unchanged pain and clicking in his right lower leg.
- He was experiencing significant symptoms and disability, with secondary psychological effects.

16. Dr Richards, among other things, said:

- Mr L's symptoms remained basically much the same as in June 2013.
- He was suffering from severe and chronic leg pain and associated pains (due to the effect that his unstable right leg had on his posture and musculoskeletal system in general), moderately severe post-traumatic stress (due to the road accident) and significant and worrying co-morbid depression.
- The prognosis for a long term recovery and a return to any form of employment was very unlikely in the foreseeable future.

- His remaining treatment options appeared to be a visit to his local pain clinic as well as more antidepressants, analgesia and CBT. The consensus of surgeons so far was that it would be too difficult to reunite his fractured right fibula.

In conclusion Dr Richards said:

- Mr L had tried all conventional forms of rehabilitation via his GP, Argent Insures and his CBT therapist.
- There did not seem to be any reasonable adjustments that would enable a prospective employer to employ him in his present state.
- At his current rate of progress he could not see Mr L improving unless a surgeon was willing to carry out what seemed an experimental procedure on his right leg, with no guarantee of long term success.
- The prognosis for finding other suitable employment was poor unless his leg problem could be effectively cured and if this was followed by a course of therapy at Oswestry Pain Management clinic.
- "In my opinion, this form of treatment would depend on a surgeon at Oswestry being willing to undertake appropriate fixation of his mid shaft fracture of the fibula in his right leg, which is currently unlikely."

17. Dr Fletcher gave his opinion that Mr L was suffering from PTSD and concluded:

- Mr L's prognosis was difficult to predict. He was unsure how well Mr L would be able to adapt to living with a disability given his personality traits and it was probable that he would continue to experience symptoms of depressive adjustment disorder until he could regain a full lifestyle which occupied his attention and enabled him to function in a productive manner.
- It was his view that Mr L should continue receiving CBT for 3-6 months following the conclusion of Mr L's legal case.

18. In April 2014 the Head of Pensions Operations, Rail Services (Mr Faulkner) notified Mr L:

"My decision at Stage 1 of the IDR Procedure is to refer your case back to the Pensions Committee under Stage 2 of the IDR Procedure, to review their decision to decline your application for incapacity benefits, based on the additional medical evidence you have now provided".

19. In the same letter he explained the reasoning for Committee's original decision (as per the Committee's meeting minutes of 18 September 2013).

20. In May 2014 Mr L wrote to Mr Faulkner:

- Given that no party had yet identified any medic with the necessary skills to remedy his fractured leg what was the designation of the Committee's medical advisor?

- Arriva Trains had dismissed him because he was proved unfit for any basic clerical employment. What duties did the Committee believe he was capable of?
- Mr Heron's letter should have read "Mr L is using a gym for 25 minutes 5 x a week and can use a cross trainer as well as a bike. He would not be able to do any higher impact work than this." He could not use a cross trainer for 25 minutes and the use of the gym was part of prescribed therapy to maintain basic movement.

21. On 16 June 2014 the Committee wrote to Mr L informing him that they had agreed to defer their decision until 12 months from the date of his last medical assessment (by Dr Richards in February 2014). They said whilst the Scheme Medical Adviser (present to assist the Committee) was of the opinion that it was unlikely that he could return to work in any capacity within the next 6 to 12 months they were of the opinion (based on Dr Richards' aforementioned report) that to date he had not tried all reasonable treatment options (such as attending a Chronic Pain Clinic or prescription of suitable pain killers). The Committee notified Mr L that in the meantime they expected him to explore additional treatment options with his doctors. The Committee said that BUPA would contact him to arrange an additional medical assessment to be presented back to the Committee at their first meeting next year.

22. Wace Morgan Solicitors wrote to the Railways Pension Scheme on 27 August 2014. Among other things they said:

- The Committee's decision to defer was a direct contravention of the Scheme rules and was having a profound and detrimental impact on Mr L's health.
- Mr L did not understand the Committee's decision given that the Committee's medical advisor was of the opinion that Mr L would not be able to work for at least 12 months.
- Mr L had been on pain killers ever since the 2011 incident and had undertaken each and every possible treatment option available to him bar surgery (which was deemed to be of overwhelming risk bordering on the experimental).
- There was no reason why he should not have received incapacity benefits from when his employment ended.
- It was abundantly obvious that the application process had been mishandled and was designed to avoid awarding Mr L what he was rightly due.
- If the Committee were not prepared to accept Mr L's application with immediate effect they at the very least should award Mr L a lump sum and continuing benefit payments from April 2013 to February 2015 (when a further meeting of the Committee was to be convened).

23. RPMI, among other things, replied:

- To award an incapacity pension the Committee needed to be satisfied that the member was incapacitated and that was why they had left their employment. The Committee must be satisfied that the incapacity was not temporary, was

sufficient to prevent the member from carrying out their duties and sufficient to prevent them from carrying out any other duties that the Trustees believed were suitable for them (such duties not being confined to railway duties).

- Based on the evidence available to the Committee they were not satisfied that Mr L's condition was other than temporary.
- However, it was not clear that all treatment options had been explored. Therefore rather than decline his application the Committee had deferred making a decision and given Mr L the opportunity to explore additional treatment options. The Committee had also arranged for their Medical Advisors to arrange an independent medical assessment to allow the case to be presented back to the Committee in early 2015.
- The Committee could defer making a decision in accordance with legal guidelines.
- Should the Committee in 2015 approve Mr L's application he would receive arrears of pension covering the period from the day after leaving service to the payment date.

24. In March 2015 BUPA referred Mr L to Mr Roach (Consultant Orthopaedic Surgeon). In his subsequent report, Mr Roach, among other things, said:

"I see nothing different to the claimant's comments to the patients I have personally treated in my normal NHS practice. Indeed some have had surgical explorations under neurosurgeons without any success. I have also personally decompressed a nerve that went within a fracture site; although this did help some of the neurological symptoms specific to the exact point of injury it did not change the generalised distribution of problems. From experience the claimant's fixation on his pain being related to the fracture behaviour is understandably excessive. It is however his only way of explaining to himself the symptoms he experiences and hence why he has repeatedly requested a surgical solution without success.

In my experience patients who have had these problems usually have no pre-existing past medical history.

I am unable to comment on specific psychological components as this is outside my area of expertise. However I am not aware of this as a common trait in patients I have managed.

Therefore the claimant gives a credible and genuine account and demonstrates a permanence in his problem. I do not believe there is any formal way of a pain management programme helping him. Certainly I would not recommend that he has any management in this regard for fear of making him worse.

In order to allow the claimant to formally adapt to his new situation I would recommend early settlement of his pension claim without delay.

There is certainly good evidence that early settlements are supported in the orthopaedic medico-legal literature for whiplash associated disorder cases and this is supported by comments arising in the psychiatry report.

The claimant should be seen as permanently disabled and I do not feel that he is at any stage going to be able to gain employment and therefore should be registered medially [sic] unfit permanently.

I do not anticipate any change in his symptomatology in his lifetime."

25. Dr Weddell (Occupational Health Physician) for BUPA considered Mr Roach's report and the previous medical evidence. He wrote to RPMI on 26 April 2015 enclosing a copy of Mr Roach's report. Dr Weddell, among other things, said:

- Mr L was currently incapacitated by his medical conditions.
- In his report Mr Roach seemed to be indicating that further surgical treatment was no longer an option.
- But he had not mentioned in his report whether Mr L had seen a limb reconstruction surgeon in terms of pros and cons of bone grafting and placing of his proximal fibula fracture or a neurologist for consideration of a further nerve conduction study.
- Dr Richards (in his 2014 report) was of the opinion that Mr L would benefit from a visit to his local pain clinic. Mr Roach was of the opinion that this would not be helpful. His opinion (Dr Weddell's) was that Mr L would benefit from such a specialist assessment to consider both drug treatment options and CBT. Mr Roach had indicated that Mr L was not currently taking any drug treatment.
- Dr Fletcher in his 2014 report had said that prognosis would be difficult to predict with respect to Mr L's mental health conditions. Dr Richards had recommended that Mr L may benefit from further treatment with antidepressant drug treatment and CBT. Dr Fletcher had said that Mr L should continue receiving CBT.
- Both Dr Fletcher and Mr Roach had made reference to the fact that it was likely that Mr L would experience some improvement in his medical condition once the legal process had been completed. This remained speculation.
- "It is possible that with further treatment intervention, both for his physical and psychological health symptoms that his level of functional capacity will improve, but this is likely to be a period of at least 12 to 18 months. From the report provided by Mr Roach, it does not appear that [Mr L] has accessed further treatment such as assessment at a local pain clinic, analgesic drug treatment, assessment by a limb reconstruction surgeon, assessment by a neurologist or further antidepressant drug treatment".
- Mr L should be considered permanently unfit to work in his role as a Control Manager.
- "Dr Richards is of the opinion that prognosis was 'certainly uncertain' as to whether [Mr L] would be able to perform any other duties in the near future.

> In my opinion, there is still some uncertainty as to whether [Mr L] would be able to perform any other duties in the future. It would appear that there are still treatment options open to [Mr L], both for his right leg problem and the medical conditions of post-traumatic stress disorder and depression. Completion of outstanding medicolegal processes may also lead to some improvement in his symptoms. Should [Mr L's] symptoms improve in the future, and, this is by no means certain, it would be a period of at least 12 to 18 months before [Mr L] could be medically fit to return to some form of work."

26. The Minutes of the Committee's 2 July 2015 Meeting, among other things said:

> "The Committee carefully considered all the evidence before it and agreed that based on the medical evidence provided [Mr L] would not return to his role as a Control Manager, but it was not clear whether he would be able to undertake alternative duties in the future. The Committee noted from Dr Weddells [sic] report '…in my opinion there is still uncertainty as to whether [Mr L] would be able to perform any other duties in the future. It would appear there are still treatment options open to [Mr L], both for his leg problem and the medical condition of post-traumatic stress disorder and depression…'. The Committee discussed in detail [Mr L's] ability to perform other suitable roles, and agreed that there was no evidence to show his incapacity was permanent. Based on the medical advice, the Committee was of the opinion that treatment options were still open to [Mr L]. After hearing the medical advice and discussing the case in detail the Committee agreed to **UPHOLD** the dispute, and pay the incapacity benefits from 13 April 2013 (date of leaving). As [Mr L] was still young and other treatment options were available the Committee **AGREED** that the application should be subject to a review in 2 years (July 2017)."

27. On 27 July 2015 [Mr L] was notified by the Secretary to the Trustee Case Committee that his appeal had been upheld. [Mr L] was then aged 44.

Adjudicator's Opinion

28. Mr L's complaint was considered by one of our Adjudicators who concluded that further action was required by the Committee. The Adjudicator's findings are summarised briefly below:

- The Committee's 2015 decision could equally have been made in 2014.
- In 2014 the Committee deferred their decision on the grounds that Mr L had not tried all reasonable treatments, but had not asked Dr Richards whether the treatment options suggested were likely to enable Mr L to return to 'suitable' work before age 60.

- The minutes of the Committee's 2014 meeting said it was considered that Mr L would be suitable for other duties now and in the future, but failed to mention what they were considered to be.

- When the Committee made the incapacity benefits award to Mr L it was not clear what had changed since 2014. Dr Weddell had commented it appeared that Mr L had not accessed further treatment since 2014 and the Committee's stated reasons for imposing a review was because of Mr Russell's age and that treatments remained outstanding - again no opinion was obtained on whether the suggested treatments were likely to enable Mr L to return to 'suitable' work before age 60.

- While Mr L had been paid incapacity benefits backdated to his date of leaving, because of the more than 12 months delay in payment, interest should be paid plus £750 for distress and inconvenience caused.

- Mr L was not entitled to the reimbursement of legal fees he had paid (because he had chosen to employ Wace Morgan when he could equally have engaged the free services of the Pensions Advisory Service) or medical fees he had paid (because Mr L had commissioned the medical reports).

29. The Committee did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Committee provided further comments, contending that new medical evidence obtained in the course of 2015 'allowed the Committee to make decision which it could not have made on 3rd June 2014'. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by the Committee for completeness.

Ombudsman's decision

30. The Committee contended that the medical opinion of Mr Roach was different to the medical opinions previously sought and considered by the Committee in 2014. They also pointed out that Dr Weddell was of the opinion that there was some uncertainty as to whether Mr L would be able to undertake alternative duties in the future.

31. Mr Roach was quite clear that Mr L would not benefit from surgery or pain management and that his symptoms should be considered permanent for his lifetime. However the Committee decided that there was no evidence that Mr L's incapacity was permanent (minutes of 2 July 2015) on the basis that there were treatment options still available to Mr L which may improve his condition (there is no reference to Mr Roach's opinion in the minutes, only Dr Weddell's). The Committee nevertheless went on to award Mr L incapacity benefits (subject to review).

32. The main reason given for the Committee's 2015 decision was the same as that given in 2014 when they deferred their decision.

33. For these reasons I agree with the Adjudicator that there is no obvious reason why the Committee could not have reached the same decision in 2014. Therefore, I uphold Mr L's complaint.

Directions

34. To put matters right within 14 days of the finalised Opinion the Committee should pay Mr L:

    - £750 for distress and inconvenience caused; plus
    - simple interest on the incapacity benefits that would have been payable in June 2014 at the rate from the time being declared by the reference banks to the date of payment.

Karen Johnston

Deputy Pensions Ombudsman
2 June 2016