PO-6848

Ombudsman's Determination

Applicant	Mr L
Scheme	Firefighters' Pension Scheme Order 1992 (**the Scheme**)
Respondent	Lancashire Fire and Rescue Authority (**the Authority**)

Outcome

1. Mr L's complaint is upheld and to put matters right the Authority should allow Mr L's appeal to the Board of Medical Referees (**the Board**) on the question of whether Mr L has a qualifying injury, as defined by the rules of the Scheme.

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

Complaint summary

3. Mr L is unhappy because the Authority will not allow him to appeal the Opinion of an Independent Qualified Medical Practitioner (**IQMP**), on whether he has a qualifying injury, as per the rules of the Scheme.

Background information, including submissions from the parties

4. This matter has a long and complex background. I have summarised the salient facts and events involved below.

5. Mr L was denied an ill health pension and injury award when he retired from Lancashire Fire & Rescue Service. In 2011, Mr L brought a Judicial Review against the Secretary of State for Communities and Local Government, who had responsibility for the Board of Medical Referees, in which the Board's decision to decline his application was quashed. The Court ordered that a new Board reconsider certain elements of Mr L's application. In particular, the Board was to reconsider whether Mr L could be said to be permanently disabled.

6. The Court Order stated that, if the new Board finds the criteria, under the Scheme rules for MR L being permanently disabled, are satisfied, then Mr L should be awarded an ill health pension and an injury award. The Board subsequently found that the criteria for being permanently disabled under the Scheme rules were satisfied. However, the Authority did not automatically award Mr L any benefits, because he had not satisfied the other relevant criteria.

7. The Authority said it had only been an interested party to the Judicial Review, had not signed the subsequent Consent Order and as such it was not bound by the Order. Instead, it said it was bound by the Scheme rules, and these required there to be a qualifying injury before any benefits could be paid. As such, the Authority said it still needed an IQMP to confirm whether Mr L had a qualifying injury under the Scheme rules. It agreed that, if the IQMP established there was a qualifying injury, it would award the relevant benefits.

8. At this stage Mr L brought a complaint to our Office. The Adjudicator found that the Authority's offer to consider making an award to Mr L if he agreed to be referred to an IQMP, and subject to it being determined that his capacity was occasioned by a qualifying injury, was reasonable in the circumstances and did not amount to maladministration. Mr L accepted this Opinion.

9. On 8 April 2013, Mr L's lawyers wrote to the Authority, confirming what would happen next. As part of this letter, Mr L stated "We have both reserved our position in respect of your argument that you are not bound by the Order". No reference was explicitly made in that letter, or the Authority's correspondence at that time, to what would happen if the IQMP report was challenged.

10. A new IQMP report was produced on 11 February 2014. This report confirmed that the new IQMP did not find that Mr L had a qualifying injury. As a result, the Authority did not make an award.

11. In March 2014, Mr L informed the Authority that he wished to appeal the IQMP's Opinion. In response to Mr L's request for an appeal, the Authority said it would not consider the matter further. In particular, it said that the Court had already considered this matter and as such Mr L was not entitled to appeal his case any further.

12. Under schedule 5 of the Scheme rules, applicants may appeal an IQMP's decision by referring their case to the Board. Mr L states that, although he agreed to allow an IQMP assess whether there was a qualifying injury, he never gave up his right to appeal the IQMP's findings. However, the Authority maintained that he could not pursue his dispute with the Authority any further, and Mr L therefore brought the matter back to our Office.

13. Since the complaint has again been referred to our Office, the Authority has argued that the Ombudsman does not have jurisdiction to consider the matter. The Authority has highlighted that the Court has already dealt with the case, and the Ombudsman cannot overrule the Court Order.

14. The Authority has also confirmed that the Board could not originally review whether there was a qualifying injury, following the Court Order, as the Board can only consider matters which have been examined first by an IQMP. As an IQMP had not deliberated on whether there was a qualifying injury at that time, the Board could not

consider it. The Authority maintains that the Order ultimately conflicts with the Scheme rules, but that it has done all it can to reconcile this.

Adjudicator's Opinion

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

    - The evidence suggests that Mr L and the Authority agreed that the question of whether he had a qualifying injury would be considered by an IQMP. There is no evidence to suggest that Mr L waived his rights to appeal the IQMP's Opinion.

    - Mr L would normally be able to appeal the IQMP's Opinion under the rules of the Scheme. Whilst a Board has already reviewed Mr L's case, it has never been able to consider whether he has a qualifying injury.

    - There appears to be no reason for Mr L to be denied his right for a Board to properly decide on whether he has a qualifying injury.

16. The Adjudicator also confirmed that the recommendations outlined in her Opinion were not intended to prevail over the Court Order. The Adjudicator iterated that the Court Order was in relation to a different party and on a different matter. As such, the Adjudicator's Opinion did not conflict with it.

17. The Authority did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Authority have provided its further comments and, in particular, argued that the IQMP Opinion on whether Mr L has a qualifying injury has been provided outside of the Scheme rules and normal process. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by the Authority for completeness.

Ombudsman's decision

18. Firstly, I should say that I have sympathy for the Authority's position. It was not a party to the judicial review, and the subsequent Court Order effectively required the Authority to act outside of its powers. However, the Authority was an interested party and it is surprising that it was not more involved when it became apparent that the Authority was being asked to act ultra vires. The Authority then suggested an approach which would allow it to adhere to both the Court Order and the Scheme rules. With the benefit of hindsight, however, it may have been better to have requested that the Judge's directions be amended.

19. However, regardless of the unusual way the case has proceeded, the fact is that Mr L has never had an appeal on the question of whether he has a qualifying injury, and he must be entitled to one under the rules of the scheme and as a matter of natural justice, unless he specifically agrees to waive that right.

20. I accept that, to some extent, the agreement the Authority made with Mr L went outside the Scheme rules. However, the Authority's overall intent appears to be to reconcile the Court Order with the Scheme rules. The Scheme rules allow for a review and appeal in such a situation, yet the Authority is denying this right to Mr L. Overall, I feel the Authority has been inconsistent. The Adjudicator's Opinion in the initial case was based on the fact that the Authority would consider making an award if the IQMP report was favourable, and although it was not, this indicated our expectation that a discretionary decision would still be made by the Authority and an appeal procedure still be available in accordance with the scheme rules.

21. It is suggested that the parties agreed that the IQMP would bring finality to the matter. However, there is insufficient evidence to demonstrate this. Clearly the involvement of the IQMP was a step towards a resolution, but Mr L's appeal rights were not expressly waived. The Authority could have included such a waiver in a formal agreement, if it wished for the IQMP's Opinion to decide the matter once and for all, with no right of appeal. Instead, the letter dated 8 April 2013 stated that both sides reserved their position in respect of whether they were bound by the Administrative Court's Order. So the evidence suggests there was always scope for the matter to be pursued further.

22. Lastly, I agree with the Adjudicator, we are not challenging the Court Order. Mr L's complaint is about the subsequent process under the Scheme rules which concerns the Authority's decision to abide by those rules to seek an IQMP's Opinion but to refuse Mr L's right to appeal to the Board on the IQMP's findings.

23. Therefore, I uphold Mr L's complaint.

Directions

24. The Authority will allow Mr L to appeal the IQMP's Opinion on whether he meets the criteria for a qualifying injury under the rules of the Scheme.

Anthony Arter
Pensions Ombudsman

19 April 2017