PO-7707

Ombudsman's Determination

Applicant	Mr R
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondents	St. Helens Council (**the Council**)

Outcome

1. I do not uphold Mr R's complaint and no further action is required by the Council.

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

Complaint summary

3. Mr R's complaint is that he has been refused ill health retirement

Background information, including submissions from the parties

4. The Council are the employing authority and Wirral Council are the administering authority for the Merseyside Pension Fund (**the Fund**). The Fund is part of the Local Government Pension Scheme.

5. Mr R was a 'Bereavement and Grounds Maintenance Service Manager' for the Council from 23 October 1978 to 7 February 2001.

6. In June 2013, Mr R applied for the early release of his deferred pension. In early July 2013, the Council asked Mr R to confirm the grounds for his request. Mr R confirmed that he was seeking the release on the grounds of ill health.

7. As Mr R left the Scheme in 2001 'The Local Government Pension Scheme Regulations 1997' applied. Relevant extracts from the 1997 Regulations are provided in Appendix 1.

8. After submitting medical evidence pertaining to his medical conditions (at that time the diagnoses were fibromyalgia, gout and a fatty liver) Mr R saw Dr King, the Council's occupational health physician. Dr King subsequently asked Dr Roy (an independent registered medical practitioner - **IRMP**) for his opinion and in a covering letter to Dr Roy summarised his meeting with Mr R.

9. Dr Roy considered the occupational health notes, including a letter dated 7 January 2014, from Mr R's Consultant Rheumatologist (Dr Dawson) to Mr R's GP.

10. In February 2014, Dr Roy certified that Mr R was not permanently incapable of efficiently discharging his former duties for the Council. In a covering letter to the Council he said not all treatment options had been tried and that there was a great deal of time for improvement in Mr R's symptoms before age 65.

11. The Council duly turned down Mr R's application:

> "As the Council; has been advised that you are not permanently unfit, you do not meet the medical criteria for your pension to be released on the grounds of ill health at this time, my decision is therefore to refuse release of pension on grounds of ill health. Should there be a deterioration in your health in the future, you may reapply at that point for pension release."
>
> The Council's letter to Mr R included a copy of Dr Roy's opinion.

12. On 27 April 2014, Mr R wrote to Dr King, copying in Dr Roy and the Council. Among other things he said:

- He was surprised by the Council's decision.
- He had only seen his (Dr King's) letter to Dr Roy after Dr Roy had given his opinion. The letter contained a number of inaccuracies. Namely, he had swelling on his hand which was not slight. While he had stated that he liked to use his computer he could only do so for up to 10 minutes because of the pain. The letter had not noted that he had said that his gout swelled every 4 to 6 weeks and prevented him from doing anything for 2 weeks. At the time of their meeting he was not being investigated for treatment. Dr Dawson had increased his medication to the highest level and had discharged him to his GP to monitor. He had also stated that he did not go out because of his disability and at age 53 he felt 73.
- He had submitted a copy of Dr Roy's opinion to Dr Dawson and had asked her to clarify if there were other treatments available to him.
- He would like Dr Roy to look at his letter and let him know what forms of treatment he was thinking of.
- Dr Dawson had informed him that he would not get better. Pain management did not remove his pain but aimed to allow him to cope with it.
- He was happy to see Dr Roy for a medical.

13. The following month Mr R invoked the Scheme's two stage internal dispute resolution (**IDR**) procedure. At IDR stage 1, among other things, he made the following points set out below.

- He felt the Council's decision was based on false information provided by Dr King and Dr Roy.

- He was under two specialist consultants (Dr Levshankov and Dr Dawson). Both doctors had diagnosed him with chronic widespread pain caused by Fibromyalgia, gout and fatty liver. Dr Dawson had told him that he would never get better, the condition would worsen, but medication may ease the pain.

- He was in constant pain and had irregular sleep patterns which left him exhausted during the day. He could not use a walking aid and his hip and knee gave way with no warning which affected his mobility. He could not walk 25 feet or stand or sit for more than 10 minutes without severe pain. His concentration was zero due to the pain and he could not use a computer for more than 10 minutes. He could not drive as the prescribed medication made him drowsy. While age 53 he felt age 73. With these symptoms neither the Council's sickness procedure or Health and Safety would allow him to do his former duties.

- He had respectively written to Dr King and Dr Roy. Dr King's reply had failed to answer the queries raised in his letter and Dr Roy had not replied.

14. In July 2014 Mr R was referred to Dr Wilson (IRMP). Dr Wilson certified that Mr R was not permanently incapable of discharging efficiently the duties of his previous Council employment. The same day Mr R emailed the Council complaining that Dr Wilson was a statistical doctor and had referred to the reports of Drs King and Roy who he (Mr R) had reported as not truthful.

15. Mr R separately wrote to the Council's Chief Executive. Commenting on Dr Wilson's report Mr R, among other things said:

    - he had a final class of pain management scheduled and then would be signing up for other courses of therapy (exercise classes). CBT had been previously discussed but was not considered appropriate;

    - while he had sat at the meeting he had constantly moved. There was restricted movement in his arms, neck and shoulders and he had leant forward in pain;

    - although Dr Dawson had discharged him to his GP, he had not been discharged by Dr Levshankov (whom he saw every three months) and Dr Wilson had been shown a letter for his next appointment;

    - Dr Wilson's reference to "73% of patients…" was a study in respect of 15 children;

    - for the duration of the meeting Dr Wilson had referred to statistics and not his particular condition and his gout had been brushed to one side; and

- he was unable to walk well enough to perform day-to-day activities without assistance and he could not do day-to-day tasks such as tying shoes, preparing meals, managing his personal hygiene, holding a pen or sorting papers.

16. The Specified Person for the Council turned down Mr R's stage 1 appeal. After considering the available medical evidence, including Dr King's letter to Dr Roy, Dr Roy's opinion and, in particular, Dr Wilson's opinion he concluded that on the balance of probabilities there was insufficient evidence to confirm that Mr R was permanently incapable of his former Council duties.

17. The next month Mr R was admitted and discharged (on the same day), with no follow up required, from Whiston Hospital following a referral by his GP in respect of chronic left calf pain.

18. In September 2014, Mr R underwent an MRI scan of his brain (following a history of dizziness, lethargy and forgetfulness), which noted focal atrophy/encephalomalacia in the inferior frontal lobes bilaterally consistent with a previous significant trauma.

19. Mr R was awarded a Personal Independence Payment (**PIP**), comprising a Daily Living component and a Mobility component, in December 2014, and an Employment and Support Allowance (**ESA**) in January 2015. Both awards were effective from July 2014.

20. In January 2015, Mr R was seen by a Consultant Neurologist at Whiston Hospital. In a letter typed on 26 January 2015, to Mr R's GP, the Consultant confirmed the MRI evidence (of the September 2014 scan) and said it potentially could have contributed to Mr R's cognitive complaints and his report of anosmia (loss of sense of smell). The Consultant added that the symptoms of "brain fog" were common in patients with fibromyalgia/chronic pain syndromes and as a side effect of the medication Mr R was taking. However, the Consultant did not feel the previous head injury accounted for Mr R's dizzy spells. Mr R was subsequently referred to the ENT Team for an opinion.

21. Mr R missed the deadline for submitting an IDR stage 2 appeal to the administering authority of the Fund.

22. Mr R, among other things, made the further points set out below.

    - His symptoms are chronic widespread pain causing chronic fatigue, which results in aggressive behaviour when confused. He has a total lack of sleep pattern. His left leg becomes visibly swollen when weight is applied. His gout flares every 4 to 6 weeks in both feet and hands, which further restricts his mobility. He has no sense of smell, taste or danger.

    - By cross referencing his medical conditions and symptoms with his Council job description he could not complete the requirements of the job to a legal standard and health and safety would be breached.

- He did not see Dr King's letter to Dr Roy until after Dr Roy had certified his opinion and the Council had turned down his application. The letter contained a number of inaccuracies and missed the important factors of his illness and its affects. If Dr King's letter had been corrected Dr Roy's report would have been different.

- The Council's stage 1 decision failed to consider his comments (see above) on Dr Wilson's preliminary report.

23. Mr R is represented by Ms French, who accompanied Mr R when he was seen by Dr Wilson. Ms French supports Mr R's comments about the visit and on Dr Wilson's report.

24. A summary of the medical evidence is provided in Appendix 2.

Adjudicator's Opinion

25. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator's findings are summarised briefly below:

- while Mr R's entitlement to state ESA and PIP is an indication of his current state of state health and ability to work, the Scheme's eligibility test for the early release of deferred pension benefits on the grounds of ill health is more stringent, requiring Mr R to be permanently (to age 65) incapable of efficiently discharging his formal duties of employment with the Council;

- it was not clear that the alleged discrepancies in Dr King's report had impinged on Dr Roy's (or Dr Wilson's) opinion. Dr Roy appeared to have considered all the available medical evidence before reaching his opinion, which was not reliant on what Dr King had said. In fact Dr King had not given an opinion on Mr R's application;

- the Council's maladministration (accepting Dr Roy's opinion without asking him to clarify the treatments he considered had not been fully explored) was corrected at the IDR stage ;

- Dr Wilson considered Mr R's gout to be a treatable condition which should not interfere with his fitness for work. He noted that Mr R's fibromyalgia had worsened but that Mr R was awaiting exercise therapy and might be offered CBT (both evidence based treatments for fibromyalgia). While Dr Wilson had placed weight on the evidence based prognosis for fibromyalgia he had also taken into account Mr R's functional and medical history and his opinion did not appear to be at odds with the doctors treating Mr R at that time; and

- if Mr R considered his health had deteriorated since the Council's IDR stage 1 decision he could submit a new application at any time.

26. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms French 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 Ms French on behalf of Mr R for completeness.

Ombudsman's decision

27. Ms French says Mr R had a meeting (not a medical) with Dr Wilson. How the consultation was conducted was for the IRMP to decide. The medical opinion (or conduct) of an IRMP does not fall within my jurisdiction.

28. Ms French says all treatments were exhausted when Mr R saw Dr Wilson. Clearly that was not Dr Wilson's opinion. A difference of opinion is not sufficient for me to say that the Council erred in accepting Dr Wilson's opinion.

29. Ms French has alluded to Dr Wilson's evidence based prognosis for fibromyalgia. But his opinion was not reliant on that, he also considered Mr R's functional and medical history.

30. Ms French asks: how can Mr R apply again and get a fair unbiased decision? Mr R may submit a new application for the early release of his pension at any time. I have no reason to suppose that the Council will not give it proper consideration.

31. Therefore, I do not uphold Mr R's complaint.

Anthony Arter

Pensions Ombudsman
31 October 2016

Appendix 1

The Local Government Pension Scheme Regulations 1997

32. As relevant regulation 27(5)(b) says:

> "…"permanently incapable" means incapable until, at the earliest, the member's 65th birthday."

33. As relevant regulation 31(6) says:

> "If a member who has left a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body-
>
> (a) he may elect to receive payment of the retirement benefits immediately, whatever his age…"

34. As relevant regulation 97says:

> "(9) Before making a decision as to whether a member may be entitled… under regulation 31 on the ground of ill-health, the Scheme employer must obtain a certificate from an independent registered medical practitioner who is qualified in occupational health medicine as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant local government employment because of ill-health or infirmity of mind or body.
>
> …
>
> (14) In paragraph (9)-
>
> (a)"permanently incapable" has the meaning given by regulation 27(5), and
>
> (b)"qualified in occupational health medicine" means holding a diploma in occupational medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA State (which has the meaning given by the European Specialist Medical Qualifications Order 1995) or being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State."

Appendix 2

Medical Evidence

Dr Dawson (Consultant Rheumatologist), 7 January 2014 letter to Mr R's GP

35. Dr Dawson stated next to diagnosis: Fibromyalgia, Gout and fatty liver on ultrasound and listed and suggested changes to Mr R's medication. Dr Dawson said the ultrasound of the liver showed a fatty infiltration but no other abnormalities. Dr Dawson referred Mr R back to his GP with no further review with himself planned.

Dr King (Consultant Occupational Physician), 7 February 2014 letter to Dr Roy

36. "[Mr R] tells me his problems started with his right hip and leg around four years ago, from that time he had increasing pain…in early 2013 he was sent to the hospital for scans, bloods and x-rays…As time went by his pains were becoming more widespread and affecting his limbs and most of his joints. He tells me his joints swell up from time to time. There was perhaps some slight signs of this in his left MC-P joints but not a lot else to see today. He was eventually referred to the rheumatologist and a copy of his note is enclosed in the records. Essentially he seemed to make a main diagnosis of fibromyalgia and gout.

    [Mr R] now feels that his is struggling with mobility and pain. He has generalised pain and his right hip which was the main problem to start with is now not so bad but his left hip is much worse. His medications include…He has appointments coming up…with the pain management service. In himself he feels bad that he can't be active and he has to take medication to keep himself in reasonable comfort and sleep at night. He is eating well. He spends his days doing mainly computer work. He can walk short distances because of the pain and similarly can drive short distances…he smokes around 10 cigarettes a day. Regarding alcohol he tells me he just drinks a glass of wine a night although he admits he did drink more when he had a pub. He states that he's been told and believes he will not get better in the future.

    In summary therefore [Mr R's] main problems are with mobility and pain. He is still investigating treatment for these symptoms. He has been discharged by the rheumatologist and is now just under the care of his GP…"

Dr Roy, 13 February 2014.

37. "[Mr R] is 53 and previously worked in a managerial capacity. At the moment I do think there is room for improvement of his symptoms, certainly a great [deal of] time before he is 65 for him to improve. I don't think all treatment options have been fully explored at the moment. [Mr R] worked in a managerial capacity and I do feel he should be able to return to these duties with further treatments. "

Dr Wilson (IRMP), 23 July 2014

38. Dr Wilson noted the evidence that he had considered: the Council's referral letter, the job description for a Bereavement Services Manager, the reports of Dr King and Dr

Roy and Consultant Occupational Physicians from January 2001 to February 2014, Dr Dawson's (Consultant Rheumatologist) report of 7 January 2014, and the 2005 Ill Health Retirement Guidance from the Association of Local Authority Medical Advisers (**ALAMA**).

Under the heading 'Medical and functional history and examination', Dr Wilson said Mr R had confirmed that he had started to experience pain in his left knee and hip in 2007, and that his left knee started giving way at that time. He noted that Mr R's GP had undertaken x-rays and scans and referred him for physiotherapy. The medical tests had not revealed any serious joint disorder but his symptoms had gradually worsened. He noted in June 2013 that Mr R had been referred to a Rheumatologist (Dr Dawson), who undertook further medical tests which again revealed no serious physical joint disorder. He had been diagnosed with Gout and Fibromyalgia in January 2014.

Dr Wilson noted the medication Mr R had been prescribed and was currently taking and that he was attending a pain management course which Mr R found helpful to his condition and symptoms. He noted that Mr R had not been offered any evidence based talking therapy such as Cognitive Behavioural Therapy.

Dr Wilson said Mr R had informed him that he required help with washing and dressing and could not fasten small buttons, do laundry or cook.

Dr Wilson observed that Mr R was using crutches (on the advice of the instructor in his pain management classes) and walked slowly with these, but noted no signs of restricted movements in his hands, shoulders, neck or back or while sitting.

Under the heading 'External Medical Evidence' Dr Wilson noted the reports from the Occupational Physicians and Dr Dawson which confirmed the diagnoses of Fibromyalgia and Gout and that Dr Roy had concluded that there was a significant likelihood of symptomatic improvement and that all treatment options had not been explored. Dr Wilson referred to ALAMA's Ill Health Medical Guidance on the treatment of Fibromyalgia. He noted that the prognosis in most cases was good and in the longest reported study, 73% of patients had said that their symptoms interfered little, if at all, with work. Dr Wilson noted that ALAMA recommended that occupational physicians should not normally support early retirement due to Fibromyalgia.

Dr Wilson concluded:

> "[Mr R] has two medical conditions. His Gout is a common, treatable medical condition, which should not interfere with his fitness for work. His Fibromyalgia currently causes substantial impairment of his ability to undertake normal day to day activities. He has not yet received either of the evidence based treatments for Fibromyalgia, namely Cognitive Behavioural Therapy (CBT) or Graded Exercise Therapy. He is awaiting exercise therapy and may be offered CBT in future. His current relapse or episode of Fibromyalgia has lasted for approximately 12 months and has become much worse in the last six months. The evidence based prognosis

for this condition, with adequate evidence based treatments, is that there is a significant likelihood that he will achieve a normal level of function, within the next 12 years, and at that point he will recover fitness for his duties as a Behavioural Services Manager.

Based on his functional and medical history, as well as the evidence based prognosis for his condition, I recommend that he is not permanently incapable of discharging efficiently the duties of the relevant local government employment by reason of ill health."