PO-8402

Ombudsman's Determination

Applicant	Mr D
Scheme	Firefighters Pension Scheme (**the Scheme**)
Respondents	London Fire & Emergency Planning Authority (**LFEPA**)

Outcome

1. I do not uphold Mr D's complaint and no further action is required by LFEPA.

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

Complaint summary

3. Mr D's complaint is that he has been refused ill health retirement. He says that if he had been assessed by an independent qualified medical practitioner (**IQMP**) in 2012 he would have been awarded ill health retirement. He says the time taken by LFEPA to reach a decision is unacceptable. He says his medical condition has not improved and believes that LFEPA would not now employ him as a firefighter.

Background information, including submissions from the parties

4. Mr D left London Fire Brigade (which is run by LFEPA) on 25 June 2001, and became a deferred member of the Scheme.

5. In June 2012, at age 52, Mr D applied for ill health retirement on the grounds that his asthma meant he was unable to perform the duties of a firefighter or do any other work. In support of his application Mr D provided a letter from his GP, Dr Smith, dated 30 May 2012.

6. Mr D saw Dr Hawkins, Consultant Respiratory Physician, in October 2012. At the end of February 2013, LFEPA wrote to Mr D and said that, despite regular chasing, their occupational health provider, Health Management Ltd – **HML,** had yet to receive Dr Hawkins' report.

7. The next month LFEPA notified Mr D that HML had received Dr Hawkins' report, which had advised that he, Mr D, had recently commenced a form of treatment for his condition. LFEPA said that HML required seeing how he responded to the treatment

before referring him to see a specialist. LFEPA said HML would arrange a referral in 3-4 months.

8. At the end of July 2013, LFEPA wrote to Mr D informing him that the period of suspension had elapsed and his case would be progressed. They asked Mr D to confirm whether he had seen any chest physicians since March 2013.

9. On 4 August 2013, Mr D submitted a report from Dr Hawkins to his GP typed on 30 May 2013. Dr Hawkins said that Mr D continued to be symptomatic and became breathless when he exerted himself. Dr Hawkins said on examination his chest was clear and his spirometry remained obstructive and that he had increased Mr D's medication and would review him in six months.

10. In October 2013, Mr D saw Dr Varadarajan, Consultant Occupational Health Physician for HML. He was subsequently referred for assessment at the Royal Brompton Hospital Respiratory Unit on 13 January 2014.

11. In April and May 2014 LFEPA received reports from Dr Szram, Occupational and Environmental Medicine Consultant Respiratory Physician at the Royal Brompton Hospital, and an internal letter from Dr Hull, Consultant Physician at the Royal Brompton Hospital, to Dr Szram typed on 25 April 2014. The latter provided the results of Mr D's lung function and cardiopulmonary exercise tests. Dr Hull said that he had discussed the result with Mr D and had outlined the fact that he would likely benefit from working with their breathing control physiotherapist. Dr Hull said that Mr D's current breathing state had a significant impact on his ability to perform physical activity.

12. On 1 August 2014, Dr Tellman, IQMP, certified that Mr D was not permanently incapable of performing his duty. Dr Tellman also signed a 'Severe Ill Health Test' certificate, for exclusion of a member's ill health pension from Annual Allowance charges. He encircled 'No' to the statement:

    "As a result of his/her ill health or infirmity, I declare that the above named member is unable to continue in their current job and is unlikely to be capable of taking on any other paid work in any capacity(otherwise than to an insignificant extent) before their State Pension Age."

13. LFEPA subsequently turned down Mr D's ill health application. Their letter to Mr D of 14 August 2014, amongst other things, said,

    "I refer to your application for an After Appearing Injury on account of Asthma.

    Having considered your case, the Independent Qualified Medical Practitioner (IQMP) has provided an opinion to LFEPA which states that, although you are suffering from this incapacity, it is not deemed to be permanent. Please find enclosed a copy of the IQMP opinion and a copy of the rationale enclosed for your information.

Therefore, your application for an After Appearing Injury has been unsuccessful."

14. Mr D unsuccessfully appealed under the Scheme's two-stage internal dispute resolution (**IDR**) procedure.

15. Extracts from the Firemen's Pension Scheme Order 1992 (as amended) are provided in Appendix 1.

16. The medical evidence provided in this case is summarised in Appendix 2.

Adjudicator's Opinion

17. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by LFEPA. The Adjudicator's findings are summarised briefly below.

- While the progress of Mr D's claim should not have been suspended in March 2013 to late July 2013, to wait and see how he responded to treatment for asthma , there was no resultant injustice to Mr D. At the time Mr D had not been diagnosed with dysfunctional breathing. It was likely that the sequence of events that occurred after the suspension was lifted would have occurred if the suspension had not been imposed. Namely, Mr D's referral to Royal Brompton Hospital for tests; the finding that his condition was not asthma but a breathing pattern disorder; and Dr Tellman's subsequent certification that he was not permanently incapable of the duties of a firefighter.

- It would have been prudent if LFEPA had clarified with Dr Tellman his opinion, rather than blindly accepting it; there was no evidence of a reasoned decision by LFEPA after obtaining Dr D's certified opinion. However, the procedural error had not caused Mr D injustice as it was unlikely that if LFEPA had properly considered the matter they would have had any reason to question Dr Tellman's opinion.

- Mr D's opinion that LFEPA would not now appoint him as a firefighter was applying the benefit of hindsight. LFEPA's decision, and Dr Tellman's opinion, was restricted to the medical evidence available around the time Mr D applied for ill health retirement, or later opinion commenting on the medical evidence back then.

- Mr D may submit a current application for the early release of his pension on grounds of ill health

18. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D has provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr D for completeness.

Ombudsman's decision

19. Mr D maintains that he cannot fulfil the duties of a firefigher. He says he would not pass the medical now or in the next three years. But LFEPA's decision (and Dr Tellman's opinion) was based on the medical evidence available during the time Mr D applied for ill health retirement.

20. Mr D says Dr Tellman would not commit himself on whether he could undertake the duties of a firefighter. Clearly that is right as Dr Tellman certified that he did not consider Mr D was permanently incapable of the duties of a firefighter.

21. Mr D points out that Dr Hawkins was of the opinion that he would not be able to resume the role of a firefighter wearing breathing apparatus. But Dr Hawkins gave his opinion before the diagnosis of Mr D's condition changed. Nevertheless a difference of medical opinion between doctors is not sufficient for me to say that LFEPA should not have accepted Dr Tellman's opinion.

22. Mr D points out that Dr Hull was of the opinion that his breathing state was having a significant impact on his ability to perform physical activity. In fact Dr Tellman recognised that Mr D had functional limitation. But he considered that there was reasonable treatment invention which was likely to improve Mr D's condition to a sufficient extent to enable him to be capable of the duties of a firefighter before age 60.

23. Mr D says Dr Szram's statement that he was unable to comment on whether he could undertake the role of a fighter, now or in the future, favoured LFEPA. But to grant Mr D ill health retirement LFEPA required the certified opinion of an IQMP that he was permanently incapable. Dr Tellman certified that Mr D was not permanently incapable, consequently LFEPA could not make the award.

24. LFEPA failed to properly consider the matter after receiving Dr Tellman's opinion. But even if they had it is unlikely they would have had a reason not to accept the IQMP's recommendation. Dr Tellman clearly understood the qualifying criteria and had considered all of the relevant evidence; his opinion does not appear to have differed from that of the doctors treating Mr D at the Royal Brompton Hospital.

25. As a deferred member of the Scheme Mr D retains the option to submit a new application to LFEPA for the early release of his pension on grounds of ill health.

26. Therefore, I do not uphold Mr D's complaint.

Anthony Arter

Pensions Ombudsman
31 October 2016

Appendix 1

The Firemen's Pension Scheme Order 1992

27. As relevant rule A10 ('Disablement') says:

> "(1) References in this Scheme to a person's being permanently disabled are references to his being disabled at the time when the question arises for decision and to his disablement being at that time likely to be permanent.
>
> (1A) In determining whether a disablement is permanent, a fire and rescue authority shall have regard to whether the disablement will continue until the person's normal pension age.
>
> (2) Disablement means incapacity, occasioned by infirmity of mind or body, for the performance of duty, except that in relation to a child it means incapacity, so occasioned, to earn a living."

28. As relevant rule B5 ('Deferred pension') says:

> "…
>
> (4) A deferred pension becomes payable-
>
> (a) from the 60th birthday of the person entitled to it, or
>
> (b) from any earlier date on which he becomes permanently disabled for engaging in firefighting or performing any other duties appropriate to his former role as a firefighter ,…"

29. As relevant rule H1 ('Determination by fire authority') says:

> "(1) The question whether a person is entitled to any and if so what awards shall be determined in the first instance by the fire and rescue authority .
>
> (2) Subject to paragraph (3), before deciding, for the purpose of determining that question or any other question arising under this Scheme-
>
> (a) whether a person has been disabled,
>
> (b) whether any disablement is likely to be permanent,
>
> (c) whether the person would be able to undertake regular employment within the meaning given by rule B3(7)
>
> (e) whether a person has become capable of performing the duties of a regular firefighter,
>
> or
>
> (f) any other issue wholly or partly of a medical nature,

the authority shall obtain the written opinion of an independent qualified medical practitioner selected by them and the opinion of the independent qualified medical practitioner shall be binding on the authority.

(2A) In his written opinion, the independent qualified medical practitioner must certify that-

(a) he has not previously advised, or given his opinion on, or otherwise been involved in, the particular case for which the opinion has been requested; and

(b) he is not acting, and has not at any time acted, as the representative of the employee, the authority, or any other party in relation to the same case."

Appendix 2

Dr Smith's open letter dated 30 May 2012

30. Dr Smith said:

> "Please be advised that [Mr D] is currently under the care of a respiratory consultant due to uncontrollable shortness of breath. He has been diagnosed with asthma which has been rather refractory to current inhaler treatments and is thus unable to work at the current time. He understandably wishes to apply for release of his Fire Department pension funds early and I confirm that given his current state of health he would not be suitable for work in the Fire Department."

Dr Hawkins, report to Dr Varadarajan typed 12 February 2013

31. Among other things Dr Hawkins said:

- Mr D had had asthma as a child but it had not caused him problems until late 2011.
- His asthma was fairly severe and his last visit indicated that it was poorly controlled.
- There were several options to help establish better control of his condition. Montelukast had been added to his medication (and an assessment of his response to this medication was due). If this was not helpful then Theophyllines may be. He also had not been screened for an allergic basis to his asthma. There were also a variety of other inhalers he could try.
- Based on his response to treatment to date it was unlikely that he would be able to resume the role of a firefighter wearing breathing apparatus during a fire suppression role before he reached age 60.

Dr Hawkins, report to Mr D's GP typed 30 May 2013

32. Dr Hawkins said Mr D continued to be symptomatic. He got breathless when exerting himself. His cough was better on Symbicort. He was using Salbutamol quite a lot prior to and after exertion and Montelukast had not helped so he had stopped using it.

33. He had increased Mr D's dosage of Symbicort and would review him in 6 months.

Dr Hull, internal report to Dr Szram typed 25 April 2014

34. Dr Hull, among other things, said:

- The lung function tests evidenced a mild airflow obstruction and a cardiopulmonary exercise test on the cycle ergometer showed persistent low etCO2.

- He had outlined to Mr D that he would likely benefit from work with their breathing control physiotherapist.
- Currently Mr D's breathing state was having a significant impact on his ability to perform physical activity (that is it limited his exercise tolerance).

Dr Szram, report to Dr Varadarajan dated 8 May 2014

35. Dr Szram said the main finding from the lung function and cardiopulmonary exercise testing was a persistently low and tidal CO2. Mr D was noted as having a dysfunctional breathing pattern during the assessment, but there was no evidence of asthma either at rest or induced on exercise.

36. Dr Szram said the findings suggested chronic hyperventilation and breathing pattern disorder as a cause of his current exercise limitation, rather than asthma

37. Dr Szram said he was not able to comment on whether Mr D could undertake the role of an operational firefighter either now or in the future.

38. Mr D had been asked whether he would like to attend at the Hospital or more locally for breathing control physiotherapy

Dr Tellman, 1 August 2014 report

39. Dr Tellman noted that Mr D had a history of asthma as a small child and that he had been prescribed treatment to age 16. He noted that Mr D had joined the fire service at age 24 and had remained in the service until age 41 and that his reason for leaving was not health related.

40. Dr Tellman said the medical evidence suggested that Mr D developed respiratory symptoms in November 2011 and was prescribed treatment for asthma. He noted that in April 2012 Mr D was seen by a respiratory specialist and pulmonary function testing revealed moderate obstructive airways disease. Dr Tellman said the assessment did not indicate the likely diagnosis but suggested various treatment interventions be trialled.

41. Referring to Dr Hawkins' February 2013 report, Dr Tellman said the diagnosis appeared to be mainly based upon Mr D's subjective symptoms. Dr Tellman said a more recent assessment by Dr Szram found that Mr D's symptoms were not suggestive of asthma. A further report by Dr Szram (dated 8 May 2014) concluded that Mr D had a dysfunctional breathing pattern, rather than asthma. Dr Szram felt that Mr D would benefit from a breathing control physiotherapist.

42. Dr Tellman said he had reviewed Mr D's spirometry tests over the years (most notably for May 1998, April 1999 and January 2014). He said Mr D's respiratory function had remained very similar over the years with no evidence of any marked changes. Dr Tellman concluded:

> "In conclusion, I do believe [Mr D] does have functional limitation but the objective medical evidence would suggest that this is not due to asthma, but is due to a breathing pattern disorder for which there is reasonable treatment intervention from which [Mr D] is likely to benefit.
>
> Therefore, on the balance of probabilities, it is my opinion that the medical evidence does not indicate permanent disablement."