

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

Complainant : Mr CR Cooledge
Scheme : The Firemen's Pension Scheme
Manager : North Wales Fire Service (NWFS)

THE COMPLAINT (dated 19 August 2002)

1. Mr Cooledge has complained of injustice as a consequence of maladministration on the part of the NWFS in that they failed to establish the date on which he became permanently disabled. Mr Cooledge considers that, as a result, his deferred pension has not been paid from the correct date.

MATERIAL FACTS

The Firemen's Pension Scheme Order 1992

2. Regulation B5(4) provides,

“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,

and no payment in respect of the pension shall be made for any earlier period.”
3. Regulation A10 provides,

“Disablement

 - (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.
 - (2) Subject to paragraph (3), disablement means incapacity, occasioned by infirmity of mind or body, for the performance of duty...

- (3) Where it is necessary to determine the degree of a person's disablement...
- (4) Where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the fire authority."

4. Regulation H1 provides,

"Determination by fire authority

- (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 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 any disablement has been occasioned by a qualifying injury,
 - (d) the degree to which a person is disabled,
 - (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 fire authority shall obtain and consider the written opinion of at least one qualified medical practitioner selected by them."

Background

5. In July 1997 Mr Cooledge suffered an accident whilst attending a fire in a cornfield when he fell whilst trying to climb over a wire fence. Mr Cooledge went on sick leave on 7 September 1997. On 14 November 1997 he was seen by the County Occupational Physician, Dr Baron, who reported that he anticipated that Mr Cooledge would make a full recovery in due course. Dr Baron did, however, say that he did not think Mr Cooledge would be fit to return to work for two months. Dr Baron saw Mr

Cooledge again on 16 January 1998 and reported that his symptoms had not improved. Dr Baron proposed a review in six weeks and thought that Mr Cooledge was unlikely to be fit to return to work for two to three months.

6. On 6 July 1998 Mr Mallucci, a Consultant Neurosurgeon, wrote to Dr Baron following a consultation with Mr Cooledge. He said that Mr Cooledge was not a candidate for neurosurgery but did have continued low back pain. Mr Mallucci said that he hoped Mr Cooledge's back would improve with time because there was no major disc prolapse. However, he went on to say that there was no way of predicting if he would be able to go back to his duties with the Fire Service because low back pain could take on a chronic nature.
7. Dr Baron informed the NWFS that Mr Cooledge did not have a problem which would respond to surgical treatment. He said that with alternative non-surgical treatment there was a chance that Mr Cooledge would be able to return to operational duties in the future. In October 1998 Dr Baron informed the NWFS that Mr Cooledge had seen small improvements in his symptoms since starting treatment but that it was too soon to judge whether it would be successful. Dr Baron suggested that it might be sensible to refer Mr Cooledge for an independent orthopaedic assessment. Dr Baron wrote to the NWFS again on 28 October 1998 after seeing Mr Cooledge again at his request. He said that, whatever the outcome of the treatment, it was unlikely that Mr Cooledge would be fit for operational duty for the near to medium foreseeable future. He said that, although it was difficult to be definite about the long term future, given the long history of Mr Cooledge's problem it was becoming more likely that he would be unable to perform operational duties in the longer term.
8. Dr Baron also wrote to Dr Lake, the Consultant Anaesthetist who had been treating Mr Cooledge at a pain clinic. Dr Lake responded,

“In the long term there is every reason to suppose that Mr Cooledge can be gainfully employed, but I suspect that this will not be in a physically demanding occupation when problems with back pain could lead to difficulties in the discharge of his duties.”

9. In November 1998 the NWFS wrote to Dr Baron explaining that it had been brought to their attention that Mr Cooledge had been taking part in car-rallying and they asked what effect this might have on his recovery and return to duty.
10. Mr Cooledge was dismissed from his employment with the NWFS on 2 December 1998 and appealed against his dismissal. This appeal was heard on 11 January 1999 and the dismissal was upheld and consequently took effect from that date. Mr Cooledge therefore became entitled to deferred benefits in the Scheme with effect from 11 January 1999. He applied for the early payment of his deferred benefits under Regulation B5(4) (see paragraph 2) on 8 February 1999. Mr Cooledge also appealed to the Secretary of State against his dismissal. In May 1999 the NWFS informed Mr Cooledge that his application for the early payment of his deferred benefits would be held in abeyance until the Secretary of State came to a decision regarding his appeal against dismissal. The Secretary of State dismissed Mr Cooledge's appeal on 8 May 2000.
11. Following the Secretary of State's decision, the NWFS requested a report from Dr Baron, who saw Mr Cooledge on 13 July 2000. On 18 July 2000 Dr Baron wrote to the NWFS,

“...I have come to some conclusions myself but given the sensitivity of the case, I think it would be extremely helpful to have an independent orthopaedic assessment before I make any recommendations...”
12. Following confirmation from the NWFS that they would pay for the consultation and report, Dr Baron wrote to an orthopaedic surgeon, Mr Braithwaite,

“...This case is a somewhat complex one from an employment point of view. Mr Cooledge was on long-term sick absence with low back pain and right sided sciatica from September 1997 to approximately November 1998. He claims that this followed an injury on duty when he fell climbing over a fence in July 1997. He had been investigated and examined by Mr. Mullicci (*sic*)... and I enclose a copy of his report. He had also been referred to Dr. Lake at the pain clinic... He was subsequently the subject of the Fire Service disciplinary process because he had been participating in international rally driving events prior to going off sick in

September and subsequent to going off sick. I enclose a summary of these events from the brigade to the Fire Policy Unit in the Home Office. As you will see, Mr. Cooledge was subsequently dismissed.

Mr. Cooledge has now applied for early release of his pension on the grounds of permanent ill-health. He is also seeking payment of an injury award on the basis that his incapacity was caused by an injury on duty. The actuarial cost of the such an award is very significant and so the Fire Brigade would wish to ensure that any judgement relating to this is taken following careful objective medical assessment and where possible is evidence based.

I would be most grateful if you could advise me regarding your opinion as to the following:-

1. Mr Cooledge's diagnoses.
2. Whether his current apparent disability is consistent with the objective clinical findings and diagnosis.
3. Whether the disability could be expected to incapacitate Mr. Cooledge from undertaking the heavy manual activities required of a fire-fighter.
4. Whether any disability could be considered to be permanent.
5. Whether his medical condition is consistent with having been caused or substantially contributed to by the accident that he describes as having occurred in July 1997.
6. Whether his rally driving activities could have contributed to the severity of his medical condition and if so by what proportion."

13. Mr Braithwaite saw Mr Cooledge in February 2001. In his report, Mr Braithwaite said,

"...In this case I am satisfied that there probably was little or no back pain in the few years prior to the incident. The incident he describes would be compatible with a jarring, twisting or flexing injury to the spine, or a combination of all of these. There appears to be a close temporal relationship between the incident and the onset of symptoms. The evidence I have suggests that symptoms continued from that date.

...Symptoms must in my view be coming from the worn discs in the low back, shown on the MRI scan, which will undoubtedly have pre-dated the accident, but may have been asymptomatic prior to the accident...

I do not know what standards of physical competence are required for fire fighting, but I understand that for front line duties Mr Cooledge would have to be A1 fit. He is clearly not that, and with back pain may be a risk to himself and others. He would however in my view be suitable for virtually all other forms of work including quite heavy work, but probably not fit for heavy manual labour...

Turning to the specific questions:

1. The diagnosis is mechanical low back pain from degenerative discs at L4/5 and L5/S1.
 2. In my view his current disability is mild, and this is consistent with the objective clinical findings and diagnosis.
 3. My understanding of the requirements of a fire-fighter is that they have to be A1 fit. He is not. He would not in my view be suitable for the heavy manual activity of a fire-fighter.
 4. Yes it will be permanent. The statistical evidence is that beyond eighteen months or two years symptoms will not get better.
 5. This question is very difficult. Does two years' acceleration constitute a substantial contribution?
 6. His rally driving activities could well have contributed to worsening and perpetuation of his symptoms. I cannot say in what proportion. More importantly it suggests to me that he had little or no trouble with his back."
14. Dr Baron forwarded a copy of Mr Braithwaite's report, together with a covering letter, to the NWFS on 12 March 2001. In his letter Dr Baron provided a summary of his interpretation of Mr Braithwaite's report. Dr Baron said that Mr Cooledge's symptoms had been present for over eighteen months and should therefore be considered permanent. He also noted,
- “...The symptoms caused absence from work some two months after the accident described on 22nd July, 1997. During this time

he had attended work and had also been involved in rally driving activities. While his description of the accident in July 1997 is consistent with a jarring and twisting injury to his spine and the timing of this is consistent with his account of the onset of symptoms, it is not clear how much this contributed to his disabling symptoms given the intervening two months period. I understand Mr Braithwaite's opinion to be that even if the incident has been responsible for bringing forward Mr. Cooledge's symptoms, the underlying condition would have been present before the accident and the most that his problem has been accelerated would be considered to be two years..."

15. On 27 March 2001 the NWFS informed Mr Cooledge that they had received a copy of Mr Braithwaite's report on 19 March 2001 and that the report had confirmed that he was permanently incapacitated. In their letter the NWFS informed Mr Cooledge that his deferred benefits would be put into payment from 26 March 2001. Mr Cooledge's solicitors wrote to the NWFS on his behalf and said that under Regulation B5(4) the benefits should become payable from the date that Mr Cooledge became permanently incapacitated. They suggested that the NWFS should obtain a supplementary report in order to establish if Mr Cooledge was permanently incapacitated at the date of his original application.
16. The NWFS responded that Dr Baron had been asked to make a determination under the Scheme and he had examined Mr Cooledge on 13 July 2000. The NWFS said that Dr Baron had requested a report from Mr Braithwaite and that they did not consider it necessary to request a supplementary report. The NWFS said that the benefits were being paid in accordance with Regulation B5(4)(b), on the basis that the NWFS had become aware of Mr Cooledge's permanent incapacity on 19 March 2001.
17. Mr Cooledge's solicitors suggested that his pension should be payable from 13 July 2000. The NWFS said that Dr Baron's report following his examination of Mr Cooledge had been inconclusive. They stated that it was only following Mr Braithwaite's report that a conclusive assessment of Mr Cooledge's condition could be ascertained. The NWFS said that they did not make a final decision on the release

of Mr Cooledge's deferred pension until 19 March 2001, when they received Mr Braithwaite's report.

18. Mr Cooledge appealed against this decision under the Internal Dispute Resolution (IDR) procedures. At Stage Two of the IDR procedure the NWFS agreed to backdate his deferred pension to 13 February 2001, ie the date of Mr Braithwaite's examination.
19. It is the opinion of the NWFS that, should they be required to reconsider the date on which Mr Cooledge's benefits became payable, it would be unreasonable to expect any doctor to look back in time and judge the precise date that Mr Cooledge became permanently disabled. The NWFS suggest that the date should be determined as provided in Regulation A10(4) (see paragraph 3) and the benefits made payable from 8 February 1999.
20. The NWFS are of the opinion that, should I find that Mr Cooledge's pension is payable from an earlier date, that I should not require them to pay any interest on arrears nor direct payment of compensation for distress and inconvenience. They give as their reasons for this, the fact that Mr Cooledge was dismissed for gross misconduct and that he has had little to do himself in bringing the complaint to me because his union's solicitors are acting for him. They also point out that Mr Cooledge has continued to develop his car rallying career.

CONCLUSIONS

21. The Regulations clearly provide for a member's deferred benefits to become payable from the date on which he becomes permanently disabled. The Regulations also provide for the fire authority to decide such questions, having obtained an opinion from a qualified medical practitioner. In coming to a decision of this kind, the fire authority are, in my opinion, making a finding of fact.
22. The initial response from the NWFS, that the pension should be paid from the date they became aware of Mr Cooledge's permanent incapacity, is not a correct interpretation of the Regulations. This initial position was altered following Mr Cooledge's appeal under the IDR. However, I am not persuaded that the alternative

date chosen by the NWFS for the commencement of Mr Cooledge's pension is correct either.

23. The Regulations require them to pay the benefits from the date Mr Cooledge became permanently disabled not from the date of the report confirming that he is permanently disabled. On the basis of the evidence submitted to me, the NWFS have made no attempt to ascertain the likely date on which Mr Cooledge became permanently disabled. Their failure to do so amounts to maladministration on their part.
24. I do have some sympathy with the NWFS's point that it would be difficult for a doctor to look back in time and decide precisely when Mr Cooledge became permanently disabled. However, the level of certainty required is not absolute but should be based on the balance of probability.
25. Regulation A10(4) would apply only if Mr Cooledge had retired prior to becoming disabled. Thus for this Regulation to apply presupposes a finding to that effect which does not accord with the evidence,
26. Mr Cooledge's deferred benefits cannot be payable any earlier than the date on which he became entitled to them, ie 11 January 1999. The NWFS say that the date of entitlement is the date when the pension should first be paid. On the contrary, a member of a pension scheme is entitled to deferred benefits when he meets the preservation requirements set out in the surrounding legislation. This is not the same as entitlement to payment of those benefits, which is what the NWFS is referring to.
27. Mr Braithwaite thought that the evidence suggested that the symptoms associated with Mr Cooledge's back problem dated from the accident in July 1997. He did not consider that the accident was the cause of the symptoms but rather that there was an pre-existing problem of worn discs. Mr Braithwaite says that, statistically, any symptoms which persist beyond eighteen months to two years can be considered permanent.
28. Mr Cooledge went on sick leave as a consequence of his back problem on 7 September 1997 and Dr Baron confirmed that he was unfit for operational duties in November 1997. At the time Dr Baron thought Mr Cooledge would be unfit for duty

for two to three months but was optimistic that he would eventually return. This optimism proved to be misplaced and Mr Cooledge has never been deemed fit for operational duty since. At the date that Mr Cooledge applied for the early payment of his deferred benefits he had been suffering the symptoms of low back pain for over eighteen months. Indeed, at the time he first became entitled to deferred benefits he had been suffering from these symptoms for over eighteen months. It would therefore have been possible, on the balance of probability, to say then that this condition was permanent. I note that the reference to an eighteen month period is made in Mr Braithwaite's report of February 2001, which the NWFS, quite rightly, say was not available to them until that date. However, when the NWFS eventually made their decision to pay Mr Cooledge's pension, it was available to them and strongly indicated that the pension should be backdated in order for it to be paid from the date that Mr Cooledge became permanently disabled. I also note that the NWFS failed to follow up Dr Baron's suggestion in October 1998 that Mr Cooledge be referred to an independent orthopaedic surgeon. Had they done so, it is reasonable to suggest the this information would have been available to them at an earlier date.

29. Thus, having accepted that Mr Cooledge's back problem renders him incapable of the performance of his duties and knowing that he had already been suffering the symptoms of this condition for at least eighteen months at the time he became entitled to deferred benefits, it would difficult to draw any other conclusion than that Mr Cooledge was permanently disabled as at 11 January 1999. However, the Regulations refer to the member being disabled at the time when the question arises for decision and to his disablement being at that time likely to be permanent (see paragraph 3). The time when the question of Mr Cooledge's permanent disability arose was when he applied for the early payment of his deferred benefits, ie 8 February 1999. Thus I find that Mr Cooledge's deferred benefits are payable with effect from the date of his application; 8 February 1999. This does not mean that I find that Regulation A10(4) applies, as I explained in paragraph 25. There may be a coincidence in the date I have arrived at but this does not mean that Regulation A10(4) applies.

30. As a consequence of the NWFS's failure to establish the date on which he became permanently disabled Mr Cooledge has suffered injustice, inasmuch as he has not received his benefits from the correct date. Consequently, I uphold his complaint against the NWFS.
31. I have considered the NWFS's representations regarding the payment of interest and compensation for distress and inconvenience. The reason for Mr Cooledge's dismissal is irrelevant to his entitlement to the arrears; as is the fact that he has been represented. Mr Cooledge has not had the beneficial use of the arrears through no fault of his and it is appropriate that he receives redress to reflect this.
32. Finally I should mention that the Clerk to the NWFS wrote to me on 24 April asking that I should delay the issue of this determination until after elections to the Welsh National Assembly had been held on 1 May. He suggested that the forthcoming elections would inhibit members of the Authority from responding to my decision in the way they would wish. That seems to me another example of NWSFS allowing irrelevant matters to intrude on the proper consideration of Mr Cooledge's pension. I have given short shrift to that suggestion which should not have been made.

DIRECTIONS

33. I now direct that, within 28 days of the date hereof, the NWFS shall pay Mr Cooledge arrears of pension backdated to 8 February 1999, together with simple interest at the rate quoted by the reference banks.

DAVID LAVERICK
Pensions Ombudsman

28 April 2003