

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

Applicant : Mr C V Marshall
Scheme : Firefighters' Pension Scheme (the **Scheme**)
Respondents : 1. Derbyshire Fire and Rescue Service (the **Employer**)
2. Department for Communities and Local Government (**DCLG**)

Subject

Mr Marshall says that the Employer and the Board of Medical Referees (**the Board**) refused his request for a pension on grounds of ill health. He does not believe that the appeal hearing was handled correctly.

The Ombudsman's determination and short reasons

- The complaint cannot be upheld against the Employer because the Employer is bound by the opinion of the independent qualified medical practitioner when determining entitlement to ill health early retirement benefits. In the independent qualified medical practitioner's opinion Mr Marshall did not satisfy the criteria that his incapacity was the result of a qualifying injury.
- The complaint should be upheld against DCFS in relation to the appeal hearing. There was a procedural error in arranging the hearing so that Mr Marshall's representative could not be present.

DETAILED DETERMINATION

Material Facts

1. The applicable Rules are contained in the Firefighters' Pension Scheme 1992 Order. The relevant sections of that order are set out in the appendix.
2. Mr Marshall was born on 15 October 1950. He was employed as a full time firefighter with East Midlands Airport and also as a retained firefighter (Watch Manager) with Derbyshire Fire and Rescue Service.
3. During the course of his employment he suffered a number of accidents whilst on duty, all of which were appropriately reported
 - 26 June 1992 – injured both knees whilst on a training course due to lifting and dragging a casualty;
 - 29 March 1993 – suffered damage to his hearing as a result of an explosion at a petrol filling station;
 - 20 June 1996 – twisted his knee whilst running across the drill ground;
 - 22 May 2002 – injured his knee whilst rescuing a cow from the River Derwent.
4. Mr Marshall commenced a period of sickness absence on 10 December 2004 and was seen by the Employer's Senior Occupational Health Physician, Dr O P Chawla, on 7 March and 24 June 2005. Having reviewed Mr Marshall's medical records, Dr Chawla stated in a report to the Employer dated 18 July 2005 that as a result of osteoarthritis in his knees, Mr Marshall was likely to be permanently incapable of acting in his post at least until age 55, the Normal Retirement Age under the Scheme. Dr Chawla recommended that Mr Marshall should be referred to an independent qualified medical practitioner under Rule H1 of the Scheme.
5. Mr Marshall's case was considered by Dr C J M Poole (Consultant Occupational Physician) acting as the independent qualified medical practitioner. His opinion was given on 21 September 2005, qualified in a further letter to Mr Marshall dated 29 September. In Dr Poole's view Mr Marshall met the requirements for ill health retirement, in that his knee problem meant that he was permanently disabled from

performing the duties of a Retained Firefighter, but his disablement had not been occasioned in the execution of his duties.

6. Mr Marshall was advised by the Chief Fire Officer on 3 November 2005 that he was to be retired on medical grounds but because the opinion of the independent qualified medical practitioner was that his medical condition was not due to a ‘qualifying injury’, he would not be entitled to a pension. His contract of employment was terminated on 29 December 2005. He was advised of his right of appeal against the medical decision.
7. The extracts of the relevant sections from ‘Firefighters Pension Scheme: Medical Appeals – A GUIDE FOR APPELLANTS’ (the **Guide**) read:

“DATES YOU WILL NOT BE AVAILABLE FOR A HEARING

- *These must be notified to BUPA and DCLG immediately if they have not already been given.*

...

- *It will take roughly four months, from receipt of all papers, to fix a hearing date. 2 months notice will normally be given.*

REPRESENTATION

- *If you wish to be represented (by a Union Rep. for example) contact the representative now. **Once the date is fixed, the hearing will proceed whether or not they are available.***

...

- *Prior notification of the attendance of a union representative is not required.*

SUBMIT EVIDENCE AS SOON AS POSSIBLE

- *All evidence has to be with the Board at least 7 days prior to the hearing.*
- *Papers and medical reports **will not** be accepted on the day.*
- *All papers must be copied to **all** parties.”*

8. Mr Marshall lodged his appeal on 18 November 2005. The appeal hearing was originally scheduled for 21 August 2006, as notified by letter from the Board dated 28

June 2006. Mr Marshall appeared on the day but one of the Board members failed to attend and the hearing was adjourned.

9. The hearing was rescheduled for 15 December 2006 and Mr Marshall was advised of the new date by letter dated 7 November. He says that both he and his FBU representative asked for the date to be changed because it coincided with the FBU Conference, but their requests were refused.
10. At the hearing on 15 December 2006 Mr Marshall was questioned by the Board about his state of health and ongoing treatments, and asked for his submission. Following this the Employer was asked for its submission at which point its representative circulated a two page written statement. Mr Marshall was given 20 minutes to read this and consider his response.
11. As part of the proceedings, Mr Marshall then underwent clinical examination by Mr D Ohio (a consultant trauma surgeon) and Dr R Palaniappan (a consultant audiological physician).
12. Mr Ohio said that there was clinical and radiological evidence of osteo-arthritis in both knees. Mr Marshall also had genu varum (bow knees), which was congenital, and pes planus (flat feet). These conditions all contributed to the pressure load on the medial compartment of the knee. The injuries suffered in the course of his duties had been mostly soft tissue / ligament injuries and had not contributed to the degenerative changes in his knees.
13. Dr Palaniappan found from examining the available audiogram that the asymmetric nature of Mr Marshall's hearing loss was not typical of occupational hearing loss due to regular long term noise exposure. The immediate awareness of hearing loss following the explosion in March 1993, which improved over the following few days pointed to possible "temporary threshold shift". It was less likely that the index event in March 1993 produced any significant lasting effect on his hearing as Mr Marshall was not symptomatic until almost a year later when he mentioned it to his GP in February 1994. The audiometric deterioration appeared significantly worse only after 2000. It was therefore Dr Palaniappan's opinion that Mr Marshall's hearing impairment was probably caused by several factors, including past history of ear infection, vascular risk factor associated with raised blood pressure and a tendency

for premature age related hearing loss as suggested by left sided tinnitus and possible deafness recorded in Mr Marshall's GP's notes dated 24 April 1980.

14. There followed a meeting of the Board at which the evidence presented was discussed. It was found at the meeting that:

- Mr Marshall had a history of left tinnitus and deafness as early as April 1980, which raised the possibility of early onset presbycusis (age related hearing loss) related to medical factors, apart from noise exposure.
- There was no record of Mr Marshall having sought medical advice or attention following the explosion in March 1993 until February 1994 suggesting that he was not significantly bothered by his hearing loss or tinnitus at that time. On reviewing the audiometric patterns, the Board did not consider the evidence to suggest changes typical of noise damage and it would be difficult to draw conclusions with respect to the contribution caused by the garage explosion.
- Mr Marshall's hearing was described by his Consultant ENT Surgeon in April 1995 as suffering from mild high frequency hearing loss, but in March 2001, another Consultant ENT Surgeon described his condition as presbycusis superimposed upon the residual effect of the blast injury. In other words there had been a major change in Mr Marshall's hearing in the years between 1995 and 2001 and not immediately following the blast. However, notwithstanding all of the above evidence his hearing was acceptable when measured against the medical standards applied to operational firefighters.
- Hearing loss at the levels experienced by Mr Marshall would not on its own have led to his premature retirement. The Board did not consider that the hearing loss could be considered in any respect a 'qualifying injury'.
- Mr Marshall suffered from bow knees and flat feet. Clinical examination and x-rays showed that he also suffered from a degree of osteo-arthritis of the knees. This was recognised clinically as constitutional in origin (i.e. wear and tear) and the Board needed to decide if his fire service had added significantly to the wear.

- The Board's view was that the various incidents cited by Mr Marshall appeared to be soft tissue injuries which have not materially contributed to the progression of his symptoms, and were not significant in terms of the progression of his illness.
 - Mr Marshall also continued to work for East Midlands Airport Fire Service until he was obliged to take sickness absence because of an unrelated problem. This would suggest that his ongoing knee problems were not a significant handicap at that time. The Board therefore concluded that Mr Marshall's fire service did not significantly contribute to the development of his bilateral knee problem. As a consequence it was decided that his knee problem and hearing impairment were not occasioned by 'qualifying injuries'.
15. Mr Marshall subsequently complained that the Chairman of the Board should not have allowed the Employer to present a written statement at the hearing as this was in contravention of the Regulations. In an e-mail to the Employer dated 15 May 2007, the Chairman wrote:

'It is important to understand that this statement did not contain new material to which Mr Marshall should have had prior access. The document simply outlined the authority's position in this case. However, mindful of the fact that Mr Marshall was representing himself, and in order that he could have every opportunity to read, consider and respond to the statement, I allowed him to have a copy and I gave him more than adequate time at the conclusion of the clinical examination for Mr Marshall and his friend (present as a supporter) to study it before the Hearing reconvened for the final session. I asked Mr Marshall whether he considered that he had had sufficient time to consider and respond to the document, and he stated that he had.

I would have been within my rights as Chairman simply to let the HR officer read his submission without giving Mr Marshall prior sight, but I wanted to give Mr Marshall every opportunity for a fair and thorough Hearing.'

Summary of Mr Marshall's position

16. Regarding the decision not to grant him a pension on grounds of ill health, he questions the independence of Dr Poole in relation to the Employer. His knee and

hearing injuries were caused whilst on duty with the Employer and were reported and documented at the time.

17. Regarding the appeal hearing, he says the Employer should not have been allowed to submit a written statement. Regulations say that his appeal hearing should have been done 7 days before. He does admit that the statement included no new evidence. He also says that he had insufficient notice of the revised date for the hearing.
18. He disagrees with the opinion of the Board Chairman, expressed in his e-mail dated 15 May 2007 that the Employer's statement simply outlined their position.
19. The Employer's statement contained no mention of his hearing impairment.
20. He disagrees with the description of his knee injury.
21. He disagrees with the finding that his hearing is adequate for his operational role.
22. He disputes the Employer's statement made that no reference to concerns raised by his managers regarding his hearing.
23. He feels that official reports concerning the hearing of two colleagues who were present at the explosion in 1993 masked the true position.
24. There were a number of irregularities in the conduct of the appeal hearing and these were: short notice of appeal hearing, lack of representation and the introduction of new evidence. In support of his argument, he refers to DCLG's 'Medical Appeals – A Guide for Appellants' (the Guide) and says:
 - he was only given five weeks' notice of the revised date for the hearing whilst the Guide states that two months' notice will normally be given
 - the Guide says that no prior notice of the attendance of a Union representative is required, but once the date of the hearing has been set it will proceed whether or not they are available
 - the revised date for the hearing coincided with the FBU conference which meant that he would be unrepresented
 - although he asked for the date to be changed, DCLG refused his request
 - the Guide says that all evidence has to be submitted at least seven days prior to the hearing and that papers and medical reports will not be accepted on the

day; the Employer presented a two page statement at the hearing and that he was given only 20 minutes in which to read, digest and comment on its contents.

Summary of the Employer's position

25. It followed the procedures as set out in the Rules when considering Mr Marshall's request for an ill health pension.
26. According to the Rules, the decision as to whether or not a member is eligible for an ill health pension is based upon medical opinion. Mr Marshall was initially examined by Dr Chawla, who decided that he was permanently unfit to continue as a Retained Fire Fighter.
27. Dr Poole fulfilled the criteria for an independent qualified medical practitioner. It was Dr Poole's opinion that Mr Marshall's condition was not due to or substantially aggravated by the injury/injuries on duty.
28. As the Rules provided that the independent qualified medical practitioner's decision was binding on the employing authority, Mr Marshall was refused an ill health pension.
29. Mr Marshall appealed against the medical opinion under rule H2. The Rules required the parties to be given 21 days notice but in practice two months notice was given.
30. The issue of representation for Mr Marshall was a matter for him and if his representative was unable to attend the hearing, any application to adjourn the hearing had to be made to the Board. This was not a matter for the Employer nor was it within its control.
31. It did not submit any new evidence at the hearing. A statement had been prepared for the Board and Mr Marshall as an alternative to a verbal presentation.
32. The statement is legitimate in that it alleviated the need for note taking for both the panel and the employee and allowed both parties to concentrate on the content of the presentation.

Summary of DCLG's position:

33. There are no rules on representation.

34. It is agreed that if the written statement constituted new evidence it should have been submitted seven days in advance of the hearing. The Employer's representative says that the statement was prepared as an alternative to a verbal presentation, thus avoiding the parties needing to take notes. It referred solely to matters contained in available documentation.
35. The Chairman of the Board said 'it is important to understand that this statement did not contain new material to which Mr Marshall should have had prior access'. The document simply outlined the Employer's position.
36. The Board had Mr Marshall's full Occupational Health and GP records available to it, and a considerable amount of medical evidence was taken into account.
37. The Pensions Ombudsman has no jurisdiction over the Board.

Conclusions

The decision to refuse a pension on grounds of ill health

38. The Rules state that the Employer shall decide whether or not a person is entitled to an ill health pension from the Scheme. The Board has no part to play in this initial decision.
39. The Rules also state that in making their decision the Employer shall obtain the written opinion of an independent qualified medical practitioner selected by them and the opinion of the independent qualified medical practitioner is binding on the Employer.
40. The Rules provide that in coming to an opinion the IQMP has to consider whether the person in question meets certain criteria. The IQMP chosen by the Employer to deal with this case was Dr Poole. In his report to the Employer of 21 September 2005, Dr Poole concluded that even though Mr Marshalls' knee problem made him permanently disabled from performing the duties of a Retained Firefighter, he was unable to confirm that Mr Marshall's incapacity was the result of a qualifying injury. As incapacity as a result of a qualifying injury is one of the criteria for qualifying for an ill health pension, the Employer was entitled to refuse Mr Marshall's request based on Dr Poole's opinion.

41. Mr Marshall has questioned the independent status of Dr Poole, without explanation. I can see no reason to question the independent status of Dr Poole.
42. For the reasons given in paragraphs 18 to 20 above, I do not uphold this part of the complaint against the Employer or the Board.

The appeal

43. I have potential jurisdiction where a complaint concerns an act or omission of an administrator of a scheme (the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, regulation 2(1)). Those regulations are made under section 146(4) of the Pension Schemes Act 1993 which empowers the Secretary of State to extend the Pensions Ombudsman's jurisdiction to a person concerned with the administration of the scheme. Section 146(4A) says that a person is so concerned if they are "responsible for carrying out an act of administration concerned with the scheme".
44. Before section 146(4A) was inserted there was a relevant appeal against a decision of a previous Pensions Ombudsman. In that appeal the High Court and the Court of Appeal found that the person concerned (an insurance company) was not "concerned with administration of the scheme" even though it might have been carrying out an act of administration of the scheme. (*R (Britannic Asset Management Ltd) v Pensions Ombudsman* [2002] EWCA Civ 1405, [2003] ICR 99.) The reasoning in that case was applied in a subsequent appeal against a Pensions Ombudsman's decision involving findings about an independent qualified medical practitioner in relation to the Firefighters' Scheme (*Suffolk County Council v Wallis* [2004] EWHC 788 (Ch)).
45. The Courts' decisions in these cases were based on the legislation as it stood before section 146(4A) existed. Under the modified legislation a person responsible for carrying out an act of administration *is by definition* concerned with the administration of the scheme.
46. So the question in this case is whether the Board was carrying out such an act. In my judgment it was. First what the Board did was plainly "concerned with" the Scheme. The appeal is provided for under the Rules, including significant aspects of process; it is integral to the Scheme. I do not see that it can be regarded as an external process. The fact that the decision that the Board reaches involves medical judgment does not

make it non administrative. The Board made a medical decision of an administrative nature in that it is capable of determining entitlement to benefit. It is therefore carrying out an act of administration and so within my jurisdiction. That said, its medical judgments cannot be interfered with if they are reached without procedural impropriety and are not perverse.

47. I am satisfied that the appeal process is within my jurisdiction, therefore.
48. Mr Marshall has made a number of criticisms of procedural aspects of the appeal hearing. He has referred to the Guide. He says that he was given insufficient notice of the date of the rearranged hearing. The Guide states that it would take roughly four months to fix a hearing date, but normally two months' notice would be given. In fact the Rules provide for 21 days' notice, which was complied with.
49. Mr Marshall says that the change of date meant that he could not be represented by the FBU as the new date coincided with the FBU conference and the Board was not prepared to consider another date. Although the Rules make no provision for representation, the Guide is clear that representation is permitted and implies that if the representative is contacted before the date is fixed arrangements can be made to accommodate him or her (if not then what is the purpose of urging early contact?)
50. Mr Marshall arrived for the initial hearing. It did not take place, through no fault of his own. It was reconvened for a time that was disadvantageous to Mr Marshall as against the original hearing because he could not be represented. Arranging the times and dates of hearings and allowing representation is a matter within the Board's discretion. But that discretion has to be exercised reasonably. No good reason has been offered for not giving Mr Marshall an opportunity for a hearing that fairly replaced the postponed one. In the circumstances I consider that the failure to rearrange a date at which Mr Marshall could be represented was maladministration.
51. Mr Marshall says that that a written statement was presented by the Employer at the hearing in contravention of the Rules. DCLG agrees that a written statement should be submitted seven days before the hearing, but, in effect, only if it contains new evidence.
52. I regard it as unsatisfactory that a written statement should be admitted so late. The Rules say nothing about the content of the statement. They say, however, that the

Board “may” postpone the hearing date if the statement is submitted late, leaving discretion for it not to be postponed. The Chairman of the Board considered the statement and was satisfied that it contained no new evidence that Mr Marshall did not have prior access to (a point with which Mr Marshall agrees). Mr Marshall was allowed a further 20 minutes to re-read the statement and consider whether he wished to raise any further matters. I do not find that the failure to postpone the hearing caused any harm to Mr Marshall.

53. I cannot make a similar finding about the fact that Mr Marshall went unrepresented. I regard that as a sufficient flaw in the proceedings to require a rehearing.

Directions

54. I direct DCLG, acting for the Secretary of State, to refer the matter to a board of medical referees under Schedule 9 of the Regulations as if this had not yet been done.

TONY KING
Pensions Ombudsman

24 August 2009

APPENDIX

Relevant sections of the Rules

“Determination by fire authority

H1. – (1) The question of 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 purposes 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 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 acted at any time acted, as the representative of the member, the fire authority, or any other party in relation to the same case.”

In Part 1 of Schedule 1 of the Firefighters’ Pension Scheme 1992 Order “Independent qualified medical practitioner” is defined as:

“A medical practitioner holding a diploma in occupational medicine 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 or being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State.”

Appeal against opinion on a medical issue

“H2 (2) If the person concerned is dissatisfied with the opinion which has been supplied to him under paragraph (1), he may appeal against it by giving notice to the fire authority in accordance with paragraph 1 of Part I of Schedule 9.”

Appeal to Board of Medical Referees

Schedule 9 Part 1 of the Regulations provides:

“2(2) The Secretary of State shall refer an appeal to a board of medical referees (‘the board’)...

4(1) ...the board

- (a) shall interview and medically examine the appellant at least once, and
- (b) may interview or medically examine him to cause him to be interviewed or medically examined on such further occasions as the board thinks necessary for the purpose of deciding the appeal.

(2) The board shall—

- (a) appoint, and
- (b) give the appellant and the fire authority not less than 21 days’ notice of, the time and place for every interview and medical examination; if the board is satisfied that the appellant is unable to travel, the place shall be the appellant’s place of residence.

...

(5) Any interview under this paragraph may be attended by persons appointed for the purpose by the fire authority or by the appellant or by each of them

5(1) Where either party to the appeal intends to submit written evidence or a written statement at an interview held under paragraph 4, the party shall...submit it to the board and to the other party not less that 7 days before the date appointed for the interview.

...

(3) Where any written evidence or statement is submitted in contravention of sub-paragraph (1), the board may postpone the date appointed for the interview and require the party who submitted the evidence or statement to pay such reasonable costs of the board and of the other party as arise from the adjournment.