

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

<b>Applicant</b>	Mr Mike Beach
<b>Scheme</b>	Firefighters' Compensation Scheme ( <b>the Scheme</b> )
<b>Respondent</b>	Shropshire and Wrekin Fire and Rescue Authority ( <b>the Authority</b> )

**Subject**

Mr Beach complains that the Authority have incorrectly refused him an injury award from the Scheme.

**The Pensions Ombudsman's determination and short reasons**

The complaint should be upheld against the Authority because they relied on a flawed report by the Independent Qualified Medical Practitioner (**IQMP**). The basis on which permanent disability was assessed was unclear and the report referred to possible treatments without describing the likelihood of their success.

## DETAILED DETERMINATION

### Material Facts

*The provisions of the Scheme and associated literature*

1. The provisions of the Scheme are contained in Schedule I to The Firefighters' Compensation Scheme (England) Order 2006 (**the Order**).
2. Part I, Rule 8 sets the criteria for disablement that would qualify a firefighter for compensation.
  - “(1) References in this Scheme to a person’s being permanently disabled are references to his being disabled at the time the question arises for decision and to his disablement being at that time likely to be permanent.
  - (2) 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.
  - (3) Subject to paragraph (4), disablement means incapacity, occasioned by infirmity of mind or body, for the performance of duty...
  - (4) Where it is necessary to determine the degree of a person’s disablement, it shall be determined by reference to the degree to which his earning capacity has been affected as a result of a qualifying injury.”
3. Part 2, deals with Injury Awards and Duty-Related Compensation. Rule 1, paragraph (4) says:
  - “(4) Where the firefighter retired before becoming permanently disabled, no payment in respect of an injury pension shall be made for the period before he became permanently disabled.”
4. Part 6 is headed “Determination of Questions and Appeals”. Rule 1, “Determination by fire and rescue authority” says:
  - (1) The question whether a person is entitled to any and if so what awards shall be determined in the first place 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 any disablement has been occasioned by a qualifying injury,

- (b) the degree to which a person is disabled, or
  - (c) any other issue wholly or partly of a medical nature,
- the authority shall obtain the written opinion of an [IQMP] selected by them; and the opinion of the [IQMP] shall be binding on the authority.
5. Part 6 Rule 2 makes provision for appeals against the IQMP's opinion to a Board of Medical Referees.
  6. Normal pension age is defined as follows:
    - “in relation to employees of a fire and rescue authority appointed on terms under which they are or may be required to engage in fire-fighting, means 55”.
  7. “A Guide to the Firefighters’ Compensation Scheme 2006 for retained firefighters appointed before 6 April 2006” says:
    - “Note that a firefighter does not have to be a member of the Firefighters’ Pension Scheme (“FPS”) or the New Firefighters’ Pension Scheme (“NFPS”) to have cover for an injury award under the Compensation Scheme. Optants-out have cover, too. Nor is there a minimum or maximum age for a firefighter’s entitlement to an injury award”.
  8. A booklet described as “Guidance for IQMPs says”:
    - “The Firefighters’ Pension Scheme 2006 (**FPS**) and the New Firefighters’ Pension Scheme 2006 (**NFPS**) provide for early payment of benefits to scheme members who are found to be permanently disabled to undertake the duties of their role...The Firefighters’ Compensation Scheme (FCS) allows the award of further benefits where the incapacity has been occasioned by a qualifying injury... Certain benefits can also be provided to firefighters who chose to opt out of the FPS or NFPS, or for those who before 2006 were not permitted entry to the FPS, i.e. those employed as Retained Duty System (RDS) or volunteer firefighters.

9. The booklet goes on to set out the questions to be addressed by the IQMP as follows –
- “• Is the member disabled from performing their duty, i.e. as applicable to the job within their role? If so, is that disablement likely to be permanent? If so...the Fire and Rescue Authority (**FRA**) may retire the person compulsorily, and...a lower ill health pension can be awarded.
  - If the member is permanently disabled for duty, is he or she also disabled for regular employment (defined as at least 30 hours a week on average over a period of not less than 12 consecutive months beginning with the date on which the issue of the person’s capacity for employment arises)? This determines whether a higher award is payable.
  - Has any permanent disablement been caused by a qualifying injury? If so, the FRA may make an injury award to be paid.
  - If disablement has been caused by a qualifying injury, what is the degree of disablement? This determines the level of the injury award.”

*Mr Beach’s complaint*

10. Mr Beach was born on 30 September 1950 and became a part-time retained firefighter - Retained Duty System (RDS) - on 6 May 1968. He rose to the position of Watch Manager. He started a separate full-time role as a Retained Support Officer (RSO) on 3 July 2006. He is a member of the New Firefighters’ Pension Scheme (NFPS) in his RSO role but he is not a member of the Firefighters’ Pension Scheme (FPS) in his RDS role.
11. On 15 December 2008, Mr Beach fell down the stairs while on a Breathing Apparatus Training Course. He was placed on modified duties from 12 January 2009 after he said that he was suffering from back pain. He attended several occupational health clinics arranged by the Authority between April 2009 and February 2012. He also attended several courses of physiotherapy and osteopathy. Mr Beach says that his condition did not improve and he was dismissed from both his roles on 25 July 2012 on grounds of ill health. Mr Beach was awarded a pension in regard to his membership of the NFPS as a RSO.

12. In April 2012, Mr Beach applied to be considered for an injury award under the Scheme. He was referred to Dr Hobson, an IQMP, on 24 September 2012, who said in his report dated 5 October 2012 that:

“There is no evidence that [Mr Beach] has a more serious back problem or underlying medical condition and no evidence of a condition that would mean he had a permanent incapacity. Moreover there is no identified medical reason why he could not improve in the future. The changes seen on his x-ray and MRI scan are compatible with normal ageing and do not represent a degenerative condition. More than 50% of people of Mr Beach’s age will have similar changes or worse and these changes are not known to correlate with clinical symptoms or predict clinical course.

The onset of his back pain does appear to be clearly related to the incident that he describes at work without previous reported significant back problems prior to this. Whilst I felt that he was disabled at the moment from carrying out full operational firefighting duties, I did feel there was potential for him to improve further for instance through an active rehabilitation approach. This might include attendance at one of the residential fire-fighters charity establishments or he could have been referred to a specific back pain rehabilitation programme for instance at Oswestry Hospital where I note that he was previously seen by the specialist. Whether this would be sufficient to allow him to return to operational duties is more difficult to say and this would have to be a question of trial and error. However, I would normally recommend that these approaches were tried in someone with this condition with the aim of return to operational duties. There is also no clinical reason why Mr Beach could not again attempt BA training”.

13. In his covering letter to the Authority dated 9 October 2012, Dr Hobson said:

“Whilst I felt that Mr Beach did have a disabling condition preventing him from returning to operational fire fighting duties I did not feel this could be stated as likely to cause permanent disability until the age of 65.”

14. The Authority wrote to Mr Beach on 6 November 2012 with their decision. They said:

“Following your case referral to the [IQMP], Dr Hobson, has determined that whilst you have a disabling condition which he believes is 100% attributable to your injury and prevents you returning to operational fire fighting duties, he did not feel that this could be stated as likely to cause permanent disability until the age of 65.”
15. They therefore turned down Mr Beach’s application.
16. On behalf of Mr Beach, the Fire Brigades Union (**FBU**) wrote to the Authority on 14 November 2012. They queried the IQMP’s opinion having referred to the age of 65, when the retirement age was 55 for FPS and 60 for NFPS, and Mr Beach was already over both ages.
17. The Authority sought clarification from the Department for Communities and Local Government (**DCLG**) and also asked Dr Hobson to clarify his opinion. DCLG said that they “must have regard to the Normal Pension Age, not that you are bound by it. I find it difficult to conclude that a member is permanently disabled if they are likely to be fit within a matter of weeks or months but just happen to be over the age of 55”. Dr Hobson replied –

“Based on my assessment of him I didn’t feel I could state that Mr Beach had permanent incapacity regardless of the age that was being considered.”
18. The Authority wrote to Mr Beach on 19 March 2013 informing him of this and reiterated their decision not to award an injury award as he was not deemed to be permanently disabled.
19. The FBU wrote to the Authority on 27 March 2013. They said that Mr Beach’s initial complaint that his back condition was caused by a qualifying injury had been resolved as the IQMP had agreed with this. They raised a new dispute that Mr Beach’s injury should have been assessed as a permanent injury.
20. The Authority issued a new Stage One decision on 19 April 2013. They said that they recognised the complexity of the issue of eligibility as Mr Beach had passed the normal retirement age. However, they had an “unequivocal opinion from Dr

Hobson” that his incapacity was not permanent and the IQMP opinion was binding on them. Accordingly, the Authority decided that he was not entitled to benefits under the FCS for his Retained Duty System (RDS) Watch Manager role.

21. Mr Beach appealed on 3 June 2013. He repeated that, as he had a qualifying injury and was already beyond the retirement age of both the FPS and NFPS, he qualified for an award.
22. The Appeals Panel met on 3 October 2012 and heard from both Mr Beach (and the FBU representative) and the Authority. Mr Beach argued that the IQMP had acted outside his powers by assessing permanency of his injury after his retirement age. He again said that permanency was only in relation to the retirement age and once he was past that age the IQMP should not have considered that aspect. The FBU said that there had been previous cases where automatic entitlement had been agreed after retirement age. The Authority said that no evidence had been provided to demonstrate this and they could not disregard the requirement for permanent disablement.
23. In its deliberations, the Appeal Panel considered Part 2 Rule 1 (4) – “Where the firefighter retired before becoming permanently disabled, no payment in respect of an injury pension shall be made for the period before he became permanently disabled”. They noted that this indicated that the permanence test was still applicable where someone had already reached retirement age. They agreed that there was no indication of how permanent disablement should be assessed after normal retirement age. However, to qualify for an award under the Regulations, the qualifying injury has to be adjudged to be permanent. They said that the Authority was bound to abide by the IQMP opinion. In accordance with the Regulations, Mr Beach was assessed on the day the question of his disablement arose for decision and the IQMP opinion was that he was not permanently disabled. This opinion could not be disregarded even if Mr Beach was past NRA and the Authority could not substitute its own decision. They also pointed out that the Regulations say that the Authority “shall have regard to” means that it was a consideration and not a requirement if the retirement age was relevant. The Panel said that “the test of permanent disablement for Mr Beach...would be whether the disability appears likely to be permanent at the time when the question arises for decision”. The Appeal Panel therefore upheld the Stage One decision not to make an award under the Regulations.

24. Mr Beach has not appealed the IQMP's opinion under Part 6 Rule 2.

### **Summary of Mr Beach's position**

25. The FBU, on behalf of Mr Beach, say that the Authority have misinterpreted the rules of the Scheme. While the IQMP is obliged to give a medical opinion, it is up to the Authority to determine the interpretation of the Scheme rules. Permanency in the Scheme rules is always in reference to retirement age and there are no instructions of how it applies to individuals already beyond it. Likewise, reassessment of an award is possible before retirement age. However, there is no further requirement for reassessment after retirement age. This implies that permanence, for the purpose of the Scheme, is achieved on retirement age.
26. The IQMP acted outside of his authority by interpreting the Scheme rules in the manner that he did. This means that the Authority should not have relied on the IQMP report regarding permanency of the qualifying injury.

### **Summary of the Authority's position**

27. They say that Mr Beach cannot automatically qualify for injury benefits just because he is past his retirement age. The requirement of permanency still applies regardless. Permanency will be assessed by the IQMP on the day of the assessment and the Authority is bound by the IQMP opinion.
28. The Authority sought advice from various sources regarding the circumstances of this case. The DCLG did not respond again before the Stage Two decision but a subsequent reply confirmed that the Authority must have "regard" to the normal pension age when considering permanency. It went on to say that this does not mean that permanency should only be considered to normal pension age only as the Scheme rules would have said so in that case.
29. The Authority have not provided the full legal advice which they received, however the summary of it which they have provided informed them that they were bound by the IQMP opinion. The summary also refers to the IQMP opinion that Mr Beach did not have a permanent disablement "regardless" of his retirement age.



30. The Authority seeks clarification whether the Ombudsman is challenging the IQMP's medical opinion as that is, ordinarily, the remit of a Medical Appeals Board. They say that an injury award is subject to lifetime review. The advice they sought (and received) is evidence of considerable effort on their part to review the case thoroughly.

### **Conclusions**

31. There are certain well-established principles which the Authority is expected to follow in the decision making process and it is against these that the decision making process must be assessed. Briefly, they:
- must take into account all relevant matters and no irrelevant ones;
  - must direct themselves correctly in law (in particular, they must adopt a correct construction of the Rules/Regulations;
  - must ask themselves the correct questions;
  - must not arrive at a perverse decision.
32. A perverse decision is taken to mean a decision which no reasonable decision maker, properly directing itself, could arrive at in the circumstances.
33. The dispute that Mr Beach has brought does not directly concern the IQMP's medical judgment (which is no doubt why he did not take the opinion to appeal). His central concern is that the correct test has not been used.
34. I have considerable sympathy for the Authority, which have struggled with an unhelpful rule and have tried to obtain clarification, with little success.

### *Permanence*

35. Essentially Mr Beach says that he should automatically qualify for the injury award as he is past the retirement age and has a qualifying injury. The Authority says that the rules do not expressly provide for when an applicant is already past the retirement age and the rules do not allow them to make an award in those circumstances. Furthermore, they say that the opinion of the IQMP is binding on the Authority and that opinion is that Mr Beach is not permanently disabled regardless of his retirement age.

36. The relevant wording is "...a fire and rescue authority shall have regard to whether the disablement will continue until the person's normal pension age." That is not the same as saying that in all cases in which the disablement will last until normal retirement age it is to be treated as permanent. The word "permanent" has not been redefined. It bears its ordinary meaning, but fire and rescue authorities are given a particular matter to bear in mind when considering any particular case.
37. In that context, in any particular case whether disablement would continue to normal retirement age would be given more or less weight depending on the degree to which it might distort what was generally understood by permanence. In Mr Beach's case it cannot be greatly relevant. It would be a nonsense to regard Mr Beach's case as permanent (that is likely to last indefinitely) simply because it has lasted beyond a date in the past.
38. If authorities have historically treated lasting to normal retirement age as being equating to permanence that would not make it right for Mr Beach to be treated as permanently disabled where the regulations do not justify that.
39. However, the Authority would obviously wish to avoid anomalous results in deciding permanence across all ages. It is slightly relevant to Mr Beach's case – as it would be to a firefighter just below normal pension age – that, properly considered, a younger firefighter may have been more likely to have been treated as permanently disabled if it seemed likely that their disability would last to normal pension age. (Though it would also be material that such a person's award would potentially be subject to periodic review.)

*The decision in Mr Beach's case*

40. The Authority says, rightly, that an IQMP's decision is binding on them. But I do not think that they would be obliged to accept an opinion evidently based on a misunderstanding of the rules, for example - or which had regard to an immaterial fact.
41. Dr Hobson initially (and incorrectly) referred to a retirement age of 65. The Authority failed to notice this error until it was pointed out by Mr Beach. This amounts to maladministration. On review, the IQMP then said that Mr Beach was not permanently disabled "regardless of the age that was being considered". I think that was unhelpful and unclear, simply because it must be wrong. If he

was disabled at all (as Dr Hobson found he was) the disablement was bound to last for some period of time. So if the age being considered was, say, 63 then the disablement might have been “permanent” to that age.

42. What Dr Hobson may have meant was that in no normal sense of the word “permanent” was Mr Beach permanently incapacitated. But it was not what he said. And at the time his opinion was given, the Authority were themselves unsure how to assess permanence. So it is not clear how they expected Dr Hobson to be able to do so. That was particularly important since his written opinion on permanence (being “any other issue wholly or partly of a medical nature”) was stated to be binding on the Authority.
43. If the Authority understood that to be what Dr Hobson meant, then it involved interpretation of what was meant to be a binding opinion.
44. As I have said, I do not think that an opinion which is obviously wrong or inconsistent with the regulations could be regarded as binding. And the Authority obviously also thought that when they went back to Dr Hobson to point out the incorrect reference to age 65. I also do not think that an opinion which required interpretation could be regarded as binding. Mr Beach could reasonably expect an opinion which was clear and on its own the basis of the rejection of his application.
45. Dr Hobson also noted alternative treatments that could be attempted but said that it would have to be “a question of trial and error”. It is not clear that Dr Hobson relied on the existence of those treatments to reach his view that Mr Beach’s condition was not permanent by reference to any age, because they were written in the context of disability to age 65. But if he did, then he was not clear that the treatments would, on the balance of probabilities, assist Mr Beach.
46. I have broadly agreed with the Appeal Panel on the definition of permanence. However, I do not agree that they should have treated Dr Hobson’s report as binding in the circumstances.
47. I am therefore remitting the decision to the Authority to consider Mr Beach’s application. (I have no power to direct that the matter be considered by a Board of Medical Referees, which would not anyway be appropriate since the issue was the test, rather than medical judgment). Also, Mr Beach has suffered some

distress and inconvenience as a result of the maladministration by the Authority and I make an appropriate award below.

**Directions**

48. Within 28 days of this determination, the Authority is to obtain a new opinion from an IQMP (which may be Dr Hobson, if that is thought appropriate) which clearly assesses Mr Beach's disability, and in particular its permanence, consistently with my remarks in paragraphs 36 to 39 above.
49. If the Authority decides that Mr Beach is entitled to an injury award under the Scheme, this should be backdated to the date of his original application with simple interest. Interest shall be calculated at the base rate for the time being quoted by the reference banks from the due dates up to the date payment is made.
50. Within 28 days of this determination, the Authority are to pay £150 to Mr Beach as compensation for the distress and inconvenience caused to him.

**Tony King**  
Pensions Ombudsman

31 March 2015